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Apprehended Violence Orders: Part 15A of the Crimes Act

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Terms of reference

In a letter to the Commission dated 28 March 2002, the Attorney General, the Hon R J Debus MP referred the following matter to the Commission:

In accordance with section 562Z of the *Crimes Act 1900* (NSW) the Commission is to review Part 15A of that Act to determine whether the policy objectives of the Part remain valid, and whether the terms of the Part remain appropriate for securing those objectives.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

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There is no special form required for submissions. If it is inconvenient or impractical to make a written submission you may telephone the Commission and either direct your comments to a Legal Officer over the telephone, or else arrange to make your submission in person.

The closing date for submissions is 31 January 2002.

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- In preparing further papers on this reference, the Commission will refer to submissions made in response to this Discussion Paper. However, requests for confidentiality will be respected by the Commission in relation to the publication of submissions.

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1. Introduction

- Terminology
- The current law
- The Commission's review

1.1 The prevention, detection and punishment of violence in all its forms has been a pressing matter on social, political and law reform agendas for many years. The focus of the criminal law is to punish the offender after the commission of an offence has been proved beyond reasonable doubt. While the imposition of criminal sanctions following a breach of the law is a necessary element in our society, it is not always sufficient to protect those who fear for their safety. A person may fear violence at the hands of another in circumstances where the conduct of that person may either not amount to criminal conduct, or may not be able to be proved to the criminal standard. A classic example is obsessive behaviour, such as constant telephone calls or sending disturbing, unsolicited gifts or messages. In domestic situations, it is possible for patterns of intimidation and abuse to continue for years without there being enough corroborating evidence to support a criminal conviction. To alleviate fear in these circumstances, a system of restraining or protection orders operates in every Australian State and Territory, and in many overseas jurisdictions. In NSW, they are known as Apprehended Violence Orders ("AVOs"), and are contained in Part 15A of the *Crimes Act 1900* (NSW) ("Part 15A"). As the name suggests, these orders are intended to act as a circuit breaker, to apprehend or prevent existing or potentially violent situations from escalating.

1.2 Since the introduction of AVOs in NSW 20 years ago, the number of applications has increased dramatically.[1] While AVOs originated as a means of preventing domestic violence,[2] they are now able to be sought generally, regardless of whether the

1. A total of 26,407 final AVOs were granted by NSW local courts in 2001, up from 21,923 in 2000: NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2001: Table 1.18* (Statistical Services Unit, March 2002) «www.lawlink.nsw.gov/bocsar». Note that this figure only refers to AVOs that were finalised, and does not include interim AVOs or AVOs issued from the Children's Court. Accordingly, the total number of AVOs issued will be much higher. By way of comparison, 1,462 AVOs were issued in 1987: L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme*, (NSW Bureau of Crime Statistics and Research, Sydney, 1997) ("BOCSAR Report 1997") at iii.
2. See para 2.3-2.14.

applicant and defendant are in a domestic relationship. Because of the surge in the number of AVO applications, and the fact that they deal with sensitive and controversial subject matter, AVO legislation has been reviewed and amended several times over the years. These are detailed in Chapter 2. In the latest round of legislative amendments, a provision was included requiring a review of Part 15A to determine whether the policy objectives of the Part remain valid, and whether the terms of the Part remain appropriate for securing those objectives.[3] The Commission has been asked to conduct that review.

TERMINOLOGY

1.3 Throughout this Discussion Paper, the Commission refers to the person who applies for an AVO, or on whose behalf an AVO is applied for by a police officer, as the "applicant". The person against whom an AVO is taken out is referred to as the "defendant". The term "AVO" is a general one used to refer to the protection orders available under Part 15A. However, in practice, people are granted either an Apprehended Domestic Violence Order ("ADVO") or an Apprehended Personal Violence Order ("APVO"), depending on the relationship between the applicant and defendant. There are some differences in the way Part 15A applies to each type of order, but largely the procedural elements and requirements are the same for each. Consequently, the Commission uses the terms "ADVO" and "APVO" when discussing the provisions peculiar to each type of order, but uses the general term "AVO" to discuss provisions common to both. This reflects the terminology and structure of Part 15A.[4]

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3. *Crimes Act 1900* (NSW) ("the Crimes Act") s 562Z. That section also provides that the review must be undertaken as soon as possible after a period of two years following the commencement of the *Crimes Amendment (Apprehended Violence) Act 1999* (NSW). That Act commenced on 26 April 2000.
4. Part 15A is divided into sections: Division 1A contains the objects and provisions specific to ADVOs, while Division 1B contains the APVO provisions. Divisions 2-5 deal with the procedural requirements relating to AVOs generally.

THE CURRENT LAW

1.4 AVOs are the primary legal means by which people may seek protection against threatened acts of personal violence.[5] AVOs can be obtained relatively quickly and easily.[6] Under Part 15A, any person may apply to the local court[7], for an order against another person if he or she suspects that some form of personal violence, or other abuse, harassment or intimidation, is occurring or is imminent. A police officer may apply for an AVO on behalf of an applicant, and *must* apply for an order where the officer suspects that a domestic violence offence[8] or a stalking offence[9] has been, or is likely to be, committed, or where the applicant is under the age of 16 years.[10]

5. It should be noted that protection orders do not, and should not, act as a replacement for the laying of criminal charges in cases of violence, abuse, stalking or harassment.
6. Providing speedy, inexpensive, safe and simple access to justice is one way that Part 15A, Division 1 (dealing with ADVOs) aims to achieve its objects. The ease with which AVOs may be obtained is a controversial issue, and is discussed throughout this Discussion Paper.
7. Where the applicant is under 18 years of age, the matter will be dealt with in the Children's Court: Crimes Act s 562G. Applications in both the Local Court and the Children's Court are made by way of complaint made orally or in writing and substantiated on oath: see Crimes Act s 562C.
8. A domestic violence offence is a personal violence offence committed within a domestic relationship, as defined in s 4 and s 562A of the Crimes Act. See definition of personal violence offence in Crimes Act s 4.
9. Crimes Act s 562C(3). Section 562AB of the Crimes Act provides that a person who stalks or intimidates another person with the intention of causing that person to fear physical or mental harm, is guilty of an offence. The test for establishing that intention is an objective one: it is assumed to exist where the conduct in question is likely to cause fear: s 562AB(3). It does not matter whether the person being stalked or intimidated actually feared physical or mental harm: s 562AB(4).
10. Crimes Act s 562C(2A).

1.5 As noted above, the applicant will seek either an ADVO and APVO, depending on the relationship he or she has with the defendant. An application for an ADVO may be made where the applicant and the defendant are in a domestic relationship. A domestic relationship is defined as one where the applicant and defendant:

- are or were married or in a de facto (including same sex) relationship;
- are or were in an intimate personal relationship (whether or not there is a sexual element);
- share or have shared a household or residential facility;
- are or were in a relationship involving dependence or ongoing care (paid or unpaid); or
- are or have been relatives.[11]

Where the applicant and defendant are in a relationship other than a domestic one, the applicant must apply for an APVO.

1.6 The order may be granted if the defendant consents,[12] or if the court is satisfied that a person, on the balance of probabilities, has reasonable grounds to fear, and does in fact fear:[13]

- the commission of a personal violence offence;[14] or

11. Crimes Act s 4 and s 562A.
12. The defendant may consent to the AVO without admitting the veracity of the claims upon which the application is based: Crimes Act s 562BA. Where the defendant consents, the AVO becomes effective immediately without the need to return to court.
13. It is not necessary for the person actually to fear the commission of a personal violence offence where the person is under the age of 16 years, or is, in the opinion of the court, appreciably below general intelligence level: Crimes Act s 562AE(2) and s 562AI(2).
14. Personal violence offence is defined in s 4 of the Crimes Act to include offences such as murder, manslaughter, malicious wounding and damage, sexual assault, indecent assault, assault with or without inflicting actual bodily harm, and breaching an AVO.

- conduct amounting to harassment or molestation, being conduct sufficient, in the opinion of the court, to warrant the making of the order;[15] or
- conduct which is either intimidating or amounts to stalking.[16]

1.7 Legal aid may be available for an ADVO applicant,[17] but not for an ADVO defendant,[18] and is not available at all in relation to APVO proceedings. After an application for an AVO is made, the defendant is notified by the court issuing either a summons or a warrant for the purpose of bringing the defendant to court.[19] An AVO may be made on an interim or a final basis, and regardless of whether the defendant is present in court or not. The AVO will take effect when the order is served on the defendant. It can remain in force for as long as necessary[20] and may be varied or revoked upon application to, and agreement by, the court.[21] An AVO may contain "such prohibitions or restrictions on the behaviour of the defendant as appears necessary or desirable to the court".[22] Despite its location in the Crimes Act, the AVO process is not a criminal one, and the defendant will not incur a criminal record. However, a *breach* of an AVO constitutes a criminal offence.[23]

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15. Conduct may amount to harassment or molestation even though it does not involve actual or threatened violence to the person, or consists only of actual or threatened damage to property belonging to, in the possession of, or used by, the applicant: Crimes Act s 562AE(3) and s 562AI(3).
16. See Crimes Act s 562AE and s 562AI.
17. Providing the means test requirements can be satisfied: see «www.lawlink.nsw.gov.au/lac.nsf/pages/avoapply».
18. Unless exceptional circumstances exist: see «www.lawlink.nsw.gov.au/lac.nsf/pages/avodefen».
19. Crimes Act s 562AF and s 562AJ. A summons is the dominant method of notifying the defendant in both ADVO and APVO proceedings.
20. Crimes Act s 562E.
21. Crimes Act s 562F.
22. Crimes Act s 562AE(4) and s 562AI(4). See also s 562D for an indication of the types of prohibitions and restrictions the court may impose.
23. Crimes Act s 562I.

1.8 AVOs have generated considerable controversy. Some of the heated debates have erupted because of the nature of the subject matter: in dealing with violence in domestic and other personal relationships, they touch on raw and sensitive issues which are extremely complex in themselves, quite apart from any legal or policy considerations surrounding the AVO process. Other issues touch on more practical or procedural matters which will be examined by the Commission in this Paper and over the course of the review.

1.9 For example, some argue that AVOs place restrictions on defendants that can be quite onerous, yet an AVO may be granted in a matter of minutes without the defendant being present, and may be based on little evidence. It is also alleged that the relative ease of obtaining an AVO, based on the balance of probabilities rather than the criminal standard of beyond reasonable doubt, exposes the provisions to a greater risk of abuse: that is, there is considerable scope to use the provisions inappropriately or even maliciously.[24] Alternatively, others argue that the focus of AVOs should be on protecting people against future acts of violence, not on the "rights" of the defendant, and for AVOs to be obtained on the basis of anything other than the lower standard of proof would defeat their purpose of preventing future conduct rather than acting as a sanction for past misdemeanors.[25] Some commentators have suggested that the real "abuse" regarding AVOs is that the law is not enforced or implemented properly.[26]

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24. See for example, J Hickey and S Cumines, *Apprehended Violence Orders: A Survey of Magistrates* (Judicial Commission of NSW, Monograph Series 20, 1999) at 44-45; M McMillan, "Should we be more apprehensive about apprehended violence orders?" (1999) 37(11) *Law Society Journal* 48; T Nyman, "Apprehended Violence: Industry or Disease?" (1999) 37(11) *Law Society Journal* 52.
25. See for example, Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999) and NSW Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law* (Discussion Paper, 1999) ("CLRD Discussion Paper"). See also N Gouda, "The AVO Backlash" (2000) 38(1) *Law Society Journal* 63.
26. R Hunter and J Stubbs, "Model Laws or Missed Opportunity?" (1999) 24(1) *Alternative Law Journal* 3; H Katzen, *"How do I prove*

THE COMMISSION'S REVIEW

The Commission's approach

1.10 The Terms of Reference for the Commission's review arise from the requirement in section 562Z of the Crimes Act, inserted by the *Crimes Amendment (Apprehended Violence) Act 1999* (NSW), to examine the validity of the policy objectives of Part 15A and to determine if the provisions of that Part remain appropriate for securing those objectives. In assessing the validity of those objectives, the Commission's focus is on the effect of the most recent legislative amendments in 1999, and on the issues raised in past reviews, or brought to our attention through consultations, which may help to further or hinder the policy objectives of Part 15A.

1.11 In order to meet its Terms of Reference, the Commission considers that the following questions need to be addressed:

(1) What are the stated and implied policy objectives?

(2) What are the barometers that measure the validity, success or otherwise of those objectives?

(3) What do we know about the operation of Part 15A, from consultation, research and statistics?

(4) Applying the criteria for success (identified in 2 above) to what we know about Part 15A, what issues emerge as the main strengths and weaknesses of the legislation?

(5) How can Part 15A operate more effectively to meet the policy objectives of the legislation?

These questions form the basis of the Commission's review and underpin our approach in this Discussion Paper.

I saw his shadow?" Responses to breaches of Apprehended Violence Orders, A consultation with women and police in the Richmond Local Area Command in NSW (Prepared for the Northern Rivers Community Legal Centre, 2000) at 308.

Major issues canvassed

1.12 In Chapter 2, the Commission traces the legislative history of AVOs, and discusses the most relevant recent reviews of Part 15A.[27] This discussion provides the context for attempting to identify the broad policy objectives of AVOs in general, and Part 15A in particular.[28] The Commission examines the validity and effectiveness of those objectives, and asks whether AVOs are effective as a method of preventing physical violence and mental or emotional abuse.[29] One of the major barriers to the effectiveness, or the perceived effectiveness of AVOs, is allegations that they are being sought and used inappropriately. The Commission looks at this issue in Chapter 5, and seeks suggestions for amending the legislation to limit the possibility of AVOs being abused.

1.13 The scope of AVO legislation, for example, whether it should apply only to domestic violence, and whether ADVOs and APVOs should be dealt with separately or together, have been a recurring theme in legislative reviews and amendments. In Chapter 6, the Commission discusses the separation between ADVOs and APVOs that resulted from the 1999 amendments and asks how that has worked in practice, and whether that separation should be taken further. A related issue is whether the Crimes Act is the appropriate statute in which to locate AVO provisions, given that they do not actually involve the criminal law unless they are breached.[30] The Commission also examines the adequacy of the definitions of "domestic violence", "personal violence" and "domestic relationship" in Part 15A.[31]

1.14 For AVOs to be truly effective, they must be accessible. The procedure for applying for AVOs is discussed in Chapter 8. Part 15A is framed so that it applies equally to all people who fear

27. Chapter 2.
28. Chapter 3.
29. Chapter 4.
30. That is to say, an AVO in itself is a civil and not a criminal procedure. The conduct which gives rise to the AVO, if proven beyond reasonable doubt, will constitute a crime.
31. Chapter 7.

personal violence. Yet, the practical application of the provisions may not affect everyone equally. Chapter 9 examines the impact of AVO legislation on the more marginalised groups in society, including Aboriginal communities, people with disabilities (particularly intellectual disabilities), people living in rural or regional areas, children and older people.

1.15 The Commission also looks at the provisions of Part 15A which deal with granting an AVO,[32] the consequences that follow the issuing and breach of an AVO for both the applicant and the defendant,[33] and other practical issues such as the appeals process.[34]

1.16 The final issue considered by the Commission in this paper is the offence of stalking and intimidation.[35] Although not directly part of the AVO process, the substantive criminal offence of stalking and intimidation is contained in Part 15A. It is therefore necessary for the Commission to determine whether these provisions remain appropriate for securing the policy objectives of the Part. Stalking and intimidation is also relevant to AVOs as a ground on which an order may be sought, and a prohibition against stalking and intimidation is a standard term of every AVO unless otherwise ordered.[36]

Inherent difficulties in the review of AVOs

1.17 The Commission's brief is to review the validity of the policy objectives in Part 15A. As the primary objective is to prevent violence, it is difficult, *prima facie*, to deny its validity. Yet, the real test of whether the policy objectives remain valid is not in the abstract, but in how effectively they work in practice to prevent violence. Assessing this is more difficult than it sounds, due to the nature of AVOs and the behaviour they are designed to address.

32. Chapter 10.
33. Chapter 11.
34. Chapter 12.
35. Chapter 13.
36. Crimes Act s 562BC.

AVOs are preventative measures: they are granted based on indications of past behaviour but essentially go to preventing future conduct. It is difficult to say for certain whether AVOs prevent future conduct, since that conduct may or may not have occurred anyway, irrespective of the AVO.[37]

1.18 Another difficulty involves the nature of the violent behaviour AVOs are intended to prevent, particularly domestic violence. There is a significant amount of written material asserting that the incidence of domestic violence is vastly under-reported to police. Assuming this to be true, any study of the effectiveness of AVOs and the validity of the policy objectives must be seen in that light: they can only be measured against the people who have been able to access the "system".

1.19 Violence prevention is a complex issue, requiring a comprehensive response extending beyond legislation. Part 15A is only one element among many which need to work together to prevent violence. Any evidence that violence is not being effectively prevented could point to the need for better implementation of the legislation, for more legal or community support services, or greater community education, rather than faults with Part 15A.

1.20 The Commission makes these observations at this initial stage of its review not to pre-empt any findings, but to note the context in which it is happening and the limits of what it can do.

Preliminary consultations

1.21 In addition to researching legislation, articles and reports pertinent to AVOs, the Commission has conducted a number of preliminary consultations with particular groups and individuals in Sydney and regional NSW, with a view to isolating the most

37. This was acknowledged in the BOCSAR Report 1997, yet considered unlikely in that particular evaluation because of the fact that there had been a continuing pattern of violence in most cases before the AVO was taken out, which ceased or was significantly reduced in 90% of cases following the AVO: see BOCSAR Report 1997 at para 3.6.1 and para 4.1, and discussion at para 2.32-2.33.

relevant issues for discussion in this Paper. Those consulted include: a number of Magistrates and Chamber Magistrates; the Family Law Reform Association; Domestic Violence Liaison Officers and staff of the Domestic Violence Court Assistance Scheme; the Domestic Violence Advocacy Service; the Violence Against Women Unit in the NSW Attorney General's Department, NSW Police and various solicitors.

1.22 The Commission has also obtained the latest available statistics relating to AVOs from the Bureau of Crime Statistics and Research, and has observed at meetings of the Apprehended Violence Legal Issues Co-ordinating Committee.

Our need for feedback

1.23 The preliminary consultations have helped the Commission isolate some relevant issues regarding Part 15A, but have not yet led to definitive conclusions. In order to gauge the effectiveness of Part 15A, the Commission needs to know how the provisions operate in practice. This Discussion Paper is designed to promote discussion and generate responses to the policy and procedural issues surrounding AVOs. The Commission would like to receive submissions from any interested person or group on the issues raised in this paper, or other issues which impact on the effectiveness or otherwise of the AVO provisions, and any suggested improvements to the legislation. The feedback from those submissions, together with further consultation and research, will form the basis of our final recommendations in a Report to be delivered in early 2003.

2. History of AVOs

- Legislative history
- Most recent changes
- Other laws affecting AVOs
- Previous reviews

2.1 This chapter sets out the background to and context of the Commission's review. It traces the legislative development of AVOs and discusses the changing policy emphasis over the last 20 years. It also looks at laws which impact on, and are affected by, AVO legislation, and the most recent reviews of Part 15A of the Crimes Act.

LEGISLATIVE HISTORY

2.2 A consideration of the legislative history of AVOs helps to shed some light on the impetus for a scheme of protection orders, and the policy principles and objectives on which the scheme is based.

The situation before AVOs

2.3 Prior to 1982, there was limited protection available for people who feared that they would become victims of violent activity in the immediate future. While the general criminal law prohibited personal violence offences, doubts emerged as to whether the criminal law alone was sufficient to deter violence in interpersonal relationships.[1] Domestic violence, in particular, has traditionally had a low prosecution rate. Many theories and studies abound as to the possible reasons for this, including low levels of reporting by victims of violence to authorities,[2] attitudes to domestic violence held by the community, the police and the

1. See for example, Australian Law Reform Commission, *Domestic Violence* (Report 30, 1986) ("ALRC Report 30") at para 76-87. See also N Naffin, *Domestic Violence and the Law – A Study of s 99 of the Justices Act (South Australia)*, Women's Advisor's Office, Department of Premier and Cabinet (June 1985) ("Naffin Report") at 50-51.
2. See para 1.17-1.20 for a brief discussion of the issues concerning the complex and insidious nature of domestic violence, and the resultant difficulties associated with assessing the effectiveness of measures designed to combat it.

criminal justice system which prevent it being taken seriously,[3] and difficult evidentiary and other issues associated with the hidden nature of domestic violence.[4]

2.4 Aside from these difficulties, the criminal law of course only applied after the violence had occurred and conviction could only be secured if the offence were proved beyond reasonable doubt. Consequently, this did little to deter future violence. The criminal law also could not operate to prevent conduct, such as harassment, which did not amount to a crime.

2.5 The main method, not involving a criminal element, by which potential victims of violence could seek protection prior to the introduction of AVOs was a recognisance to "keep the peace" under the Crimes Act.[5] Section 547[6] provided for a defendant to be brought before a Court of Petty Sessions, either by means of a summons or a warrant for arrest issued by a Magistrate, where a person, or a police officer, had accused the defendant of threatening behaviour. If the Magistrate were satisfied that the defendant had committed, threatened to commit, or was likely to

3. While it is beyond the scope of this inquiry to analyse the broader issues of domestic violence, they have been well documented: see for example, Naffin Report; Australia, Public Policy Research Centre, *Community Attitudes Towards Domestic Violence in Australia* (Office of the Status of Women, Canberra, 1988); J Scutt, "Judicial Bias or Legal Bias? Battery, Women and the Law" in J Bessant, K Carrington, and S Cook (eds) *Cultures of Crime and Violence: The Australian Experience* (La Trobe University Press, 1995); H Katzen, *"How do I prove I saw his shadow?"* Responses to breaches of Apprehended Violence Orders, A consultation with women and police in the Richmond Local Area Command in NSW (Prepared for the Northern Rivers Community Legal Centre, 2000); R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, The Federation Press, Sydney, 2002).
4. See N C Seddon, "Legal Responses to Domestic Violence – What is Appropriate?" (1986) 58 *The Australian Law Quarterly* 48.
5. There was also the possibility of obtaining an injunction under s 114 of the FLA for the protection of a party to, or a child of, a marriage. See para 2.30.
6. This has subsequently been repealed.

commit, a violent act, the Magistrate could require the defendant to enter into a recognisance (or undertaking) to keep the peace or be of good behaviour. Unlike the current AVO scheme, a recognisance order could not be tailored to include specific conditions such as preventing the defendant from contacting the applicant. More significantly, breach of an undertaking did not constitute a criminal offence, and there was consequently no power to arrest a defendant who breached a recognisance.[7] As a result, that procedure was widely criticised at the time for being inflexible, unenforceable and ineffective.[8]

2.6 In response to the perceived failings of the existing law, and the emergence of domestic violence as a significant social issue in the 1980s,[9] a Task Force on Domestic Violence was established in 1981. That Task Force made 187 recommendations to the then Premier, the Hon Neville Wran QC MP, including suggestions for legislative reform. Those suggestions were incorporated into the resulting legislation: the *Crimes (Domestic Violence) Amendment Act 1982* (NSW) ("the 1982 amendments"), which among other things, clarified and enhanced police powers of entry into premises for the purpose of investigating domestic violence offences,[10] and initiated a scheme of protection orders, later to be known as AVOs.

The Crimes (Domestic Violence) Amendment Act 1982

2.7 The 1982 amendments supplemented s 547 of the Crimes Act by inserting a new s 547AA, empowering a Magistrate to make orders which restricted or prohibited the behaviour of people whose

7. A Magistrate could require the defendant to post a monetary bond, which could be forfeited if the recognisance were breached. It seemed, however, that very little action was ever taken in relation to breaches of s 547: see ALRC Report 30 at para 85.
8. See for example, Naffin Report at 1-2; ALRC Report 30 at para 85; J Stubbs and D Powell, *Domestic Violence: Impact of Legal Reform in NSW* (NSW Bureau of Crime Statistics and Research, 1989) ("BOCSAR Report 1989").
9. BOCSAR Report 1989 at 1.
10. Crimes Act s 357F.

domestic violence was apprehended. Those orders could provide for certain conditions to be imposed on the defendant, including restricting or prohibiting the defendant from approaching the applicant or from accessing specified premises, depending on the circumstances. A procedure for making applications for orders based on a complaint by a private applicant or a police officer was established, with the complaint needing to be substantiated only by the civil (balance of probabilities) rather than the criminal standard of proof. The orders could last for up to six months, and failure to comply with the orders became a criminal offence (arrest being permitted without a warrant) carrying a maximum penalty of six months imprisonment.

2.8 The 1982 amendments applied only to physical violence between married and heterosexual de facto couples, with orders being known as Apprehended Domestic Violence Orders ("ADVOs").[11] When introducing the legislation into Parliament, the then Premier, the Hon Neville Wran, QC MP, referred to the Government's determination to eliminate the "scourge" of domestic violence,[12] the inadequacy of the existing law in leaving victims, particularly women, who fear violence "out on a limb",[13] and the impact he hoped the new law would have:

> For the tens of thousands of women from every social and economic spectrum in New South Wales who are subjected repeatedly to domestic violence the reforms which I am presenting to this Parliament today are undoubtedly among the most important reforms it will ever legislate.[14]

11. Recognisance orders under the Crimes Act s 547 continued to operate for violence in other relationships.
12. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 9 November 1982 at 2366.
13. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 9 November 1982 at 2368.
14. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 9 November 1982 at 2368.

Amendments since 1982

2.9 The AVO provisions have been amended a number of times since 1982, generally to expand their scope and availability.[15]

2.10 The *Crimes (Domestic Violence) Amendment Act 1983* (NSW) extended the application of the ADVO provisions in s 547AA of the Crimes Act to include separated heterosexual de facto and divorced spouses, who were seen as a "significant category of potential victims of domestic violence".[16] Further, ADVOs were able to be made where there was an apprehension of sufficiently serious molestation or harassment which falls short of actual physical violence. Both of these amendments implemented recommendations made by the NSW Law Reform Commission.[17] The 1983 Act also enabled the court to impose a fine of up to $2000 in addition to a term of imprisonment as a punishment for breach of the ADVO provisions, and clarified the application of the *Bail Act 1978* (NSW) in relation to ADVOs.

2.11 Another round of amendments was passed in 1987. The *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW) created Part 15A of the Crimes Act, replacing s 547AA. The category of people eligible to apply for ADVOs was extended to include those who lived or had lived in the same house (apart from a tenant or boarder), and people in existing or former intimate personal relationships.[18] In addition, the six month time limit on the duration of ADVOs, imposed in the 1982 amendments, was removed, as it was considered that six months was not long enough in many domestic situations to remove the threat of violence.[19]

15. For a further discussion of the legislative history of AVOs, see R Simpson, *Incidence and Regulation of Domestic Violence in NSW* (NSW Parliamentary Library, Briefing Paper 4/2000) at 12-14.
16. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1983 at 1879.
17. See NSWLRC, *De Facto Relationships* (Report 36, 1983) Recommendations 50-52.
18. Crimes Act s 562B. This provision has since been amended again.
19. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 1987 at 15464. Instead, the ADVO could be made for as long as the court considered necessary: Crimes Act s 562E.

For the first time, the court was empowered to prohibit or restrict the possession of firearms by a defendant of an ADVO, and provision was made for ex parte interim orders to be issued.[20]

Expansion beyond domestic relationships

2.12 In 1989, the *Crimes (Apprehended Violence) Amendment Act 1989* (NSW) expanded the ADVO scheme again to *all* people, not just those in domestic relationships, who feared physical violence, harassment or molestation towards themselves. So, for example, people could seek an order to protect themselves from threats against neighbours or colleagues. This reflected a concern that the s 547 recognisance order was inadequate to protect those who feared violence outside of domestic relationships. It was considered preferable to extend Part 15A rather than enact a new part of the Crimes Act dealing with apprehended violence in non-domestic relationships.[21] The orders became known simply as AVOs to reflect that change.

2.13 This amendment generated controversy at the time among those who were concerned that it would remove the emphasis on the particular problem of domestic violence, and that AVOs would be used in trivial or inappropriate ways.[22] Despite subsequent amendments to Part 15A, this controversy remains today.

2.14 The 1989 Act also clarified that harassment to or molestation of a person may occur even though there is no actual or threatened violence to the person, and there is only actual or threatened damage to that person's property. A new provision was also inserted enabling an AVO to be sought on behalf of a child or a

20. Crimes Act s 562H.
21. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 3 May 1989 at 7318.
22. See R Simpson, *Incidence and Regulation of Domestic Violence in NSW* (NSW Parliamentary Library, Briefing Paper 4/2000) at 13; NSW Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law*, (Discussion Paper, 1999) ("CLRD Discussion Paper") at 11.

person with an intellectual disability where the protected person is unaware of the threat to his or her safety.[23]

1993 to 1996

2.15 Several amendments to Part 15A were made in 1993 and 1996. The *Crimes (Registration of Interstate Restraint Orders) Act 1993* (NSW) enabled protection orders made in other States and Territories to be enforced in NSW.[24] Also in 1993, the *Crimes (Domestic Violence) Amendment Act 1993* (NSW):

- enabled police to apply for telephone interim orders after hours in certain circumstances;
- enabled people over 16 to apply for their own AVO;
- created a separate offence of intimidation relating to domestic violence;
- introduced a new provision to prevent stalking; and
- increased the penalties for breach of an AVO from a fine of $2000 to $5000, and from six months to two years imprisonment.

2.16 The *Crimes Amendment (Apprehended Violence Orders) Act 1996* (NSW) altered the AVO provisions by limiting the court's discretion in the following respects. An authorised justice *must*:

- issue either a summons or a warrant for the appearance of a defendant against whom an AVO is sought;
- explain to the applicant and the defendant the rights of each party and the consequences of breaching an AVO;
- issue an AVO where a person is convicted of a stalking, intimidation or domestic violence offence;
- issue an interim AVO where a person is charged with a stalking, intimidation or domestic violence offence.

23. Crimes Act s 562CA.
24. This was extended in 1999 to include the recognition of New Zealand orders made under the *Domestic Violence Act 1995* (NZ).

2.17 The 1996 amending Act also enabled a child under 16 to be included on an adult's AVO, and enabled AVO proceedings involving a child under 16 to be held in the absence of the general, or a specified member of, the public.

MOST RECENT CHANGES

Crimes Amendment (Apprehended Violence) Act 1999 (NSW)

2.18 The latest amendments to Part 15A were made in 1999 following a number of reviews of the legislation in the late 1990s.[25] The *Crimes Amendment (Apprehended Violence) Act 1999* (NSW) ("the 1999 amendments") created two categories of AVOs within Part 15A: ADVOs[26] and APVOs.[27] In his Second Reading Speech, the then Attorney General, the Hon J W Shaw, QC MLC, noted that the Government had been "most conscious of concern regarding the conflation of domestic violence matters with non-domestic or 'personal' violence matters under the AVO scheme" which had arguably "done a disservice to people experiencing domestic violence".[28] Mr Shaw stated that separating AVOs into two categories not only recognised the "difference in the nature and level of violence in domestic and non-domestic matters" but also established "significant legislative distinctions" in the ways in which ADVOs and APVOs are treated.[29]

2.19 The first such distinction is that authorised justices have a discretion to refuse to issue an APVO (except upon application by a police officer) which they consider is based on a complaint that is "frivolous, without substance or has no reasonable prospects of

25. See para 2.31-2.41.
26. Crimes Act, Division 1A.
27. Crimes Act, Division 1B.
28. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3674.
29. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3674.

success".[30] There is no such discretion in relation to an ADVO. Secondly, the court has a greater discretion to award costs against complainants in APVO matters.[31] For ADVOs, the test for awarding costs against private applicants remains based on a "frivolous or vexatious" complaint,[32] whereas for APVOs, costs may be awarded where it seems "just and reasonable" to do so.[33] The third distinction between ADVOs and APVOs is that, in ADVO proceedings, there is a restriction on disclosure of the protected person's address or the complaint on which an order is based.[34]

2.20 The final distinction between ADVOs and APVOs is the inclusion of an objects statement in Division 1A of Part 15A relating to ADVOs. Those objects are essentially to prevent and protect against domestic violence.[35] The provision states that the objects are to be achieved by empowering the courts to make ADVOs and ensuring speedy, inexpensive, safe and simple access to justice.[36] Recognition is also given to domestic violence being unacceptable, perpetrated mainly by men against women and children, and occurring in all sectors of the community.[37]

30. Crimes Act s 562AK(3). There is a presumption against exercising that discretion if the complaint discloses allegations of a personal violence offence, a stalking or intimidation offence or harassment in the nature of racial, religious, homosexual, transgender or HIV-AIDS vilification: Crimes Act s 562AK(4).
31. Crimes Act s 562N. Note where a police officer lays the complaint, costs may not be awarded unless the officer knew that the complaint contained false and misleading information: Crimes Act s 562N(3).
32. Crimes Act s 562N(2).
33. Crimes Act s 562N(1)(b).
34. Crimes Act s 562AG. This restriction does not apply where the applicant (if over 16 years of age) consents to the disclosure, the defendant already knows the address, or if it is necessary to state the address in order to achieve compliance with the order.
35. The objects are contained in s 562AC(1) of the Crimes Act, and are discussed in Chapter 3.
36. Crimes Act s 562AC(2).
37. Crimes Act s 562AC(3).

2.21 Whether the court issues an ADVO or an APVO depends on whether or not the applicant and the defendant are, or have been, in a domestic relationship. Consequently, the definition of "domestic relationship" is highly significant. The 1999 amendments extended that definition to include people living in the same household or residential facility, and people in a relationship of ongoing, dependant care.[38] This amendment is intended to reflect the "domestic contexts in which people live",[39] and, as a result, makes those people eligible to apply for ADVOs rather than APVOs. The definition of "de facto relationship", a sub-category of domestic relationship, was also changed to accord with the definition in the *Property Relationships Act 1984* (NSW) ("the PRA").[40]

2.22 The 1999 amendments also made a series of procedural and technical amendments which will be discussed later in this Paper.

OTHER LAWS AFFECTING AVOS

2.23 There are a number of other laws that impact on, and are affected by, Part 15A of the Crimes Act.

Bail

2.24 Part 15A provides that the *Bail Act 1978* (NSW) applies to a defendant in AVO proceedings in the same way as it does to people charged with an offence.[41] Under the *Bail Act 1978* (NSW), there is a general presumption that bail be granted for particular non-

38. Crimes Act s 562A(3).
39. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3675.
40. A de facto relationship is one between two people who live together as a couple and are not married to each other or related by family, and so includes same sex couples: *Property Relationships Act 1984* (NSW) s 4. The amendment was made to the definition of de facto relationships in the Crimes Act by the *Property Relationships (Amendment) Act 1999* (NSW) Sch 1.
41. Crimes Act s 562L.

violent offences.[42] However, that presumption does not apply in relation to domestic violence offences or breach of an ADVO[43] where the defendant has:

- a history of violence;
- been violent to the applicant in the past (whether or not the defendant was convicted of a violent offence); or
- failed to comply with a bail condition that was applied by the court for the protection and welfare of the applicant.[44]

2.25 An accused person is presumed to have a "history of violence" if he or she has been found guilty, within the last 10 years, of a domestic violence offence or of contravening an AVO by an act of violence.[45] Removing the presumption in favour of granting bail does not mean that bail will automatically be refused, but requires the defendant to prove to the court why bail should be granted.[46] In deciding whether or not to grant bail, the court must take into account certain criteria, one of which is the protection of the alleged victim.[47]

Firearms

2.26 When making an AVO (either an ADVO or an APVO) the court may make an order restricting or prohibiting the possession of all or any specified firearms by the defendant.[48] If such an order is made, the court may, by the order, require the defendant to dispose of any firearms in his or her possession and to surrender to the Commissioner of Police any licence permit or authority to

42. *Bail Act 1978* (NSW) s 9.
43. By an act involving violence or that would contravene the stalking provisions in s 562AB of the Crimes Act: *Bail Act 1978* (NSW) s 9A(1).
44. *Bail Act 1978* (NSW) s 9A(1) and s 9A(1A).
45. *Bail Act 1978* (NSW) s 9A(2).
46. R Simpson, *Incidence and Regulation of Domestic Violence in NSW* (NSW Parliamentary Library, Briefing Paper 4/2000) at 19.
47. *Bail Act 1978* (NSW) s 32.
48. Crimes Act s 562D(1)(c).

possess the firearms in question.[49] Further, a licence or a permit to possess a firearm must not be issued to a person who is, or who has, at any time within 10 years before the licence or permit application was made, been subject to an AVO.[50] A licence or a permit is also automatically suspended when an interim AVO is taken out against the licence or permit holder,[51] and automatically revoked if the interim AVO becomes final.[52] The *Firearms Act 1996* (NSW) also prohibits a person who is subject to an AVO from being a firearms dealer.[53]

Family law[54]

2.27 Where couples separate or divorce, orders may be made under the *Family Law Act 1975* (Cth) ("the FLA") detailing the contact arrangements between any children of the relationship and the non-residential parent. In situations where there is an AVO in addition to contact orders, the terms of the AVO and the contact order may conflict with each other. For example, B may have taken out an AVO against A, specifying that A not approach the home of, or telephone, B. Yet, under a contact order, A needs to pick up his or her children from B's home, or telephone B regarding the children. The conflict is heightened if the children are included in the AVO.

2.28 When making an order under the FLA, the Family Court must have the best interests of the child as its paramount

49. Crimes Act s 562D (3).
50. Unless that AVO has been revoked: *Firearms Act 1996* (NSW) s 11(5)(c) and s 29(3)(b) and *Weapons Prohibition Act 1998* (NSW) s 10(3)(b).
51. The suspension remains until the interim AVO is confirmed or revoked: *Firearms Act 1996* (NSW) s 23(2) and *Weapons Prohibition Act 1998* (NSW) s 17(2).
52. *Firearms Act 1996* (NSW) s 23 and s 24 and *Weapons Prohibition Act 1998* (NSW) s 17 and s 18.
53. *Firearms Act 1996* (NSW) s 44A.
54. A more detailed discussion of the issues involved in AVOs and family law proceedings is at para 5.2-5.20.

concern.[55] Within that context, the court must ensure that any orders it makes are consistent with any family violence order and do not expose any person to an unacceptable risk of family violence.[56] Division 11 of the FLA deals with the situation where there are contact orders and an AVO in place. The Family Court has the power to make contact orders that are inconsistent with family violence orders, in which case the contact order will prevail to the extent of the inconsistency with the family violence order.[57] However, a State court, when making or varying a family violence order, has the power to make, revive, vary, discharge,[58] or suspend a Division 11 contact order if the court considers that a person has been, or is likely to be, exposed to family violence as a result of the operation of the contact order.[59]

2.29 Part 15A also has provisions regarding contact orders made under the FLA. An applicant for an AVO, or an applicant to vary an AVO, must inform the court of any relevant contact order, or of proceedings pending in relation to contact orders.[60] The court must have regard to the existence of a contact order when deciding whether or not to grant an AVO.[61] The standard AVO orders[62] provide that the defendant must not approach, contact or telephone the protected person(s) except as agreed in writing or for any purpose permitted under the FLA in relation to counselling,

55. The FLA sets out the factors that the court must take into account when determining what is in a child's best interests. They include the need to protect the child from physical of psychological harm, the incidence of family violence and the existence of a family violence order: FLA s 68F(2)(g), s 68F(2)(i) and s 68F(2)(j).
56. FLA s 68K(1). Parties to proceedings who are aware of the existence of a family violence order must inform the court about the order: FLA s 68J(1). Non-parties may make such a disclosure to the court, subject to the appropriate Rules of Court: FLA s 68J(2).
57. FLA s 68R.
58. A State court cannot discharge a Division 11 contact order when making an interim family violence order, or an order varying a family violence order: FLA s 68T(2)(d).
59. FLA s 68T.
60. Crimes Act s 562FA.
61. Crimes Act s 562FA(2).
62. See Appendix A.

conciliation or mediation, or for the purpose of arranging or exercising access to children.[63]

2.30 Furthermore, the FLA and the PRA both contain provisions which allow for the making of injunctions for the personal protection of a party to a marriage or de facto relationship.[64] The injunctions can be used instead of an AVO, and may relate to the occupancy or use of the home, restrain the other party from entering or remaining in the home, or from entering a specified area surrounding the home, or entering the workplace of the applicant.

PREVIOUS REVIEWS

2.31 The subject of violence, and domestic violence in particular, has generated numerous studies into its causes, methods of prevention and appropriate legal responses. More specifically, the AVO scheme in NSW has been the subject of several recent reviews and evaluations. The most relevant reviews for the Commission's purposes are discussed below.

Bureau of Crime Statistics and Research evaluation

2.32 The Bureau of Crime Statistics and Research ("BOCSAR") conducted an evaluation in 1997 of the AVO scheme in NSW to determine whether or not AVOs were effective in providing protection from violence, abuse and harassment.[65] In his preface to the report, BOCSAR's Director, Dr Don Weatherburn, noted that much of the commentary on AVOs until that point, had centred around issues of process, such as the ease of obtaining an AVO and their potential for abuse in family law proceedings.

63. Orders 5 and 6, respectively.
64. FLA s 114 and PRA s 53. Note that the PRA provision extends to the protection of a child ordinarily residing in the same household as the parties to the relationship: s 53(a).
65. L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (NSW Bureau of Crime Statistics and Research, Sydney, 1997) ("BOCSAR Report 1997").

Dr Weatherburn considered this to be "unfortunate", since "questions about the administration of the [AVO] scheme are secondary to the question of whether the scheme itself is effective".[66]

2.33 The BOCSAR Report surveyed a sample of people (men and women) who had been granted AVOs concerning their experiences after the AVO was issued and their general level of satisfaction with the AVO process. Over 90% of survey respondents perceived that the AVO had resulted in benefits such as increased peace of mind and a greater feeling of safety.[67] This Report is discussed in more detail in Chapter 4.[68]

Survey of Magistrates

2.34 In 1999, the Judicial Commission of NSW released a *Survey of Magistrates*.[69] The Survey detailed the responses of Magistrates to a questionnaire asking about their attitude to their roles, and to the issues involved, in AVOs. All respondents to this survey considered that ADVOs were effective in addressing domestic violence. This is compared with 71% of Magistrates who considered APVOs to be an ineffective way of dealing with personal violence or harassment. One of the major reasons given for the difference in perceived levels of effectiveness between ADVOs and APVOs was the belief that APVOs were increasingly being used unmeritoriously in response to "trivial" matters. Following from this, 52% of Magistrates surveyed considered that APVOs would be better dealt with in a forum other than Local Courts, such as Community Justice Centres or counselling services, compared with 68% who believed the Local Court was the most appropriate forum for dealing with ADVOs.[70]

66. BOCSAR Report 1997at iii.
67. BOCSAR Report 1997 at para 3.6.1.
68. See para 4.13-4.14 and 4.16.
69. J Hickey and S Cumines, *Apprehended Violence Orders: a Survey of Magistrates* (Judicial Commission of NSW, Monograph Series 20, 1999) ("Magistrates Survey").
70. Magistrates Survey at 21.

2.35 Other themes emerging from the Survey included the need for an expanded role for Chamber Magistrates, better court resources, and a better system for screening out frivolous cases, such as the introduction of a filing fee.

Model Domestic Violence Laws

2.36 In September 1996, the Federal Government convened the National Domestic Violence Forum to address appropriate and effective responses to domestic violence. Arising out of that forum, suggestions for reforming the laws dealing with the prevention and punishment of domestic violence were made, including the need for greater national consistency. The Domestic Violence Legislation Working Group, comprising representatives from the Commonwealth and each State and Territory, was formed to review the existing domestic violence laws and propose a uniform or model law. The Working Group released a Discussion Paper in November 1997, and a Report, entitled *Model Domestic Violence Laws,* in April 1999.[71] The Report recommended model legislation for all States and Territories with a view to achieving a comprehensive and co-operative national approach to domestic violence legislation.[72]

71. Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999).

72. The outcomes of the Working Group have been criticised for having limited vision in primarily addressing the inconsistencies between existing laws, rather than adopting a broader, more co-ordinated approach to combating domestic violence, and for failing to recommend a preamble to the Model Laws: R Hunter and J Stubbs, "Model Laws or Missed Opportunity?" (1999) 24(1) *Alternative Law Journal* 3. A preamble setting out the guiding principles regarding ADVOs was incorporated into Part 15A by the *Crimes Amendment (Apprehended Violence) Amendment Act 1999* (NSW): see para 2.20 above.

Criminal Law Review Division Review

2.37 In 1999, the Attorney General requested the Criminal Law Review Division ("CLRD") of the Attorney General's Department to conduct a review of Part 15A. The brief given to CLRD was quite specific, requiring a review of:

(1) The delineation between ADVOs and APVOs.

(2) An alternative regime for dealing with personal violence matters.

(3) The definition of "domestic relationship" for the purpose of determining the scope of the Apprehended Violence provisions.

(4) Whether an authorised justice should have a discretion to refuse to issue process and if so, for what categories of complaint and in what circumstances.

(5) Whether the costs provisions contained in Part 15A are appropriate.

(6) The status of a complaint for an Apprehended Violence Order when an order is made by consent and without admission.

(7) Whether Part 15A should include a preamble stating the objectives of the legislation to guide and inform interpretation.

(8) The further development of technical and other features of the legislation to enhance protection and facilitate the legal process in AVO applications.

(9) Any related matter/s.[73]

73. CLRD Discussion Paper at iii.

2.38 The CLRD review examined procedural issues, in addition to broader questions such as whether or not AVOs were being abused or inappropriately sought, whether AVOs sought in relation to domestic violence offences should receive different legislative treatment from other AVO applications, and if so, how should that difference be reflected.

2.39 Around 50 submissions from interested groups and individuals were received in response to CLRD's Discussion Paper. Overall, most respondents supported the AVO provisions, considering them to be appropriate and functional. However, a few issues were mentioned in a number of submissions which were viewed as being contrary to the objectives of the legislation.

2.40 A recurrent theme in submissions was the inappropriate use of AVOs. While there was overwhelming recognition of the need for some readily available mechanism to protect people in genuine fear of danger, concern was expressed that the ease of obtaining an AVO resulted in trivial and vexatious applications. The major area in which abuse of AVO procedures was identified was in family law disputes. This issue is discussed later this Paper.

2.41 Other issues raised included the desirability of distinguishing between AVOs for domestic violence and those for personal violence due to the need to provide special protection for domestic violence victims. Concern was also expressed that "domestic relationship" should be defined more broadly and flexibly to encompass carers, guardians and "cultural" relatives, so as to make the concept more applicable to Aboriginal people.

3. Policy objectives

- Objectives of AVOs
- Should the objects be extended?

3.1 The first part of the Commission's brief is to assess whether the policy objectives of the AVO provisions, contained in Part 15A of the *Crimes Act 1900* (NSW), remain valid. This chapter attempts to identify the objectives of AVOs and the legislation that underpins them. It considers the impact of the legislative provisions on people who may be more vulnerable than others, either because circumstance makes them potentially more susceptible to violence or abuse, or because they are less likely to be in a position to benefit from obtaining an AVO.

OBJECTIVES OF AVOS

3.2 The primary objective of all protection order schemes is to prevent and protect against violence. This is also the objective of much of the criminal law. However, as can be seen from the discussion in the previous chapter concerning the development of AVO legislation, the criminal law is not always the most effective or appropriate way of preventing violence, intimidation or harassment *before* it occurs. AVOs are designed to be a flexible and accessible supplement to the criminal law. In some cases, they may act as a specific warning not to commit a criminal offence. In other instances, an AVO may also place restrictions on the behaviour or activities of the defendant to limit the likelihood of a violent offence being committed.

3.3 When introducing the AVO legislation into Parliament, the then Premier, the Hon Neville Wran, QC MP, stated the intention of the AVO provisions:

> I believe that this law reform will provide effective and immediate relief for those women who spend their lives worrying when the next battering will be.[1]

3.4 Originally designed to protect against physical violence in domestic relationships, Part 15A currently provides for Apprehended Domestic Violence Orders ("ADVOs") and

1. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 9 November 1982 at 2368.

Apprehended Personal Violence Orders ("APVOs") to be granted where the applicant fears that he or she will be the victim of some form of physical, psychological or emotional abuse.[2] The gradual expansion of Part 15A to cover relationships beyond domestic ones created concerns that the focus of the AVO provisions would shift from domestic violence, and could result in domestic violence being viewed as less significant. In an attempt to allay these concerns, a section setting out the objects of the ADVO provisions was included in Part 15A in 1999. There is no equivalent statement of objectives in relation to APVOs[3] or the provisions containing the offences of stalking and intimidation.[4]

3.5 The stated objects of the ADVO provisions are:

- to ensure the safety and protection of all persons who experience domestic violence; and
- to reduce and prevent violence between persons who are in a domestic relationship with each other; and
- to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women.[5]

3.6 These objects are to be achieved by empowering the courts to make ADVOs to protect people from domestic violence and ensuring that access to the courts is as speedy, inexpensive, safe and simple as is consistent with justice.[6] Section 562AC also states that, in enacting the ADVO provisions, Parliament recognises that domestic violence is unacceptable, perpetrated mainly by men against women and children, and occurs in all sectors of the community.[7]

2. See para 2.2-2.22 for a discussion of the development of AVO legislation.
3. Division 1B.
4. Section 562AB.
5. Crimes Act s 562AC(1).
6. Crimes Act s 562AC(2).
7. Crimes Act s 562AC(3).

3.7 These objects reflect calls over a number of years for guiding principles to be included in legislation dealing with domestic violence. For example, Rosemary Hunter and Julie Stubbs were critical of the Domestic Violence Legislation Working Group for failing to include a preamble or set of principles in the Model Domestic Violence Laws Report,[8] claiming that many debates and controversies concerning domestic violence laws could be resolved by the inclusion of appropriate principles in the legislation. They suggested that the overriding principle should be to protect those who experience domestic violence, and that legislation should also note the prevalence of domestic violence in all sections of the Australian community, the fact that the majority of domestic violence is perpetrated by men against women and children[9] and the need for perpetrators to take responsibility for their actions and for stopping the violence.[10]

3.8 A similar objects statement exists in the *Domestic Violence Act 1995* (NZ) ("the NZ Act"). The object of the NZ Act is to reduce and prevent violence in domestic relationships by recognising that violence, in all its forms, is unacceptable behaviour, and ensuring that there is effective legal protection for victims of domestic violence.[11] Like Division 1A of Part 15A, the NZ Act aims to achieve its objectives by empowering the court to make orders to protect victims of domestic violence and ensuring that access to the court is as speedy, inexpensive and simple as is consistent with justice. However, the NZ Act has a more comprehensive,

8. See para 2.36 for details of the Model Laws project.
9. In 2000-2001, 67.7% of applicants for AVOs were women: information supplied by the Bureau of Crime Statistics and Research, July 2002. A survey of women in 1996 revealed that 23% of women who had ever been married or in a de facto relationship had experienced violence by a previous partner: Australian Bureau of Statistics, *Women's Safety Australia* (Survey, 1996, Cat 4128.0).
10. R Hunter and J Stubbs, "Model Laws or Missed Opportunity?" (1999) 24(1) *Alternative Law Journal* 3.
11. *Domestic Violence Act 1995* (NZ) s 5.

rehabilitative focus than Part 15A,[12] and contains the following additional objectives:

- Providing, for persons who are victims of domestic violence, appropriate programs;
- Requiring respondents to attend programs that have the primary objective of stopping or preventing domestic violence; and
- Providing more effective sanctions and enforcement in the event that a protection order is breached.[13]

SHOULD THE OBJECTS BE EXTENDED?

3.9 It is possible to infer from Part 15A certain unstated objectives which extend beyond those that are prescribed. As noted previously, only the ADVO provisions of Part 15A contain stated objects. This has the advantage of highlighting the special nature of domestic violence, and the particular need to empower women who are most likely to be the subjects of such violence, and the desire of the legislature to provide adequate means of addressing its prevention. However, it could be seen as clouding the focus of Part 15A as a whole to have a set of objectives for one Division but not for the others.

3.10 It is possible to expand the objects of Part 15A to apply generally to ADVOs and APVOs, while still recognising the significance of measures designed to prevent domestic violence. An example can be found in the *Protection Orders Act 2001* (ACT). Like Part 15A, the ACT legislation covers violence in domestic and other relationships. Its objects are:

- To prevent violence between family members and others who are in a domestic relationship, recognising that domestic violence is a particular form of interpersonal violence that needs a greater level of protective response; and

12. The scope of the New Zealand legislation is discussed further at para 6.12.
13. *Domestic Violence Act 1995* (NZ) s 5(2).

- To provide a mechanism to facilitate the safety and protection of people who experience domestic or personal violence.[14]

3.11 An expanded statement of objects for Part 15A could read as follows:

- To supplement the criminal law by attempting to prevent violence, harassment, stalking and intimidation being perpetrated by one person against another;
- To provide an effective, fast, responsive, accessible and enforceable legal mechanism to deter violence in all its forms before it occurs;
- To recognise the particularly insidious nature of violence within domestic relationships and the need for an appropriate and effective legislative response;
- To recognise that women and children are most likely to be the subjects of domestic violence; and
- To limit the opportunities for the legislation to be used inappropriately, particularly outside the domestic context.

The Commission seeks views on whether the objects of Part 15A should be stated in this manner.

ISSUE 1

Are the current objects applicable to ADVOs appropriate?

Is the fact that the objects apply only to ADVOs beneficial, or does it detract from the overall effect of Part 15A?

Should the objects be made more general, yet still emphasise the special nature of domestic violence?

14. *Protection Orders Act 2001* (ACT) s 5.

4. Assessing the objectives

- Difficulties In determining validity
- Effectiveness of protection orders
- Factors influencing effectiveness

4.1 In this chapter, the Commission examines ways of assessing the validity of the policy objectives discussed in the previous chapter, and notes the drawbacks associated with any attempt to make such an assessment. It also looks generally at the effectiveness of AVOs, and Part 15A in particular, as a means of stopping or preventing violence or abuse.

DIFFICULTIES IN DETERMINING VALIDITY

4.2 If the central object of the AVO provisions is to prevent violence and abuse, then the validity of the objectives is determined by their effectiveness in achieving that goal. As noted in Chapter 1, the effectiveness of AVOs can be difficult to measure.[1]

4.3 Available statistics do not provide a comprehensive picture of the use or effectiveness of AVOs, and are open to a number of interpretations. For example, the increase in the number of final AVOs granted in the past year[2] may be interpreted by some to mean that the threshold for obtaining an order is too low. Alternatively, that statistic could be seen as an indication that Part 15A is fulfilling its objective of accessibility, and that better awareness of legislation, better training of police, solicitors, court staff, chamber magistrates, domestic violence counsellors and support services, etc, has led to greater use of the Act.[3] Similarly, recent statistics show that the total rate of assault increased by 7.6% from January 2000 to December 2001.[4] This could mean

1. See para 1.17-1.20.
2. The number of AVOs finalised by Magistrates in Local Courts jumped from 21,800 in 2000 to 26,407 in 2001: NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2001* at Table 1.18 (Statistical Services Unit, March 2002) «www.lawlink.nsw.gov/ bocsar1.nsf/files/ccs01.pdf».
3. J Stubbs and D Powell, *Domestic Violence: Impact of Legal Reform in NSW* (NSW Bureau of Crime Statistics and Research, 1989) ("BOCSAR Report 1989") at 29.
4. The rate of non-domestic assault rose by 6.4%, while domestic assault rose by 10.2% in the same period: BOCSAR, *NSW Recorded Crime Statistics 2001* «www.lawlink.nsw.gov.au/bocsar1.nsf/files/rcs01.pdf».

either that Part 15A has failed in its objective of preventing violence, or that more domestic and personal violence is being reported and prosecuted as a result of measures such as AVOs.

4.4 A final, controversial example concerns the fact that over 40% of interim AVOs are withdrawn or dismissed prior to the final hearing.[5] Some commentators have claimed that this indicates that the applications were not soundly enough based to begin with.[6] Others argue that the rate of withdrawal could reflect a number of factors, such as pressure on the applicant from the defendant, family, friends or the community, fear of reprisal, or uncertainty concerning legal processes, or technical problems such as failing to serve the summons on the defendant.[7] These arguments highlight deficiencies in the law and its implementation for failing to keep applicants in the system. However, the withdrawal rate could also indicate that the act of initiating process in itself was sufficient, in some cases, to stop or prevent violence, indicating that Part 15A had succeeded in its objectives. Consequently, any inferences drawn from statistics must be approached cautiously.

4.5 Another way to gauge the effectiveness of AVOs is to look at the perceptions of people who have used AVOs under Part 15A and other equivalent legislation.

5. In 2001, approximately 44% of ADVOs were withdrawn or dismissed prior to the final hearing (2.39% were dismissed following the hearing. For APVOs, the withdrawal/dismissal rate is over 50%: note that this information is based on unofficial, unaudited figures provided to the Commission on a confidential basis by the Local Courts Statistics Unit.
6. M McMillan "Should we be more apprehensive about apprehended violence orders?" (1999) 37(11) *Law Society Journal* 48 at 53.
7. N Gouda, "The AVO Backlash" (2000) 38(1) *Law Society Journal* 63 at 64.

EFFECTIVENESS OF PROTECTION ORDERS

General views

4.6 Protection orders are said to have the advantage of being quicker, cheaper, more accessible and have better enforcement mechanisms than injunctions under the FLA or PRA.[8] They are seen as a "necessary complement" to, but not a replacement of, the criminal law,[9] and have the potential to act as a useful "circuit breaker" without evoking the full force of the criminal law.[10] In recommending a system of protection orders for the ACT, the Australian Law Reform Commission ("the ALRC") noted the educational importance of such orders:

> [T]he importance of instituting a protection order regime goes beyond whatever effectiveness it may have in preventing or deterring future domestic violence offences. Undoubtedly, it will not be completely effective: it will not stop some offenders. But the symbolic and educative role of the law should not be overlooked. Provision for protection orders is a substantial measure which would reflect the law and society's disapproval of violence in the home. Given the importance of public perceptions in this matter, a clear statement of the law's position is obviously desirable.[11]

8. R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, The Federation Press, Sydney, 2002) at 87-88. See also N Naffin, *Domestic Violence and the Law – A Study of s 99 of the Justices Act (South Australia)*, Women's Advisor's Office, Department of Premier and Cabinet, South Australia (June 1985) ("Naffin Report") at 70.
9. Part 15A specifically refers to concurrent criminal proceedings by providing that a court may grant an AVO even though criminal proceedings exist in relation to the same conduct: Crimes Act s 5620.
10. Alexander at 88.
11. Australian Law Reform Commission, *Domestic Violence* (Report 30, 1986) at para 110.

4.7 Another significant advantage of protection orders is that they shift what in the past has been considered "private" violence between intimate partners, etc, into the public sphere.

> The restraining order is a critical tool for lawmakers attempting to deal with private violence. When properly crafted, the restraining order will protect individuals from immediate harm, prevent the recurrence of violence, and send a message to the community which will discourage others from perpetrating acts of domestic violence.[12]

4.8 Those expressing an alternative view consider that protection orders only deter people who are normally "law abiding" from future acts of violence, and have little effect on persistent offenders.[13] It has also been suggested that breaches of protection orders are not policed as vigilantly as they should be,[14] that they operate unfairly on defendants,[15] and weigh heavily on police and court time.[16]

Effectiveness studies

4.9 A number of studies have been conducted in Australia and overseas in which applicants for protection orders were surveyed concerning their experiences with the procedural aspects of obtaining the orders and their effect in stopping or reducing violence. The surveys revealed positive and negative results.[17] The outcome of these studies needs to be seen in the light of the

12. G R Brown, "Battered Women and the Temporary Restraining Order" (1980) 10 *Women's Rights Law Reporter* 261 at 267.
13. See Naffin Report at 116.
14. H Katzen, "*How do I prove I saw his shadow?*" Responses to breaches of Apprehended Violence Orders, A consultation with women and police in the Richmond Local Area Command in NSW (Prepared for the Northern Rivers Community Legal Centre, 2000).
15. M McMillan at 50.
16. T Nyman, "Apprehended Violence: Industry or Disease?" (1999) 37(11) *Law Society Journal* 52 at 53.
17. Note that each study utilises different methodology and survey samples.

inherent limitations in assessing the effectiveness of AVOs noted by the Commission in Chapter 1.[18]

4.10 Studies of relevant legislation in Western Australia and the United States reported that the majority of applicants were largely satisfied with the outcome and were of the view that obtaining a protection order had been beneficial.[19] In a 1992 Western Australian study, 83% of applicants who received final restraining orders were satisfied with the outcome,[20] 70% saying they would re-apply for an order in the future if further violence occurred,[21] and 67% would advise others to seek a restraining order if the need arose.[22] Curiously, this view was held despite the fact that most applicants said that the order had either no effect, or resulted in reduced levels of physical violence accompanied by a concurrent increase in verbal abuse or harassment.[23] A study in southern California revealed that physical violence continued for 1 in 8 applicants following the protection order, with none reporting increased levels of violence.[24] A Connecticut study found that the orders increased police responsiveness to domestic violence and empowered the applicants to end abusive relationships, with the likelihood of future violence dependant on other factors such as prior criminal history or substance abuse.[25]

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18. See para 1.17-1.20.
19. Note that both of these studies considered only domestic violence protection orders.
20. A Ralph, *The Effectiveness of Restraining Orders for Protecting Women from Domestic Violence* (Report prepared by the Centre of Behavioural Analysis for the WA Office of the Family, March 1992) at Table 4.46.
21. Ralph at Table 4.56.
22. Ralph at Table 4.57.
23. Ralph at Table 4.34, 4.35 and 4.40.
24. J H Kaci, "Aftermath of Seeking Domestic Violence Protective Orders: the Victim's Perspective" (1994) 10(3) *Journal of Contemporary Justice* 204.
25. M Chaudhuri and K Daly, "Do Restraining Orders Help? Battered Women's Experience with Male Violence and the Legal Process" in Buzawa and Buzawa (eds) *Domestic Violence* (Auburn House, Connecticut, 1992) at 245.

4.11 This is consistent with findings of the Australian Institute of Criminology ("AIC") on the effectiveness of legal intervention in domestic violence.[26] When comparing outcomes for women who had sought protection orders as opposed to women who had experienced violence but not sought orders, the AIC found that physical violence had ceased for most women in the 12 months prior to the interview, regardless of whether they had sought police or court intervention.[27] However, for those who had sought both police protection and court orders, the level of violence was significantly reduced compared with women who had sought only one remedy.[28]

4.12 Two studies conducted by the Bureau of Crime Statistics and Research ("BOCSAR"), specifically relating to Part 15A, have yielded mixed results. The first, conducted in 1989, reported that almost half of the survey respondents felt that the AVO had met their expectations of stopping the violence or keeping the defendant away, while a further 20% indicated that the AVO had been at least partially effective. However, almost one-third of respondents considered that the AVO failed to achieve its objectives.[29] Despite this, almost 90% of respondents indicated that

26. M Young, J Byles, A Dobson, "The Effectiveness of Legal Protection in the Prevention of Domestic Violence in the Lives of Young Australian Women" *Trends and Issues in Criminal Justice* (Australian Institute of Criminology, March 2000, No 148) at 4.
27. Young, Byles and Dobson at 4. The AIC notes, however, that this finding should be viewed with caution as it does not factor in the underlying differences between the two groups of women, that is, those who sought protection had sustained more serious injuries, were more likely to have children and their partners were more likely to have a history of violence or criminal behaviour.
28. While violence continued for some women following contacting police and obtaining a court order, there was no reported increase in the severity of violence. There was an increase in violence for some women who contacted police but did not obtain an order: Young, Byles and Dobson at 4.
29. BOCSAR Report 1989 at 120.

they would apply for an AVO again if the need arose in the future,[30] and 39% would encourage others to apply for an AVO.[31]

4.13 The second evaluation in 1997 was more positive overall.[32] BOCSAR surveyed a sample of people (men and women) who had been granted AVOs,[33] concerning their experiences after the AVO was issued and their general level of satisfaction with the AVO process. The findings revealed that, prior to the AVO, 75.2% of subjects had experienced a continuing pattern of violence, abuse or harassment, some for more than ten years.[34] Following the AVO, the vast majority of those surveyed reported that the AVO had brought about a reduction in, or cessation of, the violent, abusive or intimidating behaviour.[35] Over 90% of survey respondents perceived that the AVO had resulted in benefits such as increased peace of mind and a greater feeling of safety,[36] approximately 75% reported that the AVO had created no problems,[37] and 88.1% replied that they would apply for another AVO in the future if the need arose.[38]

30. BOCSAR Report 1989 at 114 and 121. The reasons given include lack of alternatives, the AVO kept the defendant away or was otherwise effective, it created a feeling of safety, and the applicant felt that she should not have to put up with violence anymore.
31. BOCSAR Report 1989 at 115.
32. L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (NSW Bureau of Crime Statistics and Research, Sydney, 1997) ("BOCSAR Report 1997").
33. People were interviewed as soon as the AVO was granted and one month after the AVO was served on the defendant. A sub-sample of people were interviewed again three months after the AVO was served, and a further sub-sample were interviewed after a six month interval following the AVO being served: BOCSAR Report 1997 at para 2.1-2.4.
34. BOCSAR Report 1997 at para 3.2.4.
35. BOCSAR Report 1997 at para 4.1.
36. BOCSAR Report 1997 at para 3.6.1.
37. BOCSAR Report 1997 at para 3.6.2.
38. BOCSAR Report 1997 at para 3.6.3.

4.14 The BOCSAR Report concludes that while these effects may have occurred anyway without the AVO, the fact that there had been a continuing pattern of violence before the AVO was taken out made this unlikely.[39] The reasons given for this apparent effectiveness were:

- the ramifications of breaching an AVO acted as a deterrent;
- the act of taking out an AVO showed the defendant that the applicant was serious;
- the decision to apply for an AVO and pursue the process acted as a catalyst for changes to the lives of the applicants, which lessened the risk of being subjected to violence, abuse or harassment. For example, the AVO may have resulted in the applicant terminating communications with the defendant, or implementing alternative methods for handing children over to the defendant for contact visits.[40]

FACTORS INFLUENCING EFFECTIVENESS

4.15 It is clear from the above studies that many factors contribute to the effectiveness of AVOs. Some concern the scope and procedural elements of the legislation. Other factors impinging on the effectiveness of AVOs operate beyond the scope of the legislation. For example, it is one thing to have adequate legislative provisions enabling easy access to AVOs and providing sanctions in the event that an AVO is breached, but quite another for those provisions to be properly enforced:

> [I]n order to be effective, restraining order legislation must ensure that orders are readily accessible, tailored to the particular needs of the victim, and consistently enforced to deter batterers from continued violent behaviour.[41]

39. BOCSAR Report 1997 at para 4.1.
40. BOCSAR Report 1997 at para 4.1.
41. G R Brown, "Battered Women and the Temporary Restraining Order" (1980) 10 *Women's Rights Law Reporter* 261 at 267.

4.16 As pointed out in the BOCSAR 1997 Report, AVOs can also have repercussions in terms of behavioural changes in the applicant and defendant which can contribute to the effectiveness of AVOs. These have been described as "collateral" effects of AVOs, which can "create an environment in which the offender will perceive that it is in his interest not to continue abuse".[42] The collateral effects are those such as increased police responsiveness to domestic violence, and empowering applicants to become more independent which results in them being at less "risk" of violence.[43] It has been argued that, in effect, the process of obtaining an AVO is "partially its own reward".[44]

4.17 While the Commission's main focus is on legislative reform, we are interested in how the implementation and "collateral" effects of Part 15A can be optimised by improvements to legislative policy and procedure.

Issue 2

Are AVOs an efficient and effective way of preventing violence, intimidation, stalking and harassment? Why or why not?

What general factors promote or hamper the effectiveness of AVOs?

Are these factors largely issues of implementation, or can they be addressed by amending Part 15A?

42. M Chaudhuri and K Daly, "Do Restraining Orders Help? Battered Women's Experience with Male Violence and the Legal Process" in Buzawa and Buzawa (eds) *Domestic Violence* (Auburn House, Connecticut, 1992) at 227.
43. Chaudhuri and Daly at 228.
44. Chaudhuri and Daly at 246.

5. Abuse of AVOs

- ADVOs in the context of family law proceedings
- “Frivolous” use of APVOs

5.1 Allegations are consistently made that AVOs are being sought and used inappropriately. This chapter explores the two major areas particularly affected by those allegations. First, it is suggested that ADVOs are being sought too readily, and often vindictively, in family law proceedings. Secondly, it is alleged that the recent proliferation of APVOs points to a preponderance of trivial applications.

ADVOS IN THE CONTEXT OF FAMILY LAW PROCEEDINGS

5.2 Although domestic violence is commonly dealt with in the Crimes Act by way of AVOs, it is a very relevant issue in the context of family law proceedings. Domestic violence is often about control within relationships and this control factor is at its worst at the end of a relationship. In 1996, the Australian Bureau of Statistics found that 23% of women who had ever been married or in a de facto relationship, experienced violence at some time during the relationship.[1]

The Family Court's approach to family violence

5.3 In the early years of the *Family Law Act 1975* (Cth) ("the FLA"), in keeping with the Act's focus on "no fault" divorce, the Family Court minimised the relevance of domestic violence as a factor affecting the welfare of the children. Thus, some of the very early cases distinguished between the father's affection for his children and his violent behaviour as a husband.[2]

1. Australian Bureau of Statistics, *Women's Safety Australia* (Survey, 1996, Cat No 4128.0).
2. In one case, in assessing the potential of a man accused of violence, the Judge noted that "as a custodial parent I have largely disregarded his behaviour as a husband": *Heidt and Heidt* (1976) 1 FLR 11 576 at 11579.

5.4 This approach had changed significantly by the mid-1990s. In 1994, in the case of *JG and BG*,[3] Chisholm J reviewed the legal principles relevant to allegations of family violence and stressed the importance of recognising its relevance in proceedings relating to custody, guardianship and access. The *Family Law Reform Act 1995* (Cth) ("the FLRA") constructed a framework for dealing with issues of family violence. Section 68F(2) of the FLA now recognises the "need to protect the child from physical or psychological harm caused, or that may be caused" by factors including "family violence".

5.5 However, the FLRA also introduced other principles aimed at shared parenting. This has resulted in the emergence of a very distinct "pro-contact" culture whereby the right of the child to have regular contact with both parents, except in the most serious cases, is now enshrined within the legislation. The relevant provision is section 60B(2) of the FLA which provides that:

(a) children have the right to know and be cared for by both of their parents;

(b) children have a right of contact, on a regular basis, with both of their parents;

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) such rights, duties and responsibilities are to exist except where it would be contrary to a child's best interests.

5.6 While family violence is clearly unacceptable, there are now two almost contradictory responses to it within the family law context. On the one hand, the FLA recognises the serious nature of family violence by specifying it as a relevant factor in considering the "best interests of the child",[4] and requiring that it be reported in all matters before the court.[5] Yet, simultaneously, a presumption in favour of contact appears to have developed.

3. *JG and BG* (1994) FLC 92 515.
4. FLA s 68F(2)(i) and s 68F(2)(j).
5. FLA s 68J.

5.7 The provisions introduced by the FLRA have been under scrutiny in two research reports to ascertain if the best interests of children are being served. The first of these studies found that it is now more difficult to obtain orders for "no contact" at interim hearings, even when there are allegations of violence against the contact parent, and that the court is more likely than previously to try to preserve contact between the child and the non-resident parent, especially at interim hearings.[6]

5.8 A further research study on the operation of the FLRA between 1996 and 1999 found that the previously held view which recognised the impact of domestic violence upon children's welfare appears to have been superseded by concerns about maintaining contact between a parent and child.[7]

5.9 The Chief Justice of the Family Court has also recently noted that there is:

> tension between the increased emphasis on the protection of children from family violence in the Act and the right of contact principle....This tension, the research tells us, has translated into a greater tendency for non resident parents to expect contact, even when domestic violence is an issue, and for there to be pressure on resident parents to agree to contact, despite safety concerns.[8]

6. J Dewar, S Parker, B Tynan and D Cooper, *Parenting, planning and partnership: The Impact of the New Part V11 of the FLA 1975* (Griffith University, Family Law Research Unit, Brisbane, March 1999).
7. H Rhodes, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years* (University of Sydney and the Family Court of Australia, 2000).
8. Chief Justice Nicholson, "In the child's best interest: Inter-disciplinary approaches to child abuse and family violence" (paper delivered at the Colombus Pilot Launch and Symposium, Perth, 9 November 2001).

The interaction between ADVOs and contact orders

5.10 Although there is a procedure for obtaining a restraining order or an injunction aimed at stopping domestic violence under the FLA,[9] it would appear that the ADVO provisions in the Crimes Act are more commonly used by people seeking protection. In many cases, people who have a matter in the Family Court, have either taken an ADVO against their partner or are subject to an ADVO, or are in the process of obtaining one.

5.11 Given that contact between children and non-resident parents is given great emphasis, it is important that contact orders need to focus on the safety of the children and the accompanying parent at the time of hand over as well as generally.

5.12 Clearly, both the Local Court and the Family Court jurisdictions need to take cognisance of the presence of ADVOs or contact orders, as the case may be. Both the FLA and Part 15A deal with the relationship between AVOs and contact orders. Section 562FA of the Crimes Act provides that a person applying for an ADVO or a variation of an ADVO must inform the court of a contact order or a pending contact order. Similarly, section 68K of the FLA requires that parties involved in Family Court matters are obliged to inform the court of any AVO which applies to the child or a member of the child's family. The Family Court has the discretion to make a contact order which is inconsistent with an AVO, but must explain the rationale of the order.[10] In AVO proceedings, the Local Court also the power to make, revive, vary, discharge,[11] or suspend a Division 11 contact order if the court considers that a person has been, or is likely to be, exposed to family violence as a result of the operation of the contact order.[12]

9. FLA s 114 and s 68B. See para 2.30.
10. FLA s 68R. The contact order will prevail over the family violence order to the extent of the inconsistency: s 68S.
11. A State court cannot discharge a Division 11 contact order when making an interim family violence order, or an order varying a family violence order: FLA s 68T(2)(d).
12. FLA s 68T.

Abuse of ADVOs

5.13 The Commission has received submissions from some groups alleging that the ADVO provisions are being abused to gain a tactical advantage in family law proceedings.[13] The CLRD review received similar submissions. This view was also put forward in a parliamentary debate:

> There is some reluctance by defendants of an interim apprehended violence order to consent to an interim AVO because of the impact that that may have on custody or other proceedings. Whilst we might not like it, AVO proceedings are being used as tools in custody battles and in matrimonial arrangements.[14]

5.14 The Survey of Magistrates also found that 90% of respondents were of the view that ADVOs were used by applicants in Family Court proceedings as a tactic to aid their case and deprive their partner of access to children.[15]

5.15 Despite these claims, various reviews that have considered this issue have not found this assertion to be substantiated. The CLRD Review noted that "the allegation that women use AVOs to gain some tactical advantage in family law proceedings is not reflected in research on Family Court outcomes". The CLRD Discussion Paper further stated that:

> the reality is that a claim of domestic violence does not necessarily impact on family law proceedings. There is no empirical evidence to suggest that women are under the

13. See for example, Family Law Reform Association, *Submission*.
14. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 1 July 1999 at 1818.
15. J Hickey and S Cumines, *Apprehended Violence Orders: a Survey of Magistrates* (Judicial Commission of NSW, Monograph Series 20, 1999) ("Magistrates Survey 1999") at 37-38.

> impression that it does and deliberately manufacture false claims of domestic violence for this purpose.[16]

5.16 The CRLD Review argued that the fact that an ADVO complaint is made at the same time as an application for a family court order makes sense, given the number of ADVO complainants with dependent children, and the fact that violence often escalates at the time of the separation, at which time future parenting arrangements also become an issue.[17]

5.17 This issue was also discussed in the research conducted by Rhodes, Graycar and Harrison on the first three years of the FLRA. They acknowledged suggestions that allegations of violence are sometimes used for strategic purposes in litigation. However, they referred to various research studies that have "shown conclusively that only a small proportion of such allegations fail to be established".[18]

5.18 The study also negated the assertion that women were reluctant to facilitate a relationship between their child and his or her non-resident parent, citing a judge's view that:

> women [with domestic violence concerns] usually want contact, either because they genuinely want the children to see him, or because they know he wont get off their back otherwise. So you're struggling to find a way to allow contact where the woman is not going to be exposed to vicarious violence.[19]

5.19 An English study[20] supports this view, where contrary to popular stereotypes, the majority of the women in this study

16. NSW Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law* (Discussion Paper, 1999) ("CLRD Discussion Paper") at 8.
17. CLRD Discussion Paper at 8.
18. Rhodes, Graycar and Harrison at 6.
19. Rhodes, Graycar and Harrison at 76.
20. L Radford, M Hester, J Humphries and K Woodfield, *For the sake of the children: the law, domestic violence and child contact in England* (Women's Studies International Forum, 1997) at 471-482 referred to in L Laing, "Children, young people and domestic

initially supported continued contact between their ex-partners and the children. However, only seven of the 53 women were eventually able to establish contact in such a way that there was no further violence or harassment.

5.20 The Commission is interested to receive more information about the interplay between ADVOs and family law contact orders, and suggestions for any amendments to Part 15A in this regard.

Issue 3

What concerns are there about the use of ADVOs in family law matters?

Does the legislation sufficiently address those concerns? What improvements can be made?

"FRIVOLOUS" USE OF APVOS

5.21 For some time, concern has been expressed over the growth in the number of APVO applications and the impact this has on the effectiveness of AVOs overall.[21] It has been alleged that APVOs are being sought regarding "trivial" issues, such as disputes over building being conducted in a neighbour's backyard,[22] or even for vindictive purposes such as blackmail.[23] It has been suggested that the increasing popularity of APVOs as a way of dealing with friction between neighbours and colleagues has done a disservice to people

violence" *Australian Domestic and Family Violence Clearing House* (Issues Paper 2, 2000).

21. In 2001, 39% of AVOs granted by local courts in NSW were APVOs: NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2001* at Table 1.18 (Statistical Services Unit, March 2002) «www.lawlink.nsw.gov/bocsar1.nsf/files/ccs01.pdf».
22. *Wallin v Tiernan* [1999] NSWCA 353 (Meagher JA, Stein JA, and Davies AJA). See also Magistrates Survey 1999 at 44-45.
23. M McMillan "Should we be more apprehensive about apprehended violence orders?" (1999) 37(11) *Law Society Journal* 48 at 56.

who genuinely fear personal violence or abuse, and taken AVOs too far away from their original purpose of protecting against domestic violence. This view is supported by the majority of Magistrates surveyed in relation to AVO issues in 1999, where 71% of Magistrates surveyed considered APVOs to be an *ineffective* way of dealing with personal violence or harassment.[24] One of the major reasons given for this perception was the belief that APVOs were increasingly being used unmeritoriously in response to "trivial" matters.[25]

5.22 The CLRD Discussion Paper argued that there is "little empirical evidence either supporting or refuting the claim that APVOs are routinely being abused".[26] However, that Discussion Paper also noted that even if APVOs were not being sought vexatiously, it could be argued that the Local Court is not the right forum for dealing with such disputes, given the court's focus on adversarial litigation and the fact that the parties need to continue to live or work in close proximity.[27] This argument is supported by the Magistrates Survey, in which 52% of considered that APVOs would be better dealt with in other forums, such as Community Justice Centres or counselling services.[28]

5.23 The CLRD Discussion Paper noted that "careful consideration" should be given to providing alternative methods of resolving problems that form the basis of APVO complaints. To this end, the Paper put forward options for distinguishing between ADVOs and APVOs, some of which were implemented by the *Crimes Amendment (Apprehended Violence) Act 1999* (NSW). For example, there is a discretion to refuse to issue process in

24. Magistrates Survey 1999 at 25-27. Conversely, all respondents to this survey considered that ADVOs were effective in responding to domestic violence.
25. Magistrates Survey 1999 at 25-27.
26. CLRD Discussion Paper at 11.
27. CLRD Discussion Paper at 11.
28. This is opposed to 68% who believed the Local Court was the most appropriate forum for dealing with ADVOs. Nearly one third of Magistrates said if an APVO involved physical violence, then the Local Court was the best forum, but if it was "trivial" or "non-violent", then Community Justice Centres were more appropriate: Magistrates Survey 1999 at 21.

APVO applications which does not exist in relation to ADVOs. There is also more scope to award costs against the applicant in APVO matters. Both of these measures are discussed below.

The discretion to refuse to issue process in APVO matters

5.24 Where an APVO complaint is made by an applicant in person, the court has a discretion to refuse to issue process. That discretion does not apply where the complaint is made by a police officer.[29] Section 562AK of the Crimes Act provides that a court may refuse to issue process if it is satisfied that the complaint is "frivolous, vexatious, without substance or has no reasonable prospect of success".

5.25 The intention of Part 15A is that "genuine applicants for APVOs continue to have access to the courts for protection".[30] Accordingly, there is a presumption in favour of issuing process where the complaint discloses allegations of:

(a) a personal violence offence; or

(b) stalking or intimidation with intent to cause fear of physical or mental harm; or

(c) harassment relating to the complainant's race, religion, homosexuality, transgender status, HIV/AIDS or other disability.[31]

5.26 In determining whether to make an APVO, the court must take the following matters into account:

(a) the nature of the allegations,

(b) whether the matter is amenable to mediation or other alternative dispute resolution,

29. Crimes Act s 562AK.
30. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3674.
31. Crimes Act s 562AK(4).

(c) whether the parties have previously attempted to resolve the matter by mediation or other means,

(d) the availability and accessibility of mediation or other alternative dispute resolution services,

(e) the willingness and capacity of each party to resolve the matter otherwise than through a complaint for an apprehended personal violence order,

(f) the relative bargaining powers of the parties,

(g) whether the complaint is in the nature of a cross application,

(h) any other matters that the authorised justice considers relevant.

5.27 This provision attempts to facilitate the granting of APVOs in genuine circumstances while filtering out unmeritorious complaints. However, the wording of the provision may be self-defeating. There is a presumption against exercising the discretion to refuse to issue process where the complaint discloses allegations of a personal violence or stalking or intimidation offence, or harassment in certain circumstances. Yet, these are the very grounds on which most AVOs are based.

5.28 The Commission is interested to hear whether courts are in fact exercising the discretion to refuse to issue process in APVO matters, and, if so, in what circumstances. We would also like opinions on whether or not APVOs are being inappropriately sought, and, if so, the extent of the problem.

Issue 4

How effective has the discretion to refuse to issue process in APVO matters been? Has it resulted in fewer "frivolous" applications?

Costs

5.29 Another measure introduced in 1999 to discourage frivolous or abusive APVO claims is the lower threshold for awarding costs against an APVO applicant. Prior to 1999, costs could be awarded against in applicant in all AVO proceedings only where the court was satisfied that the complaint was "frivolous or vexatious". That provision was inserted in 1987 at a time when Part 15A applied only to ADVOs,[32] and reflected the policy that victims of domestic violence should not be deterred from seeking protection because of fear of having to pay the defendant's costs.[33]

5.30 The CLRD Discussion Paper suggested that consideration should be given to whether the same "public policy reasons" for the awarding of costs extended to APVOs as well as ADVOs.[34] Accordingly, in 1999, Part 15A was amended to provide for costs to be awarded against an applicant in APVO matters where the court considers it to be "just and reasonable".[35] Where a police officer applies on behalf of an applicant for an ADVO or an APVO, costs will only be awarded where the officer knew that the complaint "contained matter that was false or misleading in a material particular".[36]

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32. See Chapter 2 for a discussion of the legislative history of AVOs.
33. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 17 November 1987 at 16140.
34. CLRD Discussion Paper at 26.
35. In accordance with the *Justices Act 1902* (NSW) s 81: see Crimes Act s 562N.
36. Crimes Act s 562N. In the ACT, there is a general presumption that each party must bear his or her own costs: *Protection Orders Regulations 2002* (ACT) reg 89. However, the court may order the applicant to pay another party's reasonable expenses where the application is frivolous, vexatious or has not been made honestly: *Protection Orders Act 2001* (ACT) s 95. In the Northern Territory, costs are not awarded unless the court is satisfied that the application was unreasonable and made in bad faith: *Domestic Violence Act 1992* (NT) s 15. Under a new amendment, this rule will also apply to an application for a variation or revocation of an order: *Domestic Violence Amendment Act 2001* (NT) s 8. In Queensland, the court may not award costs unless the application is malicious, deliberately false, frivolous or vexatious: *Domestic Violence (Family*

5.31 The Commission would like to hear particulars about costs being awarded in APVO matters, and views on whether the costs provision discourages frivolous or abusive APVO complaints.

Issue 5

Does the costs provision act as a deterrent against unmeritorious claims? Please give examples.

Should the costs provision be strengthened?

Other measures

5.32 Another measure to discourage the number of trivial APVOs discussed in the CLRD Paper included the introduction of a filing fee.[37] It was noted, however, that a filing fee may discourage genuine applicants with limited financial resources.

5.33 Another option was to refer APVO matters to mediation rather than deal with them in the Local Courts. Part 15A currently provides that, when considering whether or not to grant an APVO, the court must consider if the matter is suitable for mediation. The legislation does not, however, require APVO matters to be referred to mediation before coming to court. Mediation through organisations such as Community Justice Centres ("CJCs") may be appropriate for some types of disputes, particularly those between

Protection) Act 1989 (Qld) s 61. In Tasmania, the court may order either party to pay costs, unless the application was made by a police officer: *Justices Act 1959* (Tas) s 106H. In Victoria, each party bears his or her own costs, unless the court decides that exceptional circumstances warrant otherwise. Costs may be awarded against the applicant if the application is vexatious, frivolous or in bad faith: *Crimes (Family Violence) Act 1987* (Vic) s 14A. In Western Australia, the court makes appropriate orders as to costs. However, if the application fails, the applicant is not ordered to pay costs to the respondent unless the court considers the application to be frivolous or vexatious: *Restraining Orders Act 1997* (WA) s 69.

37. CLRD Discussion Paper at 16.

neighbours, where the disputants have an on-going relationship. An option may be for AVO legislation to require mediation to have been attempted before an APVO can be granted. This could be done either through the parties demonstrating that they have attempted to have the matter mediated before seeking an APVO, or to provide for the court to refer parties to an APVO application to mediation. Should the matter fail to be mediated, and the threat of violence, intimidation or harassment still persist, then an APVO may be granted as a last resort.

5.34 This approach may help to deter trivial APVO applications. However, there would be drawbacks. Not all APVO-type matters, particularly those involving serious violence or stalking, may be amenable to mediation. It would also place the court in the unenviable situation of having to determine whether the threat of violence was insufficiently imminent to defer an APVO pending mediation. Furthermore, there are serious doubts as to the effectiveness of compulsory mediation where the parties do not consent. The proposal would also have significant resource implications as additional mediation would need to be funded. The Commission is interested to hear views on the role that mediation should play in APVO matters.

Issue 6

Should a filing fee be introduced for APVO matters? If so, in what circumstances?

What role should mediation have in the resolution of APVO disputes?

What other measures could be introduced to discourage unmeritorious or abusive APVO applications?

Should AVO legislation continue to provide for APVOs at all? If so, how?

6. Structure of Part 15A

- Separate AVO legislation?
- Separate domestic violence legislation?

6.1 This chapter examines some of the issues that emerge concerning the structure of Part 15A and its location in the Crimes Act. As noted in Chapter 1,[1] Part 15A is a civil procedure obtained on the balance of probabilities, despite being located in the Crimes Act. Being placed in the Crimes Act has the benefit of reinforcing the fact that violence, abuse and harassment is a crime and should be taken seriously. However, it also has the disadvantage of giving the AVO procedure what has been referred to as the "taint of criminality".[2] It could be argued that this detracts from the effectiveness of AVOs as many applicants may want to stop or prevent the violence they fear or are experiencing, without necessarily wanting to invoke criminal consequences for the defendant.[3] This is particularly pertinent in cases of domestic violence where there is often a financial and emotional interdependence between the applicant and the defendant.

6.2 Another issue concerns the fact that the current Part 15A covers both domestic and personal violence. The *Crimes Amendment (Apprehended Violence) Act 1999* (NSW) affected a separation between ADVOs and APVOs to address the concern that had existed in the decade during which Part 15A made no distinction between the two type of orders.[4] There was a feeling that the "conflation" of ADVOs and APVOs had done a disservice to victims of domestic violence and diminished the effectiveness of ADVOs.[5] As the division between the two types of orders was only affected in 1999, there has been no analysis of the practical

1. Para 1.7.
2. M McMillan "Should we be more apprehensive about apprehended violence orders?" (1999) 37(11) *Law Society Journal* 48 at 50.
3. See H Katzen, *"How do I prove I saw his shadow?"* Responses to breaches of Apprehended Violence Orders, A consultation with women and police in the Richmond Local Area Command in NSW (Prepared for the Northern Rivers Community Legal Centre, 2000) at 71-72.
4. See para 2.2-2.22 for a discussion of the history of AVOs.
5. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3764; and NSW Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law* (Discussion Paper, 1999) ("CLRD Discussion Paper") at 13-14.

consequences that have ensued. The Commission is interested to learn what effect the distinction between ADVOs and APVOs has brought about, and whether the objective of improving the effectiveness of ADVOs has been achieved.

6.3 It may be that current legislation strikes the right balance between civil and criminal procedure, and domestic and personal violence. Alternatively, some may think that the effectiveness of AVOs could be better achieved by removing the provisions from the Crimes Act into separate legislation covering both ADVOs and APVOs. Another possibility is to follow the lead of other jurisdictions which have effected a more definite split between domestic and personal violence by having a separate Domestic Violence Act. Both of these options are discussed below.

SEPARATE AVO LEGISLATION?

6.4 Other jurisdictions have specific legislation which deals comprehensively with protection orders. For example, Western Australia has the *Restraining Orders Act 1997* (WA), which provides for violence restraining orders to protect against acts of personal violence,[6] and misconduct restraining orders to prevent intimidating or offensive behaviour, property damage and disorderly conduct.[7] Violence restraining orders may be in force for longer than misconduct restraining orders, and harsher penalties apply. The distinction is based on the defendant's behaviour, and not on the relationship between the applicant and the defendant.[8]

6. *Restraining Orders Act 1997* (WA) Part 2.
7. *Restraining Orders Act 1997* (WA) Part 3.
8. In practice, however, violence restraining orders tend to deal with domestic violence, and misconduct restraining orders are granted in neighbourhood disputes: see Western Australia, *Parliamentary Debates (Hansard)* Legislative Council, 25 March 1997 at 924.

6.5 Under the *Protection Orders Act 2001* (ACT), applicants may obtain a domestic violence order or a personal protection order.[9] The legislation defines domestic violence and personal violence,[10] sets out the objects of, and procedures for, obtaining protection orders, and provides examples and explanations throughout the legislation. It also contains cross references to other relevant legislation such as the *Crimes Act 1900* (ACT),[11] and the *Domestic Violence Agencies Act 1986* (ACT).

6.6 Adopting a similar approach in NSW could be beneficial in that it would provide a central legislative basis for AVOs. This could be seen as a recognition of the importance of AVOs as a means of combating violence, abuse and harassment. The legislation could refer to the domestic and personal violence offences contained in the Crimes Act, yet having separate legislation would help to clarify that AVOs are not criminal in themselves. Such legislation would also have the potential to be more "user friendly" than the Crimes Act, and could offer a more integrated approach by referring to violence support and prevention initiatives, references which may not be appropriate in the Crimes Act.

6.7 The major drawback of separate AVO legislation would be the perception that AVOs had been "sidelined" from the more mainstream Crimes Act. This may give the impression that violent actions which prompt the issuing of an AVO are somehow taken less seriously.

SEPARATE DOMESTIC VIOLENCE LEGISLATION?

6.8 Much has been written on the unique nature of domestic violence as opposed to violence in other relationships:

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9. A personal protection order may take the form of a workplace order: *Protection Orders Act 2001* (ACT) s 8.
10. *Protection Orders Act 2001* (ACT) s 9 and s 10, respectively.
11. For example, the Act contains a Schedule setting out the offences in the Crimes Act which constitute domestic violence offences for the purpose of the *Protection Orders Act 2001* (ACT).

> There are added risks involved in a domestic relationship, including barriers to escaping violence, complex histories and the traditional reluctance of authorities to intervene in the "private" realm. The separation of parties in domestic violence cases, as opposed to non-domestic disputes, often exacerbates rather than diffuses the abuse.[12]

6.9 Domestic violence also involves issues of financial dependence, physical and emotional power and control, and shared emotional history, which set it apart from non-domestic abuse. The situation is further complicated where there are children of the relationship.

6.10 These differences may justify separate legislation dealing with ADVOs only. Some jurisdictions have a dual regime, whereby domestic violence and personal violence protection orders are dealt with under separate laws.[13] Procedurally, those laws are similar to Part 15A.

6.11 Legislation and practice concerning domestic violence prevention in other jurisdictions has a focus beyond restraining orders. For example, New Zealand, Canada, the United States and the United Kingdom have integrated approaches to legislation, policy, practice and service delivery. This reflects an "international recognition that tinkering with reform in discrete sectors of the legal system is an inadequate response".[14]

6.12 The New Zealand legislation serves as a useful model. The *Domestic Violence Act 1995* (NZ) has a rehabilitative focus, attempting to address the violent behaviour itself as well as

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12. CLRD Discussion Paper at 13.
13. For example, the Northern Territory, Queensland, South Australia and Victoria all have legislation which provides separately for domestic violence and personal violence orders: see *Domestic Violence Act 1992* (NT), *Justices Act 1928* (NT), *Domestic Violence (Family Protection) Act 1989* (Qld), *Peace and Good Behaviour Act 1982* (Qld), *Domestic Violence Act 1994* (SA), *Summary Procedure Act 1921* (SA), and the *Crimes (Family Violence) Act 1987* (Vic).
14. R Hunter and J Stubbs, "Model Laws or Missed Opportunity?" (1999) 24(1) *Alternative Law Journal* 3.

delivering sanctions for breach. As noted in Chapter 3, two of the NZ Act's objects are to provide programs for victims of domestic violence, and to require perpetrators to attend programs that have the primary objective of stopping or preventing domestic violence.[15] On the making of a protection order, the court must direct the defendant to attend a specified perpetrator program unless the court considers that there is a good reason for not making that direction.[16] The programs available may be general violence prevention or anger management sessions, or may be specifically tailored so as to meet cultural or other needs.[17] Free educational programs are also available to applicants (upon request made by, or on behalf of, an applicant) and their children.[18] A recent evaluation of the NZ Act reported that the integrated, rehabilitative focus of the Act is seen by those who have used it as being particularly valuable.[19]

6.13 The primary advantage of introducing separate domestic violence legislation would be to emphasise that violence within domestic relationships involves difficult and delicate issues which do not occur in other relationships. It would also be a powerful legislative statement of the importance of measures, such as ADVOs, in combating domestic violence. Separate legislation could also facilitate formal links between the ADVO process and the role of police in domestic violence prevention and prosecution, Domestic Violence Liaison Officers and other victims support services.[20]

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15. *Domestic Violence Act 1995* (NZ) s 5. See para 3.8.
16. *Domestic Violence Act 1995* (NZ) s 32(1).
17. A 2000 evaluation of the NZ Act noted that the range of programs for defendants was improving, although there was a further need to develop programs for defendants from Maori or Pacific Island backgrounds, in same sex relationships, or with intellectual disabilities, mental illness or substance abuse problems: New Zealand, H Barwick, A Gray and R Macky, *Domestic Violence Act 1995: Process Evaluation* (Ministry for Justice and Department for Courts, April 2000) at 14.
18. *Domestic Violence Act 1995* (NZ) s 29.
19. Barwick, Gray and Macky at 121.
20. Liaison and co-ordination between services aimed at stopping or preventing violence is seen as vital: see Hunter and Stubbs at 4.

6.14 As with the option of separate AVO legislation, the major disadvantage of a specific law distinct from the Crimes Act would be the possible perception that domestic violence offences were thereby less serious than other criminal offences. Also, legislation which linked defendants and applicants with rehabilitation or educative programs would only be successful if adequate resources were allocated to fund appropriate programs, and to enforce attendance by defendants.[21]

Issue 7

Should the AVO provisions continue to be located in the Crimes Act? Why or why not?

Should the AVO provisions be contained in separate, comprehensive legislation covering both ADVOs and APVOs? Why or why not?

What has been the effect of the split been between ADVOs and APVOs in Part 15A?

It was noted in the AIC study referred to in para 4.11 that a "co-ordinated approach which systematically links the court protection orders with police intervention may be the best way to protect young women from violence": Young, Byles and Dobson at 6.

21. Of the 221 defendants directed to rehabilitation programs under the NZ Act, only 80 had completed, or were in the process of completing, the program. The most likely explanation for this is either that no suitable program was available or non-attendance at programs was not pursued by court staff: see Barwick, Gray and Macky at 129. It has also been noted that there has been no research on the proven methodologies for running successful programs: see R Busch and N Robertson, "The Gap Goes On: An Analysis of Issues Under the Domestic Violence Act 1995" (1997) 17 *New Zealand Universities Law Review* 337 at 345 and 363-367.

Should there be separate legislation covering only domestic violence? If so, should that legislation extend beyond ADVOs and take a comprehensive, holistic approach like the *Domestic Violence Act 1995* (NZ)? Why or why not?

If separate domestic violence legislation were to be introduced, how should non-domestic violence be dealt with?

7. Definitional issues

- Personal and domestic violence
- Domestic relationship

7.1 In this chapter, the Commission considers the adequacy of the definitions of "personal violence", "domestic violence", and "domestic relationship".

PERSONAL AND DOMESTIC VIOLENCE

7.2 Part 15A provides that an ADVO or an APVO may be issued where a person has reasonable grounds to fear, and in fact fears, the commission of a personal violence offence.[1] Personal violence offence is defined in section 4 of the Crimes Act to include the commission of, or the attempt to commit, a range of offences such as murder, manslaughter, malicious wounding or damage, assault, sexual assault and contravening an AVO.[2]

7.3 There is no express definition of domestic violence in the Crimes Act. Rather, a domestic violence offence is defined as a personal violence offence committed against a person who is in a domestic relationship with the offender. There have been calls for AVO legislation to contain a specific definition of domestic violence, in the belief that it would not only influence the interpretation of lawyers, courts and police, but have a wider impact in terms of "shaping community understandings of domestic violence".[3] The Model Domestic Violence Laws Report recommended that an act of domestic violence be defined as:

- causing or threatening to cause a personal injury to the protected person, or the abduction or confinement of the protected person;
- causing or threatening to cause damage to the protected person's property;

1. Crimes Act s 562AE and s 562AI.
2. Personal violence offences relate mainly to physical violence. Mental and psychological abuse which may give rise to an AVO is covered by the stalking and intimidation provisions in s 562AB of the Crimes Act: see discussion of stalking and intimidation in Chapter 13.
3. R Hunter and J Stubbs, "Model Laws or Missed Opportunity?" (1999) 24(1) *Alternative Law Journal* 3.

- causing or threatening to cause the death of, or injury to, an animal, even if the animal is not the protected person's property;
- behaving in an harassing or offensive way towards the protected person; or
- stalking the protected person.[4]

7.4 Legislation in some other jurisdictions contains definitions of personal and/or domestic violence. While the definitions differ, they all involve some form of actual or threatened personal injury or property damage, and intimidating, harassing and otherwise indecent or inappropriate behaviour.[5] The Commission is interested in hearing views on whether the current definitions in the Crimes Act are adequate, or whether a definition of personal and/or domestic violence should be included in Part 15A to clarify the offences for which an AVO may be sought. Should the option of removing the AVO provisions from the Crimes Act, or of creating separate domestic violence legislation, be favoured, it may be appropriate to develop a definition of personal and domestic violence for inclusion in that legislation.[6]

Issue 8

Are the current definitions of domestic and personal violence offence adequate?

Should domestic and personal violence be better defined in Part 15A? How?

4. Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999) at 18.
5. See for example, *Protection Orders Act 2001* (ACT) s 9 and s 10; *Domestic Violence (Family Protection) Act 1989* (Qld) s 11(1); *Domestic Violence Act 1994* (SA) s 4(2); *Crimes (Family Violence) Act 1987* (Vic) s 4; *Domestic Violence Act 1995* (NZ) s 3.
6. See Chapter 6.

DOMESTIC RELATIONSHIP

7.5 Part 15A provides that people are in a domestic relationship if they:

- are, or have been, married;
- are, or have been, in a de facto relationship within the meaning of the *Property (Relationships) Act 1984* (NSW);
- have, or have had, an intimate personal relationship, whether or not of a sexual nature;
- are living in the same household or other residential facility;
- have, or have had, a relationship where one party is dependent on the other providing ongoing paid or unpaid care; or
- are, or have been, relatives.[7]

7.6 The definition of domestic relationship is significant because it determines whether a person may apply for an ADVO or an APVO.[8] The definition was broadened in 1999 to include same-sex de facto partners, housemates (including tenants, boarders, and people living in institutions or group homes), carers and former relatives, such as ex-mothers-in-law. The CLRD Discussion Paper also raised the issue of whether the definition of domestic relationship should make specific reference to Aboriginal and other cultural traditions.[9] The Northern Territory legislation provides that a domestic relationship exists where someone is a relative "according to Aboriginal tradition or contemporary social practice".[10]

Issue 9

Is the current definition of domestic relationship adequate? If not, how should it be amended?

7. Crimes Act s 562A.
8. The definition would become increasingly important if the option of separate domestic violence legislation is adopted: see para 6.8-6.14.
9. NSW Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law* (Discussion Paper, 1999) at 22.
10. *Domestic Violence Act 1992* (NT) s 3(2)(viii).

8. Applying for an AVO

- How does a person apply for an AVO?
- What happens in court when a person applies for an AVO?
- What if it's an emergency?
- Police applications
- What if the person seeking protection wants to withdraw the application?

8.1 The aim of the legislation is to ensure "that access to courts is as speedy, inexpensive, safe and simple as is consistent with justice".[1] This chapter examines the procedural aspects of applying for an AVO and asks whether the application process is adequate to fulfil the objectives of Part 15A of the Crimes Act.

HOW DOES A PERSON APPLY FOR AN AVO?

8.2 Several avenues are open to people seeking advice about AVOs. They can approach a solicitor, the Chamber Magistrate at the local court, a community legal centre or community advocacy group, a women's refuge, the Legal Aid Commission or the police about obtaining an AVO. The police can either apply on the person's behalf, or can provide information about how to apply in person, through the police Domestic Violence Liaison Officer or Victim Support Officer. In the case of domestic violence orders, applicants can receive information and support from programs such as the Women's Domestic Violence Court Assistance Scheme, which provides support workers and legal representation in most Local Courts.

8.3 An application for an AVO is made by way of complaint made to an "authorised justice",[2] who will usually be a Magistrate.[3] The Local Courts Practice and Procedure Manual states that "the role of the authorised justice is to consider the safety of persons in need of protection (including any children), to provide information and explain court procedures and to assist the complainant in preparing a complaint for court".[4] The complaint must contain all the relevant information the court needs to decide whether to make an order.[5] It may be made orally or in writing.[6] The applicant

1. Crimes Act s 562AC(2)(b).
2. Crimes Act s 562A.
3. Crimes Act s 562AD and 562AH.
4. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo#applying».
5. This should include the protected person's details; the defendant's details, address for service, including his or her work address; the relationship between the protected person and the defendant; when the violence, harassment, molestation, intimidation or

is required to swear an oath or make an affirmation about the truth of the reasons for the order.[7]

WHAT HAPPENS IN COURT WHEN A PERSON APPLIES FOR AN AVO?

8.4 Either the person in need of protection or the police can apply for an AVO.[8] If the police make the application, they arrange for the Police Prosecutor to represent the person in need of protection. People who apply for ADVOs on their own behalf can represent themselves, or arrange for legal representation through legal aid,[9] the Domestic Violence Advocacy Service or by hiring their own lawyer. Legal aid is not available for APVOs, but applicants can ask the duty solicitor for advice. Legal aid is not available for defendants in any AVO proceedings unless there are exceptional circumstances.[10] Interpreters are provided free of charge for people seeking AVOs.

8.5 The defendant can agree or disagree with the order being made. If the defendant agrees, the Magistrate makes the order that day. If the defendant disagrees, the matter is scheduled for hearing at a later date. An interim order can be made for the applicant's protection in the meantime. If there is a criminal charge pending, the court can impose bail conditions until the

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stalking commenced; the general history of violence or harassment; specific examples of the defendant's behaviour, including what the defendant said or did; the most recent and/or most serious example of behaviour; details of any existing Family Law Orders or applications; any previous, pending or existing AVOs or police charges; the period of orders sought; the particular orders sought; and any firearms or weapons available to defendant: see Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo#offpro».

6. Crimes Act s 562C(1)(a).
7. Crimes Act s 562C(1)(b).
8. Crimes Act s 562C(2). In the case of telephone interim orders, only a police officer can apply: Crimes Act s 562H.
9. Provided they meet the means test requirements.
10. See «www.lawlink.nsw.gov.au/lac/lac.nsf/pages/avo_defendants».

matter is heard. At the hearing, the Magistrate hears evidence from both parties, and decides whether or not to make an order.

8.6 If the police were unable to serve the defendant with the complaint and summons in time for the hearing, the case is adjourned. This gives the police more time to serve the defendant. If the defendant has been served with the documents but fails to appear, the Magistrate can make an AVO in the defendant's absence. A copy of the order is given to the applicant by the court staff and a copy is served on the defendant.[11]

Court must explain consequences of an AVO

8.7 The legislation provides that the court must explain to the defendant and the protected person, if they are present:

(a) the effect of the order (including any prohibitions and restrictions imposed by the order), and

(b) the consequences that may follow from a contravention of the order, and

(c) the rights of the defendant and the protected person in relation to the order.[12]

8.8 Similarly if the court varies an order, it must explain the effect of the variation and the consequences that may follow from contravention.[13] The court must also provide a written explanation of these matters to both parties.[14] Part 15A also provides that, as far as it is reasonably practicable to do so, the explanation should be given in a language that is likely to be readily understood by the person.[15]

8.9 It is important that both parties understand the effect of the order. A simple act such as making a telephone call may amount to a breach, which is a criminal offence. The defendant must

11. See para 10.30-10.31.
12. Crimes Act s 562GC(1).
13. Crimes Act s 562GC(2).
14. Crimes Act s 562GC(3).
15. Crimes Act s 562GC(4).

appreciate this in order not to breach the order inadvertently. The protected person must also understand this so he or she can call the police if a breach occurs. There may be problems understanding the order where, for example, one of the parties does not understand English, has poor literacy skills or has an intellectual disability. This problem is exacerbated where court lists are crowded and the court has little time to explain the order. Understanding the order may also be a problem where the hearing is ex parte.

8.10 The Commission would like to hear views on whether the current provisions in Part 15A regarding explaining the consequences of an AVO need expansion and clarification. For example, the legislation could state that an authorised justice is required to explain the type of behaviour that would involve a breach of an AVO, how the AVO sits with family law contact orders, the defendant's right of appeal, and the procedure for varying or revoking an AVO.

WHAT IF IT'S AN EMERGENCY?

8.11 The Local Courts Practice and Procedure Manual states that urgent domestic violence applications should be identified and dealt with expeditiously:

> In domestic violence applications, local courts staff should, in consultation with the applicant, assess the urgency of the situation, the perception of safety and the immediacy of any danger and risk to the applicant and any children prior to attending for an appointment with a Chamber Magistrate. Appointments for urgent domestic violence applications should be provided on the same day as requested.[16]

8.12 If the person seeking protection does not have safe accommodation for the period between the complaint being made and the hearing, the court can make an interim order. If the complainant requests an interim order, the complaint should be

16. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo».

placed immediately before the court for consideration.[17] An interim order can be made without notice having been served on the defendant. However, the order is not enforceable until it has been served.

8.13 The person seeking protection normally has to go to court so a Magistrate can decide whether to make an AVO or not. However, affidavit evidence can be tendered on behalf of the person seeking protection, if the person is unable for good reason to be present, and the matter requires urgent attention.[18] Police can apply for an order over the telephone, where protection is needed outside court hours.[19] They can direct the defendant to remain at the scene of the incident while the telephone application is made. Defendants who refuse can be arrested and detained.[20] The Local Courts Practice and Procedure Manual states that although the majority of telephone interim orders are applied for after hours, police officers can apply for telephone interim orders during business hours, when they are unable to attend the court office to make a complaint.[21]

17. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_orders».
18. Crimes Act s 562BB(3). Note that in New Zealand, the person in need of protection does not have to go to court. If, because of physical incapacity, fear of harm or other sufficient cause, the person seeking protection is unable to appear, any other adult can apply for an order on that person's behalf: *Domestic Violence Act 1995* (NZ) s 12. While this makes it easier to obtain protection, one view is that "because women no longer need to come to court, they no longer appear in front of a judge and get the institutional affirmation that what the perpetrator is doing is wrong. For many women, domestic violence is a very isolating experience and to be able to do the process completely on paper compounds the isolation – there is no chance of meeting other women in the same situation. Under the Act it is more likely that respondents will go to court and they are the ones accessing the support offered by the court staff, rather than the women": New Zealand, *Domestic Violence Act 1995: Process Evaluation* (New Zealand Ministry of Justice, 2000) at 106.
19. See para 10.12-10.17.
20. Crimes Act s 562H(12).
21. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_orders».

Issue 10

Does Part 15A provide fair and effective access to AVOs?

How can procedures for applying for AVOs better reflect the objectives of Part 15A?

Should the provisions requiring authorised justices to explain the consequences of granting an AVO be clarified or expanded?

Do the AVO provisions offer adequate protection in emergency situations?

POLICE APPLICATIONS

8.14 Police officers must apply for an AVO if they suspect or believe that a domestic violence,[22] stalking[23] or child abuse offence[24] "has recently been or is being committed, or is imminent, or is likely to be committed, against the person for whose protection an order would be made".[25] A police officer must apply for an AVO unless the person is at least 16 years of age and intends to make the complaint themselves. Police officers need not apply if they believe there is good reason not to.[26]

8.15 Consequently, while the legislation requires police to apply for AVOs in certain circumstances, there is still a degree of police discretion involved. Various views have been expressed to the Commission concerning the interpretation and desirability of this discretion. For example, some consider that police have too little

22. See Crimes Act s 4(1).
23. See Crimes Act s 562AB.
24. As defined in s 227 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).
25. Crimes Act s 562C(3) and s 562H(2A).
26. However, if they decide not to apply, they must make a written record of the reason for that decision: Crimes Act s 562C(3A) and s 562H(2B).

discretion in applying for AVOs, and should be assisted with a protocol to help them better identify cases where people are genuinely in need of protection.[27] Others consider that too much discretion already exists, placing too great a burden on the person in need of protection to pursue the matter. Particular criticism has been directed at the practice sometimes adopted of asking a victim of domestic violence, in the presence of the perpetrator, whether she or he wants an AVO, rather than taking the decision out of the victim's hands and applying for one automatically.[28] The Commission is interested in hearing views on this matter.

Issue 11

How effective are the current provisions in Part 15A dealing with police applications for AVOs?

Should police have more or less discretion when applying for AVOs?

Should police discretion be more prescribed in AVO legislation?

Is the AVO application process more effective in stopping or preventing violence when police lay the complaint?

27. Correspondence from the Family Law Reform Association dated 17 December 2001.
28. Similar comments have been made in relation to police discretion in prosecuting for breaches of AVOs: see H Katzen, "*How Do I Prove I Saw His Shadow*? Responses to breaches of Apprehended Violence Orders: A consultation with women and police in the Richmond Local Area Command of NSW" (Northern Rivers Community Legal Centre, 2000) at 72.

WHAT IF THE PERSON SEEKING PROTECTION WANTS TO WITHDRAW THE APPLICATION?

8.16 Applicants can withdraw from proceedings before a final order is made. If the police apply for an order on behalf of a person in need of protection, only the police can withdraw the application. The Local Courts Practice and Procedure Manual advises that people who do not want the proceedings to go ahead can discuss their concerns with the police officer who made the application, the Police Prosecutor or the Police Domestic Violence Liaison Officer. Local Court staff also provide information to people who enquire about withdrawing their complaint or other options, including variation of the order, and generally advise a person to seek further advice before withdrawing from proceedings.[29]

8.17 It is estimated that approximately 40% of AVO applications are withdrawn or dismissed prior to the final hearing.[30] As noted in Chapter 4, this figure is open to a number of interpretations. For example, some commentators claim that this indicates that the applications were not soundly enough based to begin with, while others argue that the rate of withdrawal could reflect factors such as pressure on the applicant from the defendant, family, friends or the community, fear of reprisal, or uncertainty concerning legal processes, or technical problems such as failing to serve the summons on the defendant.[31]

8.18 While the reason why so many applications fail to proceed is matter of speculation, the high number of withdrawals is nevertheless an issue of concern. Some AVO applications would be withdrawn because the threat of violence had ceased or diminished. However, it is fair to say that, in at least some cases,

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29. Local Courts Practice and Procedure Manual «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_offpro».
30. In 2001, approximately 44% of ADVOs were withdrawn or dismissed prior to the final hearing (2.39% were dismissed following the hearing. For APVOs, the withdrawal/dismissal rate is over 50%: note that this information is based on unofficial, unaudited figures provided to the Commission on a confidential basis by the Local Courts Statistics Unit.
31. See para 4.4.

people in danger of experiencing violence, particularly domestic violence, are withdrawing AVO applications out of fear. It is indeed arguable that it is in the worst cases of violence, where this fear is greatest, that the withdrawal of an application may be more likely. This presents a problem for police trying to stop the incidence of violence, as it will be harder for them to establish the need for an AVO if they don't have the co-operation of the person in need of protection.

8.19 The prevention of domestic and personal violence is a matter of public interest, not just a private matter. Accordingly, there is an argument that police should be able to proceed with an AVO application where they have reasonable grounds to believe that there is an imminent threat of violence, even in the face of strong reluctance by the applicant. This would, however, need to be balanced with the undesirability of overpowering the will of the applicant. The Commission would like to hear views on this matter.

Issue 12

Given that the primary objective of Part 15A is to protect victims of violence, are the provisions relating to the withdrawal of AVO applications satisfactory?

Should the legislation require certain criteria to be satisfied before an application can be withdrawn?

If so, what should those criteria be?

Should police be able to proceed with an AVO application without the consent of the applicant in certain circumstances?

9. AVOs and vulnerable groups

- Impact on vulnerable groups

9.1 This chapter considers the impact of the AVO provisions on people who may be more vulnerable than others, either because circumstance makes them potentially more susceptible to violence or abuse, or because they are less likely to be in a position to benefit from obtaining an AVO.

9.2 Previous studies have revealed some of the reasons why people have not applied for AVOs. Some of those reasons relate to the procedural aspects of AVOs, such as lack of knowledge concerning law and practice, a lack of confidence in the police or the justice system or concerns about the cost of the process. Other reasons were more personal ones. For example, some people feared the consequences that may follow applying for an AVO, such as violent reprisals from the defendant, the impact on children and the financial repercussions for the applicant if the defendant were removed from the home. There may also be feelings of shame or embarrassment associated with bringing violence and abuse into the "public" arena, or pressure from family, friends, or the local community to remain quiet. In other cases, the mere threat of applying for an AVO may have been sufficient to stop the violent behaviour.[1]

IMPACT ON VULNERABLE GROUPS

9.3 For some groups, the problems associated with applying for an AVO may be more difficult than for others. This may be because some people are in more vulnerable positions than others. It may also be because particular barriers may exist for some people or groups of people that make it more difficult to gain access to violence-prevention measures such as AVOs.

1. A Ralph, *The Effectiveness of Restraining Orders for Protecting Women from Domestic Violence* (Report prepared by the Centre of Behavioural Analysis for the WA Office of the Family, March 1992) at Table 4.24; New Zealand, H Barwick, A Gray and R Macky, *Domestic Violence Act 1995: Process Evaluation* (Ministry for Justice and Department for Courts, April 2000) at 122-124.

9.4 An evaluation of the *Domestic Violence Act 1995* (NZ) made the following observation:

> There are people who need the protection of the Act but tend not to make applications in proportion to their need. Those most frequently mentioned were victims of domestic violence who are: on low incomes but above the threshold for legal aid; Maori; Pacific people; people of other cultures; men; people in same-gender relationships; and victims with gang associations.[2]

9.5 The ability to gain access to AVOs is a significant factor contributing to the effectiveness or otherwise of the legislation. The following paragraphs raise issues concerning particular difficulties that may be experienced by some people. It is not an exhaustive list. The Commission is interested in hearing about other problems that some sections of society may experience in gaining access to AVOs, and suggestions for overcoming them.

Indigenous people

9.6 Reports in Australia have indicated that violence is significantly higher in Indigenous communities than in the general population, and is apparently increasing.[3] A significant amount of violence is believed to go unreported, due to shame, fear of reprisals, lack of information or lack of support.[4] Indigenous people have also consistently been over-represented in the criminal justice

2. Barwick, Gray and Macky at 10.
3. Australia, *Violence in Indigenous Communities* (Report to the Crime Prevention Branch of the Attorney General's Department, 2001) at 2. See also Australian Law Reform Commission, *Equality Before the Law: Justice for Women, Part 1* (Report 69, 1994) ("ALRC Report 69") at para 5.27; Queensland, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (1999); Partnerships Against Domestic Violence, *Rekindling Family Relationships Forum Report* (2001) at iii; D Bagshaw, D Chung, M Couch, S Lilburn and B Waldham, *Reshaping Responses to Domestic Violence: Final Report* (University of South Australia, 2000) at para 3.8.
4. ALRC Report 69 at para 5.27.

system, and their contact with the criminal law is an ongoing issue of concern.[5] Due to this, the victim may distrust police, or may fear that the perpetrator will be imprisoned. A Queensland review of domestic violence orders noted that:

> may be ineffectual due to the way they have been constructed, implemented and enforced, based on ethnocentric and racial values. Some Indigenous women may only want 'time out' from the perpetrator with alcohol and substance abuse counselling and anger management programs enforced, rather than removal, containment or incarceration of their spouse.[6]

9.7 Although AVOs are not criminal measures in themselves, their association with the criminal law may make them a less attractive option for Indigenous people seeking to prevent violence.[7] An alternative may be to provide for a "cooling off" order, whereby the offender is temporarily removed from the home, giving time for the explosiveness of the situation to subside.[8]

People from non-English speaking backgrounds

9.8 Similar problems can exist regarding people from non-English speaking backgrounds. In some cultures it is inappropriate for a woman to take action against a family member. Shame or fear of reprisals may prevent some women from seeking legal assistance. Some victims may not be aware of their legal rights, as

5. The percentage of Indigenous people in prison is 9 times higher than the percentage of Indigenous people in the general population: See NSWLRC, *Sentencing: Aboriginal Offenders* (Report 96, 2000) at 4.
6. Queensland, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (1999) at 4.6.1. See also NSW, Violence Against Women Unit, *Working Well With Women: Creating Non-Violent Futures* (2000) at 28.
7. See H Blagg, *Crisis Intervention in Aboriginal Family Violence, Summary Report* (2000).
8. Such a provision exists in WA: the *Restraining Orders Act 1997* (WA) provides that the court may make a 72 hour "cooling off" order: s 16.

they differ from those recognised by other cultures. Victims may be reluctant to use the legal system as a result of experiences with police or courts in other countries. They may consider that their experience is normal, or that it is not serious enough to warrant legal intervention.[9]

People in rural and remote areas

9.9 There is a higher incidence of domestic violence in rural and remote communities than in urban areas.[10] Specific groups which experience a high incidence of domestic violence include indigenous women, young women and women living on farms, stations or in mining communities. The prevalence of firearms in regional areas also increases vulnerability to violence. Geographic, social and economic isolation compound the difficulties for people who experience violence in accessing legal protection. Victims do not have access to the support networks, alternative housing or other services which are available in metropolitan areas. Those who have no access to money, transport or telecommunications have very limited options. Enforced isolation may become another element of the perpetrator's control over the victim.[11]

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9. S Currie, *A Report on Legislative Options for Non-Spousal Domestic Violence* (Queensland, 1996) at 69; Australia, *Attitudes to Domestic and Family Violence in the Diverse Australian Community* (Partnerships Against Domestic Violence, June 2000) at 31. See also D Bagshaw, D Chung, M Couch, S Lilburn and B Waldham, *Reshaping Responses to Domestic Violence: Final Report* (University of South Australia, 2000) at para 3.5.
10. In 2000-2001, the highest rates of domestic assault in NSW occurred in the Murrumbidgee, the Far West and North Western areas of the State: NSW Bureau of Crime Statistics and Research, *New South Wales Recorded Crime Statistics 2001* «www.lawlink.nsw.gov.au/bocsar1.nsf/files/rcs01.pdf» at 6.
11. The Women's Services Network, *Domestic Violence in Regional Australia: A Literature Review*, 2000. See also D Bagshaw, D Chung, M Couch, S Lilburn and B Waldham, *Reshaping Responses to Domestic Violence: Final Report* (University of South Australia, 2000) at para 3.4.

9.10 AVOs may be of limited use where court hearings are held only infrequently, and access to legal advice and representation are limited. Court assistance and advocacy programs are often unavailable. Confidentiality can also be a problem in smaller communities, where many people, including the police or court staff, may know the perpetrator. The thought of airing disputes publicly may also deter people in regional areas from applying for AVOs.[12]

People with a disability

9.11 People with a disability may experience a number of difficulties gaining access to AVOs. There may be practical or procedural considerations such as the need to provide documents in alternative formats or to explain clearly what AVOs entail. Other difficulties may emerge due to circumstances which may make people with a disability more susceptible to violence. People with an intellectual disability living in group homes may be particularly vulnerable to violence.[13]

9.12 In some circumstances, people with an intellectual disability or a mental illness may lack capacity to apply for an AVO on their own behalf. Currently, Part 15A provides only for applications to be made by a police officer or the applicant themselves, where that

12. The Women's Services Network, *Domestic Violence in Regional Australia: A Literature Review* (2000) at 17.
13. See Women with Disabilities Australia, Response to the Domestic Violence Legislation Working Group Discussion Paper "A Model Domestic Violence Law for Australia" (1998) at «www.wwda.org.au/dvlaws.htm». The incidence of physical, sexual and emotional abuse in residential care facilities was also documented in the Burdekin Report: Australia, Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness* (Report of the National Inquiry into the Human Rights of People with Mental Illness, AGPS Canberra, 1993). Residents of group homes, boarders, and those in a relationship of ongoing care fall within the definition of "domestic relationship", and so may apply for an ADVO.

person is over the age of 16 years.[14] It has been suggested that the legislation should be amended to allow for third parties, such as parents, friends, or the Protective Commissioner or Guardianship Board, to apply on behalf of people with an intellectual disability or mental illness.[15] Provisions of this nature exist in other jurisdictions.[16] The benefit of this approach is that it would provide greater access to AVOs for people with a disability. The major drawback is that it would remove autonomy from people with a disability, and may be used inappropriately: for example, by parents to interfere with the rights of adult children to form relationships.[17] The Commission would like to hear views on this matter.

Older people

9.13 Older people who are frail and dependent on others may be particularly vulnerable to abuse.[18] Types of abuse include emotional manipulation and financial exploitation as well as physical violence. The situation is particularly difficult where an older person is being abused by his or her carer, as the only alternative may be institutionalised care. This may deter older people from seeking legal assistance.[19]

9.14 Older people who fear violence may face additional obstacles when seeking help. They are more likely to suffer from social isolation, and are less likely to be able to communicate effectively.

14. Crimes Act s 562C(2).
15. See CLRD Discussion Paper at 28.
16. See for example, *Domestic Violence Act 1995 (Family Protection) Act 1989* (Qld) s 14; *Restraining Orders Act 1997* (WA) s 25(1)(c); *Protection Orders Act 2001* (ACT) s 11; *Domestic Violence Act 1995* (NZ) s 11 and s 12.
17. See CLRD Discussion Paper at 28.
18. For example, it has been estimated that one in three women who experience physical or emotional abuse in a relationship are over 50 years of age: Australian Bureau of Statistics, *Women's Safety Australia* (Survey, 1996, Cat No 4128.0).
19. P Kinnear and A Graycar, "Abuse of Older People – Crime or Family Dynamics?" *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, No 113, 1999) at 5.

Their allegations may not be taken seriously, especially if they suffer from some form of dementure.[20]

Children and young people

9.15 Children and young people are particularly vulnerable to abuse, both in terms of experiencing it themselves and witnessing others being abused. In situations of domestic violence, children are often exposed to abuse by their parents, or witness one parent abusing the other.[21] Even where they are not directly experiencing it or witnessing it, children are usually aware that it is occurring. Children who are exposed to domestic violence often suffer from low self esteem, poor conflict resolution skills, increased levels of anxiety etc.[22]

9.16 Allegations of violence against children are most frequently raised in the Family Court where one parent is attempting to prevent the other from having contact with the children. The primary function of the Family Court in proceedings related to children is to determine what is in the best interests of the child in all the circumstances of the case. The law clearly recognises and appreciates the damage caused to children not only in becoming the victims of violence but also in witnessing it.

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20. S Currie, *A Report on Legislative Options for Non-Spousal Domestic Violence* (Queensland, 1996) at 29.
21. In 1988, a Queensland "phone-in" revealed that children were present in 88% of violent households and abused by the violent party in 68% of those households. The Report of the Queensland Domestic Violence Taskforce found that 90% of children present in violent homes had witnessed violence against their mother: *Beyond these Walls: Report of the Queensland Domestic Violence Taskforce* (Department of Family Services and Welfare Housing, Brisbane, 1988).
22. T Brown (ed), M Frederica, L Hewitt and R Sheehan, *Violence in Families. The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia* (1998).

9.17 In matters concerning children, State and Territory governments are responsible for the protection of children and adolescents from abuse. In NSW, causing physical injury, sexual abuse [or other harm] is an offence under s 227 of the *Children (Care and Protection) Act 1998* (NSW). Part 15A imposes an obligation on the police to apply for an AVO when a child has suffered such abuse.[23] Part 15A also makes provision for an application for an order for the protection of children to be heard in the absence of the public.[24] Further, children are not required to give direct evidence in proceedings unless such evidence is essential.[25]

Issue 13

What problems do some people experience in terms of gaining access to AVOs?

How can AVO legislation help to overcome those disadvantages?

Should third parties be able to apply for an AVO on behalf of people who may have difficulty making an application themselves? Why or why not?

Are the existing provisions in Part 15A aimed at safeguarding the interests and identity of children during the AVO process adequate?

23. Crimes Act s 562H(2).
24. Crimes Act s 562NA(1).
25. Crimes Act s 562NA(3).

10. Granting an AVO

- Types of AVOs
- Issuing an AVO

10.1 This chapter examines the types of AVOs that may be granted by a court, and whether the current grounds on which AVOs may be granted are satisfactory. It also looks at the adequacy of the provisions stating the circumstances in which the court *must* make an AVO, and when it *may* make an AVO.

TYPES OF AVOS

Interim orders

10.2 An interim order can be made for the period between making the complaint and the hearing. An interim order can be an ADVO or an APVO. It can be made whether or not the defendant is present, and whether or not the defendant has been given notice of the proceedings. The court may admit affidavit evidence tendered on behalf of the applicant if he or she is unable to be present, and the matter requires urgent attention.[1]

10.3 If an interim order is made, the court summons the defendant to appear at a further hearing as soon as practicable after the order is made. This hearing is to decide if a final order should be made. The court may confirm, vary or revoke the interim order, whether or not the defendant appears at the further hearing.[2] While in force, an interim order has the same effect as a final order.[3] The clerk of the court can make or extend an interim AVO where both parties consent.[4]

When does an interim order start?

10.4 A defendant cannot be found guilty of an offence of contravening an interim AVO unless he or she has been served with a copy of the order, or was present when the order was made.[5] This means that if the defendant is present in court when an interim order is made, it is enforceable immediately. If the defendant

1. Crimes Act s 562BB(1A)-(3).
2. Crimes Act s 562BB(4).
3. Crimes Act s 562BB(6).
4. Crimes Act s 562BBA and s 562BBB, respectively.
5. Crimes Act s 562I(2).

is not present in court when an interim order is made, it is not enforceable until the defendant is served with a copy of the order.[6]

How long does an interim order last?

10.5 There is no limitation on how long an interim AVO can last under Part 15A. It simply remains in force until it is withdrawn, dismissed or revoked, or until a final order is made.[7]

10.6 Since an interim AVO may impose significant restrictions on the defendant, the hearing should be held as soon as possible after it is made. However, interim orders may in fact last for months, or even years. This is a concern given that the defendant may not have had the opportunity to contest the order. Some jurisdictions have addressed this concern by placing time limits on the duration of interim orders.[8]

10.7 In other jurisdictions, the legislation provides for the automatic conversion of interim orders into final orders. For example, in Western Australia, the complainant elects whether the initial hearing should be held in the absence of the defendant.[9] At the initial hearing, the court may make an interim order (up to three months) or a "cooling off" order (up to 72 hours).[10] If an interim order is made, the defendant has 21 days to object, in which case the matter is set down for hearing. If there is no objection, the interim order automatically crystallises into a final

6. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_intro». See para 10.30-10.31.
7. Crimes Act s 562E(4).
8. For example, in the Australian Capital Territory, an interim order remains in force for up to 16 weeks where it is made by consent, and otherwise up to 8 weeks. It can be extended for up to 8 weeks, as long as it will not be in force for more than 16 weeks in total. A further interim order can be made only in special or exceptional circumstances: *Protection Orders Act 2001* (ACT) s 52, s 54, s 58 and s 59. In Tasmania, an interim order cannot exceed 60 days: *Justices Act 1959* (Tas) s 106D(2).
9. *Restraining Orders Act 1997* (WA) s 26.
10. Cooling off orders may not last for more than 72 hours and must be served on the defendant within 24 hours of issue: *Restraining Orders Act 1997* (WA) s 16(2).

order.[11] There is a presumption in favour of finalising the order, although the defendant's right to contest the order is preserved. This approach is intended to save people in need of protection from the pressure of having to pursue the matter and make unnecessary court appearances.[12]

10.8 The New Zealand model adopts a similar approach. A protection order is first issued as a "temporary order". The respondent may give notice of his or her intention to defend the order. If no such notice is given then, after three months, the order automatically becomes a final order.[13] Research had indicated that many respondents do not defend temporary orders, and so a high proportion become final orders.[14]

On what grounds can the court make an interim order?

10.9 An interim order can be made "if it appears to the court that it is necessary or appropriate to do so in the circumstances".[15] The legislation gives little guidance to the court on how to exercise this power. Whether an order is deemed necessary or appropriate will vary between cases and between Magistrates. Although the legislation does not refer to the urgency of the situation, some Magistrates may consider that it is only necessary or appropriate to make an interim order where danger is imminent.[16]

10.10 Other Australian jurisdictions employ more specific tests for granting interim orders.[17] An issue for consideration in this review

11. *Restraining Orders Act 1997* (WA) s 31.
12. Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999) ("Model Domestic Violence Laws Report") at 107-109.
13. *Domestic Violence Act 1995* (NZ) s 76.
14. In one study, 82% of temporary orders were not defended, and 73% were converted into final orders: New Zealand, *Domestic Violence Act 1995 Process Evaluation* (New Zealand Ministry of Justice, 2000) at 67.
15. Crimes Act s 562BB(1).
16. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_orders».
17. In the ACT, the court can make an order if "it is necessary … to ensure the safety of the aggrieved person until the application for a

is whether it may be desirable to clarify the grounds for obtaining interim orders under Part 15A of the Crimes Act.

What terms can an interim order include?

10.11 An interim AVO "may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court".[18] The terms that can be included are the same for interim and final orders, and are discussed below at paragraph 10.26.

Issue 14

Should the legislation limit the duration of interim AVOs?

Should the grounds for an interim AVO be clarified?

Should an interim AVO automatically convert to a final order after a specified time period?

final order is decided": *Protection Orders Act 2001* (ACT) s 49. In Queensland, a temporary order can be made "only if it appears to the court … that an act of domestic violence has been committed against the aggrieved spouse by the respondent spouse": *Domestic Violence (Family Protection) Act 1989* (Qld) s 39A(1). In Victoria, the court can make an interim intervention order if it is "necessary to ensure the safety of the aggrieved family member or to preserve any property of the aggrieved family member pending the hearing and determination of the complaint": *Crimes (Family Violence) Act 1987* (Vic) s 8(1). The Tasmanian test is less precise, stating that justices may make an interim order, "if they see sufficient cause to do so", whether or not they are satisfied of any of the matters alleged: *Justices Act 1959* (Tas) s 106D. In Western Australia, the grounds for an interim order are the same as for a final order – the court must be satisfied that, unless restrained, the respondent is "likely" to commit a personal offence against the applicant, or behave in a manner that could cause fear of such an offence. The order must also be appropriate in the circumstances: *Restraining Orders Act 1997* (WA) s 11.

18. Crimes Act s 562AE(4) and s 562AI(4).

Telephone interim orders

10.12 To ensure the safety and protection of people who experience violence, AVOs must be available at all hours. Police can apply for an interim order by telephone when it is not practicable for a court to make an immediate order because of the time or place at which the incident occurs. Telephone interim orders ("TIOs") are available 24 hours a day. Although most are made outside court hours, TIOs are available during business hours if the police are unable to attend the court to make the complaint.[19] Only police are permitted to apply for TIOs.

10.13 To apply for a TIO, the police officer attending an incident must have "good reason to believe an order is necessary to ensure the safety of the person who would be protected by the order or to prevent substantial damage to any property of that person".[20] Police officers must apply for a TIO if they suspect or believe that domestic violence, stalking or child abuse "has recently been or is being committed, or is imminent, or is likely to be committed, against the person for whose protection an order would be made,"[21] unless the person is at least 16 years of age and intends to make the complaint themselves. Police officers need not apply if they believe there is good reason not to.[22]

10.14 An application for a TIO is taken to have the same effect as any other AVO application, and is to contain a summons to the defendant to attend court for a hearing at a specified date.[23] It must be served personally on the defendant by a police officer as soon as practicable after it is made.[24] A TIO lasts 14 days, unless the court revokes it, makes an interim order or dismisses the

19. "Telephone" includes a radio, facsimile and any other communication device: Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_orders».
20. Crimes Act s 562H(2).
21. Crimes Act s 562H(2A).
22. However, the officer must make a written record of the reason: Crimes Act s 562H(2B).
23. Crimes Act s 562H(5A).
24. Crimes Act s 562H(8).

application for an AVO. If the closest local court is not sitting within the 14 day period, it may be extended to 28 days.[25]

On what grounds can the court make a TIO?

10.15 In deciding whether to make a TIO, an authorised justice need only consider whether "there are reasonable grounds for doing so".[26] Presumably the authorised justice will have regard to the intention of the legislation, which is to ensure the safety and protection of persons who experience violence. In making the decision the authorised justice will have to assess the reasonableness of the police officer's belief that an order is necessary to ensure the safety of the person or prevent substantial damage to the person's property.[27]

What terms can a TIO include?

10.16 A TIO states that the defendant "must not assault, molest, harass, threaten or otherwise interfere with the protected person".[28] Unless otherwise ordered, it also specifies that the defendant is prohibited from intimidating or stalking the protected person.[29] If the police officer who applies for the order has good reason to believe the person in need of protection is in imminent danger of personal injury, the TIO can:

- prohibit or restrict the defendant from approaching that person or the person's home, work or other premises, whether or not the defendant has a legal or equitable interest in the premises;
- prohibit or restrict the defendant from approaching the protected person or their home within 12 hours of consuming alcohol or drugs;
- prohibit the defendant from destroying or deliberately damaging or interfering with the protected person's property.[30]

25. Crimes Act s 562H(9) and s 562H(9A).
26. Crimes Act s 562H(3).
27. Crimes Act s 562H(2)(c).
28. Crimes Act s 562H(4).
29. Crimes Act s 562BC.
30. Crimes Act s 562H(5).

10.17 The Commission is interested to hear whether the terms of a TIO as prescribed in Part 15A are sufficient to protect against actual or threatened violence. In particular, the Commission would like to hear views on whether a TIO provides adequate protection against damage to property. As noted above, a TIO may be issued to ensure the safety of the applicant *or* prevent substantial damage to the applicant's property. Yet, the terms of a TIO may prohibit or restrict the destruction of, deliberate damage to, or interference with the applicant's property *only* where a police officer has good reason to believe the safety of the applicant is in imminent danger. This is out of step with ordinary interim and final AVOs, which may be issued where the intimidation or harassment amounts only to actual or threatened damage to property belonging to, or in the possession of, the applicant.[31]

Issue 15

Are the provisions regarding TIOs sufficient to protect people experiencing violence?

Are the grounds for and terms of TIOs adequate?

Do TIOs adequately protect against damage to the applicant's property?

Final orders

10.18 A final order can be made where both parties consent to the order, or, where the order is contested, after a hearing. As noted earlier, Part 15A does not provide for the automatic conversion of interim orders into final orders.

When does a final order start?

10.19 As with interim orders, final AVOs are not effective until the defendant has been served with a copy of the order, or was

31. Crimes Act s 562AE 3(b) and s 562AI 3(b).

present when the order was made.[32] The applicant may be protected by an interim order, until the final order is served on the defendant.

How long does a final order last?

10.20 An final AVO remains in force for the period specified by the court. This is to be as long as is necessary to ensure the protection of the applicant. If no period is specified, the order remains in force for 6 months.[33]

On what grounds can the court make a final order?

10.21 The court may make an AVO where the person to be protected has reasonable grounds to fear and in fact fears:

(a) the commission by the other person of a personal violence offence against the person, or

32. Crimes Act s 562I(2).

33. Crimes Act s 562E(1)-s 562E(3). The duration of final orders differs in other jurisdictions. In the ACT, a final domestic violence order remains in force for a specified period, or 2 years if no period is specified. A longer order can be made in special or exceptional circumstances: *Protection Orders Act 2001* (ACT) s 35. A final personal protection order remains in force for a specified period, or 1 year if no period is specified: s 36. In the Northern Territory, the order remains in force for the specified period: *Domestic Violence Act 1992* (NT) s 4(1A). In Queensland, a domestic violence order remains in force for a specified period of up to 2 years. In special circumstances, the court can specify a longer period: *Domestic Violence (Family Protection) Act 1989* (Qld) s 34. In Tasmania, the order remains in force for whatever period the court considers necessary to protect the person for whose benefit the order is made: *Justices Act 1959* (Tas) s 106B(6). In Victoria, an intervention order remains in force for the period specified or, if no period is specified, until it is revoked: *Crimes (Family Violence) Act 1987* (Vic) s 6. In Western Australia, a final violence restraining order remains in force for the specified period or, if no period is specified, for 2 years: *Restraining Orders Act 1997* (WA) s 16. A misconduct restraining order is generally of a shorter duration, remaining in force for the specified period or, if no period is specified, for 12 months: s 37.

(b) the engagement of the other person in conduct amounting to harassment or molestation of the person, being conduct that, in the opinion of the court, is sufficient to warrant the making of the order, or

(c) the engagement of the other person in conduct in which the other person:

(i) intimidates the person or a person with whom the person has a domestic relationship, or

(ii) stalks the person,

being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.[34]

10.22 These grounds are both subjective and objective: the court must be satisfied that there are "reasonable grounds" to fear personal violence, and that the applicant does in fact fear the defendant. If the subjective element is missing, an AVO will not be granted.[35] There are three exceptions to this. First, where the applicant is under 16; secondly, where the applicant has a general intelligence function which is appreciably below average, or thirdly, where the defendant consents to the AVO.[36]

10.23 The grounds for making a final order are quite broad. Conduct may amount to harassment or molestation even though it does not involve actual or threatened violence. It also includes actual or threatened damage to property belonging to, or in possession of, the person to be protected.[37]

10.24 While some jurisdictions use the "reasonable fear" test,[38] others focus on a specific act of violence and the likelihood of it

34. Crimes Act s 562AE(1) and s 562AI(1).
35. *Wallin v Tiernan* [1999] NSWCA 353.
36. Crimes Act s 562AE(2), s 562AI(2) and s 562BA. See para 10.26-10.28 for a discussion of AVOs made by consent.
37. Crimes Act s 562AE(3) and s 562AI(3).
38. South Australia also uses the "reasonable fear" test. There, the court may make a domestic violence restraining order if there is a reasonable apprehension that the defendant may, unless

happening again.[39] Some combine the "reasonable fear" and "specific act" tests.[40] The models which concentrate on a specific act

restrained, commit domestic violence, and the court is satisfied that the making of the order is appropriate in the circumstances. "Domestic violence" includes personal injury, damage to property, or certain other types of behaviour which reasonably arouse apprehension or fear in the family member: *Domestic Violence Act 1994* (SA) s 4. In deciding whether to make an order, the court must consider, as factors of primary importance, the need to ensure family members are protected from domestic violence and the welfare of any children affected. It must also have regard to the accommodation needs of family members, any relevant family contact order, how a restraining order would affect contact, any hardship that may be caused, the income and assets of the defendant, any other legal proceedings between the parties and any other matter which is relevant in the circumstances of the case: s 6.

39. In the ACT, the court need only be satisfied that the respondent has engaged in domestic violence before making an order. In the case of personal violence, the court must be satisfied that the respondent has engaged in personal violence towards the aggrieved person and may do so again: *Protection Orders Act 2001* (ACT) s 40. Domestic and personal violence include physical injury, damage to property, threats, harassment and offensive behaviour. Domestic violence also includes certain "domestic violence offences": s 9 and s 10. In Queensland, the court can make a domestic violence order if it is satisfied that the respondent has committed domestic violence against the aggrieved spouse, and is likely to again: *Domestic Violence (Family Protection) Act 1989* (Qld) s 20. "Domestic violence" includes wilful injury, property damage, intimidation or harassment, indecent behaviour or a threat to commit any of these: s 11. In Tasmania, the court must be satisfied that a person has caused personal injury or property damage, or has behaved in a provocative or offensive manner, and is likely to do so again. Restraint orders are also available for stalking: *Justices Act 1959* (Tas) s 106B(1). In Victoria, the court may make an intervention order if it is satisfied that the person has assaulted, threatened, harassed, molested or behaved in an offensive manner towards a family member or damaged his or her property, and is likely to do so again: *Crimes (Family Violence) Act 1987* (Vic) s 4.

40. In Western Australia, the court may make a violence restraining order if it is satisfied that, unless restrained, the respondent is likely to commit a personal offence against the applicant, or behave

of violence focus more on the objective conduct of the respondent and less on the subjective perceptions of the applicant. This test has been criticised because it requires the applicant to have suffered violence before an order will be granted.[41] However, where the definition of violence is broad, and includes threats, intimidation and harassment, there is no requirement that physical violence occur before an order will be granted. The "specific act" test has also been criticised where it demands the applicant show the behaviour "is likely" to happen again before an order will be granted.[42] This additional requirement may deny protection to those where violence is not "likely" but is still a real possibility.[43]

10.25 Although Part 15A focuses on "reasonable fear" rather than specific acts, applicants do give evidence of specific acts of violence in order to satisfy the court they have reasonable grounds to fear and in fact fear violence. In practice, there is considerable overlap between the different approaches. However, the "reasonable fear"

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in a manner that could cause fear that of such an offence. Granting a violence restraining order must also be appropriate in the circumstances: *Restraining Orders Act 1997* (WA) s 11. The court may make a misconduct restraining order if it is satisfied that the respondent is likely to behave in a manner that is intimidating or offensive to the applicant, cause damage to property in the applicant's possession or behave in a manner that breaches the peace. Granting a misconduct restraining order must also be appropriate in the circumstances: s 34. The Northern Territory also has a mixed test. The court may make a restraining order where it is satisfied that the defendant has assaulted, caused personal injury or damaged property and is likely to do so again, or has threatened to assault, cause personal injury or damage property and is likely to repeat or carry out the threat. The court may also make an order where the defendant has behaved in a provocative or offensive manner and the behaviour is likely to lead to a breach of the peace, including behaviour that may cause reasonable fear of violence or harassment: *Domestic Violence Act 1992* (NT) s 4(1).

41. R Hunter and J Stubbs, "Model Laws or Missed Opportunity?" (1999) 24(1) *Alternative Law Journal* 3.
42. *Domestic Violence (Family Protection) Act 1989* (Qld) s 20, *Justices Act 1959* (Tas) s 106B(1), *Crimes (Family Violence) Act 1987* (Vic) s 4.
43. Model Domestic Violence Laws Report at 65.

test may be easier to satisfy because evidence of behaviour beyond threats, intimidation and acts of violence may give rise to reasonable fear, for example evidence that the respondent has an explosive temper and is skilled in martial arts.[44]

What terms can a final order include?

10.26 A final order "may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable".[45] Unless otherwise ordered, every AVO prohibits the defendant from intimidating or stalking the protected person.[46] An order can prohibit the defendant from approaching that person or the person's home, work or other premises. It can prohibit or restrict any specified behaviour which might affect the protected person. It can also prohibit the possession of firearms.[47]

Issue 16

Is the default duration of 6 months for a final order appropriate?

Are the grounds for a final order adequate?

Should the criteria in the legislation for obtaining an AVO be more specific? If so, how?

How workable and effective are the prohibitions and restrictions that may be included in an AVO?

Orders made by consent

10.27 A court can make an AVO without being satisfied that the complainant has reasonable grounds to fear and in fact fears domestic or personal violence, if both parties consent to the making

44. Model Domestic Violence Laws Report at 59.
45. Crimes Act s 562AE(4) and s 562AI(4).
46. Crimes Act s 562BC.
47. Crimes Act s 562D(1).

of the order. By consenting to the order, the defendant does not admit to any of the particulars of the complaint. Where the parties consent, the court can only conduct a hearing if the order is a final order and it is in the interests of justice to do so.[48]

10.28 Both interim and final orders can be made by consent. The clerk of the court can make or extend an interim order where both parties consent.[49] However, only the court can make a final order.[50] One issue to be considered is whether the clerk of the court should be able to issue final AVOs where both parties consent.

10.29 Granting AVOs by consent is expedient as the matter does not have to proceed to a final hearing. Also, the applicant benefits from immediate protection without having to wait for the order to be served on the defendant. However, there is the risk of parties not understanding all the consequences that will flow from an AVO.

Issue 17

Are the provisions allowing for AVOs to be made with the consent of both parties operating fairly and effectively?

Should clerks of the court be able to issue final AVOs by consent?

Ex parte orders

10.30 When an initial complaint is made, the defendant is served with a copy of the complaint and a summons to attend court at a particular date and time. If the defendant is present when an order is made, the clerk will serve a copy of the order personally on the defendant, or can arrange for the order to be sent by post. If the

48. Crimes Act s 562BA.
49. Crimes Act s 562BBA and s 562BBB.
50. Crimes Act s 562BA.

defendant does not attend court, an order can be made ex parte. A copy of the order is then served on the defendant by a police officer or such other person as the clerk thinks fit. Service can be affected in other manners, "as the court directs".[51]

10.31 Service is important because defendants cannot be charged with contravention of an AVO unless they have been served with a copy of the order. An AVO does not afford any protection until it has been served on the defendant. If the defendant cannot be located, the order provides no protection, even if the defendant knows of its existence. This can be a problem, especially in regional areas, for example if the defendant leaves for long periods of time for work.

Issue 18

Are the current provisions relating to service effective?

Standard orders

10.32 While courts have total discretion as to the terms of an interim or final AVO, they tend to rely on standard order forms which contain a checklist of commonly used terms.[52] The Local Courts Practice and Procedure Manual states that the use of standard orders promotes consistency and efficiency, and clarifies the order for the parties, court staff and police. Reliance on standard orders means police records are easier to maintain and orders are easier to enforce. Importantly, Magistrates still have the option of tailoring orders to the circumstances of each case.[53]

51. Crimes Act s 562J.
52. See Appendix A.
53. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_intro».

10.33 The standard orders were written following consultation with Magistrates, lawyers and domestic violence agencies. However, they are not contained in the legislation, and may vary from court to court. For the sake of consistency, it may be desirable to include the standard orders in a schedule to the AVO legislation, or prescribe them by regulation. The Commission seeks views on this matter.

Issue 19

Are the standard orders adequate? If not, how should they be revised?

Should the standard orders be incorporated as a schedule to the AVO legislation?

ISSUING AN AVO

10.34 The legislation states that, if the grounds for making an order are satisfied, the court "may" make an AVO.[54] In relation to APVO proceedings, the court has a broader discretion to refuse to issue process.[55] In some circumstances, the court "must" make an order.[56] Whether a court will make an order may also depend on whether or not bail is granted.

When must the court make an AVO?

10.35 The court must make an AVO when a defendant pleads guilty to, or is found guilty of, a domestic violence offence or an offence involving intimidation or stalking.[57] Similarly, a court must

54. Crimes Act s 562AE(1) and s 562AI(1).
55. Crimes Act s 562AK. See para 5.24-5.28 for a discussion of the discretion to refuse to issue APVOs.
56. Crimes Act s 562BE and s 562BF.
57. Crimes Act s 562BE(1).

make an interim AVO when a person is charged with one of those offences.[58] In these cases the court must make the order unless it is not required, for example because an order has already been made or because the person in need of protection opposes the making of the order.[59]

When can the court choose whether or not to make an AVO?

10.36 Part 15A provides that, on complaint, a court "may" make an AVO.[60] In deciding whether or not to make an order, the court is required to consider certain factors. If the order is going to prohibit or restrict access to the defendant's residence, the court must consider:

(a) the accommodation needs of all relevant parties, and

(b) the effect of making an order on any children living or ordinarily living at the residence, and

(c) the consequences for the person for whose protection the order would be made and any children living or ordinarily living at the residence if an order restricting access by the defendant to the residence is not made.[61]

10.37 A person who applies for, or applies to vary, an AVO must inform the court of any relevant family law contact order, or any application for such an order that may be pending.[62] In deciding whether to make or vary an AVO, the court must:

> (a) consider whether contact between the protected person, or between the defendant, and any child of either of those persons is relevant to the making or variation of the order, and

58. Crimes Act s 562BF(1).
59. Crimes Act s 562BE(2) and s 546BF(3).
60. Crimes Act s 562AE(1) and s 562AI(1).
61. Crimes Act s 562D(2).
62. Crimes Act s 562FA(1).

(b) have regard to any relevant family contact order of which the court has been informed.[63]

10.38 The legislation in some other jurisdictions is more prescriptive, giving the courts more structured guidance.[64]

63. Crimes Act s 562FA(2).

64. For example, the ACT legislation states that the paramount consideration in deciding whether to make a protection order is the need to ensure that the aggrieved person is protected from domestic or personal violence: *Protection Orders Act 2001* (ACT) s 6(1)(a). The court must also consider the welfare of children who may be affected by the defendant's behaviour, the accommodation needs of the aggrieved person and any children, any hardship that may be caused by the making of the order, the income and assets of the defendant and aggrieved person, whether contact between the aggrieved person or the defendant and any child of either of them is relevant, any previous domestic or personal violence committed by the defendant, any previous protection orders and any previous contraventions, the need to ensure property is protected from damage, and anything else that is relevant: s 41. A protection order must be as unrestrictive on the personal rights and liberties of the defendant as possible, while still achieving the objects of the Act: s 6(2). In South Australia, the court must consider, as factors of primary importance, the need to ensure family members are protected from domestic violence and the welfare of any children affected. It must also have regard to the accommodation needs of family members, any relevant family contact order, how a restraining order would affect contact, any hardship that may be caused, the income and assets of the defendant, any other legal proceedings between the parties and any other matter which is relevant in the circumstances of the case: *Domestic Violence Act 1994* (SA) s 6. In Western Australia, the court must consider, as matters of primary importance in violence restraining order proceedings, the need to ensure the applicant is protected from personal violence, the need to prevent behaviour that causes fear of personal violence and the welfare of any children affected. It must also consider the accommodation needs of the parties, any hardship that may be caused, any family orders, any other current legal proceedings between the parties, the defendant's criminal record, any previous similar behaviour and any other relevant matters: *Restraining Orders Act 1997* (WA) s 12. In Tasmania, the

Issue 20

Are the circumstances in which the court must make an AVO appropriate?

Should the legislation be more specific about the factors the court must consider before making an order?

Should the legislation indicate how the factors should be weighted?

Should different factors be listed for consideration in applications for interim, telephone interim and final orders?

paramount consideration is the protection and welfare of the person for whose benefit the order is sought. The court must also consider any relevant family contact order, and whether access between the parties and any child who is a member of the family of either party is relevant to the making of the order: *Justices Act 1959* (Tas) s 106B(4AAB).

11. Consequences of an AVO

- What happens after the court makes an AVO?
- What if the defendant breaches the AVO?
- What happens if the applicant contributes to the breach?

11.1 This chapter discusses the consequences that the granting of an AVO may have for both the applicant and the defendant. Because breaching an AVO is a criminal offence, the consequences for the defendant are potentially quite serious.

WHAT HAPPENS AFTER THE COURT MAKES AN AVO?

Consequences for the applicant

11.2 An AVO protects the person from violence. Importantly, it provides protection from behaviour which is not in itself criminal, such as threats or unwanted communication. Applying for an AVO is also likely to empower a victim of violence, as it moves the issue from the private to the public realm, and indicates to the defendant that violence will not be tolerated.

Consequences for the defendant

11.3 The consequences for the defendant can be significant. For example, defendants can be prevented from residing in, or restricted in approaching, their homes. An AVO is a civil order so it does not give the defendant a criminal record. However, a record of the order is kept on a police database.

11.4 Defendants must dispose of any firearms in their possession or surrender them to the police,[1] and a licence or a permit to possess a firearm must not be issued to a person who is, or who has, at any time within 10 years before the licence or permit application was made, been subject to an AVO.[2] A licence or a permit is also automatically suspended when an interim AVO is

1. Crimes Act s 562D(3).
2. Unless that AVO has been revoked: *Firearms Act 1996* (NSW) s 11(5)(c) and s 29(3)(b) and *Weapons Prohibition Act 1998* (NSW) s 10(3)(b).

taken out against the licence or permit holder,[3] and automatically revoked if the interim AVO becomes final.[4] This will be significant where the defendant requires a firearms licence for work, for example, defendants in rural areas or who work as security guards.

11.5 A defendant is also disqualified from serving on a jury for the duration of the AVO.[5]

WHAT IF THE DEFENDANT BREACHES THE AVO?

Consequences for the applicant

11.6 It is a crime to breach an AVO.[6] If the defendant breaches any of the terms in the order, the applicant should report the breach to the police. Police are instructed to "treat all breaches of AVOs seriously, no matter how minor".[7] Police can take immediate action, for example by removing the defendant from the protected person's house. They should also investigate the breach, take evidence and lay a charge. If the police believe that the defendant has breached an AVO, they can arrest and detain the defendant without a warrant.[8]

11.7 Effective police response is the key to ensuring the safety of the protected person. The effectiveness of AVOs may be undermined where police response is inadequate. Police are advised not to mediate or counsel parties as a substitute for charging.[9] In practice, however, police may take informal action

3. The suspension remains until the interim AVO is confirmed or revoked: *Firearms Act 1996* (NSW) s 23(2) and *Weapons Prohibition Act 1998* (NSW) s 17(2).
4. *Firearms Act 1996* (NSW) s 23 and s 24 and *Weapons Prohibition Act 1998* (NSW) s 17 and s 18.
5. *Jury Act 1977* (NSW) Schedule 1(3)(a).
6. Crimes Act s 562I.
7. *Police Service Handbook* (NSW Police Service, 2000) at D-22.
8. Crimes Act s 562I(3). See also *Bhattacharya v Hamilton* [2000] NSWSC 102.
9. *Police Service Handbook* (NSW Police Service, 2000) at D-18.

only, such as warning the perpetrator.[10] Difficulties can arise for the police where there is insufficient evidence to support a charge.

Consequences for the defendant

11.8 A defendant who breaches any of the terms in the order may be arrested and charged with an offence. If the police believe that a person has breached an AVO, they can arrest and detain the person without a warrant,[11] and as soon as is practicable bring the person before a court.[12]

11.9 It is not an offence unless the defendant was in court when the order was made, or has been served with a copy of it.[13] Further, the defendant must "knowingly" contravene the order.[14] This means that the defendant must be aware of the circumstances that make the behaviour illegal. A defendant who inadvertently breaches the order, for example by entering a building without knowing the protected person is inside, will not be guilty of an offence.[15]

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10. H Katzen, "*How Do I Prove I Saw His Shadow*? Responses to Breaches of Apprehended Violence Orders: A consultation with women and police in the Richmond Local Area Command of NSW (Northern Rivers Community Legal Centre, 2000) at 138.
11. Crimes Act s 562I(3). See also *Bhattacharya v Hamilton* [2000] NSWSC 102.
12. Crimes Act s 562I(4).
13. Crimes Act s 562I(2).
14. Crimes Act s 562I(1).
15. *R v Sarri* [1999] ACTSC 109 at para 25 (Crispin J). A strict liability basis for contravention of a protection order has also been rejected in New Zealand. The prosecution does not have to show that the defendant intended to breach the order, but does have to show that the defendant knew of the existence of the order and knew that his or her conduct may be in breach of the order: *R v Police* [1999] 2 NZLR 501. In the Northern Territory, it is a defence that the act complained of was necessary to enable the defendant to exercise a legal right or perform a legal duty, or that the contravention was the result of an emergency and a similarly circumstanced ordinary person would have done the same: *Domestic Violence Act 1992* (NT) s 10.

11.10 Conduct constituting a breach may be a criminal offence in itself, for example a physical assault. Where an offender is sentenced for assault, the existence of an AVO may be an aggravating factor.[16] Alternatively, conduct which is otherwise lawful will be criminal if it amounts to a contravention of the civil order. For example, telephoning the protected person will be a criminal offence where the AVO states that the defendant must not contact the protected person. It is no defence that the protected person initiated the breach.[17]

11.11 The maximum penalty for breaching an AVO is 2 years imprisonment, a fine of $5,500, or both.[18] If the breach involves

16. *R v Moran* [2000] NSWCCA 379 at para 11 (Dowd J).
17. See para 11.12-11.19.
18. Crimes Act s 562I(1). In the ACT, the maximum penalty for breaching a protection order is, for a first offence, 50 penalty units, 2 years imprisonment or both. For a subsequent offence, it is 50 penalty units, 5 years imprisonment or both: *Protection Orders Act 2001* (ACT) s 34. In the Northern Territory, the maximum penalty is $2,000 or 6 months imprisonment. A subsequent offence attracts a mandatory prison term of between 7 days and 6 months: *Domestic Violence Act 1992* (NT) s 10. In Queensland, the maximum penalty for breaching a protection order is 40 penalty units or 12 months imprisonment: *Domestic Violence (Family Protection) Act 1989* (Qld) s 80. In South Australia, the maximum penalty for breaching a domestic violence restraining order is 2 years imprisonment: *Domestic Violence Act 1994* (SA) s 15. In Tasmania, the maximum penalty is 10 penalty units or 6 months imprisonment: *Justices Act 1959* (Tas) s 106I. In Victoria, the offender is liable, for a first offence, to a maximum penalty of 240 penalty units or 2 years imprisonment. Subsequent offences carry a maximum penalty of 5 years imprisonment: *Crimes (Family Violence) Act 1987* (Vic) s 22. In Western Australia, The penalty for breaching a violence restraining order is $6,000 or 18 months imprisonment, except where there is a "cooling off" order (lasting 72 hours or less), in which case it is $2,000 or 6 months imprisonment. The penalty for breaching a misconduct restraining order is $1,000: *Restraining Orders Act 1997* (WA) s 61. The *Model Domestic Violence Laws Report* recommend a maximum penalty of $24,000 or 1 years imprisonment for a first offence, or 2 years imprisonment for a subsequent offence: see Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999) s 64.

violence by a defendant who is 18 years or over, the defendant *must* be sentenced to a term of imprisonment, unless the court orders otherwise. The court must give reasons if the offender is not imprisoned.[19] There is a concern about the appropriateness of fines as penalty for breaching an AVO. For example, where the parties live together and share a household income, the applicant would effectively be paying part of the fine. Further, a fine may trivialise the seriousness of the breach.[20]

WHAT HAPPENS IF THE APPLICANT CONTRIBUTES TO THE BREACH?

11.12 Under Part 15A, breaching an AVO is still a crime, even if the applicant contributes to the breach. For example, if the AVO prohibits the defendant from entering the premises, it will not be a defence that he or she was invited in by the applicant.

11.13 In one survey, police officers were asked how often they considered that applicants contributed to a breach of an AVO. It was reported that some police officers "believe women have some role in the breach of the AVO".[21] Further, a majority of the police officers surveyed indicated they would consider charging the applicant for aiding or abetting the breach,[22] where he or she

19. Crimes Act s 562I(2A) and s 562I(2C). Between January 1998 to December 2001, only 11% of offenders were imprisoned for contravention of an AVO, while 28% received a fine only. Other penalties included good behaviour bonds (39%), community service orders (7%), and periodic detention (2%). 7% of offenders who were found guilty of the offence had charges dismissed without proceeding to conviction, and 4% had their sentences suspended: Judicial Commission of NSW, *Judicial Information Research System*.
20. H Douglas and L Godden, "The Decriminalisation of Domestic Violence" (2002) 11 *Australian Domestic and Family Violence Clearinghouse Newsletter* at 8.
21. Katzen at 269.
22. The Crimes Act provides that "any person who aids, abets, counsels or procures, the commission of a minor indictable offence … may be indicted, convicted, and punished as a principal offender": s 351.

provoked the defendant, or encouraged the defendant to breach the AVO.[23]

Consent as a defence

11.14 Western Australia is the only Australian jurisdiction that currently provides for consent as a defence to a breach:

> It is a defence to a charge of breaching a restraining order for the person who is bound by the order to satisfy the court that the person acted with the consent … of the person protected by the order.[24]

11.15 "Consent" must be freely and voluntarily given. It does not include consent obtained by force, threat, intimidation, deceit, or any fraudulent means.[25] The defence is not available where the protected person is a child or someone for whom a guardian has been appointed.[26] Further, the court may revoke the restraining order where the defence is established.[27]

11.16 The defence was included because in some circumstances, there may be a genuine reason for breaching a restraining order. For example, there may be an emergency such as a funeral or a child's operation, where there is no time to go to the court for a variation.[28] In other circumstances, the parties may have reconciled without seeking a variation or revocation. It would also provide a defence where the applicant contributed to or encouraged the breach.

23. Katzen at 88-89 and 269-270.
24. *Restraining Orders Act 1997* (WA) s 62(1).
25. *The Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).
26. *Restraining Orders Act 1997* (WA) s 62(2).
27. *Restraining Orders Act 1997* (WA) s 62(3).
28. Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 June 1997 at 4017. See discussion at para 12.8-12.17 regarding variation and revocation of an AVO.

11.17 The inclusion of the defence in the Western Australian legislation was controversial. It was argued that, because domestic violence often involves a power imbalance between the victim and perpetrator, the defence would further the interests of perpetrators and would weaken the legal position of people in need of protection.[29] There was some concern that a defence of consent might undermine the whole purpose of the restraining order legislation, creating "a huge loophole in what is otherwise very sound and well-constructed legislation".[30]

11.18 The consent defence has reportedly made enforcement difficult, as police are uncertain when to take action for a breach.[31] The Auditor General for Western Australia reported recently that police are instructed not to charge for a breach where they are satisfied that the applicant consented.[32] The Western Australian Department of Justice has recommended the removal of consent as a defence.[33] Instead, orders should permit a degree of contact agreed by both parties, which could be varied by the normal processes.

29. Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 June 1997 at 4001.
30. Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 June 1997 at 4009. See also Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 May 1997 at 3487; Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 May 1997 at 3490; and Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 June 1997 at 4005.
31. Auditor General for Western Australia, *A Measure of Protection: Management and Effectiveness of Restraining Orders* (Report 5, October 2002) at 38.
32. Police in 70% of localities interviewed reported that they do not lay charges for breach where there is evidence of consent unless an assault has occurred: Auditor General for Western Australia, *A Measure of Protection: Management and Effectiveness of Restraining Orders* (Report 5, October 2002) at 38.
33. Western Australia, *Evaluation of the Restraining Orders Act 1997* (Department of Justice, 1998) at Recommendation 27.

11.19 The *Model Domestic Violence Laws Report* did not support including consent as a defence to a breach of a protection order:

> Submissions were largely opposed to this defence being incorporated into the Model Laws because of concerns that the "consent" may often have been a response to a fear or a threat. Further, it was stated in submissions that the defence failed to acknowledge that a domestic violence order is an order of a court, and not an agreement between two individuals which is capable of being varied at will.[34]

Issue 21

Are the provisions relating to the breach of AVOs appropriate?

Are they adequately enforced?

Are the penalties for breaching an AVO appropriate?

Should there be defences to the breach provisions? In particular, should consent be a defence?

34. Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999) at 215.

12. Miscellaneous issues

- Cross applications
- Multiple applications
- Variation and revocation
- The appeals process

12.1 This chapter examines miscellaneous practical issues concerning AVOs, such as cross applications, variation and revocation, costs and the appeals process.

CROSS APPLICATIONS

12.2 A cross application is where the defendant in AVO proceedings makes a complaint against the applicant. A cross application may be made where both parties fear each other, and both are in need of protection. This may be appropriate where there is no power imbalance between the parties, for example in the case of APVOs for violent neighbourhood disputes.

12.3 However, cross applications may be inappropriate where there is a power imbalance between the parties. For example, where a victim of domestic violence takes out an AVO, the defendant may make a cross application to intimidate the victim. This can undermine the beneficial effect the initial AVO may have had.

12.4 Cross applications may be taken out in circumstances where other dispute resolution strategies, such as mediation, would be more appropriate. If the parties have equal bargaining power and the dispute is not violent, it may waste the court's time to hear applications followed by cross applications.

12.5 Police will not normally make a cross application on behalf of a person. However, the two parties may use different police stations and different courts. In this situation, the police may end up applying on behalf of both parties where they are unaware of the other person's application.

Issue 22

How can the legislation prevent unwarranted cross applications?

Is there a way of keeping police and courts informed of cross applications?

MULTIPLE APPLICATIONS

12.6 There is no provision to stop people from making multiple applications. For example, where an application for an AVO has been withdrawn or dismissed, the person seeking protection can initiate new proceedings either in the same or in a different court. There may be legitimate reasons for reapplying after an application has been withdrawn. However, where the application has been dismissed after a hearing and the circumstances have not altered, there will be no basis for reapplying.

12.7 It takes some time to defend a final order and have the application dismissed. An interim order can be made without notice having been served on the defendant, and the defendant must comply with the order until the hearing. If the application is dismissed after a hearing, the person seeking protection can immediately reapply in a different court. The defendant has no remedy against this.

Issue 23

Is there a way of keeping police and courts informed of multiple applications?

Should the right to reapply for an order be limited, for example where an application has already been dismissed and the circumstances have not altered?

VARIATION AND REVOCATION

12.8 An AVO is an order of the court and so cannot be varied at will by the parties. It is important that the parties go to court where there is a change of circumstances. Otherwise, conduct which both parties consent to may amount to a breach.

12.9 An applicant, a defendant or a police officer can apply to have an AVO varied or revoked.[1] A police officer can only apply if the initial complaint was made by a police officer. This means that the police cannot apply for variation where the protected person initially applied on his or her own behalf. One issue for consideration is whether police should be able to apply for variation or revocation regardless of who made the initial complaint.

12.10 The grounds for variation or revocation are not specific – a court may vary or revoke an order "if satisfied that in all the circumstances it is proper to do so".[2] The court can reject an application if it is satisfied there has been no change in circumstances and the application is in the nature of an appeal. Only a police officer can apply for a variation or revocation where the protected person is under 16 years of age. An AVO can be varied by extending or reducing its duration, or by changing, adding to or deleting the conditions in the order.[3]

12.11 An order cannot be varied or revoked unless the defendant has been served with notice of the application.[4] However, the court can extend the duration of the order without notice being served on the defendant if:

(a) the applicant lodged the application no later than 21 days before the day on which the order is due to expire, and

(b) the application is listed for mention before the court no later than 14 days after the day the application was lodged, and

1. Crimes Act s 562F.
2. Crimes Act s 562F(3).
3. Crimes Act s 562F. In the ACT, there is a presumption in favour of extending domestic violence orders. A domestic violence order must be extended by up to a year upon the protected person's application, unless the court is satisfied that it is no longer necessary. However, the presumption is reversed for personal protection orders, as the order will only be extended if the court is satisfied that it is still necessary: *Protection Orders Act 2001* (ACT) s 37.
4. Crimes Act s 562F(6).

(c) notice of the application has not been served on the defendant by the time the matter is heard by the court.

12.12 Such an order ceases to have effect 21 days after it is made (unless revoked sooner), or on an earlier date specified in the order.[5] This section is very prescriptive. It would be simpler if the legislation provided that an application for extension can be made before the order expires.

12.13 An applicant cannot apply to have an order extended if the order has already expired. Because an AVO aims to prevent apprehended violence, it cannot act retrospectively. The proper remedy is to grant an interim order for the protected person's safety until the matter can be considered by the court.[6]

12.14 Similarly, a defendant cannot apply to have an order revoked if it has already expired. This is significant, because the consequences of revocation and expiration differ. Where an AVO expires, the defendant cannot hold a firearm licence for 10 years. This prohibition does not apply where the AVO has been revoked.[7]

12.15 It is important that the decision to vary or revoke an order reflects the best interests of all persons in need of protection. For example, there is a danger that, following a reconciliation with a violent partner, an adult protected person will vary or revoke the AVO, leaving the child without legal protection. The decision to vary or revoke the order stems from the adults' decision to be together, and may not be in the child's best interests. There is also a danger that the defendant has put pressure on the protected person to apply for a revocation.[8]

5. Crimes Act s 562F(8).
6. *Vukic v Edgerton* [2001] NSWCCA 2.
7. *Firearms Act 1996* (NSW) s 11(5).
8. In Queensland, the court must consider whether any pressure has been applied, or threat has been made, to the protected person by the defendant or anyone else: *Domestic Violence (Family Protection) Act 1989* (Qld) s 36(2)(c).

12.16 If an AVO is made for the protection of more than one person, its variation or revocation can affect any one or more of them. It is not necessary that all the persons on the order apply for variation or revocation. If one of the persons is a child, the court must be satisfied that the child is no longer in need of the level of protection afforded by the order.[9]

12.17 Under Part 15A, a defendant can apply for variation or revocation if the circumstances have changed. However, it may be more efficient if only the person in need of protection can apply for variation or revocation, especially if the order was imposed on the defendant after a hearing. Where the defendant consented to the order, it may be important to preserve the right to apply for variation or revocation, as the defendant may not have fully understood the implications of the order when giving consent.

Issue 24

Are the provisions regarding variation and revocation of AVOs adequate? Why or why not?

Should police officers be allowed to apply for a variation regardless of who made the initial complaint?

Is it possible to safeguard against variation or revocation where the protected person has been threatened or coerced?

Should section 562F(8) be simplified, to provide that an application for extension can be made before the order expires?

9. Crimes Act s 562F(4B).

Do the provisions dealing with variation and revocation provide adequate protection where more than one person is included on the order?

In what circumstances should defendants be able to apply to vary or revoke an AVO?

THE APPEALS PROCESS

12.18 If the order was made ex parte, the defendant may be able to apply to the local court for the case to be reviewed. The local court will review the case if satisfied that the defendant did not know about the proceedings until they were completed, the defendant was stopped from taking action because of accident, illness or misadventure or there are other good reasons why the application should be heard.[10] The defendant cannot apply to the local court for a revocation of the AVO unless the circumstances have changed.[11] In this way an application for revocation or variation cannot be in the nature of an appeal.

12.19 The defendant can appeal to the District Court against the making of an AVO. If the order was made by consent, the defendant requires leave. A protected person, defendant or police officer can also apply to the District Court against an order varying or revoking an AVO. If the local court or children's court has dismissed an application for an AVO, the person seeking protection or police officer can appeal to the District Court for an AVO. In either case the person has 28 days to lodge the appeal.[12] Appeals in the District Court are held by way of rehearing on the transcripts of evidence of the local court proceedings. The appellant cannot call witnesses or give evidence unless the

10. *Justices Act 1902* (NSW) s 100K.
11. Crimes Act s 562F(4A).
12. However, an appeal can be brought outside the 28 day limitation period in some circumstances, in the interests of public policy: *Stanton v Jordon* (NSW, Supreme Court, 22 April 1998, unreported).

District Court is satisfied there are special or substantial reasons. The AVO remains in force pending appeal.[13]

Issue 25

Is the appeals process satisfactory? If not, how can it be improved?

13. Crimes Act s 562W and s 562WA; *Justices Act 1902* (NSW) Part 5A.

13. Stalking and intimidation

- Incidence of stalking and intimidation
- Elements of the offence
- Harassment causing distress or detriment

13.1 Section 562AB of the Crimes Act provides that it is an offence to stalk or intimidate another person:

> A person who stalks or intimidates another person with the intention of causing the person to fear physical or mental harm is liable to imprisonment for 5 years, or to a fine of 50 penalty units, or both.[1]

13.2 Since the offence is contained in Part 15A, it is necessary for this review to determine whether these provisions remain appropriate for securing the policy objectives of the Part. The policy objectives are to ensure the safety and protection of all people who experience violence, and to reduce and prevent violence.[2]

13.3 Stalking has only been recognised as a criminal offence relatively recently. All Australian jurisdictions enacted anti-stalking legislation between 1993 and 1996,[3] and there is similar legislation in the United States, the United Kingdom, Ireland, Canada and New Zealand.[4] The widespread enactment of anti-

1. Crimes Act s 562AB.
2. Crimes Act s 562AC. Although these are the stated objectives of the AVO provisions, they are also relevant to the offence of stalking and intimidation, given its place in Part 15A and the gist of the parliamentary debates on s 562AB: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 17 November 1993 at 5614-5621, and 18 November 1993 at 5723-5760; Legislative Council, 23 November 1994 at 5623-5625 and Legislative Council, 25 November 1999 at 3674-3676.
3. See *Crimes Act 1900* (ACT) s 34A; *Criminal Code Act* (NT) s 189; *Crimes Act 1900* (NSW) s 562AB; *Criminal Code Act 1899* (Qld) s 359A; *Criminal Law Consolidation Act 1935* (SA) s 19AA; *Criminal Code Act 1924* (Tas) s 192; *Crimes Act 1958* (Vic) s 21A; *Criminal Code Compliance Act 1913* (WA) s 338D and s 338E.
4. Stalking was first criminalised in the United States in California in 1990. Similar legislation has now been enacted in every other state, and a Model Anti-Stalking Code has been developed by the National Institute of Justice: see United States of America, *Stalking and Domestic Violence: the Third Annual Report to Congress under the Violence Against Women Act*, (US Department of Justice, 1998). See also *Protection from Harassment Act 1997* (UK); *Non-Fatal Offences Against the Person Act 1997* (Ireland) s 10;

stalking legislation aimed to fill a perceived gap in the law. Previously, people who were subjected to persistent unwanted attention had no legal remedy if the behaviour in question was not in itself criminal.

13.4 The stalking and intimidation offence was inserted into the Crimes Act in 1993.[5] It was introduced in the context of domestic violence, and originally only applied to people who were in a domestic relationship. In 1994 this limitation was removed, recognising that stalking and intimidation can occur regardless of whether or not the parties are in a domestic relationship.[6] In 1999, the offence was expanded again. Previously, the offender had to cause fear of "personal injury", which failed to recognise that stalking, as an expression of power and control, may not aim to arouse fear of physical violence.[7] As amended, it is an offence to cause fear of "physical or mental harm".[8]

13.5 Anti-stalking legislation is inherently difficult to draft.[9] The offence is by nature imprecise, as behaviour which is otherwise considered quite ordinary becomes threatening in context: "the difficulty in defining stalking as a concept lies in its paradoxical

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Criminal Code, RSC 1985, cl C-46 (Canada) s 264; *Harassment Act 1997* (NZ). The Law Reform Commission of Hong Kong has recommended that stalking and harassment should be criminalised: *Stalking* (Report, 2000).

5. *Crimes (Domestic Violence) Act 1993* (NSW).
6. *Crimes (Threats and Stalking) Amendment Act 1994* (NSW).
7. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3676.
8. *Crimes Amendment (Apprehended Violence) Act 1999* (NSW).
9. See E Ogilvie, *Stalking: Legislative, Policing and Prosecution Patterns in Australia* (Australian Institute of Criminology, 2000) at 53; Commonwealth of Australia, *Model Criminal Code Chapter 5 Non Fatal Offences Against the Person Report*, (Model Criminal Code Officers Committee, 1998) at 53; S Kift, "Stalking in Queensland: From the Nineties to Y2K" (1999) 11 *Bond Law Review* 144 at 145; D Wiener, "Stalking: Does the law work?" (2001) 75(8) *Law Institute Journal* 67; J Mountfort, "The Civil Provisions of the *Harrassment Act 1997*: A Worrying Area of Legislation?" (2001) 32 *Victoria University of Wellington Law Review* 999.

status as an act that is ambiguously located somewhere between crime and conformity".[10] While stalking is qualitatively different from the legitimate pursuit of a love interest, it is difficult to clarify at what point the behaviour warrants criminal sanction.[11] Because of this inherent imprecision, it is difficult to set clear parameters in the legislation.

13.6 There is significant overlap between AVOs and stalking and intimidation. The same conduct may give rise to an offence of stalking and intimidation and also constitute grounds for an AVO. Both deal with action which may not be criminal in isolation but, in context, could be serious enough to warrant legal intervention. A court can grant an AVO where the person seeking protection has reasonable grounds to fear, and in fact fears, harassment, molestation, intimidation or stalking, sufficient to warrant the making of the order.[12] The AVO provides a means of stopping the offending behaviour, as it prohibits the defendant from stalking or engaging in conduct that intimidates the protected person.[13] If a person is charged with stalking or intimidation, the court must make an interim AVO for the protection of the alleged victim.[14] A final order is made if the accused is found guilty.[15] The Bureau of Crime Statistics and Research has found that AVOs are very effective in preventing stalking.[16]

10. E Ogilvie, *Stalking: Legislative, Policing and Prosecution Patterns in Australia* (Australian Institute of Criminology, 2000) at 12.
11. Ogilvie at 7-14.
12. s 562AE(1) and s 562AI(1).
13. s 562BC.
14. s 562BF(1).
15. s 562BE(1).
16. An overwhelming majority of protected persons reported a reduction in stalking after taking out an order: L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (NSW Bureau of Crime Statistics and Research, Sydney, 1997) at para 3.4.1.

INCIDENCE OF STALKING AND INTIMIDATION

13.7 Stalking and intimidation occurs at a reasonably high rate.[17] Perpetrators are more often men and victims are more often women. The parties may be intimates, former intimates, acquaintances or strangers. In a majority of cases, the perpetrator is somebody known to the victim. Motives for offending vary – the offender may wish to initiate or renew a relationship, or may wish to control or instil fear in the victim. While some stalkers may be psychotic or delusional, most are not. Stalking and intimidation is clearly linked to domestic violence, as associated violence is more likely to occur between intimates than between strangers or acquaintances. Intimates or former intimates are more likely to be threatened or assaulted or have their property damaged, and also experience stalking-type behaviour of a longer duration and wider variety.[18]

17. Statistics tend to vary depending on the definition used. A recent Australian study found that 23.4% of respondents had been subject to repeated unwanted behaviour which provoked fear: R Purcell, M Pathé and P Mullen, "The prevalence and nature of stalking in the Australian community" (2002) 36 *Australian and New Zealand Journal of Psychiatry* 114. A study conducted by the Australian Bureau of Statistics in 1996 into women's safety found that 15% of respondents reported having been stalked: *Women's Safety Australia* (Survey, 1996, Cat No 4128.0). The 1998 British Crime Survey found that 11.8% of adults aged 16 to 59 could recall being subject to persistent and unwanted attention at some time in their lives: T Budd and J Mattinson, *The extent and nature of stalking: findings from the 1998 British crime survey* (Home Office, London, 2000) at v. The US National Violence Against Women Survey conducted in 1996 found that "Stalking is more prevalent than previously thought: 8% of women and 2% of men in the United States have been stalked at some time in their life": P Tjaden and N Thoennes, *Stalking in America: Findings From the National Violence Against Women's Survey* (National Institute of Justice Centers for Disease Control and Prevention, 1998) at 3.
18. See R Purcell, M Pathé and P Mullen, "The prevalence and nature of stalking in the Australian community" (2002) 36 *Australian and New Zealand Journal of Psychiatry* 114.

13.8 The number of convictions under section 562AB has steadily increased since the offence was introduced in 1993.[19]

ELEMENTS OF THE OFFENCE

13.9 It is an offence to stalk or intimidate a person with the intention of causing fear of physical or mental harm. The offence includes causing a person to fear harm to another person with whom he or she has a domestic relationship.[20] For example, conduct which causes a person to fear for the safety of his or her child is covered.

13.10 In deciding whether a person's conduct amounts to intimidation, the court can have regard to any pattern of violence in the person's behaviour, especially violence constituting a domestic violence offence.[21] Relationship evidence is also admissible in order to determine whether the conduct in question was likely to cause fear. Such evidence puts the conduct in question "into a true and realistic context, in order to assist the jury to appreciate the full significance of what would otherwise appear to be an isolated act".[22]

Actus reus – what type of behaviour is covered?

13.11 The legislation outlines the types of behaviour which may constitute stalking or intimidation. "Stalking" is defined as:

> the following of a person about or the watching or frequenting of the vicinity of or an approach to a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity.

19. For example, there were 189 convictions under s 562AB in 2000, compared with 111 in 1987: information supplied by the Bureau of Crime Statistics and Research (24 July 2002).
20. s 562AB(2).
21. s 562A(2).
22. *R v Atroushi* [2001] NSWCCA 406 (12 October 2001) at para 33 (Carruthers AJ).

13.12 "Intimidation" is broader, and more open ended. It means:

(a) conduct amounting to harassment or molestation, or

(b) the making of repeated telephone calls, 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.

13.13 Intimidation could therefore include keeping a person under surveillance, driving past a person's house, interfering with a person's property or sending unwanted emails, letters, faxes, unsolicited gifts or offensive material. Cyberstalking would also fall within the definition of intimidation.[23]

Mens rea – the intention to cause fear of harm

13.14 The offender must intend to cause the other person to fear physical or mental harm. To prove the requisite intent, the prosecution must satisfy the court beyond a reasonable doubt that the person knows the conduct is likely to cause fear in the other person. It is not necessary to prove the victim actually feared physical or mental harm.

13.15 Some jurisdictions require proof of an intention to cause fear or apprehension.[24] This has proved to be a significant barrier

23. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 10 April 2001 at 13405; E Ogilvie, "Cyberstalking" *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, No 166, 2000); A Davidson, "Stalking in Cyberspace" (2000) 20(3) *Proctor* 31.

24. For example, the South Australian model requires the prosecution to prove that the accused stalked the victim with intent to cause serious physical or mental harm, or serious apprehension or fear: *Criminal Law Consolidation Act 1935* (SA) s 19AA. The Model Criminal Code Committee recommended that proof of an intention to cause serious fear or apprehension be retained, so that people who caused fear without intending to could not be prosecuted: Commonwealth of Australia, *Model Criminal Code Chapter 5 Non*

to prosecution, and as a result there has been a shift towards more objective tests which focus on whether offenders *should have known* that their behaviour would cause fear.[25] In NSW, there is no need to prove that the accused subjectively intended to cause fear, only that the accused knew that the behaviour in question was *likely* to cause fear.

13.16 One area of potential ambiguity is where the accused did not intend the victim to find out about the conduct in question, for example where a stalker secretly keeps a victim under surveillance. Arguably, such activities may fall outside the scope of the offence, if they are not "likely" to cause fear.[26] Another area of ambiguity is where the behaviour is directed at more than one person. For example, if a person regularly follows different people about, and does not target the same victim more than once, does this constitute stalking?[27]

Fatal Offences Against the Person (Model Criminal Code Officers Committee, Report, 1998) at 61.

25. The Western Australian legislation was amended for this reason: "The stalking provisions need to be extended to cover those situations where there is no intent on the part of the accused but the victim nevertheless fears for his or her safety or is prevented from going about his or her normal lifestyle. Therefore, the [*Criminal Law Amendment Bill 1997*] provides for a new simple offence of stalking which does not involve any intent on the part of the accused." Western Australia, *Parliamentary Debates (Hansard)* Legislative Council, 11 November 1997 at 7465. There are now two separate offences – the more serious offence requires the accused to have behaved "with intent to intimidate"; the lesser offence only that accused's behaviour be "reasonably expected to intimidate": *Criminal Code Compliance Act 1913* (WA) s 338E(1) and s 338E(2).
26. For this reason, the Queensland legislation explicitly provides that it is immaterial whether the victim was aware of being stalked, or whether the accused intended to cause the fear or apprehension: *Criminal Code Act 1899* (Qld) s 359C.
27. See I Dussuyer, "Is Stalking Legislation Effective in Protecting Victims?", paper presented at the conference *Stalking: Criminal Justice Responses* (Department of Justice, Victoria, 2000) at para 7.1.

13.17 The mental state of the accused is also significant.[28] Some stalkers suffer from psychiatric disabilities or mental illnesses, which may result in delusional episodes and reduce their legal culpability.[29] Where the accused has a mental illness, criminal prosecution may be inappropriate. It is less clear cut where the accused has a personality disorder, or emotional or behavioural problems. Indeed, many stalkers act irrationally, and demonstrate little understanding of the effect of their behaviour. It is worth noting, however, that most offenders are not psychotic or delusional.[30]

Defences and exclusions

13.18 Other jurisdictions exclude certain conduct from the scope of their legislation. For example, in Queensland, stalking does not include acts done for a lawful purpose, acts done for the purpose of an industrial, political or other public dispute, reasonable conduct engaged in for the person's trade, business or occupation, or reasonable conduct to obtain or give information that the person has a legitimate interest in obtaining or giving.[31] In Tasmania and Victoria, it is not an offence if the person is performing his or her official duties,[32] while in Western Australia, it is a defence that the accused acted with lawful authority or reasonable excuse.[33] This ensures that legitimate activity is not inadvertently brought

28. See I Frecklington, "Stalker Sentencing and Protection of the Public" (2001) 8 *Journal of Law and Medicine* 233 at 234-236.
29. See *Bhattacharya v Hamilton* [2000] NSWSC 102 (1 March 2000) at para 34 (Dunford J).
30. In 2001, there were 838 charges of stalking or intimidation brought before the local courts. Of these, only 7 charges were dismissed on grounds of the mental health of the accused: information supplied by the Bureau of Crime Statistics and Research (3 September 2002). See also United States of America, *Stalking and Domestic Violence: the Third Annual Report to Congress under the Violence Against Women Act* (US Department of Justice, 1998) at 14.
31. *Criminal Code Act 1899* (Qld) s 359D.
32. *Criminal Code Act 1924* (Tas) s 192(3) and *Crimes Act 1958* (Vic) s 21A(4).
33. *Criminal Code Compilation Act 1913* (WA) s 338E(3).

within the scope of the offence. There are no statutory defences or exclusions in NSW.

Issue 26

How effective are the stalking and intimidation provisions in Part 15A in protecting people against acts or threats of violence?

Is the requisite intent, that the behaviour in question be "likely to cause fear of physical or mental harm", appropriate?

Should the legislation include any defences or exclusions?

HARASSMENT CAUSING DISTRESS OR DETRIMENT

13.19 The requirement that the offender cause "fear of physical or mental harm" creates an important threshold, ensuring that behaviour which is merely irritating or annoying remains outside the scope of the offence.

13.20 However, persistent unwanted attention may have a significant impact on a person's life, although no fear of harm is caused. A recent Australian study reported that "a majority of victims (63%) modified their lifestyle in response to the stalking behaviours",[34] concluding that "most victims report significant disruption to their daily functioning irrespective of exposure to associated violence".[35] Victims took measures such as increasing

34. R Purcell, M Pathé and P Mullen, "The prevalence and nature of stalking in the Australian community" (2002) 36 *Australian and New Zealand Journal of Psychiatry* 114 at 117.

35. R Purcell, M Pathé and P Mullen, "The prevalence and nature of stalking in the Australian community" (2002) 36 *Australian and New Zealand Journal of Psychiatry* 114 at 114. See also I Dussuyer, "Is Stalking Legislation Effective in Protecting Victims?", paper

their home security, changing their telephone number or screening their calls or, in more serious cases, moving house or changing jobs. The unwanted attention also restricted their social activity and led to increased work absenteeism. Arguably the statutory focus on causing "fear of physical or mental harm" does not recognise the effect that stalking and intimidation have on the victim's enjoyment of life.

13.21 For this reason, some jurisdictions include behaviour causing detriment or distress, as well as behaviour causing fear. For example, under the Queensland model, unlawful stalking includes conduct that "causes detriment, reasonably arising in all the circumstances, to the stalked person or another person."[36] "Detriment" includes prevention or hindrance from doing an act a person is lawfully entitled to do, for example where a person changes the route or form of transport he or she would ordinarily use to travel to work. It also includes compulsion to do an act a person is lawfully entitled to abstain from doing, for example where a person feels compelled to sell a property he or she would otherwise not sell.[37]

13.22 However, it is important that the threshold is not too low, otherwise behaviour which is merely irritating may be criminalised inadvertently. Indeed, legislation in some jurisdictions has been criticised for being too broad or too uncertain. The Victorian legislation is reportedly being used to deal with neighbourhood disputes, noise complaints, road rage and disputes between school children, prompting concern that "the definition of stalking is increasingly being widened through dealing with situations that originally may have been outside the scope of the current legislation".[38] The United Kingdom model has also been criticised for its breadth and uncertainty. Although it was enacted to address

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presented at the conference *Stalking: Criminal Justice Responses* (Department of Justice, Victoria, 2000) at table 26.

36. *Criminal Code Act 1899* (Qld) s 359B(d)(ii).
37. *Criminal Code Act 1899* (Qld) s 359A.
38. See I Dussuyer, "Is Stalking Legislation Effective in Protecting Victims?", paper presented at the conference *Stalking: Criminal Justice Responses* (Department of Justice, Victoria, 2000) at para 7.1.

stalking-type behaviour, it prohibits any "course of conduct which amounts to harassment of another".[39] The summary offence of harassment includes causing alarm or distress, and does not require the victim to have been put in fear.[40] This captures a much wider range of behaviour than the Australian legislation, and is reportedly being used far more widely than was intended, for a variety of behaviour including low level harassment and neighbourhood disputes relating to property or money.[41]

Issue 27

Should the offence of stalking or intimidation cover behaviour causing detriment or distress, or should it remain limited to behaviour causing fear?

Does the legislation draw an appropriate line between nuisance behaviour, which is annoying but lawful, and criminal conduct?

39. *Protection from Harassment Act 1997* (UK) s 1(1).
40. The *Protection from Harassment Act 1997* (UK) creates two separate offences. Section 2 creates a summary offence which deals with conduct amounting to harassment. Section 4 creates a more serious offence of harassment causing fear of violence.
41. J Harris, *An evaluation of the use and effectiveness of the Protection from Harassment Act 1997* (Home Office, London, 2000) at vi, 5 and 51. For a criticism of the breadth of the New Zealand legislation, see J Mountfort, "The Civil Provisions of the *Harassment Act 1997*: A Worrying Area of Legislation?" (2001) 32 *Victoria University of Wellington Law Review* 999.

APPENDIX A: STANDARD ORDERS

Statutory orders[1]

A The defendant must not engage in conduct that intimidates the protected person or any other person having a domestic relationship with the protected person.

B The defendant must not stalk the protected person.

Other orders

1 Not to assault, molest, harass, threaten or otherwise interfere with the protected person.

2 Not to reside at the premises at which the protected person may from time to time reside or work, or other specified premises: _____

3 Not to enter the premises at which the protected person may from time to time reside or work, or other specified premises: _____

4 Not to go within ____ metres of the premises at which the protected person may from time to time reside or work, or other specified premises: _____

5 The defendant must not approach, contact or telephone the protected person(s) except as agreed in writing or for any purpose permitted by an order or directions under the *Family Law Act 1975* as to counselling, conciliation or mediation.

6 The defendant must not approach, contact or telephone the protected person(s) except for the purpose of arranging or exercising access to children as agreed in writing or as otherwise authorised by an order, or a registered Parenting Plan under the *Family Law Act 1975*.

1. Pursuant to section 562BC.

7 The defendant must not contact the protected person(s) by any means (including through a third person) except through the defendant's legal representative.

8 The defendant must surrender all firearms and related licences to Police.

9 The defendant must not approach the school or other premises at which the protected person(s) may from time to time attend for the purposes of education or child care or other specified premises: _____

10 The defendant must not approach the protected person(s) within twelve (12) hours of consuming intoxicating liquor or drugs.

11 The defendant must not destroy or deliberately damage or interfere with property of the protected person(s).

12 The court extends the operation of the orders to include the following person(s) with whom the protected person has a domestic relationship: _____

13 Other orders: _____
_____
_____
_____
_____

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