Interim review of frivolous and vexatious apprehended personal violence orders – from the Review of the Crimes (Domestic and Personal Violence) Act 2007

Justice Policy
Department of Attorney General and Justice

APPREHENDED PERSONAL VIOLENCE ORDERS

This preliminary report has been prepared by Justice Policy of the Department of Attorney General and Justice (the **Department**) in the context of a broader statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* (the **Act**). It is limited to an examination of frivolous and vexatious apprehended personal violence orders (**APVOs**), in response to publicly voiced concerns about abuse of the process.

The Department published a Discussion Paper in August 2011 for the review of the entire Act. It also set out a number of specific issues relating to frivolous and vexatious APVOs and called for submissions. The statutory review of the Act (the **Review**) was advertised in newspapers and letters were sent to stakeholders seeking input. The Discussion Paper was made publicly available on the Department's website.

The Review received a total of 47 submissions. Of those, 23 responded to a majority, or all, of the questions posed in the Discussion Paper relating to APVOs. A list of submissions received is at Appendix 1.

Executive summary

Part 4 of the Act provides for the making of apprehended domestic violence orders (**ADVOs**) between persons who are in a 'domestic relationship'. Domestic relationship is defined in section 5 and this definition is being considered in the Review.

Part 5 of the Act provides for the making of APVOs between persons who are not in a domestic relationship.

This interim review considers the following provisions of the Act:

a) Part 10, Division 3 which sets out how APVO and ADVO proceedings are to commence. Section 53 sets out where an authorised officer or Registrar can refuse to issue process for an APVO application.

b) Section 21 which provides for the referral of APVO (but not ADVO) matters for mediation under the *Community Justice Centres Act 1983*. That act provides that the Director of Community Justice Centres can decline a referral. Following a mediation. the Director must prepare a written report for the referring court.

The interim review also considers the issue of providing a means to prosecute persons for false APVO applications.

The interim review has not considered the final proposal in the Discussion Paper, being whether further legislative distinction between violence within a domestic relationship (ADVOs) and violence outside a domestic relationship (APVOs) is

desirable in NSW. This issue will be considered in the Review because it is related to issues about the definitions in the Act, including 'domestic relationship'.

In 2011, the Bureau of Crime Statistics and Research (**BOCSAR**) was asked to conduct research into false and vexatious APVOs and found that they are not as frequent in NSW as some commentators have suggested. It remains appropriate however to discourage such applications and to encourage the speedy resolution of appropriately initiated matters.

The interim review makes the following recommendations intended to deter frivolous and vexatious APVO applications and to address the perception that they are increasingly used and granted unmeritoriously:

1. Amend section 7 to include a definition of harassment, for the purpose of the entire Act, to require a continuing course of conduct or ongoing pattern of behaviour.

2. Amend section 53(8) so that a registrar's refusal to issue an application notice for filing may be determined by a magistrate in chambers rather than a Court.

3. Amend section 21 to provide a presumption in favour of referral to mediation in APVO matters unless the Court considers there is good reason not to.

4. Amend section 21(2)(a) – (e) to provide an inclusive list to assess whether there is a good reason not to refer a matter to mediation. The presence of one or more of those factors should not prohibit a referral being made.

5. Further consultation be undertaken by DAGJ on the necessary case management mechanisms for Court referred applications to mediation.

6. Amend section 21(6) so that the reference to 'order' applies to interim orders.

7. Amend the Act to introduce an offence of knowingly providing false information in an application for an APVO.

8. The penalty for the offence should be a maximum penalty of 10 penalty units or 12 months imprisonment.

9. That the application form should be proscribed in a Regulation and should include the following questions to be answered by the applicant:

    (a) Whether there is an existing commercial relationship between the parties
    (b) Whether is an outstanding debt owed by or to the applicant
    (c) Whether there has been a previous history of litigation between the parties

    And a warning that it is an offence to provide false information and the maximum penalty that can be imposed on conviction.

Context

Media reports have raised a number of issues associated with APVOs. Judicial officers have also expressed concerns about abuse of APVOs.[1] Historically, concerns have been raised in various public forums and reports, the media, Parliamentary debates and in court about a perceived abuse of the APVO process.

In 2007, the Hon. John Ajaka said in the Parliamentary Debate on the *Crimes (Domestic and Personal Violence) Bill 2007*:

> I ask the Attorney General to give consideration to also examining the increasing of penalties for vexatious and unwarranted apprehended violence orders by applicants. It is evident that regrettably on some occasions apprehended violence orders applications are vexatious and designed to obtain benefit against the defendant without proper recourse. This is clearly a waste of the valuable resources of not only the police but also, just as importantly, the court's resources that should be utilised to assist those in genuine need of assistance and genuine victims of violence. It is hoped in looking at increased penalties for any such vexatious claims the Attorney General would put a stop to many being lodged.[2]

In early 2011, there were several media reports[3] that raised a number of issues associated with APVOs, including that they are sought (and granted) frivolously and vexatiously.

On 19 March 2011, the Daily Telegraph contained three separate stories on APVOs, which contained statements including:

> The abuse and over-use of personal apprehended violence orders is out of control, with the number at an all-time high and some serial "victims" able to take out dozens over a period of years...The number of personal AVOs is at a record high, with more than 150 being taken out each week.[4]

and

> Judges and lawyers say laws for personal apprehended violence orders are among the most misused pieces of legislation, while frustrated magistrates are fed up that the "time wasters" who abuse the orders are clogging up the courts.[5]

Clearly, an APVO that is granted has an impact on the parties concerned. With respect to inappropriately issued orders, in *P E v M U*[6], Judge Williams stated that

> [i]f an APVO is made inappropriately, rather than calm a developing situation it can tend to inflame it by giving apparent legitimacy to inappropriate conduct. Importantly, it also has an impact beyond the parties, with the community perception of the issue

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[1] See, for example, *P E v M U* [2010] NSWDC 2 (per Williams J)
[2] New South Wales, *Parliamentary Debates*, Legislative Council, 29 November 2007 (The Hon. John Ajaka).
[3] See, for example, *Turning AVOs into weapons* The Daily Telegraph, 19 March 2011; *AVOs keep vendettas going strong* The Daily Telegraph, 19 March 2011; *Two case studies on AVOs* The Daily Telegraph, 19 March 2011; and *'Ridiculous' sign seals cop's apprehended violence order* The Daily Telegraph, 12 May 2011.
[4] *Turning AVOs into weapons* The Daily Telegraph, 19 March 2011
[5] *AVOs keep vendettas going strong* The Daily Telegraph, 19 March 2011
[6] [2010] NSWDC 2

> impacting upon the effectiveness of ADVOs [apprehended domestic violence orders], since a great deal of the benefit derives from community respect for the seriousness of the AVO process[7]

Judge Williams went on:

> [r]egrettably, APVOs are being sought and, even more regrettably, obtained in many circumstances where an order is not justified, thereby bringing the objects and purpose of this piece of incredibly vague legislation into even further disrepute. [8]

Data on APVOs

Despite reports that there is a significant issue with APVOs being sought for matters that are vexatious, frivolous or of an otherwise unwarranted nature, there was a lack of empirical data on the issue. This has been recognised by various reports over the years.

In 1999, the Criminal Law Review Division in the then NSW Attorney General's Department reported:

> [there is] little empirical evidence either supporting or refuting the claim that APVOs are routinely being abused.[9]

In 2003, the Law Reform Commission (LRC) examined the issue and explored concerns that had been expressed "for some time" that APVOs were being used for trivial and vindictive purposes.[10] The LRC noted:

> ...we still know very little beyond anecdotes about how APVOs are operating. Thus, any assessment of the effectiveness of APVOs is limited due to the lack of available information in key areas.[11]

The LRC recognised the views expressed in several submissions that more accurate information ought to be available on various issues related to APVOs, including information about the type of people who apply for APVOs and the nature of their complaint; whether the discretion to refuse to issue process in APVO matters is being used and the results; the types of matters that are sent to mediation and the results; and more cross-matching of data to check on multiple and cross applications.[12]

Recent research

In 2011 BOCSAR undertook a research project to establish whether frivolous and

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[7] *Report 103 (2003) - Apprehended violence orders* NSW Law Reform Commission at 3.81
[8] *P E v M U* [2010] NSWDC 2 at 17
[9] Criminal Law Review Division, NSW Attorney General's Department (1999) *Apprehended Violence Orders: A Review of the Law* at 6.
[10] NSW Law Reform Commission Discussion Paper 45 (2002) *Apprehended Violence Orders: Part 15A of the Crimes Act* at 5.21
[11] *Report 103 (2003) - Apprehended violence orders* NSW Law Reform Commission at 3.85
[12] NSW Law Reform Commission *Report 103 (2003) Apprehended Violence Orders* at 3.87

vexatious APVOs are common in NSW and, if so, the circumstances in which they arise. BOCSAR conducted an online survey of NSW magistrates and registrars to examine their experiences with APVOs.

Additional objectives of the research were to examine whether the current measures in the Act, designed to minimise abuse of the APVO process, are being utilised.[13] It was also to determine the extent to which the *Vexatious Proceedings Act* (2008) could be applied in false or vexatious APVO matters.

BOCSAR published its findings in a Crime and Justice Bulletin 'Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars' in May 2012. It found:

- APVO rates are not uniform across NSW, with higher rates in the Far West and North Western regions of NSW. The lowest rates are in Central Northern and Lower Northern Sydney, followed by the Northern Beaches and Inner Western areas of Sydney. The report notes that this geographical variation in APVOs is consistent with overall rates of non-domestic violence in NSW.

- Despite some variation in the annual APVO rate between 2001 and 2011, over the entire period there was no statistically significant upward or downward trend in the monthly number of APVOs granted.

- Of the respondents who dealt with APVOs in the previous 12 months, two-thirds reported that they never, rarely or only occasionally dealt with frivolous or vexatious APVOs.[14]

- Only one in ten respondents reported that they frequently dealt with such matters. When frivolous or vexatious APVO matters do arise, respondents reported that they involve trivial/insignificant matters or a single act of harassment, and that the dispute is most often between neighbours or acquaintances/former friends.[15]

- Almost one third of respondents reported that public housing tenants or authorities were often involved in frivolous or vexatious APVO applications, and that these were likely to be neighbourhood disputes involving one or more public housing tenants.[16]

- Children and vulnerable groups, including people with an intellectual disability, are not often involved in frivolous or vexatious APVO applications, only 8% of respondents reported that children under 16 years are frequently

[13] Specifically, registrar discretion to refuse to issue process (s 53) and legislative power to refer APVO matters to mediation (s 21).
[14] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars* (appendix) rarely =<10% occasionally=10-29% sometimes=30%-49% frequently=50-69% usually=70-90% almost always=>90%
[15] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 22.
[16] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 22-23.

involved in these types of matters and only 7% reported that other vulnerable groups are frequently involved. Over 90% of respondents reported that public officers, including sheriffs and police, are rarely or never involved in frivolous or vexatious APVO applications.[17]

- Over one quarter of respondents (28%) indicated that APVO applications frequently, usually or almost always involve cross applications or multiple applications from the same parties, and approximately a third of these APVO applications were perceived as frivolous or vexatious in nature. Magistrates were more likely to report that cross and/or multiple APVO applications from the same parties are frequently, usually or almost always frivolous or vexatious, as opposed to registrars (37.0% v 24.3%).[18]

- More than one-third of magistrates reported that they frequently, usually or almost always referred APVO applications to mediation. However, a significant minority (19.7%) rarely or never refer APVO matters to mediation. The report states,

> [b]y far the most common reason for not referring APVO applications to mediation was that parties are generally unwilling to mediate in these matters. Lack of alternative dispute resolution services did not appear to be an issue affecting magistrates' decisions to mediate APVO matters.[19]

- [T]he vast majority of registrars reported that they never or have rarely refused to issue process in APVO matters (69.9%).[20] Registrars reported that there were several barriers to the exercise of the discretion provided by section 53, with the most significant being the "general unwillingness of parties to mediate" (73.7%) followed by difficulties in determining whether the allegations were frivolous or vexatious (58.8%). Other issues cited included that the application contained allegations of harassment or of a personal violence offence, stalking or intimidation. However, the research indicates that a large proportion of registrars reported informally diverting APVO matters.[21] Two registrars also noted the operation of section 52(8), with the report stating that:

> ...because an applicant can apply to the court for an APVO application to be accepted even after a registrar has refused to accept the notice, this means that, in practice, refused applications still end up going to court. This acts as a disincentive for registrars to apply section 53 in APVO matters.[22]

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[17] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 23.
[18] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 13.
[19] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 23.
[20] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 17.
[21] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 18.
[22] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 17.

The survey also provided an opportunity for the respondents to make general comments in relation to APVO matters. Ninety-four participants[23] provided text responses in this part of the survey. Following are some of those general comments:

- Almost one quarter of respondents supported the introduction of a filing fee for APVO applications, with discretion to waive the fee in certain circumstances. This was on the basis that it may deter people who are initiating complaints for trivial matters or vexatious reasons, as well as encourage applicants to more clearly specify who the defendant is in the dispute and, in doing so, lessen the frequency of multiple APVO applications.[24]

- A number of respondents thought that people applying for APVOs should be better educated on the nature of the order and the process of applying. One respondent commented:

> Too often people who complain to police about the behaviour of a neighbour about something trivial will simply be referred to the court 'to get an AVO'. The expectation then is that an AVO is available on request. Many applicants do not understand (at least initially) that they are, in fact, commencing litigation with all its obligations and risks. Legal aid is not available, so parties frequently represent themselves. The result too often is unrealistic expectations about the result; ignorance about the process; failure to understand the rights of the opposing party; and lack of objectivity in assessing the best way to deal with their problem.[25]

- Several respondents noted that police are often the first point of contact for a potential complainant. They suggested that specific training of police would assist in ensuring that they are able to inform complainants of the application process and consequences, and also act as a screening mechanism by which parties could be referred to Community Justice Centres (**CJC**) or other alternative dispute resolution services (**ADRs**), as opposed to referring them to courts.

- Complainants in APVO applications are inadequately prepared when the matter goes before the court, resulting in lengthy or multiple hearings and increased delay. Two magistrates commented on a procedure implemented in their Court,[26] which they suggest has been successful in dealing with APVOs, and particularly those that are frivolous:

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[23] A total of 210 survey responses were collected, 84 from magistrates and 126 from registrars. The overall response rate of 63% is reported by BOCSAR as being "a good response rate for an online survey, particularly in light of the fact that not all magistrates and registrars who were contacted to participate in the survey deal with APVOs on a regular basis (e.g. state coroner, chief industrial magistrate and magistrates/registrars of the drug courts)."

[24] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 24.

[25] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 21.

[26] This procedure has since been reflected in Local Court Practice Note No. 2 of 2012, where, under Part 6, all witness evidence must be given by written statement, and served on the other party prior to the hearing. Written statements of oral evidence intended to be adduced at the hearing must also be served.

> The procedure in my court is to require both sides to prepare and file statements of their evidence prior to hearing. That procedure has the following advantages: It ensures both sides come to the hearing apprised of the case they have to meet; it forces parties to think about their case and how they will present it before the day of hearing; it reinforces the point that they are engaged in litigation before a court of law and must prepare accordingly - many people withdraw/consent when faced with an obligation to put effort into asserting their position.[27]

The BOCSAR report concluded that

> Although vexatious and frivolous APVO applications are not nearly as frequent in NSW as some commentators have suggested, the findings from the current study suggest three areas where changes could be implemented in order to improve the APVO process and potentially reduce the amount of court time consumed by trivial or unmeritorious matters; (1) education of applicants (2) increase in mediation referrals (3) introduction of a filing fee.[28]

Submissions on APVO issues

While BOCSAR was administering the survey, the Department published its Discussion Paper.[29] The Discussion Paper sought submissions on the Act, and to facilitate discussion, it raised a range of issues in relation to the Act generally and set out a number proposals specifically relating to APVO reform that were designed to address concerns about frivolous and vexatious applications:

A) enhancing a registrar's discretion to refuse to issue an APVO application
B) ensuring the referral of appropriate APVOs to mediation
C) providing a means to prosecute protected persons for false or vexatious APVO applications.

This interim review considers the submissions that responded to the APVO issues. The balance of the submissions to the statutory review will be considered and responded to in the final report. The interim review also considers some, but not all, of the BOCSAR proposals. The education issue identified by BOCSAR was also referred to in some submissions to the review, though not as a primary issue. The interim review notes the issues raised with respect to the education of applicants and police, however such issues are outside the scope of a statutory review. Similarly, the question of filing fees was raised in the Discussion Paper in the context of the statutory review of the entirety of the Act. This issue is also outside are outside the scope of the statutory review.

The interim review considers and makes recommendations regarding BOCSAR's second recommendation, an increase in referrals to mediation (recommendations 3-6).

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[27] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 22.
[28] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 23.
[29] *Statutory Review of the Crimes (Domestic and Personal Violence) Act 2007 - Discussion Paper* (2011) Department of Attorney General and Justice.

Discussion Paper - Proposal A: Enhancing a registrar's discretion to refuse to issue an APVO application

Section 53 of the Act provides registrars with a discretion to refuse to issue process in APVO matters. It is a complex provision that also lists a number of presumptions against exercising the discretion to refuse. The presumption against requires a registrar to have regard to the nature and substance of the allegation.

The Discussion Paper noted that registrars refuse very low numbers of APVO applications. Reasons for this include difficulties in establishing whether a complaint is vexatious or frivolous; that the matter may be diverted before it is formally refused; and that the circumstances that give rise to the presumption against exercising the discretion[30] constitute the major reasons why APVO applications are made. The option to seek a review of a registrar's decision to refuse to issue an APVO application notice,[31] was also indicated as a factor by some respondents in the recent BOCSAR study.

The BOCSAR research indicated that although registrars use section 53 infrequently, there is a larger proportion who report informally diverting AVPO matters;[32] with almost one in five registrars reporting that complainants frequently, usually or almost always withdraw their APVO application once the registrar has explained the prospects of success and/or consequences of being unsuccessful.[33]

The Hawkesbury Nepean Community Legal Centre Inc however stated that many clients had reported that a registrar had refused to issue an APVO application despite a history of intimidation, harassment and threats by another person.[34]

The Discussion Paper outlined 4 options. They were designed to assist registrars exercising their discretion under section 53. The options and responses are discussed below.

Option 1: *Harassment should require a continuing course of conduct, not "one comment by a neighbour"*

This option would provide guidance to the operation of the Act generally. By clearly defining harassment, registrars could easily identify an application that may fail, and refuse such an application on the grounds that a single incident cannot constitute harassment for the purposes of section 7.

Section 19 of the Act provides that a court may make an APVO if it is satisfied that a

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[30] Section 53(5) *Crimes (Domestic and Personal Violence) Act 2007*

[31] Section 53(8) *Crimes (Domestic and Personal Violence) Act 200*

[32] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars,* 18.

[33] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars,* 19. However, BOCSAR also reports that than 40% of registrars stated the withdrawal of APVO matters in this way, rarely or never occurs.

[34] Submission 22 (Hawkesbury Nepean Community Legal Centre)

person has reasonable grounds to fear, and in fact fears, a personal violence offence against them, or the engagement by the defendant in conduct amounting to intimidation or stalking. 'Intimidation' is defined in section 7 of the Act as:

> (a) conduct amounting to harassment or molestation of the person, or
> (b) an approach made to the person by any means (including by telephone, telephone text messaging, e-mailing and other technologically assisted means) that causes the person to fear for his or her safety, or
> (c) any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property.
>
> (2) For the purpose of determining whether a person's conduct amounts to intimidation, a court may have regard to any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour.

The Act does not define harassment. Notwithstanding the reference to a 'pattern' of behaviour described in section 7(2), concerns have been raised that the Act enables an application for an APVO to be made in circumstances where a single incident has occurred.

In *Police v Dates*, [35] the Police brought an application on behalf of a 14 year old for an APVO against the defendant who was alleged to have banged on the front door and yelled out 'Lynette, you fat slut, come out here' a number of times. Lynette is the mother of the complainant. In his judgment, Magistrate Dare noted that the defendant had left the scene of her own accord, was unaware of the complainant's presence in the house, had not caused any damage to, or on, the property, and that there was no suggestion of similar conduct either before or after the alleged incident. The Magistrate declined to make an order, noting that:

> Harassment is not defined in the Act but in its legal sense it refers to ongoing behaviours that are found to be threatening or disturbing.[36]

In its submission to the LRC's 2003 review of apprehended violence orders, the Local Court suggested amending the section providing a registrar with a discretion to refuse to issue process to:

> ...provide that the presumption against exercising the discretion to refuse to issue process with regard to harassment only applies where there is a continuing course of conduct, that is, not on the basis of one comment by a neighbour.[37]

The majority of stakeholders who commented on this option were supportive of APVO applications requiring the complainant to detail a continuing course of conduct by the defendant.[38] The Inner City Legal Centre (**ICLC**) commented that applications

> ...should not be reliant on the use of offensive language on one isolated incident in

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[35] *Police v Dates* 28 March 2011, Tumut Local Court
[36] *Police v Dates* 28 March 2011, Tumut Local Court
[37] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.15
[38] Submission 6 (Office of the Director of Public Prosecutions), Submission 13 (Law Society of NSW), Submission 17 (Redfern Legal Centre & Sydney Women's Domestic Violence Court Advocacy Service), Submission 26 (Legal Aid), Submission 21(Inner City Legal Centre), Submission 31 (NSW Police Force)

order to make an APVO application.[39]

In their submission, Shopfront indicated support for the proposal:

> We agree that APVOs should not be used in the case of isolated incidents, particularly where physical violence is not involved.[40]

Some stakeholders were generally supportive of the proposal, with qualifications. For example, Wirringa Baiya Aboriginal Women's Legal Centre (**Wirringa Baiya**) suggested that there should be some discretion to allow applications to be made where the harassment was very serious, for example, where it was in the nature of sexual harassment, racial vilification or some other serious type of harassment (including, for example, homophobic comments), or harassing behaviour.[41] Northern Rivers Community Legal Centre submitted that the requirements should not be tightened to such an extent that applications would only be accepted in the most extreme of circumstances.[42]

Three stakeholders opposed or raised concerns regarding option 1. The Bar Association stated in its submission that it was appropriate for registrars to be cautious when assessing whether to exercise discretion, and that the proposed change would be unlikely to have a significant practical effect:

> It appears likely that registrars would still be reluctant to refuse summarily to issue process except in the clearest cases. Moreover, this reluctance appears sensible. The legislative test for exercise of the discretion in s 53(4) is narrow. To refuse to issue process where there was a genuine risk of violence could have tragic consequences. It is appropriate for registrars to err on the side of caution.[43]

The Hawkesbury Nepean Community Legal Centre and Women's Legal Services NSW did not support option 1 on the basis that a single comment can be a threat that warrants protection:

> In some circumstances, a one off threat or violent incident will warrant the making of an APVO for a person's protection and it would be inappropriate to refuse to issue an application.[44]

The interim review notes these stakeholder concerns but further notes that 'single threat behaviour' will be covered by the definition of 'intimidation' in section 7(1)(b). This can consist of a single approach if it causes the person to fear for his or her safety.

The interim review had regard to similar provisions in other jurisdictions and found that in both Victoria and New Zealand harassment has been defined for the purposes of their relevant Act.

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[39] Submission 21 (Inner City Legal Centre)
[40] Submission 20 (The Shopfront Youth Legal Centre)
[41] Submission 37 (Wirringa Baiya Aboriginal Women's Legal Centre Inc.)
[42] Submission 43 (Northern Rivers Community Legal Centre)
[43] Submission 9 (NSW Bar Association)
[44] Submission 22 (Hawkesbury Nepean Community Legal Centre)

Section 7 of the *Personal Safety Intervention Orders Act 2010* (*Vic*) defines 'harassment' as a course of conduct by a person towards another person that is demeaning, derogatory or intimidating and includes such conduct that is carried on by or through a third person. New Zealand legislation defines 'harassment' to require a pattern of behaviour or course of conduct by the defendant as:

> **3 Meaning of harassment**
>
> (1) For the purposes of this Act, a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.
>
> (2) To avoid any doubt -
> (a) the specified acts required for the purposes of subsection (1) may be the same type of specified act on each separate occasion, or different types of specified acts:
> (b) the specified acts need not be done to the same person on each separate occasion, as long as the pattern of behaviour is directed against the same person.[45]

The interim review considers that 'harassment' should be defined to require a pattern of behaviour or course of conduct by a defendant toward the person in need of protection (**PINOP**). What is proposed is the incorporation of the plain english definition of the word into the legislation. This may assist in preventing the use of APVOs to resolve trivial and/or frivolous applications that are based on 'one-off' events involving acts that do not fall under one of the other sub-sections of section 7.

The interim review considers that the existing provisions relating to conduct that amounts to 'intimidation' and/or 'stalking' will continue to capture serious and inappropriate behaviour, notwithstanding that such behaviour may be an isolated occurrence.

The interim review also notes that providing a definition of 'harassment' will impact upon the definition of 'intimidation' for the purposes of the test for an ADVO in section 16 and an APVO in section 19, as well as the discretion of registrars in section 53(5).

Recommendation 1

Amend section 7 to include a definition of harassment, for the purpose of the entire Act, to require a continuing course of conduct or ongoing pattern of behaviour.

Option 2: *Registrars should not have to consider the offences of stalking or intimidation because it is too difficult for a Registrar to determine whether the person knew that their conduct is likely to cause fear in the other person.*

[45] Section 3 *Harassment Act 1997* (NZ)

There is a presumption against the exercise of discretion to refuse to issue process, where there are allegations of an offence under section 13 (stalking or intimidating behaviour) (section 53(5)(b)). This presumption applies unless there are compelling reasons to exercise that discretion.

The 2003 LRC report considered the Local Court's view that the presumption should be removed as it causes difficulties for the Chamber Magistrate in ascertaining whether or not the defendant "intended" to cause the applicant to fear physical or mental harm.[46]

The LRC did not explicitly recommend that this proposal be adopted, but stated more generally that:

> ...the section could be amended to clarify when the discretion to refuse to issue process in APVO matters should be exercised.[47]

The majority of stakeholders did not comment on this option. Two stakeholders, Legal Aid and the Law Society, indicated general support for it, while a number of stakeholders opposed it for different reasons. The Bar Association commented that it was unlikely to have much practical effect, and introduces a 'greater complication';[48] while a number of stakeholders argued that it was appropriate that a court determine such matters.[49]

Two stakeholders opposed the option on the basis of the difficulty of proving such offences. Wirringa Baiya submitted:

> ...the offence of stalking can be difficult to prove and challenging for registrars and magistrates to determine...we are of the view that each matter should be determined on its own facts and that stalking allegations should be considered when alleged and should turn on their own facts and evidence.[50]

The NSW Police Force suggested that it would increase the threshold to obtain an APVO:

> ...this would make it more difficult to obtain an APVO as proving a person's intentions requires proof by admissions of intent or knowledge that they knew their conduct was likely to cause the requisite fear, or evidence that demonstrates intent or knowledge.[51]

The interim review acknowledges these comments but considers that refining the presumption in line with the option proposed by the discussion paper and identified above, would not have a significant effect on the overall number of applications that

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[46] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.15 The view related to s562AK(4) of the Crimes Act which was in force at the time and was in similar terms to s53(5)(b)
[47] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.18
[48] Submission 9 (NSW Bar Association)
[49] Submission 15 (Women's Legal Services NSW); Submission 22 (Hawkesbury Nepean Community Legal Centre), Submission 43 (Northern Rivers Community Legal Centre)
[50] Submission 37 (Wirringa Baiya Aboriginal Women's Legal Centre Inc.)
[51] Submission 31 (NSW Police Force)

are issued for process. Importantly, the effect of recommendation 1, if accepted, will assist a registrar in the consideration of intimidation, given that it is defined as including harassment.

In the absence of any strong arguments submitted to support this option, the interim review agrees with the comments made by the Bar Association that there is little evidence to suggest that such a proposal would have a significant positive impact.

Option 3: *an authorised officer or registrar should have to consider whether an application for an APVO is brought by a police officer when considering whether to exercise their discretion to refuse to issue an application notice.*

Section 53(1) states that an authorised officer or registrar may refuse to issue process unless the application was made by a police officer.

The LRC suggested that this limitation is presumably because of the assumption that the matter must be fairly serious to warrant police involvement.[52] However, the LRC considered that the necessity of this exception to the use of a registrar's discretion is unclear given that the discretion does not apply where the application alleges a personal violence, stalking or intimidation offence, or particular forms of harassment (section 53(5)). Further, these categories are fairly broad, making it difficult to imagine situations outside of those grounds where police would become involved in an APVO dispute, so process would be issued in these cases anyway.[53] The LRC notes that even if there were matters falling beyond the scope of section 53(5), as long as the application was not frivolous, vexatious, lacking in substance or reasonable prospect of success, the registrar's discretion to refuse to issue process would not apply (section 53(4)).

In addition to the argument that section 53(1) is otiose, the LRC expressed concern that its existence implies that private applications are of a less serious nature than those brought by police, and commented that consultation responses to its review did not support this with references to private APVO complaints disclosing serious sexual assault and stalking.[54] In addition, the LRC noted that the small percentage of police-initiated APVO applications suggested that a substantial number of private complaints are made on the basis of very serious allegations.[55]

The LRC subsequently took the view that the registrar's discretion should apply equally to applications brought by private citizens and by police, and recommended the removal of the provision now contained in section 53(1) on the basis that

> the subject matter of the complaint should determine the appropriate legal response, not whether the complainant is a police officer.[56]

In addition, the LRC recommended that the fact that an application is brought by a

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[52] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.19.
[53] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.19.
[54] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5. 21.
[55] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.21.
[56] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.22.

police officer be incorporated as an additional factor into section 53(6) (formerly section 562AK(5)), which lists the factors to be considered by a registrar when determining whether or not to exercise the discretion to refuse to issue process.[57]

As noted, the legislation continues to limit the exercise of a registrar's discretion to private APVO applications. The Discussion Paper sought submissions on the LRC's recommendations.

A number of stakeholders, including Legal Aid, Northern Rivers Community Legal Centre and the Law Society, supported this option. Wirringa Baiya supported it, commenting that the same presumptions should apply irrespective of who brings the application.[58]

The Bar Association also indicated support for this option, but commented that it is unlikely to have much impact on the rate of refusal.[59]

However this option was not supported by NSW Police Force who commented that:

> ... police are only required to apply for an APVO if the investigating officer suspects or believes that a stalking/intimidation offence or child abuse offence has been, is currently being [committed], or is imminent or likely. In all other circumstances, police have greater discretion to refuse to make an application. Police are skilled in identifying allegations that are frivolous, vexatious, calculated to gain advantage or otherwise lacking in substance. They will generally not apply for an APVO unless the allegation merits an application.[60]

The interim review agrees in a general sense with the position taken by the LRC and the majority of stakeholders, that it is inappropriate to distinguish between APVO applications on the basis of who commences proceedings, as opposed to its substance in a situation where all parties are equal. However, the proposed amendment would have practical consequences. It would mean that the police would have no certainty that an application would be granted. The person in need of protection would lose the certainty that they currently have when the police make an application. It may also have the unintended consequence of causing more applications to be made by individuals, as there would be nothing to be gained though police involvement at the application stage.

No recommendation for change to this provision is therefore made at this time.

Option 4: *provide that a magistrate may determine in chambers, a registrar's refusal to accept a notice for filing.*

In practice, when a person seeks to issue proceedings they speak with a registrar and outline the "grounds of application" along with all other relevant information. The registrar completes the application notice and the PINOP signs it. If the registrar refuses to accept the notice for filing, they must record their reasons in writing

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[57] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.22.
[58] Submission 37 (Wirringa Baiya Aboriginal Women's Legal Centre Inc.)
[59] Submission 9 (NSW Bar Association)
[60] Submission 31 (NSW Police Force)

(section 53(7)). If a registrar refuses to accept the notice, the Court must determine whether it should be accepted for filing (section 53(8)).

Two registrars responding to the recent BOCSAR survey indicated that one of the barriers to refusing to issue process was the practical application of this provision:

> because an applicant can apply to the court for an APVO application to be accepted even after a registrar has refused to accept the notice, this means that, in practice, refused applications still end up going to court. This acts as a disincentive for registrars to apply section 53 in APVO matters.[61]

A number of stakeholders indicated general support for this option, noting that it had the potential to save court time.[62]

Victims Services commented that allowing an applicant to apply to a court for a review of the decision to refuse to issue process is appropriate because it allows rectification of any error made by the registrar, but also acts as a deterrent for trivial or vexatious claims.[63]

Legal Aid supported the option, suggesting that it would require some changes to the current process:

> This [option] would require applicants to provide an application notice with as much information as possible so that the magistrate could make an informed decision.[64]

The Northern Rivers Community Legal Centre and Redfern Legal Centre were supportive of this option, but noted the need to ensure that there was support for particular groups of people, including those who are illiterate, from culturally and linguistically diverse backgrounds, have learning difficulties or do not fully understand the process, to ensure that its implementation did not act as a barrier to obtaining protection.[65] Women's Legal Services and the Hawkesbury Nepean Community Legal Centre both opposed the option based on similar concerns.[66]

Other stakeholders opposed this option. The Law Society opposed it in the interests of open justice, alternatively suggesting that section 53(8) should provide that a Magistrate is not required to have a full hearing if it was clear that the matter is frivolous, vexatious, without substance or has no reasonable prospect of success.[67]

The Bar Association did not support this option, submitting that it 'defeats the purpose' if the magistrate reviewing the registrar's decision is assessing the

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[61] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 17.
[62] Submission 32 (Victims Services, Department of Attorney General and Justice), Submission 37 (Wirringa Baiya Aboriginal Women's Legal Centre Inc.), Submission 43 (Northern Rivers Community Legal Centre)
[63] Submission 32 (Victims Services, Department of Attorney General and Justice)
[64] Submission 26 (Legal Aid)
[65] Submission 17 (Redfern Legal Centre & Sydney Women's Domestic Violence Court Advocacy Service), Submission 43 (Northern Rivers Community Legal Centre)
[66] Submission 15 (Women's Legal Services NSW); Submission 22 (Hawkesbury Nepean Community Legal Centre)
[67] Submission 13 (Law Society of NSW)

application on the same basis as the registrar, without having the opportunity to hear the applicant. It further noted that the proposed reform does not address the underlying concern: that the discretion to refuse is rarely exercised in the first place.[68]

In considering option 4, the interim review has had regard to the submissions of stakeholders in the context of low levels of refusal to issue process by registrars but has also taken particular note of comments made by two registrars in the BOCSAR survey outlined above. The effect of not utilising the discretion contained in section 53 in the manner intended, has the effect of increasing the number of applications being listed before the courts that are potentially frivolous, vexatious or otherwise more appropriate for referral to mediation.

The interim review also referred to the judgment of Hidden J in *Potier v Magistrate O'Shane and Anor.*[69] It considered the review of a registrar's refusal to issue a court attendance notice in a private prosecution.[70] Justice Hidden described both the magistrate and registrar's discretion to refuse as an administrative function to which a judicial mind is to be brought:

> Section 49 requires the intervention of a registrar or a magistrate in the initiation of a private prosecution because private citizens have a personal interest in the outcome of a prosecution and may not be in a position to assess its appropriateness, the prospect of its success, or the possibility of adverse consequences for them. Hence the discretion conferred on a registrar or magistrate to refuse to issue a court attendance notice. The fact remains, however, that the exercise of that discretion by both the registrar and the magistrate is an administrative function, albeit one to which a judicial mind is to be brought. [71]

The interim review considers that section 53(8) should be amended to allow the 'review' to be undertaken by a magistrate rather than a Court. It should be made clear that the issue for determination is a threshold question as to whether the application should issue. The magistrate will have the application and the written reasons for refusal to inform them prior to making a determination.

Stakeholder concerns are noted regarding the need to support disadvantaged applicants. Allowing the application for redetermination to be conducted in chambers should reduce the burden on such applicants. The application will proceed on the basis of the information already presented to the magistrate and will place no higher burden on the applicant. They will also have removed the stress and pressure of an appearance in court.

In matters where registrars have identified mediation as an appropriate course of action to be undertaken, referral will be made to a CJC.

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[68] Submission 9 (NSW Bar Association)
[69] 2008 NSWSC 141
[70] Section 49 *Criminal Procedure Act 1986 has some similarities to s53*
[71] Paragraph 20 of *Potier v Magistrate O'Shane and Anor.* Reported on www.lawlink.nsw.gov.au

Recommendation 2

Amend section 53(8) so that a registrar's refusal to issue an application notice for filing may be determined by a magistrate in chambers rather than a Court.

Proposal B - Ensuring the referral of appropriate APVOs to mediation

In 2003 the LRC had considered mediation to be important in APVO disputes in order to limit the opportunity for abuse of the system. The LRC said:

> The role of mediation is linked with the question of refusing to issue process in APVO matters, but is also a broader issue. In some cases, mediation may be a more suitable option than an APVO, and so it may be preferable that process does not issue. In other cases, however, mediation may be appropriate in addition to an APVO, following an application being made or an order being granted.[72]

The LRC also considered whether mediation should be compulsory in APVO matters, noting that a 'significant number' of submissions supported this on the basis that it would "save court time and deter frivolous and vexatious applications", but all agreed that mediation was not appropriate where there had been physical violence or abuse.[73] Concerns with the proposal noted by the LRC included that it was only effective where both parties were willing to participate; that it could be counterproductive if mandatory because in some cases it would put the application, mediator and others in real or greater danger; that it may be inappropriate where there are language or cultural barriers for one or both of the parties; and that it is inappropriate in matters involving violence, fear or inequality.[74]

Section 21 of the Act enables a Court to refer an APVO matter to mediation, and implemented a key recommendation of the LRC.

Section 21(2) lists a number of factors that, if present in a matter, prohibit the Court from referring it to mediation. They are circumstances where:

a) there has been a history of physical violence to the protected person by the defendant
b) the protected person has been subjected to conduct by the defendant amounting to a personal violence offence
c) the protected person has been subjected to conduct by the defendant amounting to an offence under section 13
d) the defendant has engaged in conduct amounting to harassment relating to the protected person's race, religion, homosexuality, transgender status, HIV/AIDS infection or disability, or
e) there has been a previous attempt at mediation in relation to the same matter and the attempt was not successful.

The inclusion of these factors was described in the Second Reading Speech as:

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[72] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.25
[73] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.29
[74] NSW Law Reform Commission *Apprehended Violence Orders* Report 103, 5.30-5.31

> ...important so that appropriate matters can be diverted away from the court process and dealt with more expediently and economically for the parties involved.[75]

Section 21 also requires that the Director of Community Justice Centres provide a written report on the outcome of mediation or attempted mediation to the court, and provides that if the referral to mediation is made without an order being made, the proceedings are taken to have been stayed until a report is provided.

As stated above, the BOCSAR survey of magistrates and registrars noted the high settlement rate of APVO matters that are mediated by CJCs, and emphasised that providing for mandatory mediation in non-violent APVO matters was a strategy worthy of consideration to increase the rate of referral of such matters to CJCs.

The Discussion Paper sought submissions on the proposal to ensure appropriate APVO matters are referred to mediation. Submissions were also sought on the appropriateness of the Victorian model (*Personal Safety Intervention Orders Act 2010*) which gives courts the power to direct parties to mediate where the dispute has been assessed as suitable.

Of the 22 submissions to the Review that responded to this proposal, 21 supported stronger powers to refer APVO matters to mediation, although there were differences as to whether there should be power to direct parties, and what matters were appropriate for an order directing parties to mediation.

A number of stakeholders supported the Victorian model, including the Department of Family and Community Services, Hawkesbury Nepean Community Legal Centre, Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service, Elizabeth Evatt Community Legal Centre, Legal Aid NSW and Women's Legal Services NSW. It was noted by a number of these stakeholders stated that, should a similar model be adopted in NSW, it should ensure that matters are appropriately assessed as being suitable for mediation, as opposed to being referred automatically.[76]

In its submission to the Review, NSW Young Lawyers recommended, "further study into the adoption of court directed mediation under the Act".[77] In acknowledging the poor levels of voluntary participation in mediation, Young Lawyers state:

> A factor relevant to poor levels of voluntary participation is that parties do not have the knowledge nor are they objectively placed to assess the effectiveness of mediation, assisting in their particular circumstances. Mandatory mediation may overcome the inhibition to voluntary participation by removing the sense that one party or the other has weakened its position.[78]

Young Lawyers submit that the Victorian model is appropriate as a result of the incorporation of three key features: 1) free assessment and mediation provided by experienced, accredited mediators who are subject to practice standards; 2) there

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[75] Second Reading Speech *Crimes Amendment (Apprehended Violence) Act 2006* (Neville Newell)
[76] Submission 15 (Women's Legal Services NSW); Submission 22 (Hawkesbury Nepean Community Legal Centre)
[77] Submission 33 (NSW Young Lawyers, Criminal Law Committee)
[78] Submission 33 (NSW Young Lawyers, Criminal Law Committee)

are no sanctions for non-compliance; and 3) the mediation certificate preserves confidentiality.

The Bar Association was the only stakeholder that did not support the proposal. In taking this position, their submission notes that the amendment based on the recommendations of the LRC's 2003 report, that gave the court the power to refer matters to mediation (section 21) has had little impact on the rate of APVO matters actually being referred, despite expectations to the contrary.[79]

The Alternative Dispute Resolution Directorate (**ADR Directorate**) also submitted that the Victorian power to direct attendance is not substantially different from the section 21 power to refer, given that lack of willingness to attend is a factor considered in Victoria when assessing a matter's suitability for mediation, and it is unlikely that courts would take significant steps to enforce orders directing parties' attendance.[80] The ADR Directorate, together with a number of other stakeholders, suggested going further than simply a power to direct. The ADR Directorate propose that APVO applications should be mediated unless a referral is not appropriate, citing the examples of section 86 of the *Justices Act* (NT) and section 25(1) of the *Domestic Violence and Protection Orders Act 2008* (ACT).[81]

These are mandatory models requiring the Court to refer the parties for mediation unless it is not in the interests of justice to do so (for example, because of a history of violence or previous failed mediation attempts);[82] and that the Registrar **must** recommend that the parties seek mediation and give the parties information about mediation when conducting a preliminary conference (which is required for non-emergency protection orders in the ACT) if they are satisfied that the application is likely to be more effectively resolved through mediation than by a hearing.[83]

Similarly, Shopfront indicated that they "fully support the referral of APVOs to mediation in appropriate cases". It suggests magistrates could be given greater discretion to refer matters to mediation by amending section 21(2). Shopfront suggests section 21 be amended to be factors that a Magistrate must take into account when determining whether to refer a matter to mediation (as opposed to factors precluding mediation).[84]

Wirringa Baiya also supported a stronger version than that offered by the Victorian model:

> We agree with Proposal B and would go further to suggest that the legislation should be revised to include a presumption in favour of mediation in APVO matters except in matters where there are charges or serious allegations of violence or an offence.[85]

The Law Society indicated their strong support of mediation of APVO disputes as a

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[79] Submission 9 (NSW Bar Association)
[80] Submission 38 (ADR Directorate, Department of Attorney General and Justice)
[81] Submission 38 (ADR Directorate, Department of Attorney General and Justice)
[82] Section 86 *Justices Act* (NT)
[83] Section 25 *Domestic Violence and Protection Orders Act 2008* (ACT)
[84] Submission 20 (The Shopfront Youth Legal Centre)
[85] Submission 37 (Wirringa Baiya Aboriginal Women's Legal Centre Inc.)

strategy to limit the opportunity for abuse of the system, advocating for a rebuttable presumption that APVO disputes go to mediation.[86]

The submissions to the Review supported the proposal to ensure that appropriate APVO matters are referred to mediation. This suggests that, notwithstanding the existence of a legislative provision that allows magistrates to refer APVO matters to mediation, there is a widespread view that the current provision is inadequate. Consequently, strong support exists for a strengthening of this power to ensure that appropriate matters are diverted away from the courts. This was echoed by respondents in the BOCSAR survey, where several indicated their support for a model similar to that used in Family Law matters, whereby parties are directed to attend mediation except in cases where there is violence or serious threats of violence.[87]

The ADR Directorate argue that APVO matters are very often appropriate for mediation:

> They typically involve ongoing personal relationships between neighbours, friends, and colleagues of members of a community. The real issues in dispute often involve interpersonal conflict escalating into allegations of threats and aggression, which in turn may trigger police involvement.[88]

There is limited empirical data on the nature of relationships between parties to APVO matters. However, the BOCSAR surveys indicate that the parties most likely to be involved in these matters were in relationships in the nature of those suggested by the ADR Directorate in their submission.[89]

A number of submissions supported referral to mediation in "appropriate" or "suitable" matters, without further qualification.[90] Other submissions specified the types of matters in which an order to direct mediation should not be made. For example, the Victim's Advisory Board (**VAB**) stated in its submission

> ...a formal diversion prior to going to court is required. Potentially non-violent disputes (i.e. neighbourhood disputes) could be removed from the court process and perhaps taken to the Community Justice Centre (CJC) for mediation.[91]

Similarly, the Bar Association noted that not all disputes leading to APVO applications are suitable for mediation, and "mediation is inappropriate where there is a history of violence or serious harassment".[92]

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[86] Submission 13 (Law Society of NSW)
[87] Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*, 19.
[88] Submission 38 (ADR Directorate, Department of Attorney General and Justice)
[89] See, for example, Bureau of Crime Statistics and Research (2012) *Apprehended Personal Violence Orders – A survey of NSW magistrates and registrars*; Trimboli, L. & Bonney, R. (1997) *An Evaluation of the New South Wales Apprehended Violence Order Scheme*. Bureau of Crime Statistics and Research.
[90] Submission 35 (Elizabeth Evatt Community Legal Centre); Submission 6 (Office of the Director of Public Prosecutions); Submission 26 (Legal Aid)
[91] Submission 45 (Victim's Advisory Board)
[92] Submission 9 (NSW Bar Association)

Two submissions, those of the Chief Magistrate and Shopfront, specifically referred to the factors under s 21(2) and suggested that they would be more flexible if they were factors to which the court was to have regard to when considering whether to refer an APVO to mediation.[93] However, many submissions referred to behaviour which is captured under section 21(2),[94] arguing that matters involving these factors would be inappropriate for mediation.

An issue raised in relation to the suitability of a matter for mediation was the willingness (or otherwise) of a party to mediate. The findings of the recent BOCSAR survey indicated that, although many APVO matters are referred by magistrates to mediation under section 21, a significant minority (one in five) rarely or never referred parties to mediation, most commonly based on the unwillingness of the parties to mediate.

NSW Young Lawyers referred to the unwillingness of parties in APVO matters to mediate, but suggested that this was not a barrier that should impede the court directing them to mediation:

> ...given that the NADRAC [National Alternative Dispute Resolution Advisory Council] acknowledges concerns that there is no evidence that bad faith participation is a barrier to legitimate, successful, mandatory mediation.[95]

NADRAC's ADR Resource Paper[96] suggests that outcomes are at least as positive for mandated mediation as it is for voluntary referrals. Similarly, in a more recent paper NADRAC asserts that there is no evidence to suggest that 'bad behaviour' by participants is prevalent or undermines the overall integrity of ADR processes.[97]

Given the research evidence indicated above, it is arguable that court directed mediation, even where parties appear unwilling, could achieve positive outcomes for the parties. Therefore, the interim review considers that unwillingness should not render a matter unsuitable for mediation.

The interim review has had the benefit of considering the CJC "Year In Review 2010 – 2011" annual report[98] which highlights a settlement rate of 84 percent for matters involving an AVO. The report also indicates that 70 percent of their files were finalised in 30 days and 90 percent within 60 days.

The interim review notes the submissions of the ADR Directorate and the Bar Association that the differences between the existing section 21 power and the Victorian model are not substantially different. It is also noted that that there was a divergence of views among respondents as to whether mediation should be compulsory, noting that this was dependent largely on the nature of the behaviour

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[93] Submission 12 (NSW Chief Magistrate); Submission 20 (Shopfront Youth Legal Centre)

[94] Department of Family and Community Services, Manly Warringah Women's Resource Centre, Redfern Legal Centre & Sydney Women's Domestic Violence Court Advocacy Service, Women's Legal Services NSW, Brian Fenn, Victim's Advisory Board, NSW Bar Association and Wirringa Baiya Aboriginal Women's Legal Centre.

[95] Submission 33 (NSW Young Lawyers, Criminal Law Committee)

[96] *ADR: a resource paper* (2004) National Alternative Dispute Resolution Advisory Council

[97] *Maintaining and Enhancing the Integrity of ADR Processes: From principles to practice through people* (2011) National Alternative Dispute Resolution Advisory Council

[98] Community Justice Centre website www.cjc.nsw.gov.au

that is the subject of the complaint. Most respondents for example, considered that mediation should be compulsory where there had been no violence or serious threats of violence.

The interim review considers that there is merit in providing for a presumption in favour of referral to an assessment for mediation.

The interim review notes the submissions and recommendations discussed above with respect to mediation where there has been violence. The interim review has consulted with the ADR Directorate on this issue. The interim review acknowledges that there are some circumstances of lower level violence which do not affect the capacity of the parties to participate in mediation. Decisions about whether mediation is appropriate in a particular case should be made on a case by case basis, taking into account all relevant considerations. These include the safety of each party and any power imbalances arising from the violence or other factors. The interim review notes the CJC screening process includes consideration of these issues.

The interim review recommends that the Act should not continue to prohibit a referral to mediation where there has been a history of physical violence to the protected person by the defendant. Instead, a history of violence should be one of the factors to be considered by a magistrate in determining whether the presumption to refer a matter should be rebutted. Following a referral, issues such as safety of the parties and their respective capacity to participate will be considered in the CJC intake process to assess whether the referral is accepted.

With respect to the other factors in section 21(2)(b) – (e), the interim review considers that magistrates should consider these when determining whether to refer parties to mediation, but the existence of one or more of those factors should not prohibit referral to mediation.

The interim review acknowledges that this would allow for mediation where the protected person has been subjected by the defendant to conduct amounting to a personal violence offence (section 21(2)(b)) or a s 13 stalking or intimidation offence (section 21(2)(c)). The interim review notes that the category of personal violence offences is under review when the balance of the Act is reviewed. Any violent personal violence offences will however be included in the consideration of the history of violence. With respect to offences under s 13, it is appropriate that the Magistrate be given discretion to refer given the breadth of offending behaviour covered by this offence. The interim review also notes that if Recommendation 1 is adopted, harassment will be defined for the purposes of section 21(2)(d)).

Other issues in relation to mediation

The Chief Magistrate's submission made particular mention of the need to ensure that there are appropriate case management mechanisms available to support referrals to mediation. He suggests that further clarification to section 21 in a number of areas is desirable.[99] For example, the provision of a mechanism that expressly enables the adjournment of proceedings for further mention when an application is referred to mediation and the effective disposal of APVO proceedings in the event

[99] Submission 12 (NSW Chief Magistrate)

that no report is received within a reasonable timeframe.[100]

The Chief Magistrate notes that the results of matters not being returned to court after referral to mediation are twofold: first, there are case management issues arising for the court; and second, the operation of the provision deprives a party (or parties) of finality in the matter (for example, a defendant may agree to referral to mediation but subsequently refuse to participate).[101]

Clearly there is merit in ensuring that not only the mediation, but the process underpinning it, is efficient and supports the progress of the matter through the system. However these suggestions were not consulted on in the course of the review. These suggestions should form the basis of further work by the Department to enable the implementation of changes and improvements to existing processes.

The Chief Magistrate's submission also made note of an anomaly. Under the Act, apprehended personal violence order is defined in section 3 as an order made under Part 5 of the Act. The reference in s 21(1) does not appear to encompass interim APVOs in Part 6, with the consequence that Courts may refer proceedings to mediation after the making of a final order but not after making an interim order.[102] This appears to the interim review to have been an oversight as there is no sound, identifiable policy reason for it.

The interim review notes that CJC have their own referral processes and policies and that following a referral by a Magistrate or registrar, matters will be assessed by a CJC as to whether they are appropriate for mediation. If Recommendation 3 is adopted and there is a change in emphasis from a prohibition against to a presumption for mediation, the interim review considers that consultation about case management processes should include discussion of the assessment processes for both Courts and CJCs in terms of referral for mediation.

Recommendation 3

Amend section 21 to provide a presumption in favour of referral to mediation in APVO matters unless the Court considers there is good reason not to.

Recommendation 4

Amend section 21(2)(a) – (e) to provide an inclusive list to assess whether there is a good reason not to refer a matter to mediation. The presence of one or more of those factors should not prohibit a referral being made.

Recommendation 5

Further consultation be undertaken by DAGJ on the necessary case management mechanisms for Court referred applications to mediation.

[100] Submission 12 (NSW Chief Magistrate)
[101] Submission 12 (NSW Chief Magistrate)
[102] Submission 12 (NSW Chief Magistrate)

Recommendation 6

Amend section 21(6) so that the reference to 'order' applies to interim orders.

Proposal C - Providing a means to prosecute protected persons for false or vexatious APVO applications.

Proceedings for APVOs commence by way of application notice in accordance with Division 3 of the Act. If a police officer is initiating the proceedings, they issue and file the application notice with the court (section 51), however where the PINOP is seeking to commence the process, they are required to issue and file the application notice which has been signed by a registrar (section 52).

In practice, this means a PINOP attends a local court, speaks with a registrar and outlines the grounds of application along with all other relevant information. The registrar then completes the application notice and the PINOP signs it. The PINOP is not required to declare the truth of the information given to the Registrar.

The Discussion Paper noted that the offences of making a false declaration (section 314, *Crimes Act 1900*) and causing a public mischief (section 547B, *Crimes Act 1900*) are unlikely to be applicable to a PINOP making a false statement to a registrar because:

a) the false declaration offence requires a person to make an accusation intending a person to be the subject of an investigation of an offence, knowing that other person to be innocent of the offence; and

b) the public mischief offence requires a person to make a statement to a police officer that calls for a police investigation.

However they may apply to APVO applications made by a police officer upon a complaint being made to police by the PINOP.

Submissions were sought on two reform options.

***Option 1**: Amend section 307A of the Crimes Act 1900 to extend the provision to include applications for AVOs.*

The Discussion Paper stated:

> Section 307A of the *Crimes Act 1900* creates an offence of knowingly providing a false or misleading application. The section does not require a statutory declaration or oath, but an element of the offence is that "the statement is made in connection with an application for an authority or benefit", which does not cover an application for an AVO. An amendment could be made such that the offence does cover statements made in the process of applying for apprehended personal violence orders, however the court file may not contain sufficient information to sustain a prosecution.

***Option 2**: Require the applicant to file a statutory declaration or affidavit upon making the application*

The Discussion Paper noted that there are existing offences that would be available if there was a requirement that a PINOP making an APVO application provide a statutory declaration or affidavit in support of their application:

- Section 25 of the *Oaths Act 1900* provides for the offence of making a false statutory declaration and attracts a maximum penalty of 5 years imprisonment.
- Section 327 of the *Crimes Act 1900* provides for the offence of perjury and attracts a maximum penalty of 10 years imprisonment.

In their report, *Family Violence – A National Legal Response*, the Australian and NSW Law Reform Commissions (the **Commissions**) recommended that applicants applying for apprehended *domestic* violence orders "swear or affirm a statement incorporated in, or attached to, the application form, setting out the basis of the application. Where the applicant is a police officer, the application form should require the police officer to certify the form".[103]

The Discussion Paper referred to concerns raised by the Commissions in their report about increasing an applicant's legal costs and disadvantaging unrepresented and vulnerable parties, and the Commissions' view that these concerns could be appropriately managed through the provision of culturally appropriate victim support services and enhanced support for victims in high risk and vulnerable groups. However, there are significantly fewer legal and support services available for APVO matters.

Of the fifteen stakeholders that commented on the proposal, nine supported it,[104] although Shopfront did so with reservations. NSW Police proposed that a specific offence under the Act should be created. Further, those supporting the proposal referred only to the second option requiring applicants to provide a statutory declaration or to swear or affirm an affidavit.

Given that the submissions received by the Review did not address option 1, the following discussion is limited to option 2.

Legal Aid and Victims Services noted and agreed with the issues outlined in the Discussion Paper with respect to the lack of services available for APVO matters and the potential to disproportionately impact upon unrepresented and disadvantaged persons (in particular, those people with a disability or from culturally and linguistically diverse backgrounds).[105] On balance however, both supported the

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[103] Recommendation 18-2 *Family Violence – A National Legal Response* (2010) Australian Law Reform Commission and New South Wales Law Reform Commission

[104] Submission 6 (Office of the Director of Public Prosecutions), Submission 9 (NSW Bar Association), Submission 13 (Law Society of NSW), Submission 20 (The Shopfront Youth Legal Centre), Submission 26 (Legal Aid), Submission 31 (NSW Police Force), Submission 32 (Victims Services, Department of Attorney General and Justice), Submission 37 (Wirringa Baiya Aboriginal Women's Legal Centre Inc.), Submission 43 (Northern Rivers Community Legal Centre).

[105] Submission 26 (Legal Aid), Submission 32 (Victims Services, Department of Attorney General and Justice)

proposal, with Legal Aid commenting that it is important to test the veracity of information to reduce vexatious applications.[106]

The Law Society and the Bar Association both supported the proposal on the basis that there are serious consequences of APVOs on defendants. They noted that it would create an incentive for applicants to be truthful, and that the threat of criminal prosecution may further assist to ensure the integrity of the judicial process.[107]

The Northern Rivers Community Legal Centre and the DPP supported the proposal, but noted that it should be limited to APVO matters only and should not be used to prosecute victims who have been pressured into changing a statement.[108] Both organisations cited concerns about ADVO matters where the PINOP is pressured by the defendant into withdrawing the application. They noted that in doing so, the PINOP may feel pressured to say that they never had any fears for their safety and subsequently there may be a prosecution for making a false oath.[109]

NSW Police Force also supported the proposal, but shared the concerns of the Northern Rivers Community Legal Centre and the DPP, submitting:

> Care is...required to recognise that real victims of violence do lie at a later time to protect the perpetrator and that an admission of itself that a PINOP lied does not necessarily mean that the allegations are false.[110]

Shopfront supported the proposal in appropriate circumstances, but noted reservations about criminalising people for making frivolous or vexatious applications and raising concerns about the impact on people with mental health issues. A number of other stakeholders also referred to this group. Wirringa Baiya noted that mental health issues are a common feature of APVO applicants, while ICLC said that in their experience, applicants who had made a false or vexatious application had been suffering from a mental illness.[111] Shopfront commented that:

> the number of wilfully or knowingly false complaints is quite low. It appears that a significant number of people involved in APVO applications are living in stressful conditions, often exacerbated by poor health, financial hardship and having to live at close quarters with similarly disadvantaged neighbours and family members. They may also suffer from mental health problems. Rather than making false complaints they are often acting on a genuine, albeit misguided, belief that they are victims of violence worthy of an AVO.[112]

Several stakeholders opposed the proposal for various reasons, including the impact upon disadvantaged parties;[113] the fact that costs are already a deterrent;[114] and

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[106] Submission 26 (Legal Aid)
[107] Submission 9 (NSW Bar Association), Submission 13 (Law Society of NSW)
[108] Submission 6 (Office of the Director of Public Prosecutions), Submission 43 (Northern Rivers Community Legal Centre)
[109] Submission 6 (Office of the Director of Public Prosecutions)
[110] Submission 31 (NSW Police Force)
[111] Submission 21(Inner City Legal Centre), Submission 37 (Wirringa Baiya Aboriginal Women's Legal Centre Inc.)
[112] Submission 20 (The Shopfront Youth Legal Centre)
[113] Submission 15 (Women's Legal Services NSW), Submission 17 (Redfern Legal Centre & Sydney Women's Domestic Violence Court Advocacy Service), Submission 22 (Hawkesbury Nepean Community Legal Centre)

concerns about the lack of resources needed to prosecute such matters.[115]

Of the possible processes outlined in the Discussion Paper, most submissions supported the option with the smallest penalty. This support suggests that there is a general consensus that prosecution could act as a deterrent against vexatious applications and importantly; it would highlight that the process of applying for an ADVO is not to be entered into lightly.

Legal Aid and Wirringa Baiya supported a statutory declaration requirement rather than an affidavit, with Legal Aid referring to the lower penalties involved. Both also supported the statutory declaration being incorporated into the application form.[116]

The DPP and Northern Rivers Community Legal Centre supported the proposal, but did not indicate a preference as to which mechanism should be utilised.[117] NSW Police Force supported providing a means of prosecuting people for making false or vexatious applications, and suggested the creation of a specific offence under the Act.

The interim review considered that many people during their day-to-day life are involved in processes that oblige them to make a declaration. Some require a statutory declaration and are subject to the penalty imposed under section 25 of the *Oath Act NSW (1900).*[118]

> **25 False declaration**
>
> ...any person who wilfully and corruptly makes and subscribes any such declaration, knowing the same to be untrue in any material particular, shall be guilty of an indictable offence and liable to imprisonment for 5 years.

Other processes require a person to declare the truth of the information they provide and warn that it is an offence to make a false statement on the face of the application forms.[119] Penalty provisions are contained in the relevant governing legislation and vary from fines only, to imprisonment, or both.[120]

Introducing a requirement to acknowledge the truth of assertions made to a registrar or police officer is not an unreasonable measure when considering the potential consequences that flow from an order being made. It re-enforces the importance that the court places on a person's veracity, particularly in matters that are not born out of a police investigation.

The BOCSAR survey results show that the parties involved in a significant percentage of all frivolous and vexatious APVO matters are neighbours and public

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[114] Submission 15 (Women's Legal Services NSW), Submission 21 (Inner City Legal Centre), Submission 22 (Hawkesbury Nepean Community Legal Centre)
[115] Submission 1 (Brian Fenn)
[116] Submission 37 (Wirringa Baiya Aboriginal Women's Legal Centre Inc.), Submission 26 (Legal Aid)
[117] Submission 6 (Office of the Director of Public Prosecutions), Submission 43 (Northern Rivers Community Legal Centre)
[118] For example, an application for the exemption – peer passenger (RTA website – forms)
[119] For example, an application for 'licence – driving instructor' (RTA website- forms)
[120] Section 22 *Road Transport (Driver Licensing) Act NSW (1998)* provides a maximum penalty of 20 penalty units.

housing tenants or authorities. It is accepted by the interim review that a reasonable percentage of public housing tenants are also likely to be 'vulnerable persons'.[121] This is supported by submissions that raised concerns that a penalty would disproportionately impact upon unrepresented and disadvantaged people. This emphasises the need for the interim review to have regard to the type and nature of any proposed penalty provision. The NSW Police submission suggested that a penalty provision could be inserted into the Act that could be restricted to APVO applicants. The interim review agrees with this submission.

It is proposed to introduce an offence of knowingly make a false declaration. Requiring the defendant to possess the mental element of knowledge is appropriate given that the impetus behind introducing the offence is to deter frivolous and vexatious applications. There is also another significant reason for the inclusion of this element in the offence and that is the fact that there is a likelihood that the applicant may be vulnerable. It is only appropriate that a conviction can be obtained against a person who has made a frivolous or vexatious application, where a person knew that the information they were providing was false. In the event of conviction the person's subjective circumstances will be taken into account on sentence.

The aim of introducing the offence is to deter applications on false grounds. To facilitate that aim it is proposed to provide a standard form of application in a Regulation which will include a number of questions for the applicant to answer. This will serve two purposes. It will assist the registrar's exercise of discretion under section 53. It will also ensure that the applicant is full and frank in the application and require them to provide relevant information. Doing so will also underscore the seriousness of the application and in turn dissuade frivolous applications. The proposed questions are:

1. Whether there is an existing commercial relationship between the parties
2. Whether is an outstanding debt owed by or to the applicant
3. Whether there has been a previous history of litigation between the parties

As a further disincentive, the application form will contain a warning that it is an offence to provide false information and state the maximum penalty that may be imposed.

Custodial penalties are available for similar offences. For example the penalty for the similar offence in section 25 of the *Oaths Act* is 5 years imprisonment. A custodial penalty is proposed for the new offence, capped at 10 penalty units and 12 months imprisonment to reflect the limited application of the offence and the people to whom it may apply. The empirical data from the BOCSAR survey and the consistent theme in the submissions, reveal that the people applying for APVOs include people who may be less able to understand and properly engage with the process. This recommendation acknowledges that research. The research also found that frivolous or vexatious APVOs were not as frequent as they have reported to be. Nonetheless, it is appropriate to discourage such applications and smooth the way to a speedy resolution of appropriately commenced matters through this, and the balance of the

[121] Vulnerable is used here in the widest sense to include disadvantaged people who may also have an intellectual disability, or other cognitive impairment.

recommendations in this report.

Recommendation 7

Amend the Act to introduce an offence of knowingly providing false information in an application for an APVO.

Recommendation 8

The penalty for the offence should be a maximum penalty of 10 penalty units or 12 months imprisonment.

Recommendation 9

That the application form should be proscribed in a Regulation and should include the following questions to be answered by the applicant:

1. Whether there is an existing commercial relationship between the parties
2. Whether is an outstanding debt owed by or to the applicant
3. Whether there has been a previous history of litigation between the parties

And a warning that it is an offence to provide false information and the maximum penalty that can be imposed on conviction.

APPENDIX 1 – SUBMISSIONS

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 Attorney General and 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

This is a list of submissions made to the statutory review of the *Crimes (Domestic and Personal Violence) Act*. Only the submissions raising issues relevant to the interim review are referred to in this paper. The balance of the submissions will be considered and responded to in the final review.