



Justice

**Statutory Review of the  
*Crimes (Domestic and Personal  
Violence) Act 2007 (NSW)***

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ISBN: 978-1-922254-08-5

# Table of contents

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Executive Summary .....	5
Recommendations .....	6
Part 1 Overview.....	11
1. Introduction .....	11
Terms of reference .....	12
Conduct of the review .....	12
The Act’s policy objectives.....	13
Findings of the review .....	14
2. Context: domestic violence in NSW .....	15
Prevalence of domestic violence in NSW .....	15
History of NSW ADVO scheme.....	16
Other recent reports and reviews .....	18
Government initiatives to address domestic violence .....	18
Part 2 Statutory Review.....	20
3. Who can get an ADVO?.....	20
The definition of “domestic relationship” .....	21
Recognising specific categories of victims.....	24
4. When can a person get an ADVO? .....	26
The definition of “personal violence offence” .....	27
Should the range of offences for imposing ADVOs be expanded? .....	28
Granting ADVOs without requirement that person in fact fears.....	31
ADVOs to protect children.....	33
5. Procedural issues .....	34
Transition from provisional to final orders .....	36
Transition from interim to final orders .....	37
Cross-examination of children .....	38
Jurisdiction of the higher Courts in AVO matters.....	40
Variation applications .....	41
Revocation of expired orders .....	43
Costs .....	45
ADVO conditions .....	45

<b>6. Interaction between ADVOs and family law orders .....</b>	<b>49</b>
<b>Parenting orders .....</b>	<b>49</b>
<b>Property orders .....</b>	<b>50</b>
<b>7. Children’s Court jurisdiction .....</b>	<b>51</b>
<b>8. Implementation.....</b>	<b>54</b>
<b>Appendix A: Apprehended Violence Legal Issues Co-ordinating Committee.....</b>	<b>55</b>
<b>Appendix B: Submissions to the Review .....</b>	<b>56</b>

## Executive Summary

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The *Crimes (Domestic and Personal Violence) Act 2007* (**the Act**) creates the legislative framework for apprehended violence orders (**AVOs**) in NSW, both apprehended *domestic* violence orders (**ADVOs**) and apprehended *personal* violence orders (**APVOs**). It allows an immediate, civil response to domestic and personal violence in a way that prioritises the future safety of the person in need of protection (**PINOP**).

As a separate report addressing issues concerning APVOs was tabled in the NSW Parliament on 10 September 2013,<sup>1</sup> the focus of this review is ADVOs.

The Act nominates 55 existing criminal offences as “personal violence offences”. When these are committed or attempted in the context of a “domestic relationship” the Act defines them as “domestic violence offences” for which an ADVO may be sought.

The Act also provides that when a person actually commits and is convicted of one of these offences in a domestic context the conviction will be permanently recorded as a “domestic violence offence” on his or her criminal history. NSW is the only Australian jurisdiction to take this approach.

Section 104 of the Act requires a review of the Act be undertaken within three years of its assent to ensure that the terms of the Act remain appropriate to ensuring its objectives.

This review, undertaken by Justice Strategy and Policy within the NSW Department of Justice, involved extensive consultations with key stakeholders. In addition to receiving submissions, the reviewers conducted focused consultations with the Apprehended Violence Legal Issues Coordinating Committee (**AVLICC**).<sup>2</sup>

Consultation with stakeholders canvassed a range of issues and the reviewers wish to acknowledge their appreciation for the quality of the extensive comments received. This report covers only those issues where the review concluded that recommendations for change were warranted.

Overall, the review concluded that the policy objectives of the Act remain valid and its terms mostly remain appropriate for securing those objectives. This report contains 17 recommendations proposing legislative amendments to improve the operation of the Act and to better protect people from domestic violence.

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- 1 NSW, Department of Attorney General and Justice, *Interim review of frivolous and vexatious apprehended personal violence orders - from the Review of the Crimes (Domestic and Personal Violence) Act 2007* (2013).
  - 2 NSW, Apprehended Violence Legal Issues Coordinating Committee: for further information see Appendix A.

## Recommendations

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### Recommendation 1

The relationship between a person's new partner and ex-partner should be recognised as a "domestic relationship" in section 5 of the Act.

### Recommendation 2

The objects of the Act should be amended to acknowledge the particular impact of domestic violence upon Indigenous persons, those from culturally and linguistically diverse backgrounds, those from the gay, lesbian, bisexual, transgender and intersex communities, older persons, and persons with disabilities.

### Recommendation 3

Criminal offences that include a "personal violence offence" as an element (for examples, sections 112 and 113 of the *Crimes Act 1900* (NSW)) should be listed in section 4 as a "personal violence offence".

### Recommendation 4

The range of offences that are categorised as "domestic violence offences" under the Act for the purposes of granting ADVO should be expanded.

"Domestic violence offences" currently include "personal violence offences" when committed in a "domestic relationship". These should be expanded to include any other NSW criminal offence or offence under the Commonwealth Criminal Code when committed in a domestic relationship and:

- (a) intended to coerce or control the PINOP or to cause the PINOP to be fearful;  
or
- (b) arising from substantially the same circumstances as those from which a "personal violence offence" has arisen.

### Recommendation 5

Section 16(2) of the Act already permits the Court to make any order without being satisfied that the person *in fact fears* the relevant conduct for certain persons (namely where the person is (i) a child; (ii) suffering from an appreciably below average general intelligence function; or (iii) where there is a history of personal violence).

Section 16 of the Act should be amended to allow the Court to make an order (but pursuant to the standard orders in section 36 only) *for any other PINOP* without needing to be satisfied that the PINOP *in fact fears* the relevant conduct. This will allow Courts to make orders to protect PINOPs who may be reluctant to express fear due to concerns about retaliation, for example.

## **Recommendation 6**

Section 48(3) of the Act should be amended to:

- a) clarify, for the avoidance of doubt, that only a police officer may make an application for an order if the person is a child where the child is the sole person for whose protection the order is sought (not where a child is listed on an application for the protection of another person); and
- b) confer a discretion on the Court to refer any other application involving a child (that is, where the child is not the sole person for whose protection the order is sought) to police at any stage of the proceedings if satisfied it is in the best interests of the child for police to appear on behalf of the child.

## **Recommendation 7**

Section 32 of the Act should be amended to provide that the terms of a provisional order remain in force until:

- c) where the defendant is present at Court on the listing date - an interim or final order is made by the Court;
- d) where the defendant is not present at Court on the listing date - an interim or final order is served on the defendant; or
- e) the application is withdrawn or dismissed,

whichever occurs first.

## **Recommendation 8**

An amendment to the Court's ability to make final orders should be made, modelled on section 196 of the *Criminal Procedure Act 1986* (NSW), so that if the defendant and PINOP are not present, the Court may proceed to hear and determine the matter in their absence, provided the Court is satisfied that the requirements for service have been met and that it is in the interests of justice to do so.

## **Recommendation 9**

The Act should prohibit the defendant in an application for an ADVO from personally cross-examining any child (defined in the Act as a person under the age of 16 years).

## **Recommendation 10**

The Act should include provisions:

- a) allowing for the referral of related AVOs and the exercise of summary jurisdiction by the District and Supreme Courts based on Part 3, Division 7 of the *Criminal Procedure Act 1986* (NSW); and
- b) providing that related AVO proceedings are to be finalised in the higher Court where it is in the interests of justice to do so; and

- c) providing for the admission of a record of the evidence admitted in the related criminal proceedings in any subsequent AVO proceedings in the District or Local Court, with fresh evidence only admissible with the leave of the Court (modelled on s 18 and s 19 of the *Crimes (Appeal and Review) Act 2001* (NSW)).

### **Recommendation 11**

- a) The Act should be amended so that where an application is made to revoke or vary orders which were originally sought by police, or to which police were otherwise a party, the Commissioner of Police must be notified, served with the application and given standing to appear before any such application proceeds.
- b) Further, section 72(3) of the Act should be amended so that in relation to orders in which the protected person or one of the protected persons is a child:
  - i. the existing requirement that applications for variation or revocations are to be made by a police officer should be limited to those circumstances where the application was originally made by police, or was an application to which police were otherwise a party.
  - ii. for any other application involving a child as a protected person, the Court may nonetheless refer the matter to police at any time if satisfied the best interests of the child require it.
  - iii. if, in the circumstances of (i) above, the police decline to initiate the variation or revocation application, written reasons in admissible form must be provided to the protected person or defendant seeking the application. That person may then file an application attaching those reasons, seeking leave from the Court to make the application. The Court may grant leave where it is satisfied that it is in the interests of justice to do so. Where leave is granted, the Commissioner of Police must be notified, served with the application, and given standing to appear before any such application proceeds.

### **Recommendation 12**

Sections 72(5)-(8) of the Act should be repealed so that a person previously subject to an AVO cannot apply for the AVO to be revoked after it has expired.

### **Recommendation 13**

Section 99 should be re-drafted so the Act contains a stand-alone provision governing the award of costs without reference to other legislation. The provision should make clear that a court is not to award costs against a police officer unless satisfied that the police officer made the application knowing it contained matter that was false or misleading in a material particular; or that the police officer's conduct of the resulting court proceedings have resulted in unreasonable and inexcusable



deviations from the expected case management of the proceedings. The mere fact that a police officer pursues an application, in good faith, in circumstances where the protected person states that they have no fears, do not want the order, will give unfavourable evidence, or will not give evidence, does not amount to grounds for the court to award costs against a police officer. A costs order made by the Court must specify the amount of costs payable.

#### **Recommendation 14**

Section 35(2) of the Act should be amended to expressly invite the Court to consider conditions which prohibit a person against whom an order is made from locating or attempting to locate the person in need of protection.

#### **Recommendation 15**

The Act should include a Regulation making power to prescribe application forms for AVOs, specifically such forms should:

- (a) require applicants (other than police) to indicate whether *Family Law Act 1975* (Cth) proceedings are on foot and whether parenting or property orders have been made;
- (b) require applicants (other than police) to provide the terms of any order to the Court; and
- (c) indicate that the Court requires evidence of the basis upon which any parenting orders were made and why it should intervene.

#### **Recommendation 16**

The Act should be amended so that applicants (other than police) are also required to inform the Court of any existing or pending family law property orders (currently only parenting orders must be disclosed), and judicial officers are required to inform the applicant of this obligation.

#### **Recommendation 17**

- (a) Where care proceedings before it are not related to concurrent criminal proceedings in another jurisdiction, the jurisdiction of the Children's Court should be extended to allow it to:
  - (i) make an ADVO with the child the subject of the care proceedings named as the protected person;
  - (ii) make an ADVO to protect that child's siblings and any adult who is affected by the same or similar circumstances.
- (b) The jurisdiction of the Children's Court should be extended to allow it to vary or revoke any existing ADVO on the application of a party or its own motion where care proceedings are before the Court and the circumstances justify making the order.

(c) The NSW Department of Family and Community Services and the Commissioner of Police should be notified and given the right of appearance before this jurisdiction is exercised.

# PART 1: OVERVIEW

## 1. Introduction

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- 1.1 The Act creates the legislative framework for AVOs in NSW. It allows an immediate, civil response to domestic and personal violence that prioritises the future safety of the PINOP.
- 1.2 The Act allows a person (or police on behalf of a person) to apply to a Court for an ADVO where the person is, or has been, in a domestic relationship with the person from whom they require protection. The Court can make an ADVO if the PINOP has reasonable grounds to fear, and in fact fears, the commission of a “personal violence offence”, or an offence of intimidation or stalking by the defendant. Every ADVO must contain the mandatory order set out at section 36 of the Act (prohibition on assaulting, molesting, harassing, threatening or otherwise interfering with; intimidating or stalking the PINOP). A Court can additionally prohibit or restrict the conduct of the defendant in any way the Court considers necessary or desirable to ensure the safety of the PINOP.
- 1.3 The Act also creates a separate but similar type of order – an APVO – that can be made where the PINOP is not in a domestic relationship with the defendant.
- 1.4 On 10 September 2013, an interim report<sup>3</sup> on APVOs was tabled in the NSW Parliament. This report focused on addressing concerns about frivolous and vexatious APVOs. All but one of the interim report’s recommendations were accepted by the NSW Government and implemented in 2013. As such, this report does not further address issues to do with APVOs. The focus of this final report is on ADVOs and the protection of persons at risk of becoming victims of domestic and family violence.
- 1.5 The NSW ADVO scheme remains linked to the criminal justice system, reflecting the seriousness with which NSW considers domestic violence. The Act defines a series of criminal offences as “personal violence offences” (section 4) which will be “domestic violence offences” (section 11) when they are committed or attempted within the context of a “domestic relationship” (sections 5 and 6). In those circumstances an ADVO may be sought (Part 4). Where a domestic relationship does not exist an APVO is the appropriate order (Part 5).

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3 NSW, Department of Attorney General and Justice, *Interim review of frivolous and vexatious apprehended personal violence orders - from the Review of the Crimes (Domestic and Personal Violence) Act 2007* (2013)..

- 1.6 Section 12 provides that when a person is convicted of one of these offences in a domestic context, the conviction will be permanently recorded as a “domestic violence offence” on his or her criminal history. NSW is the only Australian jurisdiction to take this approach.

## Terms of reference

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- 1.7 Section 104 of the Act provides as follows:

### Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 3 years.

## Conduct of the review

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- 1.8 Justice Strategy and Policy within the NSW Department of Justice has coordinated this review on behalf of the Attorney General.
- 1.9 The review commenced with the release of a Discussion Paper. Stakeholders were invited to make submissions on a range of issues pertaining to the Act, particularly the recommendations of the 2010 joint Australian Law Reform Commission (**ALRC**) and NSW Law Reform Commission (**NSWLRC**) report, *Family Violence - A National Legal Response* (referred to in this report as the **Family Violence Report**).<sup>4</sup>
- 1.10 Consultation was then conducted with both Government and non-Government agencies on the issues raised in the Discussion Paper and in stakeholders’ submissions. In particular, targeted consultation was undertaken with AVLICC.<sup>5</sup>

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4 Australian Law reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010).

5. See Appendix A for further information about AVLICC; Appendix B for list of stakeholders who made written submissions.

## The Act's policy objectives

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- 1.11 Section 9(1) sets out the Act's policy objectives in relation to domestic and family violence. They are:
- to ensure the safety and protection of all persons, including children, who experience or witness domestic violence;
  - to reduce and prevent violence by a person against another person where a domestic relationship exists between those persons;
  - to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women; and
  - to enact provisions consistent with the United Nations Convention on the Rights of the Child.<sup>6</sup>
- 1.12 Courts must take these objectives into account when exercising powers under the Act.<sup>7</sup>
- 1.13 Section 9(2) states that the Act aims to achieve its objectives by:
- empowering Courts to make apprehended domestic violence orders to protect people from domestic violence, intimidation (including harassment) and stalking; and
  - ensuring that access to Courts is as safe, speedy, inexpensive and simple as is consistent with justice.
- 1.14 In enacting the Act, Parliament recognised:
- that domestic violence, in all its forms, is unacceptable behaviour;
  - that domestic violence is predominantly perpetrated by men against women and children;
  - that domestic violence occurs in all sectors of the community;
  - that domestic violence extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years;
  - that domestic violence occurs in traditional and non-traditional settings;
  - the particularly vulnerable position of children who are exposed to domestic violence as victims or witnesses, and the impact that such

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6 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9.

7 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(4).

exposure can have on their current and future physical, psychological and emotional well-being; and

- that domestic violence is best addressed through a co-ordinated legal and social response of assistance and prevention of violence and, in certain cases, may be the subject of appropriate intervention by the Court.<sup>8</sup>

## Findings of the review

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- 1.15 Overall, the review concluded that the policy objectives of the Act remain valid and its terms generally remain appropriate for securing those objectives. Part 2 (chapters 3-5) of this report sets out 17 recommendations for reform to the terms of the Act to improve its operation and the protections it offers to victims of domestic violence.
- 1.16 This report covers those issues where the review concluded that recommendations for change should be made. Many other issues were also considered and discussed with stakeholders but are not reflected in the report.

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8 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3).

## 2. Context: domestic violence in NSW

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- 2.1 Domestic violence is a critical issue facing the NSW community. This chapter discusses rates of domestic violence, the history of the NSW ADVO scheme, previous reviews of domestic violence legislation, and recent NSW Government initiatives to combat domestic and family violence.

### Prevalence of domestic violence in NSW

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- 2.2 It is generally acknowledged that rates of domestic violence are higher than official records suggest. The NSW Bureau of Crime Statistics and Research (**BOCSAR**) considered the Australian Bureau of Statistics 2008-2009 figures on domestic violence and concluded that less than half of victims of domestic violence had actually made reports to police.<sup>9</sup>
- 2.3 A BOCSAR study in October 2013 indicated that, of 300 victims attending domestic violence services, approximately half had reported violence at the hand of their spouses to police. They were most likely to report violence if they had an existing AVO against the offender, had previously reported abuse, property had been damaged, they had been injured or sexually assaulted or felt their children were at risk. However, victims were less likely to report abuse if they were pregnant or had suffered more than five previous incidents of abuse. The most common reasons for not reporting abuse were fear of retribution, embarrassment or a perception that the incident was too trivial to involve police. The most significant reason for failing to report abuse was that victims felt authorities either did not understand or were not proactive in handling domestic violence.<sup>10</sup>
- 2.4 BOCSAR analysis of crime trends between 2001 and 2010 showed that rates of reported domestic violence remained stable over the period in the Sydney region while there had been a slight decrease in the wider NSW regional areas.<sup>11</sup> Figures for 2011 also demonstrated that recorded incidents of domestic violence remained stable, continuing the pattern observed between 2001 and 2010.<sup>12</sup>

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9 K Grech and M Burgesss, *Trends and patterns in domestic violence assaults: 2001 to 2010* (NSW Bureau of Crime Statistics and Research, 2011) 8.

10 E Birdsey and S Snowball, *Reporting Violence to Police: A survey of victims attending domestic violence services*, Bureau Brief, Issue Paper 91 (NSW Bureau of Crime Statistics and Research, 2013).

11 E Birdsey and S Snowball, *Reporting Violence to Police: A survey of victims attending domestic violence services*, Bureau Brief, Issue Paper 91 (NSW Bureau of Crime Statistics and Research, 2013) 2.

12 D Goh and S Moffat, *New South Wales Recorded Crime Statistics 2011*(NSW Bureau of Crime Statistics and Research, 2012) 16.

- 2.5 In 2004 Access Economics concluded that approximately 1.6 million people in Australia had experienced some form of domestic violence since the age of 15, with 71% of victims being women and 80% of defendants being men.<sup>13</sup> Access Economics concluded that the annual cost of domestic violence in 2002/2003 was \$8.1 billion, or \$224,470 per victim. Access Economics found that while the victim shouldered the greatest financial burden, children, employers, governments and the community also bore significant costs.<sup>14</sup>
- 2.6 The Director of BOCSAR, Dr Don Weatherburn, gave evidence to the 2012 Parliamentary Committee Inquiry into trends in domestic violence. Dr Weatherburn described a gradual increase in the numbers of ADVOs granted over the period between 2001 and 2011.<sup>15</sup> Personal violence orders had not increased in such fashion over the same time period. A particular increase in ADVOs just before 2006-2007 was noted, and a continued increase thereafter following the legislative reforms in the area which made applications mandatory in some circumstances.<sup>16</sup>
- 2.7 In its 2012-2013 Annual Report, the Domestic Violence Death Review Team reported that in NSW, between 1 July 2000 and 30 June 2012, there were 280 victims of domestic violence related homicide – 164 females and 116 males. Of the 164 females killed in a context of domestic violence, 129 were killed by a current or former intimate partner; and 35 were killed by a relative or kin member (including 26 girls under the age of 18 years).<sup>17</sup>

## History of NSW ADVO scheme

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- 2.8 The civil ADVO scheme was first introduced into the *Crimes Act 1900* (NSW) in 1982, in response to the recommendations of a 1981 Taskforce on Domestic Violence.<sup>18</sup>
- 2.9 In 1997, BOCSAR conducted an evaluation of the scheme.<sup>19</sup> The evaluation found that for the vast majority of persons granted orders, the orders resulted in a reduction or cessation of the abusive behaviour.

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13 Access Economics, *The Cost of Domestic Violence to the Australian Economy* (2004) 16.

14 Access Economics, *The Cost of Domestic Violence to the Australian Economy* (2004) viii..

15 Approximately 24,000 ADVOs were granted in 2011, compared to 19,000 in 2001.

16 Dr Weatherburn stated that the spike prior to the introduction of the reforms could perhaps be explained by an “anticipated policing effect or police taking the issue more seriously than previously – it is impossible to be sure”.

17 NSW Department of Attorney General and Justice, *Domestic Violence Death Review Team: Annual Report 2012-2013* (2015).

18 NSW, Premier’s Department, *Report of the New South Wales Task Force on Domestic Violence to Honourable N.K. Wran Q.C., Premier of New South Wales* (1981).

19 L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (NSW Bureau of Crime Statistics and Research, 1997) (“BOCSAR Report 1997”).



- 2.10 The NSWLRC considered the implementation and expansion of the scheme in its 2003 report on the operation of ADVOs in NSW. The NSWLRC noted that domestic violence traditionally had a low prosecution rate, and that the AVO scheme was first introduced in an attempt to overcome the criminal law's inability to protect people who feared they would become victims of future violence.<sup>20</sup> Studies at the time suggested that the low prosecution rate was due to negative attitudes held by the community, the police and the criminal justice system, which militated against domestic violence being taken seriously, evidentiary and other difficulties created by the hidden nature of domestic violence, and the fact that the criminal law could not address behaviour which in itself was not criminal.<sup>21</sup>
- 2.11 The NSWLRC concluded that the construction of the provisions in the *Crimes Act 1900* (NSW) was confusing and complex, creating difficulty for practitioners and the judiciary in its application. It made 56 recommendations for improvements to streamline the scheme and better protect victims.
- 2.12 In 2007, the current Act was introduced with bipartisan support. It is a standalone legislative scheme that consolidated relevant provisions in one place, reduced the complexity identified by the NSWLRC and strengthened protections for victims of domestic violence.
- 2.13 The Act was amended in 2008 and again in 2013 to address technical problems and enable better information sharing between public sector and non-government agencies to facilitate victims' access to support services.<sup>22</sup>
- 2.14 In its 2014 evaluation of the current scheme BOCSAR reported that 98 per cent of women who experienced physical violence in the month prior to taking out an ADVO no longer experienced physical violence in the month after taking out the order.<sup>23</sup> The study also showed that 24 per

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20 NSW Law Reform Commission, *Apprehended Violence Orders: Part 15A of the Crimes Act*, Discussion Paper 45 (2002); NSW Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003) 7-11.

21 N Naffin, *Domestic violence and the law – a study of s.99 of the Justices Act (SA)* (SA, Department of Premier and Cabinet, Women's Advisor's Office, 1985); Public Policy Research Centre, *Community attitudes towards domestic violence in Australia* (Australia Office of the Status of Women, 1988); J Scutt, "Judicial bias or legal bias? Battery, women and the law" in J Bessant, K Carrington and S Cook (ed) *Cultures of crime and violence: the Australian experience* (La Trobe University Press, 1995); H Katzen, "How do I prove I saw his shadow?: Responses to breaches of Apprehended Violence Orders, a consultation with women and police in the Richmond Local Area Command in NSW" (prepared for the Northern Rivers Community Legal Centre, 2000); R Alexander, *Domestic Violence in Australia: the legal responses* (Federation Press, 3rd ed, 2002).

22 *Crimes (Domestic and Personal Violence) Amendment Act 2008* (NSW) and *Crimes (Domestic and Personal Violence) Amendment (Information Sharing) Act 2013* (NSW). Amendments were also made in 2013 by the *Crimes (Domestic and Personal Violence) Amendment Act 2013* (NSW) to address recommendations made about APVOs in the interim statutory review report.

23 L Trimboli, *Legal Service for Defendants in Apprehended Domestic Violence Order (ADVO) proceedings: An Evaluation* (NSW Bureau of Crime Statistics and Research, 2014).

cent of women had experienced stalking before an ADVO was taken out, compared to 3.7 per cent after an order was made. The survey revealed that an overwhelming majority of women who take out ADVOs believe they are effective in deterring violent partners.

## Other recent reports and reviews

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- 2.15 This review of the Act was prepared in the context of a number of other significant reviews and reports on domestic and family violence, including:
- the 2010 joint ALRC and NSWLRC report, *Family Violence - A National Legal Response* (referred to in this report as the Family Violence Report);
  - Stop the Violence, End the Silence - NSW Domestic and Family Violence Action Plan 2010-2015;
  - the 2011 NSW Auditor-General's Report: *Responding to Domestic and Family Violence*;
  - the 2011-2012 Annual Report of the NSW Domestic Violence Death Review Team;
  - the 2012 Legislative Council Standing Committee on Social Issues Report 46 on *Domestic Violence Trends and Issues in NSW*;
  - the 2012 Department of Justice *Domestic Violence Strategy for NSW*; and
  - the NSW Government's domestic and family violence reforms set out in *It Stops Here: standing together to end domestic and family violence in NSW* (2013).
- 2.16 This report does not attempt to replicate the detailed examination of the legislative and policy framework carried out in these reports and policy statements. Instead, it draws on relevant recommendations from these reports, as well as the issues raised by stakeholders, to identify specific areas where the Act needs reform in order to better achieve its policy objectives.

## Government initiatives to address domestic violence

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- 2.17 The NSW Government has recently introduced a number of initiatives to combat domestic violence and complement the Act, which are outlined below.
- 2.18 The *Domestic Violence Justice Strategy 2013-17* was developed in 2012. The Strategy is an operational framework that outlines the approaches and standards justice agencies in NSW will adopt to improve the criminal justice system's response to domestic violence. Its

objectives are to make victims safer, hold perpetrators accountable and prevent domestic violence from reoccurring. The Strategy commits all justice agencies and victims support services to work together to provide an effective and integrated response.

2.19 The Strategy sets out six outcomes:

- (1) Victims' safety is secured immediately and the risk of further violence is reduced
- (2) Victims have confidence in the justice system and are empowered to participate
- (3) Victims have the support they need
- (4) The Court process for domestic violence matters is efficient, fair and accessible
- (5) Abusive behaviour is stopped and perpetrators are held to account
- (6) Perpetrators change their behaviour and re-offending is reduced or eliminated.

2.20 The Strategy also identifies areas where reform is needed to ensure effective implementation. These key areas are being addressed through research, and legislative, policy and practice reform throughout its term, from 2013 to 2017.

2.21 In 2014, the NSW Government released *It Stops Here: The Domestic and Family Violence Framework for Reform*. The Framework aims to improve victims' safety and prevent domestic and family violence from occurring. Under the Framework, victims at threat are identified and referred to domestic violence support services, and those at serious threat are prioritised and provided with a coordinated agency response to prevent death, disability or injury as a result of domestic violence.

2.22 The Framework outlines five priority elements including prevention and early intervention, streamlined referral pathways and a strengthened criminal justice system via the *Domestic Violence Justice Strategy*. Key to the reforms is improved information sharing, streamlined service delivery mechanisms, better management and monitoring of referrals and the introduction of a common safety assessment, and improved service coordination.

2.23 Recent legislative changes aimed at better protecting victims include provisions whereby:

- senior police can approve provisional ADVOs and direct and detain defendants for the purpose of serving orders (commenced 20 May 2014);

- domestic violence complainants can give evidence in Court by way of prior recorded video or audio statement (commenced 1 June 2015);
- police and other service providers can share information to facilitate victims' access to domestic violence support services and to prevent or reduce further abuse or threats (commenced 15 September 2014);
- accused persons charged with murder can no longer claim to have lost self-control in response to the deceased exercising personal autonomy, such as by ending a relationship or commencing another, when raising the partial defence of provocation (commenced 13 June 2014); and
- accused are refused bail if they are considered to provide an "unacceptable risk" to the complainant. A history of violence and/or non-compliance with previous AVOs are part of the assessment process for "unacceptable risk" (commenced 20 May 2014 and 28 January 2015).

## PART 2: STATUTORY REVIEW

### 3. Who can get an ADVO?

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- 3.1 The Act allows a PINOP to apply to a Court for an ADVO where the PINOP is in, or has been in, a "domestic relationship" (as defined in section 5) with the defendant, or proposed subject of the order.
- 3.2 Under the Act, police officers *must* apply for an ADVO on behalf of a PINOP where there is a domestic relationship and they suspect a personal violence offence, an offence of stalking or intimidation, child neglect or property damage has been committed, is being committed or is likely to be committed<sup>24</sup>. This requirement aims to protect PINOPs in situations where they may be coerced, persuaded or intimidated into not seeking an ADVO themselves.
- 3.3 The review recommends:
  - an additional category of "domestic relationship" to recognise the position of new partners of a person who require protection from violence threatened by former partners (**Recommendation 1**);

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<sup>24</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 27.

- the Act should be amended to recognise the particular impact of domestic and family violence on certain categories of vulnerable victims (**Recommendation 2**).

## The definition of “domestic relationship”

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### Recommendation 1

The relationship between a person’s new partner and ex-partner should be recognised as a “domestic relationship” in section 5 of the Act.

- 3.4 The Act defines “domestic relationship” broadly. Section 5 states that a person is in a domestic relationship with another person if the person:
- a. is or has been married to the other person, or
  - b. is or has been a de facto partner of that other person, or
  - c. has or has had an intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature, or
  - d. is living or has lived in the same household as the other person, or
  - e. is living or has lived as a long-term resident in the same residential facility as the other person and at the same time as the other person (not being a facility that is a correctional centre within the meaning of the *Crimes (Administration of Sentences) Act 1999* or a detention centre within the meaning of the *Children (Detention Centres) Act 1987*), or
  - f. has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person, or
  - g. is or has been a relative of the other person, or
  - h. in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person’s culture.<sup>25</sup>

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25 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

- 3.5 Currently, where a threat is directed at a person's new partner by that person's former partner, that new partner is unable to take out an ADVO in their own right as they themselves do not have a "domestic relationship" (as defined in the Act) with the defendant (the former partner).
- 3.6 In such circumstances the APVO scheme will apply, which has different processes to ADVO.
- 3.7 Rather than police appearing on their behalf, the new partner would have to make a private APVO application, which may expose the new partner to referral to mediation with the former partner and the risk of costs orders (unless the former partner has been charged with a relevant criminal offence, in which case an interim order will be made automatically).
- 3.8 Submissions to the review noted the frequency of this type of violence and proposed that an additional category should be included in the definition of "domestic relationship" to cater for these situations.
- 3.9 In its 2011-2012 Annual Report, the Domestic Violence Death Review Team recommended that the definition of "domestic violence death" in the *Coroners Act 2009* (NSW) should include these third parties.<sup>26</sup> The *Coroners Act 2009* (NSW) has now been amended in those terms.
- 3.10 The review considers that given that some instances of violence threatened against new partners by ex-partners display the dynamics common to domestic violence, and affect children, this category warrants the extra protection of categorisation as a "domestic relationship".
- 3.11 Accordingly, the relationship between a person's new partner and ex-partner should be recognised as a "domestic relationship" in section 5 of the Act (see case study below).

#### Case study

Susan and Tom lived together in an intimate relationship for seven years. After separating, Susan formed a relationship with James and has been living with James for two years.

Recently, Tom has made violent threats against James.

Under the current Act, if James wants the protection of an AVO, he needs to make his own application to the Court for an APVO. This may require James to enter into mediation with Tom, for example, which is not a requirement under the ADVO scheme.

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26 Department of Attorney General and Justice, *Domestic Violence Death Review Team: Annual Report 2011-2012* (2012), Recommendation 1.

It is proposed to amend the Act so that people like James are eligible to have an ADVO made for their protection.

- 3.12 In addition to the category of new partner, many stakeholders were concerned that the domestic relationships at Section 5(d)-(f) of the Act – co-residents, people in residential facilities and people in paid or unpaid care relationships – are too broad in their application.<sup>27</sup> They cover, for example, ex-flatmates, people with cognitive impairments living together in supported accommodation and the relationship between a paid carer and a resident at a nursing home regardless of the nature of the relationship between the PINOP and the defendant. The positive requirement in section 27 for police to seek an ADVO is potentially problematic in these situations, where the relationship may not in reality be characterised as domestic in nature, and/or where the defendant is themselves a vulnerable person in care.
- 3.13 While those stakeholders wanted categories (d)-(f) removed, other stakeholders<sup>28</sup> strongly opposed their removal or modification because of the many situations in which domestic violence can occur and the importance of addressing abuse of vulnerable people with disabilities and in care settings.
- 3.14 The review considered a compromise approach would be to provide police and the Courts with a discretion to decide whether a relationship in the categories at (d)-(f) constituted a “domestic relationship”. However the NSW Police Force as well as groups representing people with a disability considered that a discretionary approach would be difficult on an operational level and may not sufficiently protect people with disabilities and/or individuals in care relationships. Accordingly the review determined that the status quo should be retained.

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27 NSW Health; Chief Magistrate; Children’s Court; NSW Police Force; Director of Public Prosecutions; Legal Aid NSW; Law Society of NSW; NSW Bar Association; NSW Young Lawyers; Shopfront Youth Legal Centre; Warringa Baiya Aboriginal Women’s Legal Centre; Redfern Legal Centre; Victims Advisory Board; Elizabeth Evatt Community Legal Centre; Domestic Violence Death Review Team; NSW Women’s Refuge Movement; Manly-Warringah Women’s Resource Centre; Illawarra Shoalhaven Local Health District; Sydney Local Health District; South Western Sydney Local Health District; South Eastern Sydney Local Health District; Hunter New England Local Health District.

28 People with a Disability; Intellectual Disability Rights Service; Victims Services NSW; NSW Department of Family and Community Services; Northern Rivers Community Legal Centre; Inner City Legal Centre; Women’s Legal Services; Hawkesbury Nepean Community Legal Centre.

## Recognising specific categories of victims

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### Recommendation 2

The objects of the Act should be amended to acknowledge the particular impact of domestic violence upon Indigenous persons, those from culturally and linguistically diverse backgrounds, those from the gay, lesbian, bisexual, transgender and intersex communities, older persons, and persons with disabilities.

- 3.15 Section 9 sets out the objectives of the Act in relation to domestic violence. In particular, Section 9(3) states that in enacting the Act, Parliament recognises that domestic violence in all its forms is unacceptable behaviour; is predominantly perpetrated by men against women and children; occurs in all sectors of the community; extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years; and occurs in traditional and non-traditional settings. Section 9(3) further recognises the impact of domestic violence on children's current and future physical, psychological and emotional wellbeing.
- 3.16 The Family Violence Report recommended that domestic and family violence legislation should recognise the particular impact of such violence on: Indigenous people; people from culturally and linguistically diverse backgrounds; people from the gay, lesbian, bisexual, transgender and intersex communities; older people, and people with disabilities.<sup>29</sup>
- 3.17 The Family Violence Report noted that:
- [this] may assist in the challenging task of ensuring that experiences of family violence of such groups are properly recognised across the legal system.<sup>30</sup>

By way of illustration, the Family Violence Report also noted some issues that may be referred to by family violence legislation (in each State and Territory) include the following:

the fact that there is a disproportionate level of family violence among Indigenous communities, and the particular dynamics of Indigenous family violence such as violence within extended kinship networks;

the barriers faced by victims from Culturally and Linguistically Diverse (CALD) communities, including communication and language difficulties, and cultural barriers such as beliefs about traditional gender roles and the importance of the family;

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29 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) Recommendation 7-2.

30. Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) [7.42].



the features of elder abuse—that it commonly consists of economic abuse, as well as the withholding of medication, involuntary social isolation, and neglect;

the particular problems faced by victims with disabilities because of their dependence on others for support, the compounding effect of their disability on their lack of power and control in a relationship, and the fact that their disability is exploited by their abusers; and

the problems faced by those from the gay, lesbian, bisexual, transgender and intersex communities—including the fear of homophobia, transphobia, intersexphobia, the fear of being ‘outed’ and the fear of discrimination from the legal system due to their gender or sexual orientation.<sup>31</sup>

- 3.18 Stakeholders supported this proposal.<sup>32</sup> The review considers that the objects set out in section 9 of the Act should be amended to recognise the particular impact of domestic violence on these groups.

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31. Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) [7.44].

32. South Eastern Sydney Local Health District; Women’s Legal Services; Inner City Legal Centre; Hawkesbury Nepean Community Legal Centre; Legal Aid NSW; NSW Police Force; Women’s Refuge Movement; Warringa Baiya Aboriginal Women’s Legal Centre.

## 4. When can a person get an ADVO?

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- 4.1 Section 16(1) of the Act provides that applications for ADVOs are to be made to a Court. Before making an order, the Court has to be satisfied that a person who has or has had a domestic relationship with another person has reasonable grounds to fear *and in fact fears* the commission of a personal violence offence or conduct which intimidates them or another person with whom they have a domestic relationship or stalking by the other person.
- 4.2 However the Court does not have to be satisfied that the person *in fact fears* where the person: is a child; is of appreciably below average intelligence; or has previously been subjected to a personal violence offence by the defendant and there is a reasonable likelihood the defendant may commit a personal violence offence against the person in the future.<sup>33</sup>
- 4.3 Section 17 requires that the Court consider the safety and protection of the protected person and any child affected by the conduct of the defendant in deciding whether or not to make an order.
- 4.4 Whenever a Court makes an ADVO it must include standard, catch-all orders under section 36 prohibiting the defendant from:
- assaulting, molesting, harassing, threatening or otherwise interfering with the PINOP or a person with whom they have a domestic relationship;
  - engaging in any other conduct that intimidates the PINOP or a person with whom they have a domestic relationship; and
  - stalking the PINOP or a person with whom they have a domestic relationship.
- 4.5 Additional orders may also be imposed pursuant to section 35 which are specifically tailored to the PINOP's circumstances if the Court considers them necessary or desirable.
- 4.6 The review recommends:
- the definition of "personal violence offence" should be expanded to include offences that nominate the commission of a "personal violence offence" (for example, sections 112 and 113 of the *Crimes Act 1900 (NSW)*) (**Recommendation 3**);

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<sup>33</sup> *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* s 16(2).

- the definition of “domestic violence offence” should be expanded for the purpose of granting an ADVO to include any NSW criminal offence or offence under the Commonwealth *Criminal Code* where certain characteristics are present (**Recommendation 4**); and
- the Act should be amended to allow the Court to make an order (pursuant to section 36) for any PINOP without needing to be satisfied that the PINOP in fact fears the relevant conduct (**Recommendation 5**).

## The definition of “personal violence offence”

### Recommendation 3

Criminal offences that include a “personal violence offence” as an element (for examples, sections 112 and 113 of the *Crimes Act 1900* (NSW)) should be listed in section 4 as a “personal violence offence”.

- 4.7 Section 4 of the Act lists 55 offences that are “personal violence offences” for the purposes of an ADVO application.<sup>34</sup> The list includes murder, sending threatening documents, wounding, other assaults, sexual and indecent assaults, child sex offences, kidnapping, stalking, intimidation, contravening an ADVO, and certain firearms and property damage offences.
- 4.8 Section 4(b) currently makes provision for a “personal violence offence” to include “an offence of attempting to commit” one of the 55 personal violence offences.
- 4.9 However, in somewhat of an anomaly, some specific offences which involve the commission, attempt or intent to commit these offences, are not included. For example, a person breaks into his ex-partner’s home and sexually assaults her. That person is charged under section 112 of the *Crimes Act 1900* (NSW) with “break, enter and commit serious indictable offence.” Sexual assault is a “personal violence offence”, however section 112 is not.
- 4.10 The review considered that the definition of “personal violence offence” should be expanded to fix this anomaly.

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<sup>34</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4.

## Should the range of offences for imposing ADVOs be expanded?

### Recommendation 4

The range of offences that are categorised as “domestic violence offences” under the Act for the purposes of granting ADVO should be expanded.

“Domestic violence offences” currently include “personal violence offences” when committed in a “domestic relationship”. These should be expanded to include any other NSW criminal offence or offence under the Commonwealth *Criminal Code* when committed in a domestic relationship and:

- (a) intended to coerce or control the PINOP or to cause the PINOP to be fearful; or
- (b) arising from substantially the same circumstances as those from which a “personal violence offence” has arisen.

#### 4.11 The Family Violence Report recommended that:

State and territory family violence legislation should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- a) physical violence;
- b) sexual assault and other sexually abusive behaviour;
- c) economic abuse;
- d) emotional or psychological abuse;
- e) stalking;
- f) kidnapping or deprivation of liberty;
- g) damage to property, irrespective of whether the victim owns the property;
- h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- i) behaviour by the person using violence that causes a child to be exposed to effects of behaviour referred to in (a)–(h) above.<sup>35</sup>

#### 4.12 The Act does not currently include a definition of “domestic violence”. Instead, section 4 of the Act sets out a list of “personal violence offences” which, when committed within a “domestic relationship” set out in

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<sup>35</sup> Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010), Recommendation 5-1.

section 5, are “domestic violence offences” providing grounds for an application for an ADVO. The ADVO may be granted when there is a reasonable fear that one of these offences might be committed.

- 4.13 A number of stakeholders were concerned that replacing this approach with a stand-alone definition of “domestic violence” as the basis for applications for ADVOS would create uncertainty about what types or degrees of behaviour warranted intervention. Expanding the scheme to address behaviours which could not easily be defined or delineated would create complexity for police and Courts when making orders.
- 4.14 The review considered that all of the above behaviours would fall within the parameters of existing NSW criminal offences so that the existing approach to granting ADVO could be maintained if the category of relevant offences were expanded.
- 4.15 Other stakeholders considered that a definition of “domestic violence” could be included in the Act and reflect the definition set out in the Family Violence Report<sup>36</sup>, although it was not immediately apparent what role a definition might play in NSW.
- 4.16 The review recommends that rather than inserting a definition of “domestic violence” into the Act, which may cause confusion and is at odds with the current offence-based approach, the objective of the Family Violence Report recommendation can be achieved by extending the range of offences that are categorised as “domestic violence offences” under the Act for the purposes of granting ADVO.
- 4.17 Stakeholder submissions (including those from the Chief Magistrate, Law Society of NSW and Bar Association of NSW) overwhelmingly favoured an expansion of the range of offences which can be categorised as “domestic violence offences”, however were divided as to how this should occur. The two most favoured models were:
  - A non-exclusive definition:<sup>37</sup> that any criminal offence under the *Crimes Act 1900* (NSW) or the *Criminal Code* (Cth) should be considered a “domestic violence offence”, if a nexus to domestic violence could be demonstrated; and

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36 Women’s Legal Services NSW; Commission for Children and Young People; Women’s Domestic Violence Court Advocacy Service Network; Hawkesbury Nepean Community Legal Centre; Legal Aid NSW; NSW Police Force; NSW Women’s Refuge Movement; Wirringa Baiya Aboriginal Women’s Legal Centre; NSW Department of Family and Community Services; South West Sydney Local Health District.

37. NSW Police Force; Chief Magistrate; Director of Public Prosecutions; NSW Bar Association; Inner City Legal Centre; Women’s Legal Services NSW; Hunter New England Area Health District; Law Society of NSW; Manly-Warringah Women’s Resource Centre.

- An expanded exhaustive list:<sup>38</sup> extending the current exhaustive list to include additional specified offences.
- 4.18 While an exhaustive and comprehensive list would give greater guidance in when an ADVO may be granted, there remained the crucial issue of what offences should be included. The NSW Police Force submitted that it would be difficult to catalogue all possible offences which may be committed in a domestic violence context while the Chief Magistrate pointed out that there would inevitably be offences committed within a domestic violence context that fall outside it. The approach recommended by the review addresses this problem.
- 4.19 The review agrees with the Family Violence Report recommendation that ADVOs should be available to address violent and threatening behaviour in addition to any other behaviour employed to coerce, control or instil fear.
- 4.20 The review recommends that the “domestic violence offence” category be expanded for the purposes of granting ADVOs to encompass any other NSW criminal offence or offence under the Commonwealth Criminal Code when committed in a domestic relationship and intended to coerce or control the PINOP or cause the PINOP to be fearful.
- 4.21 Further, it is currently the case that where an existing “personal violence offence” may be charged and recorded as a “domestic violence offence”, other, related offences, arising from the same factual scenario may not. For example, the offence of destroying or damaging property is listed in section 4 as a “personal violence offence”, while the offence of predatory driving is not. This means that, currently, if a defendant kicked and damaged his ex-wife's front door, causing her to flee and drive away from the scene, and then pursued her in his own car, trying to run her off the road with the intention of injuring her, the first offence of damaging the door would be considered a “domestic violence offence” while the second would not, despite the fact they arose out of the same factual scenario and would be considered by the Court together.
- 4.22 The review accordingly recommends that the definition of “domestic violence offence” should be expanded to include any other NSW criminal offence or offence under the Commonwealth Criminal Code when committed in a “domestic relationship” and arising from substantially the same circumstances as those from which a “personal violence offence” has arisen. This will allow these related charges to be charged and recorded as “domestic violence offences”.

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38 Children’s Court of NSW; Legal Aid NSW; NSW Young lawyers; Criminal Law Committee; Women’s Domestic Violence Court Advocacy Service Network; Redfern Legal Centre; Hawkesbury Nepean Community Legal Centre; Victims Advisory Board; Northern Rivers Community Legal Centre; Elizabeth Evatt Community Legal Centre.

## Granting ADVOs without requirement that person in fact fears

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### Recommendation 5

Section 16(2) of the Act already permits the Court to make any order without being satisfied that the person *in fact fears* the relevant conduct for certain persons (namely where the person is (i) a child; (ii) suffering from an appreciably below average general intelligence function; or (iii) where there is a history of personal violence).

It is recommended section 16 of the Act be amended to allow the Court to make an order (but pursuant to the standard orders in section 36 only) *for any other PINOP* without needing to be satisfied that the PINOP *in fact fears* the relevant conduct. This will allow Courts to make orders to protect PINOPs who may be reluctant to express fear due to concerns about retaliation, for example.

- 4.23 A Court can make an ADVO if it is satisfied that the person has *reasonable grounds to fear* and *in fact fears* the commission of a “personal violence offence”, intimidation or stalking by the defendant.
- 4.24 The Family Violence Report expressed concern about the inclusion of a subjective requirement of fear as it may lead to gaps in protecting PINOPs who cannot or will not express fear or cooperate in an application, because they are concerned about retaliation.<sup>39</sup> This concern is reflected in the experience of NSW police and those who practice in legal proceedings in respect of domestic violence, that victims are often reluctant to give evidence about subjective fear due to intimidation by the defendant or their concern about possible repercussions.
- 4.25 The proposed change would allow the Court to make the standard order pursuant to section 36 of the Act (that is, an ADVO that prohibits stalking, intimidation, assault, molestation, harassment and any other behaviour interfering with the protected person or another relevant party) without needing to be satisfied that the PINOP in fact held fears. This change would allow police to seek the order even when the PINOP may be reluctant to admit fear or to cooperate with police, thereby expanding protections for such PINOPs. Victoria and Queensland have already adopted this approach, in response to the Family Violence Report.

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39 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010)166.

- 4.26 Stakeholder views on the proposed change were divided. Some stakeholders supported the change,<sup>40</sup> while others felt the current test for the granting of an ADVO was preferable.<sup>41</sup> Others expressed concern that the change could result in more orders being made, including where the PINOP did not wish the matter to proceed, which may have unintended consequences (including under-reporting and increased breach rates).<sup>42</sup>
- 4.27 The Chief Magistrate’s Office considered that, if the subjective test were removed, orders should be available pursuant to section 36 only where police did not have instructions from the PINOP. The standard orders in section 36 prohibit what is already criminal conduct (stalking, intimidation, assault, molestation, harassment and any other behaviour interfering with the protected person or another relevant party). More discrete and specific orders in section 35 (prohibitions on approaching the defendant, or restricting the defendant from accessing particular places) would be too intrusive in the circumstances.
- 4.28 The review considered the need to ensure that PINOPs are not dissuaded from reporting violence because of fears that, once an application is initiated, they will effectively be silenced in the Court process. There is concern that this may lead to under-reporting of domestic violence and an increase in breaches where intrusive orders are made that are not supported by the PINOP. Anecdotal evidence from Victoria and Queensland suggests that while the numbers of applications for ADVO in those jurisdictions have increased since the test was amended to be objective only, breaches have also increased with impacts on Court resources and public sentiment.<sup>43</sup>
- 4.29 The review considers that the proposed, revised test offers improved protection to PINOPs who may be reluctant to admit fear or to co-operate with police. Currently the Court is unable to make orders for the protection of such PINOPs (unless there is a history of violence or the PINOP is suffering from an appreciably below average general intelligence function). The review acknowledges, however, that the ability of the State to intervene in the interpersonal relationships of members of the community against their wishes must be appropriately limited. The review accordingly considers that amending the Act to allow the Court to

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40. Women’s Legal Services NSW; The Hawkesbury Nepean Community Legal Centre; The Wirringa Baiya Aboriginal Women’s Legal Centre; The Domestic Violence Justice Strategy Senior Executive Committee.

41. Legal Aid NSW; NSW Police Force; NSW Department of Family and Community Services.

42. Apprehended Violence Legal Issues Coordinating Committee.

43. R Spooner and C Butt, “System struggles as domestic violence orders, breaches hit record high”, *The Age*, 28 November, 2013; C Butt and C Vedelago, “Domestic violence serial abusers get free rein to run riot”, *The Age*, 6 April, 2014; B Vonow and R Brennan, “Queensland Courts wade through 100 domestic violence orders every day but at least a third are ignored”, *The Courier Mail*, 24 April 2014.



make an order (but pursuant to section 36 only) *for any PINOP* without needing to be satisfied that the PINOP *in fact fears* the relevant conduct, strikes the appropriate balance.

## ADVOs to protect children

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### Recommendation 6

Amend section 48(3) of the Act to:

(a) clarify, for the avoidance of doubt, that only a police officer may make an application for an order if the person is a child where the child is the *sole* person for whose protection the order is sought (not where a child is listed on an application for the protection of another person); and

(b) confer a discretion on the Court to refer any other application involving a child (that is, where the child is not the sole person for whose protection the order is sought) to police at any stage of the proceedings if satisfied it is in the best interests of the child for police to appear on behalf of the child.

- 4.30 The Act currently provides that only a police officer may make an application for an order if the person for whose protection the order would be made is a child at the time of the application.<sup>44</sup> This requirement allows the police to ensure that the best interests of the child are prioritised.
- 4.31 If the Court makes an order, it must include as a protected person any child with whom the primary PINOP has a domestic relationship unless it is satisfied that there are good reasons for not doing so.<sup>45</sup> Section 38(5) provides that this is the case even though an application for the order was not made by a police officer.<sup>46</sup>
- 4.32 Section 38(5) clearly anticipates that not all applications where a child is involved will be made by police officers. However some stakeholders raised concerns about difficulties adult primary PINOPs with children experienced in having their children named on *their own* ADVOs without police involvement.<sup>47</sup>

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44 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48(3).

45 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 38(2)-(3).

46 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 38(5).

47. Legal Aid NSW; AVLICC.

- 4.33 Stakeholders stated that reluctance around approaching police may delay or dissuade some people from seeking otherwise appropriate applications.
- 4.34 In a 2013 Report, “Women’s experiences of seeking a domestic violence protection order in NSW”,<sup>48</sup> Aboriginal participants stressed that negative police attitudes, for example assuming that a woman had been drinking, provide formidable barriers to their pursuing legal protection.
- 4.35 The same Report notes the disadvantage that women with children sometimes face when approaching police to seek an ADVO

Consistent with previous research studies, many women reported that their simultaneous seeking of a protection order and involvement in the Family Law system resulted in their efforts to seek protection being met with an attitude of scepticism (in both arenas of law).

And I think that women with children have a very disadvantaged – because they are looked upon as if they are using [the AVO] as a tactic. So women with children can’t escape domestic violence. It’s just not possible ...<sup>49</sup>

- 4.36 For the avoidance of doubt, the review agrees that the Act should be amended to clarify that the requirement in section 48(3) for police to appear on behalf of a child applies only where the child is the *sole* person for whom protection is sought. This will clarify that women and men with children can make private applications for an ADVO, in the same way that women and men without children can.
- 4.37 However, the review also considers the Court should have a discretion in all other cases to refer any application involving a child to police at any time during the proceedings if it would be in the best interests of the child to do so.

## 5. Procedural issues

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- 5.1 The review recommends that:
- the Act clearly provide for the term of provisional orders (**Recommendation 7**);
  - an amendment to the Court’s ability to made final orders should be made, modelled on section 196 of the *Criminal Procedure Act 1986* (NSW), so that, if the defendant and PINOP are not present, the Court may proceed to hear and determine the matter in their

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48 L Laing, “Women’s experiences of seeking a domestic violence protection order in NSW” (University of Sydney, 2013) 7.

49 L Laing, “Women’s experiences of seeking a domestic violence protection order in NSW” (University of Sydney, 2013) 52.

absence, provided the Court is satisfied that the requirements for service have been met and that it is in the interests of justice to do so (**Recommendation 8**);

- self-represented defendants be prohibited from personally cross-examining any child (**Recommendation 9**);
- AVOs related to criminal charges be referred to a higher Court on committal of the criminal charges and finalised in that jurisdiction if it is in the interests of justice to do so (**Recommendation 10(a) and (b)**);
- a record of evidence admitted in any related criminal proceeding be admissible in subsequent AVO proceedings, with fresh evidence admissible with leave of the Court (**Recommendation 10(c)**);
- police be given notice of, and standing to appear in, any application for variation or revocation of an order they originally sought or were otherwise a party to (**Recommendation 11(a)**);
- where police originally sought an order protecting a child and decline to initiate a variation or revocation application, the adult PINOP or defendant be furnished with reasons so that the Court can consider whether to grant leave to bring the application, with police notified and given standing to appear if it does so (**Recommendation 11(b)**);
- the provisions allowing for revocation of an expired AVO in order to avoid consequences flowing from the operation of other Acts be repealed (**Recommendation 12**);
- following the Supreme Court's decision in *Constable Redman v Willcocks* [2010] NSWSC 1268, section 99 be amended to clarify when costs may be awarded against police (**Recommendation 13**);
- section 35 be expanded to invite the Court to consider a condition prohibiting the defendant from locating or attempting to locate the PINOP (**Recommendation 14**);
- the Act include a Regulation making power to prescribe application forms for ADVOs (**Recommendation 15**);
- the Act requires PINOPs and defendants to advise the Court of any *Family Law Act 1975* (Cth), property orders (**Recommendation 16**); and
- the Children's Court be provided with jurisdiction to make, vary and revoke ADVOs to protect children, their siblings and any adult affected by the same conduct when care proceedings are before it after police and the NSW Department of Family and Community Services have been notified and given standing to appear (**Recommendation 17**).

## Transition from provisional to final orders

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### Recommendation 7

Section 32 of the Act should be amended to provide that the terms of the provisional order remain in force until:

- (a) where the defendant is present at Court on the listing date - an interim or final order is made by the Court;
  - (b) where the defendant is not present at Court on the listing date - an interim or final order is served upon the defendant;  
or
  - (c) the application is withdrawn or dismissed,
- whichever occurs first.

- 5.2 The Act allows a senior police officer or other authorised officer to impose provisional ADVOs if the officer reasonably believes that the order needs to be made immediately to ensure the safety and protection of the victim or to prevent any substantial damage to the victim's property.<sup>50</sup> The provisional order is treated as an application for the Court to make a final ADVO, and it must include an instruction to the defendant to appear at Court on a date when the Court will consider the matter. The date must be within 28 days.<sup>51</sup>
- 5.3 The Act specifies that a provisional order remains in force for 28 days, unless the Court sooner determines the application for a final ADVO or the application is withdrawn. The Act states that, when the Court makes a final ADVO within 28 days, the provisional order ceases to have effect when the order is made (if the defendant is present at Court) or when the order is served on the defendant (if the defendant is not present at Court).<sup>52</sup>
- 5.4 The Chief Magistrate submitted that this part of the Act can cause problems if a final ADVO has been made but not served on the defendant, but the 28 days have expired. Magistrates have taken different views about whether the provisional order remains in force in these circumstances.
- 5.5 The review concludes that this anomaly needs to be resolved. Allowing for a PINOP to be without protection should a respondent fail to attend Court or avoid service is contrary to the objects of the Act.

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50 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 26.

51 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 29.

52 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 32.

- 5.6 In accordance with the views of stakeholders,<sup>53</sup> the review recommends that the Act be clarified by removing the 28 day time limit on provisional orders. The order should still set a hearing date within 28 days, but the provisional order should remain in force until the order is made (if the defendant is present at Court), the order is served on the defendant (if the defendant is not present at Court), or the application for a final order is withdrawn or dismissed.

## Transition from interim to final orders

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### Recommendation 8

An amendment to the Act should be made, modelled on section 196 of the *Criminal Procedure Act 1986* (NSW), so that if the defendant and PINOP are not present, the Court may proceed to hear and determine an application for a final AVO in their absence, provided the Court is satisfied that the requirements for service have been met and that it is in the interests of justice to do so.

- 5.7 Currently, the Court may make a final AVO in the same terms as an interim order, or with variations, or may revoke the interim order, whether or not the defendant appears on the date set for the hearing. Where the PINOP does not appear, however, the Court cannot proceed to make a final order and the application may be dismissed. This arises because, in order to make a final order, the Court requires admissible evidence from the PINOP of the matters the Court is required to be satisfied of under the Act.
- 5.8 However, the Court can make an interim order in the absence of both the PINOP and defendant by admitting affidavit evidence or a written statement by a police officer if there is good reason for the PINOP not being in attendance at Court.
- 5.9 The Chief Magistrate and the NSW Police Force submitted that the Court should be able to make final ex parte orders. Similarly, the NSW Police Force submitted that the rules of evidence should be further relaxed for AVO proceedings.
- 5.10 In criminal proceedings, the Court may convict and sentence the defendant in his or her absence and on the basis of a Court Attendance Notice alone. Section 196 of the *Criminal Procedure Act 1986* (NSW), for

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53 Women's Legal Services; Hawkesbury Nepean Community Legal Centre; NSW Police Force; Chief Magistrate.

example, provides that if the Court is satisfied that the defendant had reasonable notice of the date, time and place of the hearing it may proceed to determine a summary matter in the absence of the defendant. In those circumstances the attendance of the alleged victim is not required.

- 5.11 The review considers that, given conviction and sentence orders may be made *ex parte* and the Court can currently make interim orders in the absence of both parties in certain circumstances, it should be empowered to make final AVO orders *ex parte* in similar circumstances where the defendant has been served with the application and it is satisfied it is in the interests of justice to do so.

## Cross-examination of children

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### Recommendation 9

The Act should prohibit the defendant in an application for an ADVO from personally cross-examining any child.

- 5.12 The Family Violence Report recommended that the Act should prohibit a defendant in ADVO proceedings from personally cross-examining any person against whom the defendant is alleged to have used family violence.<sup>54</sup>
- 5.13 Some stakeholders supported the proposal.<sup>55</sup> The Chief Magistrate noted that Magistrates have reported instances of attempts at harassment or intimidation during cross-examination in such circumstances.
- 5.14 Legal Aid raised concerns about unfairness to the defendant, as Legal Aid support is generally not available to defend ADVO proceedings. Some supported the proposal on condition that adequate funding was provided for legal representation of both parties.<sup>56</sup>
- 5.15 Several stakeholders suggested alternative approaches, including increased protection for children giving evidence, allowing pre-recorded interviews to be given as evidence, applying for victims to give evidence by audio-visual link and allowing victims to give written evidence.<sup>57</sup>

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54 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) Recommendation 18-3.

55 Chief Magistrate; Wirringa Baiya Aboriginal Women's Legal Centre.

56 Women's Legal Services; Hawkesbury Nepean Community Legal Centre.

57 Chief Magistrate; NSW Police Force; Women's Legal Services.

- 5.16 The Chief Magistrate's practice note No 2 of 2012 – Domestic and personal violence proceedings<sup>58</sup> - specifies that evidence in chief is to be given by way of written statements in contested proceedings. This reduces the ability of the defendant to intimidate or influence the PINOP at that stage, so that the Court considers their complete version before the defendant has the opportunity to question them about it. PINOPs can also make an application to give evidence via audio-visual link.<sup>59</sup>
- 5.17 As of 1 June 2015, domestic violence complainants are able to give evidence by way of a prior recorded video or audio statement, in proceedings for a domestic violence offence. While domestic violence complainants need to make themselves available to the Court for at least cross-examination, section 41 of the *Evidence Act 1995* (NSW) allows the Court to disallow improper questions put to a witness in cross-examination and imposes a positive duty where questions or the manner in which they are put are, for example, misleading or confusing, harassing, intimidating, humiliating, belittling, insulting or otherwise inappropriate. Section 41(2) sets out a non-exhaustive list of factors a Court must consider when determining whether a question is improper. These include the witness's personal characteristics and the relationship between the witness and the other party in the proceeding.
- 5.18 On balance, therefore, the review considers that there are already sufficient protections in place for adult victims in contested ADVO proceedings. However, protections for children giving evidence should be formalised.
- 5.19 The Act already specifies that a child can only be required to give evidence in AVO proceedings if the Court considers that it is in the interests of justice. The Court must be closed if a child is directed to give evidence.<sup>60</sup> Children can also be accompanied by a support person, can give their evidence in chief via a recording, and can give evidence via audio-visual link.<sup>61</sup>
- 5.20 The Chief Magistrate's practice note<sup>62</sup> states that children cannot be questioned by an unrepresented defendant and may only be questioned by a Court appointed legal practitioner. The review recommends that this protection should be included in the Act.

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58 Local Court of NSW, *Practice Note No 2 – Domestic and Personal Violence Proceedings*, 30 July 2012, 5-6.

59 *Evidence (Audio and Visual Links) Act 1998* (NSW) s 5B.

60 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35.

61 *Criminal Procedure Act 1986* (NSW) Part 6.

62 Local Court of NSW, *Practice Note No 2 – Domestic and Personal Violence Proceedings*, 30 July 2012, 8-9.

## Jurisdiction of the higher Courts in AVO matters

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### Recommendation 10

The Act should include provisions:

- (i) allowing for the referral of related AVOs and the exercise of summary jurisdiction by the District and Supreme Courts based on Part 3, Division 7 of the *Criminal Procedure Act 1986* (NSW); and
- (ii) providing that related AVO proceedings are to be finalised in the higher Court where it is in the interests of justice to do so; and
- (iii) providing for the admission of a record of the evidence admitted in the related criminal proceedings in any subsequent AVO proceedings in the District or Local Court, with fresh evidence only admissible with the leave of the Court (modelled on s 18 and s 19 of the *Crimes (Appeal and Review) Act 2001* (NSW)).

- 5.21 The Local and District Courts are generally required to make a final ADVO where a conviction is entered for a “domestic violence offence” or an intimidation offence. In contrast, in the case of interim ADVOs made on charge for other “serious offences” that are heard in the District Court, the Local Court must consider the final ADVO in a separate proceeding.
- 5.22 This results in “double handling” which leads to delay. It may mean the PINOP has to return to the Local Court at the conclusion of the criminal matter in the District Court to give similar evidence a second time.
- 5.23 A number of options for resolving this problem were discussed in submissions and consultations. The preference of most stakeholders<sup>63</sup> was for the higher Court to be given jurisdiction to finalise the ADVO matter at the same time as it finalised the charges for the serious offences. This would dovetail with the existing requirement that any Court (Local Court, District Court or Supreme Court) must make an ADVO when a person is found guilty of a personal violence offence committed within a domestic relationship, unless it is satisfied that an order is not required.<sup>64</sup>
- 5.24 The higher Court could retain discretion to remit the ADVO proceedings back to the Local Court if it was in the interests of justice to do so. If

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63 NSW Chief Magistrate; Women’s Legal Services; NSW Bar Association; Inner City Legal Centre; Victim’s Services; Women’s Domestic Violence Court Advocacy Service Network; Redfern Legal Centre.

64 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 39.



proceedings were remitted, the Act could specify that any evidence admitted in the higher Court proceedings was admissible in the ADVO proceedings. This would minimise the evidence that the victim would have to repeat in the Local Court proceedings.

- 5.25 One of the ways in which the Act aims to achieve its objects is by ensuring that access to Courts is as safe, speedy, inexpensive and simple as is consistent with justice.<sup>65</sup> The review considers that any duplication of the need for a complainant and witnesses to give evidence of domestic violence is contrary to the manner in which the objects of the Act are to be achieved.

## Variation applications

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### Recommendation 11

(a) The Act should be amended so that where an application is made to revoke or vary orders which were originally sought by police, or to which police were otherwise a party, the Commissioner of Police must be notified, served with the application and given standing to appear before any such application proceeds.

(b) Further, section 72(3) of the Act should be amended so that in relation to orders in which the protected person or one of the protected persons is a child:

- the existing requirement that applications for variation or revocations are to be made by a police officer should be limited to those circumstances where the application was originally made by police, or was an application to which police were otherwise a party.
- for any other application involving a child as a protected person, the Court may nonetheless refer the matter to police at any time if satisfied the best interests of the child require it.
- if, in the former circumstances the police decline to initiate the variation or revocation application, written reasons in admissible form must be provided to the protected person or defendant seeking the application. That person may then file an application attaching those reasons, seeking leave from the Court to make the application. The Court may grant leave where it is satisfied that it is in the interests of justice to do so. Where leave is granted, the Commissioner of Police must be

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65 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(2)(b).

notified, served with the application, and given standing to appear before any such application proceeds.

- 5.26 Under section 72 of the Act, the PINOP or the PINOP's guardian, a police officer, or the defendant, can make an application to the Court for a variation or revocation of an interim or final order. However section 72(3) provides that only a police officer may apply for the variation or revocation where one of the protected persons is a child at the time of the application.
- 5.27 Section 73(4) requires that a final AVO or interim court order is not to be varied or revoked on the application of the defendant unless notice of the application has been served on each protected person to whom the order relates.
- 5.28 The NSW Police Force observed that while they may appear as the applicant and obtain orders for the protection of a PINOP, an application can subsequently be made to vary or revoke the order without notice to them. This may result in defendants coercing PINOPs into consenting to inappropriate applications for variation or revocation.
- 5.29 The NSW Police Force submitted that section 72 should be varied to make police a party to any application where they were originally a party.
- 5.30 The review accepts the submission of the NSW Police Force. The Act should be amended so that the Commissioner of Police is notified of any subsequent variation or revocation application where police applied for the original ADVO or were otherwise a party. If the application proceeds, police should have standing to appear so they may object to any changes or to revocation of the order.
- 5.31 As stated above, where one of the protected persons is a child, only a police officer may apply for the variation or revocation.<sup>66</sup> Some stakeholders<sup>67</sup> raised concerns that there is no avenue for the protected child or his or her parent(s) to apply to have the order varied or revoked if the police refuse to make an application.
- 5.32 On the one hand, police officers act to ensure that the best interests of the child are prioritised and considered separately to the interests of the adults involved. Requiring police involvement reduces the risk that the defendant may pressure the adult PINOP to agree to vary orders against the interests of the child.

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66 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 72(3). "Child" is defined in s 3 as a person under the age of 16 years.

67 Redfern Legal Centre; Women's Domestic Violence Court Advocacy Service.

- 5.33 On the other hand, the current provisions do not allow an adult PINOP or defendant to apply to vary orders that also directly affect them if police refuse to intervene on their behalf.
- 5.34 Stakeholders had mixed views about how this issue would be best resolved. Some submissions generally supported allowing parties other than police to seek to vary or revoke an order where a child is a protected person, but stressed that police should be notified.<sup>68</sup> The Law Society of NSW submitted that the Court should have discretion to refuse to amend an order if it is not in the best interest of the child.
- 5.35 Other submissions opposed parties other than police making applications, where a child is concerned.<sup>69</sup> In particular, many submissions noted that whilst some people may be reluctant to approach police, coercion by the defendant or others on the PINOP to have the order removed was a greater concern.
- 5.36 On balance, the review recommends that police involvement should be retained but that there should be a process for Courts to grant leave to parties to bring applications once police have declined to act. Notice to police and a right for police to appear should be part of this process.
- 5.37 Where the police applied for the original ADVO protecting a child the Commissioner of Police should be notified of any application to vary or revoke the order and should have standing to object. If the police object, the Court should only give leave for the application to be heard if it considers that it would be in the interests of justice to do so.
- 5.38 Where a PINOP privately applied for the ADVO and it also lists a child as a protected person, the Court should consider whether it would be in the best interests of the child for the police to be notified of any application to vary or revoke the order.

## Revocation of expired orders

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### Recommendation 12

Sections 72(5)-(8) of the Act should be repealed so that a defendant cannot apply for an AVO to be revoked after it has expired.

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68 Children's Court NSW; NSW Bar Association; Commission for Children and Young People; Women's Domestic Violence Court Advocacy Service; Redfern Legal Centre; Juvenile Justice; Victims Advisory Board.

69 Chief Magistrate; NSW Police Force; Victims Services NSW; Illawarra Shoalhaven Local Health District; Inner City Legal Centre; Elizabeth Evatt Community Legal Centre; NSW women's Refuge Movement; Warringa Baiya Aboriginal Women's Legal Centre.

- 5.39 Under section 72 of the Act, an AVO may be revoked both during its term of operation and after its term has expired. Sections 72(5)-(8) provide that a Court may revoke an expired AVO if satisfied that if the order was still in force, it should be revoked. This test is based upon the circumstances at the time of the revocation application, not the circumstances when the AVO was in force.
- 5.40 The provision was inserted into the Act in order to ameliorate the effect of other pieces of legislation, specifically those governing licensing for firearms and other weapons.
- 5.41 For 10 years following an AVO's expiry, a person who was subject to it cannot hold a firearms licence or a prohibited weapons permit.<sup>70</sup> There is no discretionary power for a Court to enable such a person to hold a license or permit during this period.
- 5.42 Following the revocation of an expired AVO under section 72 of the Act, a defendant is eligible to apply for a license or permit as though the order had never existed.
- 5.43 Many stakeholders supported the Act being amended so that a defendant cannot apply for an AVO to be revoked after it has expired.<sup>71</sup> The Chief Magistrate, for example, stated, "the fiction enabled by such provisions is an affront to the legitimacy surrounding the making of the original order".
- 5.44 The NSW Police Force noted that there is ample provision for a defendant, PINOP or police to apply to revoke an AVO while it is in force.
- 5.45 The Inner City Legal Centre noted that applications to revoke an AVO after it has expired may distress victims years after the original AVO proceedings.
- 5.46 Some stakeholders thought that this aspect of the Act should not be changed.<sup>72</sup> The Law Society of NSW's primary concern was the impact on a person's future employment, when the AVO was made against the person when they were a child. However, the legislation governing employment checks has since been amended so that an AVO alone will not trigger a risk assessment review on an applicant.

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70 *Firearms Act 1996* (NSW) s 11(5)(c); *Weapons Prohibition Act 1998* (NSW) s 10(3)(b).

71 Chief Magistrate of the Local Court; NSW Police Force; NSW Family and Community Services; Redfern Legal Centre; Women's Domestic Violence Court Advocacy Service Network; Women's Legal Services; Hawkesbury Nepean Community Legal Centre; Manly-Warringah Women's Resource Centre; Legal Aid NSW.

72 Law Society of NSW; Elizabeth Evatt Community Legal Centre; NSW Young Lawyers; Victims' Advisory Board.

- 5.47 The review considers that ability to revoke an expired order in order to avoid the consequences flowing from the record of that order's existence is anomalous, unique and undesirable. Any concerns about a defendant's ability to hold a firearms licence or prohibited weapons permit would be better dealt with by introducing a limited discretion into the legislation governing those permits. The review therefore recommends that the Act be amended to delete the provisions that allow a defendant to apply for an expired order to be revoked.

## Costs

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### Recommendation 13

Section 99 should be re-drafted so the Act contains a stand-alone provision governing the award of costs without reference to other legislation. The provision should make clear that a court is not to award costs against a police officer or other public officer unless satisfied that the prosecutor made the application knowing it contained matter that was false or misleading in a material particular; or that the conduct of the resulting court proceedings has resulted in unreasonable and inexcusable deviations from the expected case management of the proceedings. The mere fact that a police officer or other public officer pursues an application, in good faith, in circumstances where the protected person states that they have no fears, do not want the order, will give unfavourable evidence, or will not give evidence, does not amount to grounds for the court to award costs against a police officer or other public officer. A costs order made by the Court must specify the amount of costs payable.

- 5.48 The Court's power to award costs following an AVO application is currently governed by four separate pieces of legislation.<sup>73</sup> The Act specifies in section 99 that costs awards are governed by the *Criminal Procedure Act 1986* (NSW), except that:
- Costs can only be awarded against the person seeking protection if the Court is satisfied that the application is frivolous or vexatious
  - Costs can only be awarded against a police officer if the Court is satisfied that the police officer or other public officer made the

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73 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 99; *Criminal Procedures Act 1986* (NSW) s 211-218, *Legal Profession Act 2004* (NSW) s 353(4), *Fines Act 1996* (NSW) s 4(3)(a).

application knowing that it contained matter that was false or misleading in a material particular.<sup>74</sup>

- 5.49 Division 4 of Part 2 of the *Criminal Procedure Act 1986* (NSW), however, sets out a wider variety of circumstances where costs can be awarded against a prosecutor (who will generally be a police officer for the purpose of AVO proceedings but may also be a public officer from the Office of the Director of Public Prosecutions or the Crown Solicitor's Office, for example), including for procedural misconduct.
- 5.50 The Supreme Court has considered in *Constable Redman v Willcocks*<sup>75</sup> the complexity that arises in the interplay between section 99 of the Act (allowing for costs orders against police officers only where the police officer made the application knowing that it contained matter that was false or misleading in a material particular) and the provisions in Division 4 of part 2 of the *Criminal Procedure Act 1986* (NSW), (which pursuant to sections 211-218 do not require these exceptional circumstances where procedural misconduct is proven).
- 5.51 In *Redman v Willcocks*, the application was taken out by a police officer. Between the first and second hearing date, the prosecution decided to withdraw the matter. That decision was not conveyed to the defendant. The defendant, legally represented, attended the second hearing date where the case was withdrawn. Costs were awarded against the police officer for procedural misconduct - having irresponsibly put the defendant to needless expense.
- 5.52 The Supreme Court noted the difficult interplay between section 99 of the *Crimes (Domestic and Personal Violence) Act* and section 214 of the *Criminal Procedure Act*. The Court said that it would benefit from clarification by Parliament.<sup>76</sup>
- 5.53 *Redman v Willcocks* confirms police do have immunity from costs orders in the bringing of the ADVO. *Redman v Willcocks* awarded costs against police for procedural misconduct. Procedural misconduct is about the way police subsequently conduct the court proceedings, for example inexcusable breaches of case management orders by the Court.
- 5.54 At paragraph 36 of the judgment in *Redman v Willcocks* the Court said,
- The sub-section was never intended to provide an immunity, and does not provide an immunity, to a police officer except for the bringing of the proceedings. It was not intended to protect, nor does it protect, the police officer from his conduct of the proceedings. If that was so, for example, inexcusable breaches of case management orders would not be able to be visited with costs orders despite the clear words of s 214(1)(b) or (d).

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74 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 99.

75 *Constable Redman v Willcocks* [2010] NSWSC 1268.

76. *Constable Redman v Willcocks* [2010] NSWSC 1268 [41].

5.55 At paragraph 38 of the judgment in *Redman v Willocks* the Court said:

There should be no discouragement to police officers applying for orders in good faith because of a costs risk if they do so. Nor should they be dissuaded from withdrawing such proceedings or asking them to be dismissed where it is appropriate to do so. They are, however, entirely different considerations from where a police officer does not conduct the proceedings properly.

5.56 Since *Redman v Willocks*, NSW Police have reported a rise in the number of costs orders against them in ADVO matters. Anecdotally, defendants' solicitors are also using the *Redman v Willocks* decision to threaten police with costs orders once an application has been made.

5.57 Stakeholders overwhelmingly supported the Act being amended to clearly set out the procedures relating to costs applicable in AVO proceedings.<sup>77</sup> Stakeholders proposed that stand-alone provisions within the Act should govern costs without reference to other legislation.<sup>78</sup>

5.58 However, stakeholders had mixed views on the best way to approach costs in relation to police. Some were concerned that police officers should not be discouraged from making AVO applications.<sup>79</sup> While others submitted that the Act should be amended to make it clear that a police officer's immunity against costs extends only to the initiation of the application in good faith (with costs available where an officer knowingly presented false or misleading material that pertained to a material particular) and does not extend to later procedural misconduct as set out in the *Criminal Procedure Act 1986* (NSW).<sup>80</sup>

5.59 The NSW Police Force fact that police ought not to be dissuaded from applying for ADVOs in good faith in appropriate circumstances because of concerns that they may be subject to a costs order if the matter is subsequently withdrawn. This is particularly the case given police officers are under a positive obligation to make applications in certain circumstances.

5.60 The Review accordingly recommends that section 99 should be re-drafted so the Act contains a stand-alone provision(s) governing the award of costs without reference to other legislation. The provision(s) should make clear that a court is not to award costs against a police officer unless satisfied that the police officer made the application knowing it contained matter that was false or misleading in a material particular; or that the police officer or other public officer's subsequent conduct of the resulting court proceedings have resulted in unreasonable and inexcusable deviations from the expected case management of the

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77 Chief Magistrate; NSW Crown Solicitor; NSW Bar Association; Manly Warringah Women's Resource Centre; Elizabeth Evatt Community Centre; Inner City Legal Centre.

78 NSW Bar Association; Manly Warringah Women's Resource Centre; Elizabeth Evatt Community Centre; Inner City Legal Centre.

79 NSW Bar Association; NSW Legal Aid; NSW Victim's Services.

80 Redfern Legal Centre; NSW Young Lawyers; The Northern Rivers Community Legal Centre.

proceedings. The mere fact that a police officer or other public officer pursues an application, in good faith, in circumstances where the protected person states that they have no fears, do not want the order, will give unfavourable evidence, or will not give evidence, does not amount to grounds for the court to award costs against them. A costs order made by the Court must specify the amount of costs payable.

## ADVO conditions

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### Recommendation 14

Section 35(2) of the Act should be amended to expressly invite the Court to consider conditions, which prohibit a person against whom an order is made from locating or attempting to locate the PINOP.

- 5.61 The Act specifies that all ADVOs must contain conditions prohibiting assault, harassment, threats, stalking and intimidation.<sup>81</sup> In addition to these prohibitions, the Court can add any other conditions that it considers necessary or desirable to ensure the safety and protection of the victim from domestic violence.
- 5.62 The Act suggests a range of possible conditions that the Court may wish to add, including place restrictions, restrictions on approaches to the victim when under the influence of alcohol or drugs, restrictions on the possession of firearms and weapons, prohibitions on property damage and restrictions on any specified behaviour which might affect the PINOP.<sup>82</sup>
- 5.63 A prohibition on attempting to locate the PINOP is not expressly included in the Act's list of potential conditions. The Family Violence Report recommended that such a condition be legislated to draw Courts' attention to the option of adding this restriction.<sup>83</sup>
- 5.64 Stakeholders generally supported this proposal.<sup>84</sup> In particular, the NSW Police Force noted that this condition would allow police to intervene at an early stage rather than wait for the subject of an ADVO to actually contact the PINOP. Thereby providing greater protection to PINOPs and their children.

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81 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.

82 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35.

83 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) Recommendation 11-6.

84 Women's Legal Services; Hawkesbury Nepean Community Legal Centre; Legal Aid NSW; NSW Police Force; Wirringa Baiya Aboriginal Women's Legal Centre; NSW Family and Community Services.



- 5.65 The review recommends that the Act should be amended so that a condition that prohibits the person subject to an order from locating the PINOP is included in the list of possible conditions. While not a substantive change to the Act (in light of the operation of the mandatory condition and the Court's ability to make any condition it thinks necessary or desirable), such an express condition may lead to its more frequent use.

## 6. Interaction between ADVOs and family law orders

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### Parenting orders

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#### Recommendation 15

The Act should include a Regulation making power to prescribe application forms for AVOs, specifically such forms should:

- (a) require applicants (other than police) to indicate whether *Family Law Act 1975* (Cth) proceedings are on foot and whether parenting or property orders have been made;
- (b) require applicants (other than police) to provide the terms of any order to the Court; and
- (c) indicate that the Court requires evidence of the basis upon which any parenting orders were made and why it should intervene.

- 6.1 The Commonwealth's *Family Law Act 1975* allows federal Courts to make parenting orders governing custody and contact with children, and property orders about the division of property after a relationship dissolves. In some situations, these orders may cross over and/or conflict with orders made under the Act.
- 6.2 When the Family Court makes parenting orders under Commonwealth legislation, it is required to take into account any family violence and any existing State family violence order (such as an ADVO).<sup>85</sup> The *Family Law Act 1975* (Cth) also deals with how inconsistencies between parenting orders and State family violence orders are to be resolved by the Family Court.<sup>86</sup>
- 6.3 When State Courts make family violence orders, the *Family Law Act 1975* (Cth) gives them jurisdiction to change existing parenting orders,

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<sup>85</sup> *Family Law Act 1975* (Cth) s 60CC, s 60CG, s 60F.

<sup>86</sup> *Family Law Act 1975* (Cth) s 68P, s 68Q.

but only if relevant material was not before the Family Court at the time the parenting order was originally made.<sup>87</sup>

6.4 The Family Violence Report recommended that:

State and territory family violence legislation should require courts exercising jurisdiction under that legislation to inquire about existing parenting orders under the Family Law Act 1975 (Cth), or pending proceedings for such orders.<sup>88</sup>

6.5 Some stakeholders supported this proposal.<sup>89</sup> However, the NSW Police Force submitted that the Act currently provides sufficient provision.

6.6 The Chief Magistrate advised that parties often either asked the Local Court to wait for concurrent family law proceedings to be finalised, or did not inform the Local Court of pending family law proceedings or existing parenting orders.

6.7 The Act already states that a person applying for an interim or final AVO must advise the Court of any relevant parenting order of which they are aware, or any pending application for such an order. A judicial officer is also required to inform the applicant of their obligation under this section.<sup>90</sup>

6.8 In this context, changes to the Act are unlikely to help the Court access more information about existing or pending parenting orders. Instead, ADVO application forms should be modified to help improve awareness of the need to inform the Court about these issues. The application should require an applicant to indicate whether family law proceedings are on foot, whether any orders have been made and the terms of any orders. The application form should also indicate that, if the applicant wants existing parenting orders to be changed, the Court will need to know the basis for the original parenting order and why it needs to be changed.

## Property orders

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### Recommendation 16

The Act should be amended so that applicants (other than police) are also required to inform the Court of any existing or pending family law property orders (currently only parenting orders must be

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87 *Family Law Act 1975* (Cth) s 68R.

88 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) Recommendation 30-6.

89 Women's Legal Services; Hawkesbury Nepean Community Legal Centre; Legal Aid NSW.

90 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 42.

disclosed), and judicial officers are required to inform the applicant of this obligation.

- 6.9 When the Court makes an ADVO under the Act, it can also make ancillary property recovery orders. These orders allow either the victim or the alleged defendant to recover personal property left at premises occupied by the other party. The Act makes provision for the recovery to occur at a specified time and for the person recovering property to be accompanied by a police officer.
- 6.10 Under the Commonwealth's *Family Law Act 1975*, the Family Court can make binding orders for the disposition of all real, financial and personal property. Unlike the situation for parenting orders, the Commonwealth legislation does not cover how such orders interact with a State personal property recovery order made with an ADVO.
- 6.11 To resolve this issue, the Family Violence Report recommended that the Act should require Courts to inquire about and consider any family law property orders (or pending applications for such orders) before making personal property recovery orders.<sup>91</sup>
- 6.12 Stakeholders generally supported this proposal.
- 6.13 While noting that the *Family Law Act 1975 (Cth)* does not confer jurisdiction on NSW Courts in relation to property orders, the review concludes that section 37 of the Act should be amended to provide that applicants must inform the Court of any *Family Law Act 1975 (Cth)* orders or pending applications for such orders and require judicial officers to so enquire.
- 6.14 As already noted in recommendation 15, ADVO application forms should be modified so that they require applicants to state whether there are any existing family law property orders or pending applications for such orders.

## 7. Children's Court jurisdiction

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### Recommendation 17

(a) Where care proceedings before it are not related to concurrent criminal proceedings in another jurisdiction, the jurisdiction of the Children's Court should be extended to allow it to:

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91 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010).

- make an ADVO with the child the subject of the care proceedings named as the protected person;
  - make an ADVO to protect that child's siblings and any adult who is affected by the same or similar circumstances.
- (b) The jurisdiction of the Children's Court should be extended to allow it to vary or revoke any existing ADVO on the application of a party or its own motion where care proceedings are before the Court and the circumstances justify making the order.
- (c) The NSW Department of Family and Community Services and the Commissioner of Police should be notified and given the right of appearance before this jurisdiction is exercised.

- 7.1 Currently, the Children's Court cannot make an ADVO in care proceedings regardless of whether evidence exists that would justify making an order. Instead, a separate application must be made in the Local Court.
- 7.2 The Family Violence Report recommended that the Children's Court have jurisdiction to make an ADVO to protect a child where the Court is presiding over care proceedings involving the child.<sup>92</sup> A number of stakeholders supported this proposal,<sup>93</sup> to avoid parties being involved in a number of Court proceedings arising from similar facts or circumstances.
- 7.3 In May 2011 The Children's Court Advisory Committee considered a number of Family Violence Report recommendations to extend the Children's Court jurisdiction to make AVO applications. It highlighted that the following issues would need to be resolved before the recommendations could be adopted:
- what should be done when associated criminal proceedings are run concurrently with AVO applications;
  - the likely need to involve police in care proceedings;
  - the need for Children's Court practitioners to develop expertise in AVO matters; and
  - whether listing difficulties could arise where AVO applications made in care proceedings are contested.

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92 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) Recommendation 20-3.

93 The NSW Police Force; Women's Legal Services; Hawkesbury Nepean Community Legal Centre; Wirringa Baiya Aboriginal Women's Legal Centre; NSW Young lawyers; Legal Aid NSW.

- 7.4 The reviewers acknowledge these issues and note that some of these can be resolved by providing legislative guidance on when jurisdiction of the Children’s Court is enlivened.
- 7.5 The review accordingly recommends that the Children’s Court should be empowered to make an ADVO to protect a child the subject of care proceedings. This change would recognise the importance of minimising the number of proceedings in which the child would otherwise be involved. The review recommends however that where there are related criminal proceedings, any ADVO application or proceedings should be dealt with by the Court presiding over them.
- 7.6 The Family Violence Report also recommended that the Children’s Court should be able to make an AVO to protect the siblings of a child that is the subject of care proceedings, or other children in the same household.<sup>94</sup> Additionally, the report recommended that the Children’s Court should be able to make an AVO to protect an adult related to the child that is subject to care proceedings.<sup>95</sup>
- 7.7 Several stakeholders, including the NSW Police Force, supported this proposal.<sup>96</sup> The NSW Family and Community Services reiterated that the issues raised by the Children’s Court Advisory Committee (above) would need to be resolved before the proposal could be implemented.
- 7.8 The review found that adopting these recommendations would reduce duplication and delay, and support the policy objectives of the Act. As stated above, legislative guidance would be required to support the Children’s Court in implementing this and other related recommendations.
- 7.9 The Family Violence Report also recommended that:
- Where a Children’s Court has jurisdiction to hear a family violence protection order application .... the court should also have power to vary or revoke a family violence protection order on the application of a party to the order, or on its own motion.<sup>97</sup>
- 7.10 A number of submissions supported this proposal.<sup>98</sup> It would address the situation where the Children’s Court cannot make a child protection order

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94 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) Recommendation 20-4.

95 Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) Recommendation 20-5.

96 The NSW Police Force; Women’s Legal Services; Hawkesbury Nepean Community Legal Centre; Wirringa Baiya Aboriginal Women’s Legal Centre; Shopfront Youth Legal Centre; NSW Family and Community Services; Legal Aid NSW.

97. Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010) Recommendation 20-6.

98 The NSW Police Force; Women’s Legal Services; Hawkesbury Nepean Community Legal Centre; Wirringa Baiya Aboriginal Women’s Legal Centre; Shopfront Youth Legal Centre; NSW Family and Community Services; Legal Aid NSW.

under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) because a conflicting AVO is in place. Parties must then approach the police to apply to vary or revoke the order. This can give rise to unnecessary delays and the review considers that it is appropriate the Children's Court's jurisdiction also be extended in this regard.

- 7.11 In accordance with the recommendation of the Family Violence Report, the review recommends that the Children's Court have jurisdiction to vary or revoke any ADVO when care proceedings are before it and the circumstances justify making the order. However, the jurisdiction should only be exercised where the Commissioner of Police and the NSW Department of Family and Community Services have been notified and given the opportunity to appear.

## **8. Implementation**

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- 8.1 The recommendations, to a large extent, reflect the Family Violence Report's concern that the community overall develop an appreciation of the extent to which domestic violence can be committed through acts that may not be physically violent.
- 8.2 The implementation of many of the recommendations will therefore perform an educative function, while others will bring about significant procedural changes.
- 8.3 The Review notes that implementation of the recommendations, particularly recommendations 1, 4, 11 and 16, will require the provision of training and education to the judiciary, practitioners and the NSW Police Force.

## Appendix A: Apprehended Violence Legal Issues Co-ordinating Committee

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The Apprehended Violence Legal Issues Co-ordinating Committee (AVLICC) was established in 1997 to ensure appropriate co-ordination of criminal justice services for people seeking AVOs and to examine and identify legal, policy and procedural barriers to the provision of such services. AVLICC considers legislation, policy and procedure in the area with particular focus on the needs of women and children. Its terms of reference are to:

- Examine and identify legal, policy and procedural barriers to the provision of adequate criminal justice services and to ensure appropriate co-ordination of services to persons seeking protection from personal and domestic violence.
- Make recommendations for consistent and improved legislation, policies, procedures and criminal justice system services to persons seeking protection from personal and domestic violence.
- Pay particular attention to the needs of persons, particularly women and children, seeking protection from domestic violence. Needs and concerns of Aboriginal and Torres Strait Islander women and children, women and children from non-English speaking backgrounds, older women, women and children with disabilities, lesbians and their children, young women and their children are a key consideration AVLICC.

It includes representatives from:

- NSW Department of Justice
- NSW Police
- NSW Police Ministry
- Department for Women
- Local Courts
- Legal Aid Commission
- Judicial Commission
- Office of the Director of Public Prosecutions
- Domestic Violence Advocacy Service
- Domestic Violence Court Assistance Scheme

## Appendix B: Submissions to the Review

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- 1 Brian Fenn
- 2 Dennis Drabble
- 3 NSW Health
- 4 Aboriginal Affairs
- 5 Children's Court
- 6 Office of the Director of Public Prosecutions (NSW)
- 7 Illawarra Shoalhaven Local Health District
- 8 Central Coast Local Health District
- 9 NSW Bar Association
- 10 Sydney Local Health District
- 11 South Eastern Sydney Local Health District
- 12 Chief Magistrate Henson
- 13 Law Society of NSW
- 14 One In Three Campaign
- 15 Women's Legal Services NSW
- 16 Commission for Children and Young People
- 17 Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service
- 18 Barry Collier
- 19 Intellectual Disability Rights Service
- 20 Shopfront Youth Legal Centre
- 21 Inner City Legal Centre
- 22 Hawkesbury Nepean Community Legal Centre Inc
- 23 Manly Warringah Women's Resource Centre Limited
- 24 People with Disability Australia Incorporated
- 25 Alberto Carvalho



- 26 Legal Aid Commission
- 27 Ali Peter Noonan
- 28 Domestic Violence Death Review Team
- 29 Women's Domestic Violence Court Advocacy Service Network Inc
- 30 NSW Crown Solicitor's Office
- 31 NSW Police Force
- 32 Victims Services
- 33 Law Society of NSW Young Lawyers
- 34 Elizabeth Evatt Community Legal Centre
- 35 NSW Women's Refuge Movement
- 36 Juvenile Justice
- 37 Wirringa Baiya Aboriginal Women's Legal Centre Inc
- 38 Department of Justice ADR Directorate (Community Justice Centre)
- 39 Non-Custodial Parents Party
- 40 Family and Community Services
- 41 Hunter New England Local Health District
- 42 South Western Sydney Local Health District
- 43 Northern Rivers Community Legal Centre
- 44 NSW Legal Assistance Forum
- 45 Victims Advisory Board
- 46 Kernaghan & Associates
- 47 Electorate Office Wagga Wagga
- 48 Children's Court Advisory Committee