

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

**Discussion Paper**

### **Format and content of submissions**

Submissions to the statutory review should be guided by section 104(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (the 'Act'), which provides:

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. [Emphasis added]

There is no set format for submissions.

This Discussion Paper sets out specific issues that may be addressed in the statutory review. It would be of assistance if submissions referred to the issues set out in the Discussion Paper, however submissions are not limited to these issues.

### **Making a submission**

Submissions should be sent to the Director, Criminal Law Review, Department of Attorney General and Justice, GPO Box 6, Sydney NSW 2001, or be e-mailed to [ag\\_clrd@agd.nsw.gov.au](mailto:ag_clrd@agd.nsw.gov.au).

The closing date for submissions is 18 November 2011.

### **Use of submissions and confidentiality**

Submissions may be referred to in the final report or be made publicly available unless you advise you wish all or part of your submission to be treated as confidential.

If you require further information about the statutory review, please contact:

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## Introduction

The *Crimes (Domestic and Personal Violence) Act 2007* (the **Act**) commenced on 7 December 2007 and “created a stand-alone Act for apprehended violence orders and associated domestic and personal violence issues”.<sup>1</sup> This was considered important as it gave “full recognition to the seriousness of violence against women and children”.

The policy objectives of the Act are split into two parts, addressing domestic and personal violence respectively. Section 9 of the Act sets out the objects in relation to domestic violence as being:

- a) to ensure the safety and protection of all persons, including children, who experience or witness domestic violence, and
- b) to reduce and prevent violence by a person against another person where a domestic relationship exists between those persons, and
- c) to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women, and
- d) to enact provisions that are consistent with the United Nations Convention on the Rights of the Child.

The object of the Act in relation to personal violence is to ensure the safety and protection of all persons who experience personal violence outside a domestic relationship (section 10).

Section 104 of the Act states that the Attorney General is to review the 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. A report on the outcome of the review is to be tabled in each House of Parliament by December 2011.

Since the Act’s commencement in 2007 there have been several reviews examining legal frameworks and support mechanisms to protect victims and enable effective domestic violence responses, as well as the development of state and national strategic plans to implement these responses.

In particular, two recent documents raise issues that are relevant to the statutory review of the Act. These are the *Stop the Violence, End the Silence - NSW Domestic and Family Violence Action Plan 2010-2015* (the **Action Plan**); and the joint Australian Law Reform Commission and NSW Law Reform Commission report, *Family Violence - A National Legal Response* (the **Family Violence Report**).

The Action Plan was released in July 2010 and “provides a strategy for Government, non-government organisations and the community on how [to] work together better to stop domestic and family violence and respond more effectively when it happens”<sup>2</sup>. It links in with other key policy documents including *Keep Them Safe: A Shared Approach to Child Wellbeing*; *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children 2009–2021* and *A Way Home: Reducing Homelessness in NSW*. The Action Plan includes several

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<sup>1</sup> The Hon. Tony Kelly (then Minister for Lands, Minister for Rural Affairs, Minister for Regional Development, and Vice-President of the Executive Council), *Crimes (Domestic And Personal Violence) Bill 2007*, Second Reading Speech, Legislative Council, 29 November 2007

<sup>2</sup> *Stop the Violence, End the Silence - NSW Domestic and Family Violence Action Plan 2010-2015* (July 2010), p 6

actions that involve “reviewing legislation to give victims the best possible protection”.<sup>3</sup>

On 17 July 2009, Federal Attorney General, Robert McClelland MP, issued Terms of Reference for the Australian Law Reform Commission, in association with the New South Wales Law Reform Commission (the **Commissions**), to undertake a comprehensive review of specified family violence laws and legal frameworks to improve the safety of women and their children. The Report produced by the Commissions makes 187 recommendations for reform, including 29 that the Department has identified as relevant to the statutory review of the Act.

The issues arising from the Action Plan and the Report which will be examined as part of the statutory review are identified on pages 19 - 24 of this Discussion Paper. Commentary about each issue is contained in the Action Plan and the Report at

- [http://www.dpc.nsw.gov.au/data/assets/pdf\\_file/0005/93920/Stop the Violence. End the Silence. Domestic and Family Violence Action Plan - Web2.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0005/93920/Stop_the_Violence_End_the_Silence_Domestic_and_Family_Violence_Action_Plan_-_Web2.pdf)
- [http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114\\_WholeReport.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf)

In the context of the statutory review, submissions are also sought on a number of specific issues that have arisen in the operation of the Act. These issues include:

- Definition of ‘personal violence offence’ (‘domestic violence offence’)
- Definition of ‘domestic relationship’
- Variation applications where a child is the person in need of protection (**PINOP**)
- Revocation of apprehended violence orders
- Costs in AVO matters
- AVO applications involving ‘serious offence’ matters that are remitted to a higher court
- Apprehended Personal Violence Orders

For the purposes of this discussion paper, we have used the following acronyms to describe particular groups of orders as follows:

- Apprehended Domestic Violence Orders (**ADVOs**)
- Apprehended Personal Violence Orders (**APVOs**)
- Both domestic and personal violence orders (**AVOs**)

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<sup>3</sup> *Stop the Violence, End the Silence - NSW Domestic and Family Violence Action Plan 2010-2015* (July 2010), p 40

## 1. Definition of ‘personal violence offence’ (‘domestic violence offence’)

Section 4 of the Act sets out the definition of ‘personal violence offence’:

In this Act, **personal violence offence** means:

- (a) an offence under, or mentioned in, section 19A, 24, 26, 27, 28, 29, 30, 31, 33, 33A, 35, 35A, 37, 38, 39, 41, 44, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66EA, 80A, 80D, 86, 87, 93G, 93GA, 195, 196, 198, 199, 200, 562I (as in force before its substitution by the Crimes Amendment (Apprehended Violence) Act 2006) or 562ZG of the Crimes Act 1900, or
- (b) an offence under section 13 or 14 of this Act, or
- (c) an offence of attempting to commit an offence referred to in paragraph (a) or (b).

Section 11 sets out the definition of ‘domestic violence offence’:

In this Act, **domestic violence offence** means a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship.

It has been argued that some offences that occur in the context of domestic violence are not covered by the current definition of ‘personal violence offence’. The result is that perpetrators of some offences that may occur in a domestic violence context are not recorded as perpetrators of domestic violence, unless additional charges that are recognised under the definition are laid.

Examples of offences that are not covered in the definition of *personal violence* include:

- Breaking out of dwelling-house after committing, or entering with intent to commit, indictable offence in circumstances of aggravation (s 109(2) *Crimes Act 1900*)
- Breaking, entering and assaulting with intent to murder etc (s 110 *Crimes Act 1900*)
- Entering dwelling-house in circumstances of aggravation (s 111(2) *Crimes Act 1900*)
- Breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation (s 112(2) *Crimes Act 1900*)
- Breaking etc into any house etc with intent to commit serious indictable offence in circumstances of aggravation (s 113(2) *Crimes Act 1900*)
- Being armed with intent to commit indictable offence (s 114 *Crimes Act 1900*)

There are significant consequences if an offence falls within the definition of a domestic violence offence. One rationale for defining offences as domestic violence was to “help identify repeat offenders”<sup>4</sup>. A conviction for a ‘domestic violence offence’ results in a “permanent stain”<sup>5</sup> on the records of offenders. This consequence was identified as a means of increasing protection for victims and their children as it would be “readily identifiable to a sentencing court or a court making a bail determination”. It also assists the police in tracking repeat domestic violence offenders. Other consequences of an offence being defined as a ‘domestic violence offence’ include:

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<sup>4</sup> New South Wales, *Second Reading Speech*, Legislative Council, 29 November 2007 (The Hon. Tony Kelly).

<sup>5</sup> New South Wales, *Second Reading Speech*, Legislative Council, 29 November 2007 (The Hon. Tony Kelly).

- Giving the police greater powers to deal with such offences (Part 6, *Law Enforcement (Powers and Responsibilities Act 2002)*), including the power to search for a greater range of weapons at the scene of domestic violence incidents (s 86-87, *Law Enforcement (Powers and Responsibilities Act 2002)*)
- The offence being an exception from the presumption in favour of bail (s 9A *Bail Act 1978*)
- That the sentence for such an offence cannot include home detention where it is likely the offender would reside, or resume a relationship with the victim/s (s 76(g) *Crimes (Sentencing Procedure) Act 1999*)
- Police are required to make an application for an order<sup>6</sup>
- (In some cases) it can be considered an aggravating factor in sentencing<sup>7</sup>.

The definition of a ‘domestic violence offence’ was also examined in the Family Violence Report, which recommended (**Recommendation 5-4**) that:

The governments of NSW and the ACT should review the offences categorised as ‘domestic violence offences’ in their respective family violence legislation with a view to:

- (a) ensuring that the classification of such offences falls within the proposed definition of family violence in Rec 5–1; and
- (b) considering the inclusion of relevant federal offences committed in a family violence context, if they choose to retain such a classification system.

At page 20 of this paper, submissions are sought on this recommendation.

The Action Plan includes a broader review of the definition and asks whether it should include other forms of violence (**Item 29**). Submissions are sought on this issue at page 20 of this paper.

Submissions are sought on whether the definition of *personal violence offence* should be expanded to include additional offences involving violence.

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<sup>6</sup> Section 49 *Crimes (Domestic and Personal Violence) Act 2007*

<sup>7</sup> Under the *Crimes (Sentencing Procedure) Act 1999* a “serious personal violence offence” means a personal violence offence within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007*, that is punishable by imprisonment for life or for a term of 5 years or more: s 21A(6).

## 2. Definition of ‘domestic relationship’

‘Domestic relationship’ is defined in section 5 of the Act as:

### 5 Meaning of “domestic relationship”

For the purposes of this Act, a person has 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.

Note. “De facto partner” is defined in section 21C of the *Interpretation Act 1987*.

It has been suggested that the definition is too broad, with criticism particularly of sections 5(d), (e) and (f). The relationships covered by these sections can be broadly defined as covering flatmates; persons living long-term in the same residential facility; and carer type relationships respectively.

If two people are in a domestic relationship, then a ‘personal violence offence’ (specific offences are provided in section 4) committed by one person against the other will be a ‘domestic violence offence’. Police are required to seek orders in matters where they suspect or believe a domestic violence offence has been or is being committed or is likely to be committed (section 27), for example:

- on behalf of care workers against children
- on behalf of care workers against adult persons in their care
- on behalf of flatmates

It has been suggested that some of the relationships described above are more appropriately considered in the context of personal violence matters (violence outside a domestic relationship). Police may seek orders in relation to personal violence matters, but there is no obligation to do so.

The policy question is whether the Act, in so far as it is a tool to educate and protect against domestic violence, should interpret ‘domestic relationship’ in a traditional sense, focussing on relationships between intimate partners or family members, or whether it should retain the breadth provided by subsections (d), (e) and (f) which may cover a broader group. If it is the latter, to what extent should protection be afforded? Should it extend to any persons who reside together, or be limited to where protection is required for some reason, for example, one person is caring for or has a position of responsibility in respect of another more vulnerable person?

In the Family Violence Report, the Commissions examined which relationships should be captured in the definition in their report. It is noted however that the current NSW definition is broader than that recommended by the Commissions. The Commissions recommended at 7–6 that:

**Recommendation 7-6**

State and territory family violence legislation should include as the core group of protected persons those who fall within the following categories of relationships:

- (a) past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature;
- (b) family members;
- (c) relatives;
- (d) children of an intimate partner;
- (e) those who fall within Indigenous concepts of family; and
- (f) those who fall within culturally recognised family groups.

At page 21 of this paper, submissions are sought on this recommendation.

Submissions are sought on issues relating to the definition of ‘domestic relationship’.



### 3. Variation applications where a child is the person in need of protection

Section 72(1) of the Act provides that an application may be made to a court for the variation or revocation of a final AVO or interim court order. Section 72(2) allows for such an application to be “made only by” a protected person (whether or not that person was the original applicant), a police officer or the defendant. Section 72(3) provides that an application for variation or revocation of an order must be made by a police officer if the protected person or one of the protected persons is a child at the time of the application.

‘Child’ is defined in section 3 of the Act as a person under the age of 16 years.

It has been suggested that the legislation should be amended to also allow for a protected person or defendant to make an application to vary or revoke an order where the protected person (or one of the protected persons) is a child.

#### *Considerations against amending to enable applications to be made by parties other than police*

- Police can act to ensure protection of the child. The best interests of the child are not necessarily prioritised in the process when the applicant or the defendant can make an application to vary.
- Police are required by legislation to seek an order on behalf of a child where it appears there has been an incident involving a child directly, where the child is at risk or has directly witnessed incidents. Children’s right to safety should be protected independently of the interests of the applicant or defendant.
- The current provision removes the potential for pressure by a defendant to apply to vary orders in a way that may not maintain adequate protection for the protected adult or the child.

#### *Considerations in support of amending to enable applications to be made by parties other than police*

- Access to justice. Under the current provision, a person who is affected by the orders, either as a protected person or defendant, cannot apply to vary the orders.
- Some people may be reluctant to approach the police for assistance. Historical and cultural experiences mean that the existing provision may impact disproportionately on some groups (for example, Aboriginal and Torres Strait Islander people and people from Culturally and Linguistically Diverse communities).
- The Act provides for parties to take other actions in relation to AVOs, independently of police. This includes initiating an application where children are named as additional protected persons and appeals. The policy basis for not allowing them to apply to vary orders is unclear.

Submissions are sought on issues relating to variation applications where a child is the person in need of protection.

#### 4. Revocation of AVOs

An AVO may be revoked both during (section 72(1)) and after (section 72(5)) its term. It has been suggested that it is undesirable to enable a person to apply to revoke an order that has expired.

Section 72(6) provides 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 application to revoke, not when the order was made and/or in force although the Court must consider the grounds of the original order under section 72(8)(b).

Issues for consideration in relation to the test include:

- The test is essentially whether the order would be required in the current circumstances. Presumably in many circumstances an AVO will not be required, which is the reason that there is no order currently in place.
- The test becomes easier with the passage of time.
- The existence of an expired AVO may be the only bar to the issuing of a firearms licence and/or prohibited weapons permit. This may be persuasive when considering an application.

#### Consequences of an AVO

##### *Firearms and prohibited weapons*

The imposition of an AVO upon a person has various consequences including beyond the duration of the order. An example is that for 10 years following the expiry of an AVO, persons subject to an order are not able to:

- hold a firearms licence. Section 11(5)(c) of the *Firearms Act 1996* provides that a licence must not be issued to a person who is subject to an AVO or who has, at any time within 10 years before the application for the licence was made, been subject to such an order (other than an order that has been revoked).
- hold a prohibited weapons permit. Section 10(3)(b) of the *Weapons Prohibition Act 1998* provides that a permit must not be issued to a person who is subject to an AVO or who has, at any time within 10 years before the application for the permit was made, been subject to such an order (other than an order that has been revoked).

There is no discretionary power available under either the *Firearms Act* or the *Weapons Prohibition Act* for a court to enable such a person to hold a license or permit during this period. However, a defendant is able to apply for the revocation of an expired AVO. Following the revocation of an order, a defendant is eligible to apply for a license or permit.

##### *Children and Young People and Employment issues*

An AVO can also impact on a person's employment through a 'Working with Children Check' (**WWCC**), which is conducted under the *Commission for Children and Young People Act 1998* (**CCYP Act**). The *Children (Criminal Proceedings) Act 1987* (**CCP Act**) provides that convictions for children under the age of 16 years are not to be recorded, and for persons between the ages of 16 and 18 years, convictions are only recorded at the discretion of the Magistrate.<sup>8</sup> The policy rationale is to avoid the stigmatisation of a criminal conviction for something done while young and immature.

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<sup>8</sup> *Children (Criminal Proceedings) Act 1987* s 14

However, there is no equivalent discretionary power to exclude AVOs made against juvenile defendants from the WWCC background check process. Currently the only remedy available to a defendant under the age of 18 who wishes to avoid a final AVO being considered in the WWCC is to apply for a revocation of the AVO. A related issue is that a defendant cannot apply for the revocation of a final order where the protected person was under the age of 16 years, as such applications can only be made by police<sup>9</sup>.

The Department has been advised that this WWCC issue commonly arises when the defendant reaches an employable age and seeks employment in a “child-related area” which is broadly defined (s 33, CCYP Act).<sup>10</sup>

It has been suggested that issues related to the impact of AVOs on defendants should be dealt with in the legislation that gives rise to the issue (i.e. *Firearms Act 1996*, *Weapons Prohibition Act 1998* and the *Commission for Children and Young People Act 1998*), not domestic violence legislation.

Submissions are sought on:

- The policy considerations around providing a mechanism for a person to seek revocation of an AVO after the term of the order has expired.
- Where the provision for revocation should be located.
- The appropriateness of the current test.
- What considerations should form part of a test to determine whether an application to revoke an expired order should be granted.

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<sup>9</sup> s 72(3)

<sup>10</sup> It can include, for example, employment as a youth worker or child carer, employment in a school, be it as a teacher, administrative officer or carpenter, employment as a bus-driver and employment in a club or society with significant child membership or involvement.

## 5. Costs in AVO matters

The Court's power to award costs following an application for an AVO is in section 99 of the Act.

Two issues have been identified for consideration.

### a) Assessment of liability – costs orders against police

The court's power to award costs in AVO matters was considered in respect of a costs order made against police (*Constable Redman v Willcocks* [2010] NSWSC 1268). In that matter, costs were awarded to a defendant for procedural failures by the plaintiff (the Police), which caused the defendant to incur the costs of the appearance before the Magistrate.

The Supreme Court upheld the order of the Magistrate in the original proceedings to award costs against the police, which the Court assessed as \$2,310. However, the Court expressed concern that "the test for the awarding of costs in s 99(4) is certainly not the same test as s 214(1)(b) [of the *Criminal Procedure Act 1986*] implies in relation to the initiation of the proceedings."<sup>11</sup>

The Supreme Court suggested that "it would be useful if the Parliament were to give some consideration to s 99 as it relates to Div 4 [of the *Criminal Procedure Act 1986*] so that its intention with regard to costs in these sorts of applications is made clear."<sup>12</sup>

Submissions are sought on this issue.

### b) Assessment of quantum – relationship between the *Criminal Procedure Act 1986* and the *Legal Profession Act 2004*

When an applicant for an AVO seeks costs, section 99(2) states that Division 4 of Part 2 of Chapter 4 of the *Criminal Procedure Act 1986* applies. Section 215 of the *Criminal Procedure Act* provides when costs may be awarded to a prosecutor.

Sections 215(1) and (3) of the *Criminal Procedure Act* require the Court to specify the amount of costs payable. Section 353(4) of the *Legal Profession Act*, however, provides for an application for assessment of party/party costs in relation to an application for, and the issue of, an AVO.

Proceedings in respect of this issue were recently determined by the Court of Appeal in *Garde v Dowd*<sup>13</sup>. The Court considered that "the statutory scheme with respect to costs orders in relation to proceedings under the 2007 Act [the Act] is undesirably complex".<sup>14</sup> The Court of Appeal found that the Local Court has the power to award costs as agreed or assessed in proceedings under the Act.

Submissions are sought on how the costs provisions in relation to AVOs should be clarified.

<sup>11</sup> *Constable Redman v Willcocks* [2010] NSWSC 1268 at 40 (Davies J)

<sup>12</sup> *Constable Redman v Willcocks* [2010] NSWSC 1268 at 41 (Davies J)

<sup>13</sup> [2001] NSWCA 115.

<sup>14</sup> *Garde v Dowd* [2001] NSWCA 115 at 15

## **6. AVO applications involving ‘serious offence’ matters that are remitted to a higher court**

Section 40(1) of the Act requires a court to make an interim order where it appears a ‘serious offence’ has been charged. Section 40(2) requires the court that makes the interim order to summon the defendant to appear once the serious offence charge has been determined.

This process allows the serious offence to be dealt with in the appropriate jurisdiction (ie the District Court or Supreme Court) but necessitates the defendant being called back to the original court (ie the Local Court) following the determination of the serious offence.

A number of issues have been raised with respect to the operation of these provisions:

- a) The procedure requires additional and unnecessary steps. The higher court must notify the lower court that the serious offence charge has been determined. It requires an additional appearance before the lower court and a delay in resolving the matter.
- b) Where the defendant has been acquitted in the higher court, and the AVO is contested, the victim is required to give what is often similar evidence again in the AVO proceedings.
- c) Section 39 provides that an AVO must be made on guilty plea or finding of guilt. This only applies however to some of the serious offences that section 40 applies to.

Submissions are sought on the following options:

Option 1: Provide that, when a defendant is committed for trial in a higher court for a serious offence and there is a related AVO matter in the Local Court, a 2-year final order be made from the date of committal.

Option 2: Enable the AVO matter to be remitted to a higher court for finalisation (either by making the order or dismissing the application). Alternatively the higher court may formally refer the matter back to the lower court to finalise [together with any material to assist the Local Court]. This would enable the serious charge matter and the related AVO matter to travel through the system together.

Option 3: If the existing system is retained or Option 2 adopted, provide for the transmission of evidence given in the higher court to the lower court, and provide for the admissibility of that evidence in the AVO proceedings.

## 7. Apprehended Personal Violence Orders

Part 5 of the Act provides for the making of APVOs between persons who are not in a domestic relationship. Media reports have raised a number of issues associated with APVOs, and judicial officers have also expressed concerns about abuse of APVOs.<sup>15</sup>

Media criticism of APVOs is that they are sought (and granted) frivolously and vexatiously. In 1999, Criminal Law Review Division of the Attorney General's Department found there was "little empirical evidence either supporting or refuting the claim that APVOs are routinely being abused".<sup>16</sup> In 2003, the NSW Law Reform Commission (**NSWLRC**) expressed similar concern that "that there is a lack of empirical or qualitative research in relation to APVOs generally, and a dearth of useful or reliable statistics. It appears that 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."<sup>17</sup> The Department notes that there continues to be a lack of data on this issue.

Clearly, an APVO that is issued, despite being vexatious or for an ulterior motive, has an impact on the parties concerned. In *PE v MU*<sup>18</sup>, Justice 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 impacting upon "the effectiveness of ADVOs, since a great deal of the benefit derives from community respect for the seriousness of the AVO process".<sup>19</sup>

Four proposals have been identified to address the concerns expressed about vexatious applications:

- A) enhancing the Registrar's discretion to refuse to issue an APVO application notice
- B) ensuring the referral of appropriate APVOs to mediation
- C) providing a means to prosecute protected persons for false or vexatious APVOs
- D) further legislative distinction between ADVOs and APVOs.

### **Proposal A: Enhancing the Registrar's discretion to refuse to issue an APVO application notice**

Low numbers of APVO applications are refused by Registrars. The Local Court submission to the NSWLRC in 2003 suggested a number of possible reasons for this including: the difficulty of establishing whether a complaint is vexatious or frivolous; that the matter may be diverted before it is formally refused and that the circumstances which give rise to the presumption against exercising the discretion<sup>20</sup> cover the major reasons why APVO applications are made. The options to enhance the Registrar's discretion are:

#### *Options 1 and 2*

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<sup>15</sup> See, for example, *PE v MU* [2010] NSWDC 2 (per Williams J)

<sup>16</sup> Apprehended Violence Orders: A Review of the Law, [http://www.lawlink.nsw.gov.au/lawlink/clrd/ll\\_clrd.nsf/pages/CLRD\\_avo#5](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_avo#5).

<sup>17</sup> NSW Law Reform Commission *Report 103 (2003) - Apprehended violence orders* 3.85  
<sup>18</sup> [2010] NSWDC 2

<sup>19</sup> NSW Law Reform Commission *Report 103 (2003) - Apprehended violence orders* 3.81

<sup>20</sup> Now in *Crimes (Domestic and Personal Violence) Act 2007* s 53(5)

The NSWLRC's *Apprehended violence orders*<sup>21</sup> Report (the **AVO Report**) referred to two suggestions by the Local Court to amend the presumptions against a refusal to issue an application notice, being:

- harassment should require a continuing course of conduct, not “one comment by a neighbour”;
- 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.

The issue of a continuing course of conduct was raised in a recent Local Court decision, where the Magistrate stated that “(g)iven the stated purposes of the legislation, APVO’s should not be used to regulate incidents disclosing little or nothing more than the use of offensive language on an isolated occasion”.<sup>22</sup>

#### *Option 3*

The NSWLRC also recommended that 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.<sup>23</sup> Currently, an authorised officer or Registrar cannot refuse to issue process where the application is brought by a police officer.<sup>24</sup>

#### *Option 4*

Currently, if a Registrar refuses to accept an application notice, the applicant may apply to the court for the application to be accepted (s 53(8)). In practice, this can result in a court hearing the whole matter before it is able to determine if the matter is frivolous, vexatious, without substance or has no reasonable prospects for success. An alternative would be for a magistrate to make this determination in chambers on the papers. This may require additional written material, such as suggested in proposal ‘C’ below.

Each of the above four options would require legislative amendment.

Submissions are sought on these options.

### **Proposal B: Ensuring the referral of appropriate APVOs to mediation**

The NSWLRC considered mediation to be important in APVO disputes in order to limit the opportunity for the abuse of the system. In many cases, mediation may be more appropriate than, or a valuable complement to, an APVO.<sup>25</sup> This is reflected in Community Justice Centre (**CJC**) data that there is a higher settlement rate for APVO referrals, than for general matters.

In 2002, approximately 8% of APVOs were referred by the Local Court to the CJC.<sup>26</sup> In 2003, the AVO Report noted the CJC submission that “many matters suitable for mediation do not proceed to mediation” due to the perceptions of parties about

<sup>21</sup> NSW Law Reform Commission *Report 103 (2003) - Apprehended violence orders*

<sup>22</sup> *Police v Dates* 28 March 2011, Tumut Local Court

<sup>23</sup> NSWLRC AVO Report Recommendation 15

<sup>24</sup> *Crimes (Domestic and Personal Violence) Act 2007* s 53(1)

<sup>25</sup> NSWLRC AVO Report 5.44

<sup>26</sup> NSWLRC AVO Report 5.36

mediation. The CJC suggested that training should be provided to authorised officers and Registrars to identify which matters are suitable for mediation.<sup>27</sup> The CJC also suggested a legislative power to refer APVO matters to the CJC, which was then recommended by the AVO Report<sup>28</sup> and is largely reflected in section 21 of the Act. The CJC submission estimated that following the suggested legislative amendment, 40% of APVO matters would be referred to the CJC. Despite the amendments encouraging referrals the 2009/2010<sup>29</sup> rate is the same as the 2002 rate<sup>30</sup>.

Data is not available to determine whether APVO matters which should be referred to the CJC are not, and the reasons for this. The AVO Report commented that a co-operative assessment of matters between Local Courts and CJsCs would strengthen the relationship between APVOs and mediation.

The Victorian Parliament has recently passed new personal violence legislation which aims to better protect victims of serious inappropriate behaviour that threatens their safety, where that behaviour occurs outside the family, and to refer appropriate disputes to mediation services. Courts will have the power, where a matter has been assessed as suitable,<sup>31</sup> to direct parties to attend mediation.<sup>32</sup> The AVO Report considered compulsory mediation for APVO matters<sup>33</sup> and stated that the legislation should enable the court to refer suitable APVO matters to mediation even where one or both the parties do not agree to the matter being mediated.<sup>34</sup> Section 21 gives the Court a discretion to refer matters to mediation however there is no power to direct attendance.

Submissions are sought on this proposal, and on the appropriateness of the Victorian model.

### **Proposal C: Providing a means to prosecute protected persons for false or vexatious APVOs**

Currently, an APVO application is made by filing and issuing an application notice signed by a Registrar.<sup>35</sup> In practice, this means that a protected person attends a local court and speaks with a Registrar who completes the application notice. The protected person signs the application notice, which includes the Registrar's summary of the grounds relied on by the applicant, but is not required to testify to the veracity of the information given to the Registrar.

<sup>27</sup> NSWLRC AVO Report 5.40

<sup>28</sup> NSWLRC AVO Report Recommendation 17

<sup>29</sup> This represents 1063 referrals. CJC data does not show whether these are referrals by a Registrar under section 53 or by a court under s 51.

<sup>30</sup> NSWLRC AVO Report 5.36

<sup>31</sup> The court must not give a direction under subsection (1)(b) unless it has received a mediation assessment certificate that specifies that the matter is suitable for mediation: *Personal Safety Intervention Orders Act 2010 (Vic)* s 26(2). This section has not yet commenced.

<sup>32</sup> *Personal Safety Intervention Orders Act 2010 (Vic)* s 26. This section has not yet commenced

<sup>33</sup> NSWLRC AVO Report 5.29 – 5.31

<sup>34</sup> NSWLRC AVO Report 5.49

<sup>35</sup> *Crimes (Domestic and Personal Violence) Act 2007* s 50



The offences of making a false allegation<sup>36</sup> and causing a public mischief<sup>37</sup> are unlikely to be applicable to a protected person making a false statement to a Registrar because:

- a) the false accusation 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 which calls for a police investigation.

However, these offences may apply to APVO applications made by a police officer upon a complaint being made to police by the protected person.

The Department has identified two possible reforms to rectify this situation. One option would require an amendment to section 307A of the *Crimes Act 1900* to extend the provision to include applications for AVOs. Alternatively, the applicant could be required to file a statutory declaration or affidavit upon making the application.

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”<sup>38</sup>, 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.

Alternatively, existing offences would be available if the protected person was required to provide a statutory declaration or affidavit in support of their application. If a false statutory declaration was provided, the protected person could be prosecuted for making a false declaration in the *Oaths Act*, with a maximum penalty of 5 years.<sup>39</sup> If a false affidavit was provided, the protected person could be prosecuted for perjury under the *Crimes Act*, with a maximum penalty of 10 years.<sup>40</sup>

The Family Violence Report recommended that application forms for protection orders under state and territory family violence legislation should require that applicants 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.<sup>41</sup> The Commissions do not recommend that this be a legislative requirement, so as to ensure flexibility for courts to accept applications that do not comply, especially where the applicant is vulnerable.

While this recommendation is directed to ADVO applications (because family violence is the focus of the Family Violence Report), the discussion is nonetheless

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<sup>36</sup> *Crimes Act 1900* 314

<sup>37</sup> *Crimes Act 1900* s 547B

<sup>38</sup> *Crimes Act 1900* s 307A(1)(c)

<sup>39</sup> *Oaths Act 1900* s 25

<sup>40</sup> *Crimes Act 1900* s 327

<sup>41</sup> ALRC and NSWLRC joint report *Family Violence – A National Legal Response (2010)* Recommendation 18-2

relevant to APVO applications. The Commissions referred to concerns about increasing an applicant's legal costs and disadvantaging unrepresented and vulnerable parties and stated that these can be addressed through the provision of culturally appropriate victim support services and enhanced support for victims in high risk and vulnerable groups. This comment must be put in the context, however, of the fewer legal and support services available for APVO matters.

There are various approaches to this issue around Australia, with some jurisdictions requiring sworn statements or affidavits for their equivalent to APVO applications.

Submissions are sought on these proposals.

### **Proposal D: Further legislative distinction between ADVOs and APVOs**

A number of jurisdictions in Australia have separate legislation for their equivalents to APVOs and ADVOs. Others have a single piece of legislation, like NSW. South Australia will be adopting one piece of legislation for all orders when the *Intervention Orders (Prevention of Abuse) Act 2009* comes into effect. Victoria will continue to have two separate pieces of legislation when the *Personal Safety Intervention Orders Act 2010* comes into effect.

The issue of separate legislation for ADVOs and APVOs was discussed in the AVO Report, which outlined some of the arguments raised in submissions for legislatively separating the two regimes as:

- the widely acknowledged view that violence in domestic relationships differs from other types of violence in that it often involves issues of financial dependence, physical and emotional power and control and shared emotional history.
- that having ADVOs and APVOs together “muddies the waters and detracts from the seriousness and particular dynamics of domestic violence”<sup>42</sup>.
- media criticism about the abuse of AVOs through making frivolous complaints does not distinguish between APVOs and ADVOs. This trivialises domestic violence and undermines the integrity of the AVO legislation.

The issue was also discussed by the Victorian Law Reform Commission (the **VLRC**) in its *Review of Family Violence Laws: Report* (2006), which referred to concerns that the increased applications for intervention orders for stalking (the then Victorian equivalent to APVOs) had diverted the limited resources of police and courts and had undermined the seriousness of family violence.<sup>43</sup> The VLRC found that it was neither appropriate nor practical for the family violence legislation to also apply to community-based interpersonal disputes and recommended that they be separated. This recommendation has been followed in Victoria.

Submissions are sought as to whether further legislative distinction between violence within a domestic relationship (ADVOs) and violence outside a domestic relationship (APVOs) is desirable in NSW.

<sup>42</sup> Submission of Blue Mountains Community Legal Centre, NSW Law Reform Commission *Report 103 (2003) - Apprehended violence orders* 2.19

<sup>43</sup> Victorian Law Reform Commission *Review of Family Violence Laws: Report* (2006) 3.68

## The Action Plan

Comments are sought on the following actions in the Action Plan, which may impact on or be relevant to the operation of the Act.

The Action Plan can be accessed at:

[http://www.dpc.nsw.gov.au/data/assets/pdf\\_file/0005/93920/Stop the Violence. End the Silence. Domestic and Family Violence Action Plan - Web2.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0005/93920/Stop_the_Violence_End_the_Silence_Domestic_and_Family_Violence_Action_Plan_-_Web2.pdf) or a copy may be obtained by contacting Legislation, Policy and Criminal Law Review (contact details listed on page 2).

Item 29	Review the definition of domestic violence in the <i>Crimes (Domestic and Personal Violence) Act 2007</i> to consider whether it captures all relevant forms of violence, such as (but not limited to) economic, emotional, sexual and animal abuse.
Item 30	Review the objects in the <i>Crimes (Domestic and Personal Violence) Act 2007</i> to consider: <ul style="list-style-type: none"> <li>(a) recognising the presumption that a victim of domestic violence has the right to remain in the family home</li> <li>(b) focusing on perpetrators of domestic violence taking responsibility for their actions.</li> </ul>
Item 31	Review the <i>Crimes (Domestic and Personal Violence) Act 2007</i> to consider allowing courts to make voluntary referral orders to a program which has the primary objective of stopping or preventing domestic violence on the defendant's part, promoting the protection of the protected person or assisting a child to deal with the effects of domestic violence.
Item 32	Continue to review the <i>Crimes (Domestic and Personal Violence) Act 2007</i> to consider providing a statutory presumption (which can be displaced) in favour of the protected person remaining in their place of residence.
Item 33	Ensure consistency between the <i>Crimes (Domestic and Personal Violence) Act 2007</i> and reforms to the tenancy laws in the area of AVOs and the rights of occupants.

## The Family Violence Report

Comments are sought on recommendations of the Commissions in the Family Violence Report which may impact on or be relevant to the operation of the Act.

The Report may be accessed at:

[http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114\\_WholeReport.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf)  
or a copy may be obtained by contacting Legislation, Policy and Criminal Law Review (contact details listed on page 2).

5-1	<p>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:</p> <ul style="list-style-type: none"> <li>(a) physical violence;</li> <li>(b) sexual assault and other sexually abusive behaviour;</li> <li>(c) economic abuse;</li> <li>(d) emotional or psychological abuse;</li> <li>(e) stalking;</li> <li>(f) kidnapping or deprivation of liberty;</li> <li>(g) damage to property, irrespective of whether the victim owns the property;</li> <li>(h) causing injury or death to an animal irrespective of whether the victim owns the animal; and</li> <li>(i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.</li> </ul>
5-2	<p>State and territory family violence legislation should include examples of emotional and psychological abuse or intimidation and harassment that illustrate conduct that would affect - although not necessarily exclusively - certain vulnerable groups including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with a disability; and those from the gay, lesbian, bisexual, transgender and intersex communities. In each case, state and territory family violence legislation should make it clear that such examples are illustrative and not exhaustive of the prohibited conduct.</p>
5-4	<p>The governments of NSW and the ACT should review the offences categorised as ‘domestic violence offences’ in their respective family violence legislation with a view to:</p> <ul style="list-style-type: none"> <li>(a) ensuring that the classification of such offences falls within the proposed definition of family violence in Rec 5–1; and</li> <li>(b) considering the inclusion of relevant federal offences committed in a family violence context, if they choose to retain such a classification system.</li> </ul>

7-2	State and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.
7-4(c)	State and territory family violence legislation should articulate the following common set of core purposes: (c) to ensure that persons who use family violence are made accountable for their conduct.
7-5	State and territory family violence legislation should adopt the following alternative grounds for obtaining a protection order. That is: (a) the person seeking protection has reasonable grounds to fear family violence; or (b) the person he or she is seeking protection from has used family violence and is likely to do so again.
7-6	State and territory family violence legislation should include as the core group of protected persons those who fall within the following categories of relationships: (a) past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature; (b) family members; (c) relatives; (d) children of an intimate partner; (e) those who fall within Indigenous concepts of family; and (f) those who fall within culturally recognised family groups.
9-4	State and territory family violence legislation should empower police officers, only for the purpose of arranging protection orders, to direct a person who has used family violence to remain at, or go to, a specified place or remain in the company of a specified officer.
11-1	State and territory family violence legislation should make it clear that the making, variation or revocation of a protection order, or the refusal to make, vary or revoke such an order, does not affect the civil or criminal liability of a person bound by the order in respect of the family violence the subject of the order.

11-2	<p>State and territory legislation should clarify that in the trial of an accused for an offence arising out of conduct that is the same or substantially similar to that on which a protection order is based, references cannot be made, without the leave of the court, to:</p> <ul style="list-style-type: none"> <li>(a) the making, variation and revocation of protection orders in proceedings under family violence legislation—unless the offence the subject of the trial is breach of a protection order, in which case leave of the court is not necessary;</li> <li>(b) the refusal of a court to make, vary or revoke a protection order in proceedings under family violence legislation; and</li> <li>(c) the existence of current proceedings for a protection order under family violence legislation against the person the subject of the criminal proceedings.</li> </ul> <p>Evidence given in proceedings under family violence legislation may be admissible by consent of the parties or by leave of the court.</p>
11-4	<p>State and territory family violence legislation should expressly empower prosecutors to make an application for a protection order where a person pleads guilty or is found guilty of an offence involving family violence.</p>
11-6	<p>State and territory family violence legislation should provide expressly that one of the conditions that may be imposed by a court making a protection order is to prohibit the person against whom the order is made from locating or attempting to locate the victim of family violence.</p>
11-8	<p>State and territory family violence legislation should require judicial officers making protection orders to consider whether or not to make an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises.</p>
11-9	<p>State and territory family violence legislation should provide that a court should only make an exclusion order when it is necessary to ensure the safety of a victim or affected child. Primary factors relevant to the paramount consideration of safety include the vulnerability of the victim and any affected child having regard to their physical, emotional and psychological needs, and any disability. Secondary factors to be considered include the accommodation needs and options available to the parties, particularly in light of any disability that they may have, and the length of time required for any party to secure alternative accommodation.</p>
11-11	<p>State and territory family violence legislation should provide that:</p> <ul style="list-style-type: none"> <li>(a) courts have an express discretion to impose conditions on persons against whom protection orders are made requiring them to attend rehabilitation or counselling programs, where such persons have been independently assessed as being suitable and eligible to participate in such programs;</li> <li>(b) the relevant considerations in assessing eligibility and suitability to participate in such programs should include: whether the respondent consents to the order; the availability of transport; and the respondent's work and educational commitments, cultural background and any disability; and</li> <li>(c) failure to attend assessment or to complete such a program should not attract a sentence of imprisonment, and the maximum penalty should be a fine capped at a lower amount than the applicable maximum penalty for breaching a protection order.</li> </ul>

11-13	<p>State and territory legislation should provide that a court sentencing an offender for a family-violence related offence should take into account:</p> <ul style="list-style-type: none"> <li>(a) any protection order conditions to which the person being sentenced is subject, where those conditions arise out of the same or substantially the same conduct giving rise to the prosecution for the offence; and</li> <li>(b) the duration of any protection order to which the offender is subject.</li> </ul>
16-1	<p>Family violence legislation in each state and territory should require judicial officers making or varying a protection order to consider, under s 68R of the <i>Family Law Act 1975</i> (Cth), reviving, varying, discharging or suspending an inconsistent parenting order.</p>
16-6	<p>Application forms for protection orders under state and territory family violence legislation should include an option for an applicant to request the court to revive, vary, discharge or suspend a parenting order.</p>
16-11	<p>State and territory family violence legislation should require courts, when considering whether to make personal property directions in protection order proceedings, to inquire about and consider any property orders under the <i>Family Law Act 1975</i> (Cth), or pending application for such orders.</p>
16-12	<p>State and territory family violence legislation should provide that personal property directions made in protection order proceedings are subject to orders made by a federal family court or other court responsible for determining property disputes.</p>
18-3	<p>State and territory family violence legislation should prohibit the respondent in protection order proceedings from personally cross-examining any person against whom the respondent is alleged to have used family violence.</p>
18-4	<p>State and territory courts should require that undertakings by a person against whom a protection order is sought should be in writing on a standard form. The form should require each party to sign an acknowledgment that he or she understands that:</p> <ul style="list-style-type: none"> <li>(a) breach of an undertaking is not a criminal offence nor can it be otherwise enforced;</li> <li>(b) the court's acceptance of an undertaking does not preclude further action by the applicant to address family violence; and</li> <li>(c) evidence of breach of an undertaking may be used in later proceedings.</li> </ul>
18-5	<p>State and territory family violence legislation should provide that:</p> <ul style="list-style-type: none"> <li>(a) mutual protection orders should not be made by consent; and</li> <li>(b) a court may only make mutual protection orders where it is satisfied that there are grounds for making a protection order against each party.</li> </ul>
20-3	<p>State and territory family violence legislation should confer jurisdiction on children's courts to hear and determine applications for family violence protection orders where:</p> <ul style="list-style-type: none"> <li>(a) the person affected by family violence, sought to be protected, or against whom the order is sought, is a child or young person; and</li> <li>(b) proceedings related to that child or young person are before the court; and</li> <li>(c) the court is satisfied that the grounds for making the order are met.</li> </ul>

20-4	Where a children’s court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also be able to make a family violence protection order in favour of siblings of the child or young person who is the subject of proceedings, or other children or young people within the same household, who are affected by the same or similar circumstances.
20-5	Where a children’s court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also have jurisdiction to make a family violence protection order for the protection of an adult, where the adult is affected by the same or similar circumstances.
20-6	Where a children’s court has jurisdiction to hear a family violence protection order application (see Rec 20–3), 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.
30-3	Non-publication provisions in state and territory family violence legislation should expressly allow disclosure of information in relation to protection orders and related proceedings that contains identifying information in appropriate circumstances, including disclosure of family violence protection orders to the federal family courts under s 60CF of the <i>Family Law Act 1975</i> (Cth).
30-6	State and territory family violence legislation should require courts exercising jurisdiction under that legislation to inquire about existing parenting orders under the <i>Family Law Act 1975</i> (Cth), or pending proceedings for such orders.