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Apprehended Violence Orders

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NEW SOUTH WALES LAW REFORM COMMISSION

Letter to the Attorney General

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

Apprehended Violence Orders

We make this Report pursuant to the reference to this Commission dated 28 March 2002.

The Hon Justice Michael Adams
Chairperson

His Hon Judge Christopher Armitage

Professor Michael Chesterman

Master Joanne Harrison

Her Hon Judge Angela Karpin

Professor Michael Tilbury

October 2003

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TERMS OF REFERENCE

Apprehended Violence Orders

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

Division Members

Pursuant to section 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:

The Hon Justice Michael Adams
His Hon Judge Christopher Armitage
Professor Michael Chesterman
Master Joanne Harrison
Her Hon Judge Angela Karpin
Professor Michael Tilbury (Commissioner-In-Charge)

Officers of the Commission

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Administrative Assistance	Ms Wendy Stokoe

RECOMMENDATIONS

Refer to the pages listed below for a full discussion of the Recommendations.

RECOMMENDATION 1 | see page 39

The Commission recommends that the AVO provisions remain in the Crimes Act for the time being. However, the issue of separate AVO legislation, and/or separate domestic violence legislation, should be revisited at a later date.

RECOMMENDATION 2 | see page 39

The Commission recognises that domestic violence raises different issues from violence in other relationships, and requires a specialised legal response. Accordingly, the Commission recommends that a panel of Magistrates with specialist training in domestic violence issues be established as a pilot project in a Local Court with a high turnover of domestic violence matters. That panel should deal with all aspects of violence, intimidation, harassment and stalking in domestic relationships, including ADVOs.

RECOMMENDATION 3 | see page 49

The Commission recommends that the current policy objectives applying to apprehended domestic violence orders in Division 1A be retained and expanded. Section 562AC(1) should provide that the objects of the Division are:

- to ensure the safety and protection of all persons (especially children) who witness or 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; and
- to enact provisions that are consistent with the United Nations Convention on the Rights of the Child.

RECOMMENDATION 4 | see page 49

Section 562AC(2) should be retained to provide that Division 1A aims to achieve its objects by:

- empowering courts to make apprehended domestic violence orders to protect people from domestic violence; and
- ensuring that access to courts is as speedy, inexpensive, safe and simple as is consistent with justice.

RECOMMENDATION 5 | see page 49

Section 562AC(3) should be retained and expanded to provide that, in enacting Division 1A, Parliament recognises:

- that domestic violence, in all its forms, is unacceptable behaviour; and
- that domestic violence extends beyond physical violence, and may involve the exploitation of power imbalances and patterns of abuse over many years; and
- that domestic violence is predominantly perpetrated by men against women and children; and
- that domestic violence occurs in all sectors of the community in traditional and non-traditional settings; and
- the particularly vulnerable position of children who are exposed to domestic violence as victims or witnesses, and the impact that such exposure can have on their current and future physical, psychological and emotional well-being; and
- that domestic violence is best addressed through an integrated framework of prevention and support.

RECOMMENDATION 6 | see page 50

The Commission recommends that a separate statement of objects applicable to APVOs be included in Division 1B. The objects of that Division should be to ensure the safety and protection of people who experience personal violence outside of a domestic relationship.

RECOMMENDATION 7 | see page 50

The Commission recommends that Division 1B should state that it aims to achieve its objects by:

- empowering courts to make apprehended personal violence orders in appropriate circumstances to protect people from serious violence, intimidation, stalking and harassment; and
- ensuring that access to courts is as speedy, inexpensive, safe and simple as is consistent with justice; and
- ensuring that other avenues of dispute resolution are encouraged where appropriate.

RECOMMENDATION 8 | see page 90

A new definition of "domestic violence" should be inserted in Part 15A by substituting the following for s 562A(2):

(2) For the purposes of this Part "Domestic Violence", means:

(a) violence against a person by another person with whom that person is, or has been, in a domestic relationship.

(b) In this section, "violence" means the actual or threatened commission of:

  (i) a personal violence offence (as defined in section 4),

  (ii) psychological abuse, including, but not limited to intimidation and threats to commit personal violence offence,

  (iii) damage to property belonging to, or in the possession of, or used by the person.

(c) Without limiting subsection (b)(ii), a person psychologically abuses a child if that person without reasonable excuse,

  (i) causes or allows the child to see or hear the commission of a personal violence offence or the psychological abuse of a person with whom the child has a domestic relationship; or

  (ii) puts or allows the child to be at risk of seeing or hearing that abuse occurring.

(d) Without limiting subsection (b) of this section, psychological abuse may be constituted by

  (i) a single act or a number of acts that form a pattern of behaviour, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial;

  (ii) behaviour which does not involve the actual or threatened commission of a personal violence offence.

RECOMMENDATION 9 | see page 91

Section 562AE (1) and (2) should be amended as follows:

562AE

(1) A court may on complaint, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that:

(i) facts exist providing a person with reasonable grounds to fear domestic violence; and

(ii) the person in fact fears domestic violence.

(2) Despite subsection (1), it is not necessary for the court to be satisfied that the person for whose protection the order is made in fact fears that such domestic violence will be engaged in if:

(a) the person is under the age of 16 years, or

(b) the person is, in the opinion of the court suffering from an appreciably below average general intelligence function.

Section 562AE(3) should be repealed.

RECOMMENDATION 10 | see page 92

The definition of a "Personal Violence Offence" in s 4 should be amended to list the various offences and section numbers in the Crimes Act that constitute personal violence offences.

The list of offences should also be expanded to include the following:

s 26 (conspiring to commit murder);

s 31 (documents containing threats);

s 35A (maliciously cause dog to inflict grievous bodily harm);

s 65A (sexual intercourse procured by intimidation, coercion and other non-violent threats);

s 80D (causing sexual servitude);

s 86 (kidnapping);

s 87 (child abduction); and

s 93G (causing danger with firearm or speargun).

RECOMMENDATION 11 | see page 97

The definition of a "domestic relationship" in s 562A(3) should be expanded to include:

(a) relationships according to indigenous customs;

(b) relationships between a person and his/her ex-partner's new partner.

RECOMMENDATION 12 | see page 97

The phrase "other residential facility" in paragraph (d) of the definition of "domestic relationship" in s 562A(3) should be clarified to mean any facility that provides long term accommodation.
The relationship between people who live in a residential unit within such a facility should be considered a domestic relationship.

RECOMMENDATION 13 | see page 97

A carer for the purposes of paragraph (e) of the definition of "domestic relationship" in s 562A(3) should be clarified to include a foster carer. The relationship between the foster carer and the natural parent of the foster child should be considered a domestic relationship.

RECOMMENDATION 14 | see page 97

The amendments in recommendations 11 to 13 should be reflected in the definition of "domestic violence offence" in s 4.

RECOMMENDATION 15 | see page 107

Section 562AK(1) should be amended to permit an authorised justice to refuse to issue process in relation to complaints made by police officers. Whether or not the complaint was made by a police officer should be listed in s 562AK(5) as one of the factors an authorised justice must consider when determining if the discretion to refuse to issue process should be exercised.

RECOMMENDATION 16 | see page 107

Section 562AK(3) should be amended to provide that an authorised justice may exercise the discretion to refuse to issue process if satisfied that the complaint is:

- frivolous; or
- vexatious; or
- without substance; or
- has no reasonable prospect of success; or
- where the matters referred to in the complaint may more appropriately be dealt with by mediation or other form of alternative dispute resolution.

RECOMMENDATION 17 | see page 115

A new section should be included in Part 15A to empower a Chamber Magistrate or a Magistrate to refer suitable APVO matters to an appropriate mediation service. That referral should be able to be made at any time, either before or after process has been issued, and in any circumstances where the court deems mediation to be appropriate, whether or not the parties consent to the matter being mediated.

That section should state that matters should not be referred where:

- there is a history of physical violence; or
- there are allegations of a personal violence offence; or
- there is conduct amounting to harassment relating to the complainant's disability (including HIV/AIDS status), race, religion, homosexuality, or transgender status; or
- there has been a previous failed attempt at mediation in relation to the same issue; or
- the mediation service has assessed that a dispute is not suitable for mediation.

The terms of a standard APVO should also be amended to provide that parties may contact each other for the purpose of arranging or engaging in mediation.

RECOMMENDATION 18 | see page 124

Authorised third parties should be allowed to make applications on behalf of people with an intellectual disability, people under Guardianship orders and people with certain physical disabilities.

RECOMMENDATION 19 | see page 128

The Police should be required to make separate AVO applications on behalf of a child/ren, where the child/ren are on the protected parent's AVO and the parent seeks to withdraw or vary the AVO.

RECOMMENDATION 20 | see page 133

Section 562C(3A) should be amended to state that the victim's reluctance to make a complaint is not in itself a good reason for the police not to make a complaint, in situations where:

- violence has occurred; or
- there is a significant threat of violence; or
- the victim is a person with an intellectual disability who has no guardian.

RECOMMENDATION 21 | see page 142

Section 562H(2)(b) should be amended to clarify that TIOs are available on a 24 hour basis (whether or not the court is sitting) in circumstances where the police officer making the application has good reason to believe that a person requires immediate protection under such an order, and it is not practicable to lodge a complaint for an interim order.

RECOMMENDATION 31 | see page 165

The court should be empowered to make an Ancillary Property Recovery Order against the applicant or defendant where:

(a) an AVO has been made; and

(b) the applicant has recently left a residence where personal property is located; or

(c) the defendant has by order been excluded from such premises where personal property is located.

The Court should also be empowered to order that the Police attend the execution of an Ancillary Property Recovery Order.

RECOMMENDATION 32 | see page 175

Section 562D(2) and s 562FA(2) should be repealed and a new section inserted to provide that the paramount consideration in deciding whether to make an order should be the safety and protection of the applicant and any child directly or indirectly affected from domestic or personal violence. In making this determination, the court should consider:

(a) the effects and consequences on the safety of 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;

(b) any hardship that may be caused by making or not making the order, particularly on the person for whose protection the order would be made and any children;

(c) the accommodation needs of all parties and particularly the applicant and any children; and

(d) any other relevant matter.

The section should provide that the order must be as unrestrictive as possible on the rights and liabilities of the defendant while still achieving the objectives of the legislation.

RECOMMENDATION 33 | see page 176

Section 562H(4) should be clarified to make it clear that the standard terms of a TIO are the same as those of other orders.

RECOMMENDATION 34 | see page 181

There should be specific reference to Exclusion orders in the non-statutory Standard orders and that the following clauses be amended:

Clause 6 should refer to exercising “contact” with children rather than “access”.

Clause 7 should prevent the defendant from contacting, locating and approaching the protected person or loitering in the person’s presence.

RECOMMENDATION 35 | see page 190

Section 562F(1) should be amended to provide that police can apply to vary an order regardless of who made the initial complaint.

RECOMMENDATION 36 | see page 190

Either of the parties, or an authorised third party, should be able to make an application for variation.

RECOMMENDATION 37 | see page 190

Section 562F(4B) and (4C) should be amended to require that a police officer must be the applicant where one of the protected persons is a child under 16 years of age if the application for variation or revocation affects that child.

RECOMMENDATION 38 | see page 190

Section 562F should provide that an application to vary an AVO is considered to be a complaint for the purposes of Part 15A.

RECOMMENDATION 39 | see page 190

An AVO should be able to be revoked after it has expired where:

(a) the application is made jointly by both parties;

(b) a period of 6 months has lapsed since the expiry of the AVO; and

(c) the court considers it is appropriate to do so.

RECOMMENDATION 40 | see page 197

Police must proceed with an application, where:

(a) violence has occurred or there is a history of violence;

(b) there is a significant threat of violence whether communicated or not ;

(c) there are other grounds that give rise to a substantial risk of violence; or

(d) the victim is a person with an intellectual disability who has no guardian,

whether or not the victim wishes to withdraw an application.

RECOMMENDATION 41 | see page 198

An applicant seeking withdrawal must attend court to make the application in order to satisfy the court that it is a genuine application (except in exceptional circumstances).

RECOMMENDATION 42 | see page 198

Where a matter is mediated, the withdrawal of that matter shall take effect after a cooling off period of 7 days from the date of the agreement reaching the court with no additional requirement for the parties to attend court.

RECOMMENDATION 43 | see page 202

The *Firearms Act 1996* (NSW) and the *Weapons Prohibition Act 1998* (NSW) should be amended so that the 10 year prohibition on holding a firearms licence be replaced by a suspension of the licence for the duration of an AVO (whether TIO, Interim or Final Order) and that the suspension also be applied to holders of a Powderman's Certificate, a Shot Firer's Certificate and a Shot Firer's Permit for the duration of an AVO.

RECOMMENDATION 44 | see page 212

Section 562I should be amended to specify that the defendant bears the onus of proving on the balance of probabilities that he/she did not knowingly contravene a prohibition or restriction specified in the order.

RECOMMENDATION 45 | see page 212

The offence of aiding and abetting in the Crimes Act should not apply in relation to the person for whose benefit the order is made.

RECOMMENDATION 46 | see page 219

Court forms should be drafted to include relevant questions to determine if the applicant is, or has been, a defendant to AVO proceedings between the same parties.

RECOMMENDATION 47 | see page 221

Court forms should be drafted to include relevant questions to determine if the matter has previously been adjudged or withdrawn.

RECOMMENDATION 48 | see page 222

The Commission recommends that s 562BB(3) (which requires evidence to be tendered by affidavit) be amended to permit use of a sworn complaint or police statement instead.

RECOMMENDATION 49 | see page 225

Section 562NA should be amended to provide the following:

- subsection (1) should state that the section applies to all AVO proceedings that involve children either in the capacity of witnesses or protected persons.
- children should not give evidence in AVO proceedings, whether by way of oral testimony or sworn affidavit, unless the court orders otherwise in the interests of justice.
- children's evidence given under this section should be given in accordance with Part 4 of *Evidence (Children) Act 1997* (NSW).

RECOMMENDATION 50 | see page 225

Consequential amendments should be made to the *Evidence (Children) Act 1997* (NSW) (section 17(b)) to state that Part 4 of the Act applies to all proceedings in relation to AVOs.

RECOMMENDATION 51 | see page 232

Section 562J should be amended to provide that every reasonable attempt must be made to serve a copy of an AVO, or a variation of an AVO, personally on a defendant. The court should be able to direct that an alternative means of service may occur only after all reasonable attempts to serve the AVO personally on the defendant have failed.

RECOMMENDATION 52 | see page 232

Section 562J should grant a limited power to police to arrest and detain a defendant for the purpose of serving a copy of an interim or a final AVO, or a variation of an AVO, personally on that defendant. That power should only extend to arresting and detaining the defendant for the purpose of serving the order:

- at the place where the defendant happens to be when confronted by the police officer; or
- in order to take him or her to the nearest police station.

The power should also apply where the defendant refuses to remain at the scene referred to above or to accompany the officer to the nearest police station.

RECOMMENDATION 53 | see page 237

Section 562WA should be amended to:

(a) enable authorised third parties to bring an appeal; and

(b) provide a right to appeal against an award for costs.

RECOMMENDATION 54 | see page 237

Section 562N should be amended to allow the court to award costs to authorised third parties.

RECOMMENDATION 55 | see page 254

The definition of "intimidation" in s 562A should be amended to mean:

- any conduct amounting to harassment or molestation, or
- any conduct that causes any other person to fear for his or her safety, including damage to property.

Intimidation may include approaches conducted through technologically-assisted means, such as telephoning, emailing or mobile telephone text messaging.

RECOMMENDATION 56 | see page 254

The definition of "stalking" in s 562A should be amended as follows:

Stalking includes 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.

1. Introduction

- Terms of reference
- Terminology
- Overview of AVO law and practice
- Background
- The Commission's review
- General themes in consultations and submissions
- Structure of this Report

1.1 Apprehended Violence Orders ("AVOs") are the primary legal means by which people may seek protection against actual or threatened acts of personal violence, stalking, intimidation and harassment. As the name suggests, AVOs are intended not only to put a stop to ongoing violence, but to prevent or apprehend potentially violent behaviour before it can escalate. The key factor in granting an AVO is fear: if the court is satisfied that a person fears on reasonable grounds that an act of violence, intimidation or harassment will be directed against them by another person, the court may issue an order to prevent such behaviour from occurring.

1.2 The type of behaviour which may ground an AVO is extremely broad. The actions may constitute criminal acts in themselves, such as actual or threatened acts of physical or sexual violence. AVOs may also be obtained to prevent emotional, psychological or financial abuse, such as withholding money from someone, and damage to property.[1] Further, the grounds on which an AVO may be sought extend to cover actions which, in isolation, are not criminal in nature, and may not even be seen by some to be unpleasant, but may be extremely disturbing when those acts form a pattern of behaviour and when viewed from the perspective of the person to whom they are directed. A classic example is persistent telephoning or repeatedly sending unsolicited gifts, where that behaviour causes the recipient to have reasonable grounds in the circumstances to fear violence, intimidation or harassment.

1.3 Consequently, AVOs involve elements of criminal and civil law.
The order itself is a civil order obtained from a local court[2] on the balance of probabilities. Yet, an AVO may be based on actions which in themselves constitute serious criminal offences. Any conduct which breaches an AVO is also a criminal offence. Due to this association with the criminal law, the legislative provisions underpinning AVOs are contained in Part 15A of the *Crimes Act 1900* (NSW) ("the Crimes Act").

1.4 Since the introduction of AVOs in New South Wales 20 years ago, the number of applications has increased dramatically.[3] Indeed, the jurisdiction of Local Courts under Part 15A represents its most significant workload outside the hearing of criminal offences.[4] While AVOs

1. 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 1900* (NSW) s 562AE(3) and s 562AI(3).
2. Where the defendant is under 18 years of age, the matter will be dealt with in the Children's Court: Crimes Act s 562G.
3. Although the number of final AVOs granted by local courts is difficult to pinpoint. According to the Bureau of Crime Statistics and Research, 26,099 AVOs were granted in 2002: see «www.infolink/bocsar1.nsf/pages/lc_2002_avo». However, Local Courts NSW report a total of 22,326 final AVOs in 2002 from a total of 44,827 applications: NSW, Local Courts NSW, *Annual review 2002* at 7. 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.
4. Local Courts NSW, *Annual review 2002* at 7.

originated as a means of preventing domestic violence,[5] they can now be sought generally, regardless of whether the applicant and defendant are in a domestic relationship.

TERMS OF REFERENCE

1.5 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.

1.6 The Commission considers that the Terms of Reference give rise to the following questions:

(1) What are the stated and implied policy objectives of Part 15A?

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

(3) What is known about the operation of Part 15A, from consultation, research and statistics?

(4) Applying the criteria for success (identified in 2 above) to what is known about the operation of 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?

The recommendations in this Report are aimed at addressing these issues.

TERMINOLOGY

1.7 Throughout this Report, 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

5. See para 1.19.

order, but uses the general term "AVO" to discuss provisions common to both. This reflects the terminology and structure of Part 15A.[6]

1.8 In general, the Commission has a policy of using gender-neutral language. However, in some instances throughout this Report gender-specific terms are used: for example, when quoting directly from submissions that use such terminology, or where referring to particular services that represent only women (such as the Women's Domestic Violence Court Assistance Scheme) ("WDVCAS"), or referring to submissions from either women or men, where to neutralise the terminology would distort the submission's meaning.

OVERVIEW OF AVO LAW AND PRACTICE

Current provisions

1.9 Under Part 15A, any person may apply to a local court, 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[7] or a stalking offence[8] has been, or is likely to be, committed, or where the applicant is under the age of 16 years.[9]

1.10 As noted above, the applicant will seek either an ADVO or 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.[10]

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6. 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.
7. A domestic violence offence is a personal violence offence committed within a domestic relationship, as defined in Crimes Act s 4 and s 562A. See definition of personal violence offence in Crimes Act s 4.
8. Crimes Act s 562C(3). Crimes Act s 562AB 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).
9. Crimes Act s 562C(2A).
10. Crimes Act s 4 and s 562A.

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

1.11 The order may be granted if the defendant consents,[11] or if the court is satisfied that a person, on the balance of probabilities, has reasonable grounds to fear, and does in fact fear:[12]

- the commission of a personal violence offence;[13] or
- conduct amounting to harassment or molestation, being conduct sufficient, in the opinion of the court, to warrant the making of the order; or
- conduct which is either intimidating or amounts to stalking.[14]

1.12 Legal aid may be available for an ADVO applicant[15] (but not if the application is frivolous, vexatious or has no possible prospects of success), but is not available for applicants in APVO matters. Defendants in either ADVO or APVO matters will be eligible for legal aid in exceptional matters only.[16] 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.[17] 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[18] and may be varied or revoked upon application to, and agreement by, the court.[19]

1.13 An AVO may contain "such prohibitions or restrictions on the behaviour of the defendant as appears necessary or desirable to the court".[20] While there is a standard form of order,[21] an

11. 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.
12. 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).
13. "Personal violence offence" is defined in Crimes Act s 4 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.
14. See Crimes Act s 562AE and s 562AI.
15. Providing the applicant and defendant are or were married or in a de facto or intimate personal relationship, and that the applicant can satisfy the general means test requirements. For applicants in other types of domestic relationships, legal aid is only available in exceptional circumstances: see Legal Aid NSW, *Submission* and «http://www.legalaid.nsw.gov.au/lac/lac.nsf/pages/avo_for_applicants».
16. See «http://www.legalaid.nsw.gov.au/lac/lac.nsf/pages/avo_for_defendants». Exceptional circumstances include those where the person applying for legal aid has a physical, psychiatric or intellectual disability, and other options for resolving the matter have been unsuccessful or are inappropriate: see Legal Aid NSW, *Submission*.
17. Crimes Act s 562AF and s 562AJ. A summons is the dominant method of notifying the defendant in both ADVO and APVO proceedings.
18. Crimes Act s 562E.
19. Crimes Act s 562F.
20. 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.

AVO may be tailored to suit the needs of each circumstance. A typical AVO may, for example, state that the defendant must not intimidate or stalk the applicant, or require the defendant not to "assault, molest, harass, threaten or otherwise interfere with" the applicant.[22] AVOs can provide that the defendant must not go within a certain distance of the premises where the applicant works or lives, and can accommodate approaches by the defendant to the applicant for the purpose of complying with family law contact orders.[23]

1.14 If a defendant upon whom an AVO has been served knowingly breaches a restriction or prohibition contained in that order, he or she will be guilty of a criminal offence, carrying a penalty of up to 50 penalty units[24] or 2 years imprisonment, or both.[25]

1.15 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. Part 15A specifically provides for situations where there are concurrent criminal proceedings arising from the same grounds as an AVO.[26]

BACKGROUND

Legislative history

1.16 The background to, and history of, AVO legislation is examined at length by the Commission in Discussion Paper 45, and need not, therefore, be discussed in as much detail here.[27] However, the following synopsis is provided as it gives context to the purpose and intent of the current legislation.

Situation prior to AVOs

1.17 Prior to 1982, there was limited protection available for people who feared that they would become victims of violent activity in the immediate future. The criminal law only operated after 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, and presented particular difficulties in relation to domestic violence due to negative attitudes held by the community, the police and the criminal justice system which prevented it being taken seriously,[28] and difficult

21. Made pursuant to Crimes Act s 562BC.
22. See Standard Orders, Order 1. The Standard Orders are discussed further in Chapter 8.
23. Standard Orders 5 and 6.
24. A penalty unit is currently $110: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.
25. Crimes Act s 562I(1).
26. Crimes Act s 562O.
27. NSW Law Reform Commission, *Apprehended Violence Orders* (Discussion Paper 45, 2002).
28. 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, N Naffin, *Domestic violence and the law – a study of s 99 of the Justices Act (SA)* (SA, Department of Premier and Cabinet, Women's Advisor's Office, 1985) ("Naffin Report"); Public Policy Research Centre, *Community attitudes towards domestic violence in Australia* (Australia, Office of the Status of Women, 1988); J Scutt, "Judicial bias or legal bias? battery, women and the law" in J Bessant, K Carrington and S Cook (ed) *Cultures of*

evidentiary and other issues associated with the hidden nature of domestic violence.[29] The criminal law also could not operate to prevent conduct, such as harassment, which did not amount to a crime.

1.18 The Crimes Act did provide for a civil "keep the peace" order,[30] but this could not be tailored to include specific conditions, and breach of the order was not a criminal offence. Hence, that procedure was widely criticised at the time for being inflexible, unenforceable and ineffective.[31]

Original AVO legislation

1.19 The *Crimes (Domestic Violence) Amendment Act 1982* (NSW) was the first legislation to provide for AVOs. That legislation implemented recommendations made by a Task Force on Domestic Violence established by the then Premier, the Hon Neville Wran QC MP, in response to the perceived failings of the existing domestic violence laws.[32] The 1982 Act provided for flexible orders to be made by a court on the civil standard of proof, which could prohibit the defendant from undertaking certain actions in order to diffuse the threat of violence occurring. The orders could be tailored to include conditions appropriate to the needs of each case, and were enforceable since breaching them amounted to a criminal offence. However, they were quite limited in scope, covering only physical violence between married or heterosexual de facto couples.[33]

Widening the legislative net

1.20 The AVO provisions have been amended a number of times since 1982, generally to expand their scope and availability.[34] The definition of domestic relationship was broadened to include others considered to be vulnerable to violence and abuse, such as separated heterosexual de facto and divorced spouses,[35] and those who lived or had lived in the same house (apart from tenants or boarders).[36] In recognition of the fact that violence has many forms, the type of behaviour for which an AVO could be granted was expanded beyond physical

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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, Federation Press, Sydney, 2002).

29. See N C Seddon, "Legal responses to domestic violence – What is appropriate?" (1986) 58 *Australian Law Quarterly* 48.
30. Under Crimes Act s 547A. This has subsequently been repealed.
31. See for example, Naffin Report at 1-2; Australian Law Reform Commission, *Domestic violence* (Report 30, 1986) 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").
32. For further discussion, see ALRC Report 30 at para 76-87; Naffin Report at 50-51.
33. Recognisance orders under the Crimes Act s 547 continued to operate for violence in other relationships.
34. 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.
35. *Crimes (Domestic Violence) Amendment Act 1983* (NSW).
36. *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW).

violence to include serious molestation or harassment,[37] which may include actual or threatened damage to a person's property, even where there has been no actual or threatened violence to the person.[38] In 1993, a separate criminal offence of stalking or intimidation with the intent to cause fear of physical or mental harm was introduced.[39] That same year, police were empowered to apply for telephone interim orders after hours in certain circumstances.[40]

1.21 In 1989, the AVO scheme was broadened significantly to extend beyond domestic relationships to cover all people who feared violence, molestation, harassment or intimidation at the hands of another.[41] 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.[42] 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.[43]

Placing the emphasis back on domestic violence

1.22 That concern developed momentum over the next decade, and spurred the decision in 1999 to create two separate categories of AVOs within Part 15A, dealing with ADVOs and APVOs. 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".[44] 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.[45]

1.23 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 success".[46] There is no

37. *Crimes (Domestic Violence) Amendment Act 1983* (NSW).
38. *Crimes (Apprehended Violence) Amendment Act 1989* (NSW).
39. *Crimes (Domestic Violence) Amendment Act 1993* (NSW).
40. *Crimes (Domestic Violence) Amendment Act 1993* (NSW).
41. *Crimes (Apprehended Violence) Amendment Act 1989* (NSW).
42. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 3 May 1989 at 7318.
43. See Simpson at 13; NSW, Attorney General's Department, Criminal Law Review Division, *Apprehended Violence Orders: a review of the law* (Discussion Paper, 1999) ("CLRD Discussion Paper") at 11.
44. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3674.
45. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3674.
46. 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).

such discretion in relation to an ADVO. Secondly, the court has a greater discretion to award costs against complainants in APVO matters.[47]
For ADVOs, the test for awarding costs against private applicants remains based on a "frivolous or vexatious" complaint,[48] whereas for APVOs, costs may be awarded where it seems "just and reasonable" to do so.[49] 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.[50]

1.24 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.[51] 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.[52] 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.[53]

1.25 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.[54] This amendment is intended to reflect the "domestic contexts in which people live",[55] 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").[56]

47. 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).
48. Crimes Act s 562N(2).
49. Crimes Act s 562N(1)(b).
50. 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.
51. The objects are contained in Crimes Act s 562AC(1), and are discussed in Chapter 2.
52. Crimes Act s 562AC(2).
53. Crimes Act s 562AC(3).
54. Crimes Act s 562A(3).
55. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3675.
56. 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.

Other laws affecting AVOs

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

Bail

1.27 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.[57] Under the *Bail Act 1978* (NSW), there is a general presumption that bail be granted for particular non-violent offences.[58] However, that presumption does not apply in relation to domestic violence offences or breach of an ADVO,[59] in circumstances where the court is satisfied that the defendant has:

- a history of violence;
- been violent to the applicant in the past (whether or not the defendant was convicted of an offence in respect of that violence); or
- failed to comply with a bail condition in respect of the offence that was imposed by the court for the protection and welfare of the applicant (unless the court is satisfied that the defendant will comply with any such bail condition in the future).[60]

1.28 Under the *Bail Act*, an accused person is deemed to have a "history of violence" if he or she has been found guilty, within the last 10 years, of a personal violence offence committed against any person, or of contravening an AVO by any act of violence.[61] 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.[62] 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.[63]

Firearms

1.29 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.[64] 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 possess the firearms in question.[65] 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.[66] A licence or a permit is also automatically suspended when an interim AVO is taken out against the licence or

57. Crimes Act s 562L.
58. *Bail Act 1978* (NSW) s 9.
59. By an act involving violence or that would contravene the stalking and intimidation provisions in Crimes Act s 562AB: *Bail Act 1978* (NSW) s 9A(1).
60. *Bail Act 1978* (NSW) s 9A(1) and s 9A(1A).
61. *Bail Act 1978* (NSW) s 9A(2).
62. Simpson at 19.
63. *Bail Act 1978* (NSW) s 32.
64. Crimes Act s 562D(1)(c).
65. Crimes Act s 562D(3).
66. 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).

permit holder,[67] and automatically revoked if the interim AVO becomes final.[68] The *Firearms Act 1996* (NSW) also prohibits a person who is subject to an AVO from being a firearms dealer.[69]

Family law[70]

1.30 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.

1.31 When making an order under the FLA, the Family Court must have the best interests of the child as its paramount concern.[71] 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.[72] 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.[73] However, a State court, when making or varying a family violence order, has the power to make, revive, vary, discharge,[74] 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.[75]

1.32 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.[76] The court must have regard to the existence of a contact order when deciding whether or not to grant an AVO.[77]

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67. 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).
68. *Firearms Act 1996* (NSW) s 23 and s 24 and *Weapons Prohibition Act 1998* (NSW) s 17 and s 18.
69. *Firearms Act 1996* (NSW) s 44A.
70. See Chapter 3 for a more detailed discussion of the issues involved in AVOs and family law proceedings.
71. 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).
72. 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).
73. FLA s 68R.
74. 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).
75. FLA s 68T.
76. Crimes Act s 562FA.
77. Crimes Act s 562FA(2).

The standard AVO orders[78] 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, conciliation or mediation, or for the purpose of arranging or exercising access to children.[79]

1.33 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.[80] 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.

Working With Children Check

1.34 The *Child Protection (Prohibited Employment) Act 1998* (NSW) and the *Commission for Children and Young People Act 1998* (NSW) aim to create safer environments for children by establishing the Working With Children Check to ensure that people who may pose a risk to children do not work in positions that involve direct, unsupervised contact with them. The Check requires employers in child-related industries[81] to:

- ask all current employees and preferred applicants for positions vacant, in both paid and unpaid capacities, if they are a "prohibited person";[82] and
- request an Approved Screening Agency[83] to conduct employment screening of all people commencing paid work that involves direct, unsupervised contact with children.[84]

1.35 Since 10 February 2003, the existence of a final AVO is one of the things that may be checked during the screening process, in addition to a national criminal record check and a review of relevant disciplinary proceedings the applicant may have had in previous employment.[85]
While the existence of an AVO will not necessarily preclude someone from gaining employment in a child-related field, it will be brought to the attention of a prospective employer.

78. See Chapter 8.
79. Orders 5 and 6, respectively.
80. 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: PRA s 53(a).
81. For details of the Working With Children Check, including how it works and the type of child-related employment covered, see «http://www.kids.nsw.gov.au/check».
82. A prohibited person is one who has been convicted of committing a serious sex offence punishable by 12 months or more: *Child Protection (Prohibited Employment) Act 1998* (NSW) s 5(3).
83. The Approved Screening Agencies are the NSW Department of Community Services, NSW Department of Education and Training, NSW Department of Health, NSW Department of Sport and Recreation, Catholic Commission for Employment Relations and the Commission for Children and Young People.
84. See *Commission for Children and Young People Act 1998* (NSW) Part 7. While screening is mandatory for all new paid employees, employers may choose to screen existing and/or voluntary workers.
85. *Commission for Children and Young People Act 1998* (NSW) s 38(1) as amended by the *Child Protection Legislation Amendment Act 2002* (NSW).

THE COMMISSION'S REVIEW

Discussion Paper 45

1.36 In December 2002, the Commission released DP 45 which examined the major issues associated with Part 15A of the Crimes Act and posed a series of questions. That Discussion Paper was based on research, findings of previous reviews and preliminary consultations which gave rise to various issues. It was designed to promote feedback from those who have experienced, either directly or indirectly, the way in which the AVO system works in practice.

Submissions

1.37 In response to DP 45, the Commission received in excess of 60 written and oral submissions from a diverse range of groups and individuals, including advocacy and representative organisations, women's refuges, regional community legal centres, community justice centres, government departments, the police service, and interested individuals.[86] A number of these written and oral submissions from individuals revealed personal details of people's experiences as applicants or defendants in AVO matters. Those submissions also included information about third parties, including children. While most of these people were happy for their stories to be told and their names to be made public, the Commission has decided that, due to the potentially adverse impact on third parties, a policy of confidentiality in relation to submissions revealing personal information is appropriate. Accordingly, while the issues raised have been considered by the Commission in the course of developing the recommendations in this Report, the names of those individuals do not appear in footnotes or in Appendix A.

1.38 Those submissions were extraordinary in their level of detail and quality, and have been enormously helpful and informative. The significant themes emerging from those submissions are discussed below and throughout this Report. The Commission would like to thank those who took the time to contribute to this review.

Consultations

1.39 In February and March 2003, the Commission undertook extensive statewide consultations on the issues raised in DP 45. Meetings were held in Sydney with Chamber Magistrates and the Family Law Reform Association. A community consultation was also held in conjunction with the Redfern Legal Centre and the South Sydney Domestic Violence Unit, in which a number of people from women's refuges, the WDVCAS, legal aid, police Domestic Violence Liaison Officers ("DVLOs"), advocacy organisations and other support services participated. The Commission also attended a network meeting of the WDVCAS.

1.40 The Commission visited regional areas to hear first hand accounts of how Part 15A is working in practice. In addition to meeting with the Domestic Violence Unit of the Campbelltown Benevolent Society, the Commission attended seminars in Moree, Bourke, Orange, Newcastle, Gosford and Wollongong.

86. See Appendix A for the list of written submissions.

GENERAL THEMES IN CONSULTATIONS AND SUBMISSIONS

AVO legislation is generally effective

1.41 The general consensus in submissions and consultations is that Part 15A, while in need of some fine-tuning, is, for the most part, adequate and effective.[87] Most people consider AVOs to be generally effective as a means of preventing violence, intimidation and harassment. While it is acknowledged that they cannot and do not eliminate violence in all cases, and may very occasionally exacerbate it, the overall view expressed in submissions is that these drawbacks do not detract from the effectiveness of AVOs as provided for in Part 15A. During the course of this review, the Commission heard from people who believe that AVOs are too readily open to abuse, or unfairly expose defendants to criminal liability for non-criminal actions. However, the majority of people, including those with negative views concerning AVOs, consider that the main problems lie with the implementation of the legislation rather than inherent defects in Part 15A,[88] and that AVO legislation serves deserving cases well. In fact, nearly all of the submissions noted that the major failing of the AVO system was the way in which the legislation was being implemented, or in some cases, not being implemented, by the police and in the courts.

1.42 Overall, submissions expressed the view that AVOs were a more effective and appropriate means of preventing violence and harassment in domestic rather than other types of relationships. Most submissions suggested that alternative means of dispute resolution, such as mediation, may be a more appropriate method of dealing with APVO disputes not involving serious violence, and should be encouraged to a greater extent. However, the general view was that Part 15A should continue to provide for APVOs where mediation is not suitable, since there may be serious instances of violence, harassment and stalking in non-domestic relationships.[89]

1.43 The Commission heard from women who have experienced persistent domestic violence and harassment over a number of years. Many said that taking out an ADVO was extremely effective and empowering. It acts as a statement that violence will no longer be tolerated, may serve as a mechanism to end an abusive relationship, and often assists victims to come into contact with support services they may otherwise not have been familiar with. The Commission was told that the knowledge that there was some legal recourse to stop the violence gave these women a feeling of peace, safety and control over their destinies, and the well-being of their children, that they had never before encountered. Advocacy and support services noted that their clients report feeling safer after an AVO has been granted. Although there is always the reality that those who take action risk further violence, people have reported that, in their experience, legal responses to violence can and do work.

1.44 Domestic violence has traditionally been viewed as a private matter. Most submissions considered that AVOs have helped change that attitude by making it clear to both the applicant and the defendant that violence is not accepted by the community and is an appropriate matter for police and court intervention.

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87. The views expressed in submissions are discussed in detail throughout this Report. Only a very general overview is provided here.
88. Problems concerning the implementation of Part 15A are discussed at para 1.47-1.48 below, and in Chapter 3.
89. Recommendations concerning the role of mediation in APVO disputes are discussed in Chapter 5.

1.45 AVOs have also been instrumental in raising awareness, about domestic violence in particular, amongst the community, the legal profession and the police. This has in turn improved the response of the police and the legal system to domestic violence complaints, although significant problems still exist.[90] Many submissions praised current initiatives such as the WDVCAS and DVLOs as being extremely beneficial in enhancing women's access to AVOs and other support services, and advocate increasing these programs.

1.46 It was emphasised in many submissions that AVOs are only one method of violence prevention. The view strongly held in submissions and consultations is that AVO legislation should be part of an integrated system-wide response to violence prevention. Submissions suggest that such a response should encompass the criminal law; the provision of safe accommodation; counselling programs for perpetrators and victims; education and violence prevention programs for children and young people; continuing education for police, lawyers and judicial officers, particularly regarding domestic violence; free legal advice; and financial assistance.

Problems are primarily with implementation

1.47 The view expressed almost unanimously in submissions and consultations was that the greatest impediment to the effectiveness of Part 15A is the way in which it is implemented and interpreted by the police, the legal profession and Magistrates. The following factors are cited in submissions as having an impact on Part 15A:

- Understanding of the complexity of domestic violence isues and the attitudes towards victims held by police, judicial officers, court staff and lawyers. Where those attitudes are well-informed and take full account of the power dynamics involved in domestic violence, submissions report that the system can work very well. However, negative attitudes can impact significantly on the success and effectiveness of ADVOs.
  For example, if the view is held that domestic violence is less serious than other crimes, this may affect the willingness of police to use the powers they currently have under Part 15A and be proactive in pursuing ADVO complaints and prosecuting breaches of orders. Attitudes also affect the demeanour of police prosecutors, legal aid solicitors and court staff in their treatment of applicants and defendants, and the approach taken by Magistrates in determining applications. This can result in reluctance by an applicant to proceed with an ADVO application or to report a breach. Negative attitudes also counteract the deterrent value of an AVO for the defendant and lessen the applicant's feeling of safety.
- Related to the previous point, submissions highlight a need for more public education regarding domestic violence and the purpose and intent of AVOs, to ensure that the issues are not trivialised.
  In particular, the need to develop more specialist expertise in domestic violence prevention within the police, the courts and the judiciary was highlighted.
- Inconsistency between different courts, and between Magistrates in the same court, in the interpretation of Part 15A can cause anomalies and injustice. Further, submissions assert a reluctance by some Magistrates to use the powers currently available to them under the legislation, particularly the power under section 68T of the FLA to vary family court contact orders to accommodate an ADVO, or to grant exclusion orders. Submissions and consultations suggested that specialist courts and Magistrates would go some way to addressing this.

90. See discussion at para 1.47 and in Chapter 3.

- The need for greater funding and resources, particularly for translators and support services like the WDVCAS, and DVLOs, which are said to be working well and should be more widely available.
- Time pressures, growing court lists and cumbersome administrative processes often mean delays in applying for and granting AVOs, or can result in AVOs being issued without the underlying issues being fully understood or addressed, which can be detrimental to both parties.
- The lack of adequate, comprehensive and co-ordinated qualitative and quantitative research and data on most aspects of the AVO process, which causes anomalies in the system and prevents the detection of systemic trends and problems.
- The need to provide sufficient information to applicants and defendants, presented in a variety of languages and formats, explaining the AVO process and the consequences of an AVO for all parties involved.
- The allegations, put strongly by some, that both ADVOs and APVOs are being sought inappropriately. On one hand, where these allegations can be substantiated, the manipulation of the AVO system for ulterior motives can cause significant hardship for people wrongly accused, and brings the system into disrepute. Legislative and administrative solutions to such abuse of the AVO process should continue to be sought. On the other hand, however, focusing on these allegations promotes the negative attitudes towards AVOs, and domestic violence in particular, referred to in the first dot point above.
- The need to involve mediation to a greater extent where suitable (that is, not in cases of severe violence or harassment) during all stages of the AVO process to ensure that Part 15A remains true to its original intention.
- The need to address the significant difficulties associated with serving AVOs on defendants.

1.48 All of these implementation issues are discussed at great length in Chapter 3. Some flow directly into legislative amendments to Part 15A discussed by the Commission in Chapter 4. For example, the legislation can provide for an enhanced role for mediation and tighten the provisions relating to service of process. Naturally though, such legislative changes would still require proper implementation for the legislation to be truly effective. Other current problems which reportedly hamper the effectiveness of Part 15A, such as the lack of understanding of some police and judicial officers, and the lack of adequate funding and resources, transcend the legislation. In other words, these problems will persist regardless of any changes to Part 15A, and require a more lateral, holistic solution.

Need for caution in assessing effectiveness

1.49 In DP 45, the Commission pointed out the difficulties associated with assessing the effectiveness of AVOs as a violence prevention measure due to a number of factors surrounding the nature of AVOs and the behaviour they are designed to address.[91] For example, while AVOs are granted on the basis of indications of past behaviour, they are essentially preventative measures aimed at future conduct that may or may not have occurred anyway, irrespective of the AVO.

91. See DP 45 at para 1.17-1.20.

1.50 Violence prevention is a complex issue, requiring a comprehensive response extending beyond legislation. As noted above, submissions acknowledged that Part 15A is only one element among many which need to work together to prevent violence. As also pointed out in submissions, it is important to recognise the limited effectiveness of any kind of legislation in an area where implementation is such a key element.

1.51 Furthermore, some submissions suggest that it would be a mistake to base an assessment of the effectiveness of Part 15A on purely empirical evidence. Apart from the fact that there is a dearth of such evidence, the symbolic effects of AVO legislation are significant and cannot be easily quantified.

1.52 It should also be noted that the question of whether or not Part 15A is being implemented effectively is largely a question of perspective.
For example, some say that police are not proactive enough in applying for AVOs, leaving people in danger of abuse without protection. Others, however, are of the view that AVOs are granted too readily in some circumstances and that police and the courts should have more discretion in deciding whether or not to seek or grant an AVO.

STRUCTURE OF THIS REPORT

1.53 The structure of this Report reflects the main elements that contribute to the effectiveness of AVOs. Part 1 examines the underlying policy that guides AVO law and practice, and the way in which those policy objectives are given effect through the implementation of Part 15A.
Part 2 looks at the way in which the objectives are achieved through the provisions of Part 15A itself.

1.54 Part 1 comprises Chapters 2 and 3. Chapter 2 examines the policy, in the broad and the narrow sense, that should guide the legislation and its interpretation. The Commission recommends:

- leaving the AVO provisions in the Crimes Act to reflect the seriousness of the behaviour that AVOs are intended to address;
- retaining and expanding the current policy objectives applying to ADVOs in Division 1A to include specific recognition of the impact on, and the need to protect the welfare of, children who are exposed to or witness domestic violence;
- including a separate statement of objectives applicable to APVOs in Division 1B; and
- the need to establish a pilot program whereby a specialist domestic violence panel is set up, initially in one Local Court with a high turnover of domestic violence matters, to deal with all aspects of violence, intimidation harassment and stalking in domestic relationships, including ADVOs.

1.55 In Chapter 3, the Commission highlights the views expressed in submissions and consultations concerning the way in which the provisions of Part 15A are being administered. The view expressed virtually unanimously in submissions and consultations is that the major factors hampering effectiveness of the legislation are associated with the implementation of Part 15A.

1.56 Part 2 of this Report consists of Chapters 4 through 12. Those chapters contain recommendations for changes to Part 15A aimed at remedying the implementation problems

referred to in Chapter 3 and giving greater effect to the policy objectives of the legislation. Specific recommendations for legislative change include, among others:

- clarifying the definitions of domestic and personal violence;
- extending the definition of "domestic relationship" to include the concept of kinship in indigenous relationships;
- facilitating greater recourse to mediation at all stages of the AVO process in appropriate circumstances;
- streamlining the process for obtaining telephone interim orders;
- providing for third party applications for AVOs in limited circumstances to facilitate greater access to AVOs for children and young people and people with a disability;
- clarifying the nature of procedural fairness at hearings for interim orders;
- enabling police to have limited powers to arrest and detain a defendant in certain circumstances for the purpose of serving an interim or final AVO;
- providing for the situation where children are included on an AVO that is varied or withdrawn; and
- requiring Magistrates to consider certain factors during applications to withdraw AVOs.

2. Policy issues

- Location of AVO provisions
- Policy objectives of Part 15A
- The Commission's view

2.1 This chapter examines and makes recommendations about the policy that should underpin the legislation governing AVOs and the way in which that legislation is interpreted. The first issue discussed is the location of the AVO provisions in the Crimes Act, or whether there should be separate legislation for all AVOs, or separate domestic violence legislation encompassing ADVOs. While this is a structural issue, it also raises significant questions of policy concerning the basic nature, purpose and intent of AVOs. Ultimately, the decision to leave AVOs to be governed by Part 15A of the Crimes Act is a policy one, based on the view that the underlying rationale of the AVO scheme is to stop or prevent criminal behaviour, and to send a clear message that any form of violence, intimidation or harassment is a crime.

2.2 Having determined that both ADVOs and APVOs should remain in the Crimes Act, the Commission then examines the need to recognise the unique nature of domestic violence through practical rather than legislative measures. To this end, the Commission recommends that a specialist Domestic Violence Panel be piloted in one Local Court with a high domestic violence caseload, to deal exclusively with domestic violence offences and ADVOs.

2.3 Finally, this chapter discusses the specific policy objectives contained in the legislation that should act as a guide to its interpretation.
The Commission recommends retaining and bolstering the current objectives relating to ADVOs in Division 1A to focus more on the position of children who experience or witness domestic violence. The Commission further recommends that a separate statement of policy objectives reflecting the purpose and intent of APVOs should be incorporated into Division 1B.

LOCATION OF AVO PROVISIONS

Separate AVO legislation?

2.4 In DP 45, the Commission discussed some of the issues arising from the placement of the AVO provisions in the Crimes Act.[1] As noted in Chapter 1, AVOs involve elements of criminal and civil law. The order itself is a civil order obtained on the balance of probabilities. Yet, an AVO may be based on actions which in themselves constitute serious criminal offences. Any conduct which breaches an AVO is also a criminal offence.[2]

2.5 In DP 45, the Commission noted that the placement of AVO provisions in the Crimes Act has the benefit of reinforcing the fact that violence, abuse and harassment are crimes 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".[3] This association with the criminal law could have the unintended effect of deterring applicants who may want to stop or prevent the violence they fear or are experiencing, without necessarily wanting to invoke criminal consequences for the defendant.[4] This is particularly pertinent in cases of domestic violence

1. NSW Law Reform Commission, *Apprehended Violence Orders* (Discussion Paper 45, 2002) ("DP 45") at Chapter 6.
2. See para 1.9-1.14 for a discussion of the current AVO provisions.
3. M McMillan "Should we be more apprehensive about apprehended violence orders?" (1999) 37(11) *Law Society Journal* 48 at 50.
4. 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*

where there is often a financial and emotional interdependence between the applicant and the defendant, or among indigenous or certain culturally diverse communities where relationships with the police may be strained or even hostile.

2.6 Some other jurisdictions, such as Western Australia and the Australian Capital Territory, have specific legislation which deals comprehensively with restraining or protection orders.[5] The Commission noted in DP 45 that this approach would have the benefit of clarifying that AVOs were civil rather than criminal proceedings, and could offer a more integrated approach by referring to victim support and violence prevention initiatives, references which may not be appropriate in the Crimes Act.
The Commission asked whether such an option, covering both ADVOs and APVOs, would be appropriate for NSW.

Views in submissions and consultations

Arguments for retaining the status quo

2.7 A significant number of submissions conveyed a strongly-held opposition to removing the AVO provisions from the Crimes Act.[6]
Even though AVOs are not criminal in themselves, submissions expressed the view that the location of the provisions in the Crimes Act reflects the seriousness of the violence and harassment that can give rise to an AVO.[7] Since violence occurs in a criminal context, laws aimed at preventing it should be retained in the Crimes Act.[8]

2.8 It was considered by many that having Part 15A in the Crimes Act is highly symbolic, sending a strong message to perpetrators that their actions are criminal and to victims that they are victims of a crime.[9] Submissions stressed the need to guard against the idea that violence is

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Local Area Command in NSW (Prepared for the Northern Rivers Community Legal Centre, 2000) at 71-72.

5. See *Restraining Orders Act 1997* (WA) and *Protection Orders Act 2001* (ACT).
6. AVLICC, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Intellectual Disability Rights Service Inc, *Submission*; Legal Aid NSW, *Submission*; Margrette Young, *Submission*; Julie Stubbs, *Submission*; Shoalcoast Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*; Manly Warringah Women's Resource Centre, *Submission*; NSW Health, *Submission*; NSW Women's Refuge Movement, *Submission*; Jane Wangmann, *Submission*.
7. AVLICC, *Submission*; Intellectual Disability Rights Service Inc, *Submission*; Legal Aid NSW, *Submission*.
8. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; NSW Health, *Submission*; Jane Wangmann, *Submission*.
9. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Intellectual Disability Rights Service Inc, *Submission*; Legal Aid NSW, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; Jane Wangmann, *Submission*.

a "problem" rather than a "crime".[10] This was considered to be particularly important in relation to domestic violence, with the concern that it would be seen as "less criminal" if the AVO provisions were removed from the Crimes Act.[11] The association with the criminal law was seen by some to be the reason for the overall effectiveness of AVOs, as defendants were more likely to realise the seriousness of their actions.[12]

2.9 The Chief Magistrate of the Local Court of NSW noted that there were cogent arguments both in favour of retaining the status quo and of introducing separate AVO legislation so as to clarify the civil nature of AVO proceedings. However, on balance, he favoured the retention of Part 15A in the Crimes Act:

> Part 15A has historically provided a coherent code for AVOs, not just for civil applications, but importantly also for the criminal offences underpinning them …. and for bail determinations. AVOs are a very particular category of civil proceedings, essentially protective in nature. Police play a vital role in initiating them and in providing court support domestic violence liaison officers to assist persons in need of protection. To now remove the provisions from the Crimes Act could well be misconstrued as overriding the original intention of Parliament and diminishing the importance it gave to domestic violence prevention.[13]

2.10 The Chief Magistrate also noted that it was common practice for Magistrates to attempt to dispel the notion held by some parties that AVOs create a criminal record for the defendant. Magistrates routinely inform parties that AVOs regulate future behaviour and do not constitute a criminal offence unless breached.[14]

Arguments in favour of separate AVO legislation

2.11 Other submissions supported the idea of separate holistic legislation for both ADVOs and APVOs.[15]

2.12 In some submissions, the current placement of AVOs in the Crimes Act was considered to be inappropriate due to their civil nature (except for breach of an AVO).[16] The location of the provisions helps to foster the misapprehension that AVOs are a criminal prosecution.[17] This fear may deter otherwise willing defendants from consenting without admission.[18]
It is alleged that there is also a large number of applicants who withdraw AVO applications

10. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Jane Wangmann, *Submission*.
11. Jane Wangmann, *Submission*.
12. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Intellectual Disability Rights Service Inc, *Submission*; Legal Aid NSW, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
13. Chief Magistrate, Local Court of NSW, *Submission*.
14. Chief Magistrate, Local Court of NSW, *Submission*;
15. Blue Mountains Community Legal Centre, *Submission*; Children's Magistrate, Lidcombe Children's Court, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; NSW Department of Education and Training, *Submission*; NSW Ombudsman, *Submission*.
16. Law Society of NSW, Criminal Law Committee, *Submission*.
17. NSW Department of Education and Training, *Submission*.
18. Mt Druitt and Area Community Legal Centre, *Submission*; NSW Ombudsman, *Submission*.

because of the associated concept of criminality.[19] If the primary object of the legislation is to protect victims, then the enactment of separate legislation may be helpful.[20] However, breaches involving criminal conduct should remain a criminal offence and be provided for in the Crimes Act.[21] It was also considered that Part 15A contains too many procedural provisions, which is inconsistent with the approach of the Crimes Act since most other procedural provisions have been moved to criminal procedure legislation.[22]

2.13 Further, the view was expressed that the AVO provisions have become so complex that they have been lost in the "rump" of the Crimes Act, which decreases public accessibility.[23] Separate legislation would underline the importance of AVOs.[24] It would also enable a more holistic approach to violence prevention and not just focus on criminal deterrence.[25] For example, the court could have the power under separate legislation to accept undertakings from a defendant to engage in a rehabilitation program, such as anger management, drug and alcohol assessment, counselling, psychiatric assessment, even if the court decided not to issue an AVO.[26]

2.14 The NSW Ombudsman raises concerns regarding the impact of AVO proceedings in terms of causing delays in investigations into child abuse allegations, where the basis for both complaints arises from the same action. The Ombudsman suggests that a person who is subject to a child abuse allegation, and who is collaterally defending an AVO, may have some grounds in declining to respond to an investigation on the ground that material unearthed may prejudice the person's defence against the AVO application. This is made more likely because the statutory base of AVOs is the Crimes Act, with the hearing being conducted in the Local Court, generally at times when criminal matters are heard. To avoid this situation, the Ombudsman recommends that AVOs be placed in other legislation, and that there should be a clear distinction between the hearing for an AVO and criminal proceedings.[27]

Separate domestic violence legislation

2.15 As an alternative to separate legislation covering both ADVOs and APVOs, the Commission presented the option in DP 45 of separate legislation covering violence in domestic relationships only.[28]

This suggestion reflects the widely acknowledged view that violence in domestic relationships differs from other types of violence, which may justify a specialist legal response. As noted in Chapter 1, the last amendments to Part 15A in 1999 were aimed at affecting a greater legislative distinction between ADVOs and APVOs for the same reason.[29] Domestic violence often involves issues of financial dependence, physical and emotional power and control, and shared emotional

19. University of Newcastle Legal Centre, *Submission*.
20. University of Newcastle Legal Centre, *Submission*.
21. University of Newcastle Legal Centre, *Submission*.
22. Children's Magistrate, Lidcombe Children's Court, *Submission*.
23. Children's Magistrate, Lidcombe Children's Court, *Submission*.
24. Children's Magistrate, Lidcombe Children's Court, *Submission*.
25. Children's Magistrate, Lidcombe Children's Court, *Submission*.
26. Children's Magistrate, Lidcombe Children's Court, *Submission*.
27. NSW Ombudsman, *Submission*.
28. See DP 45 para 6.8-6.14.
29. See para 1.22.

history, which set it apart from non-domestic abuse. The situation is further complicated where there are children of the relationship.

2.16 Other Australian jurisdictions have a dual regime, whereby domestic violence and personal violence protection orders are dealt with under separate laws.[30] Procedurally, those laws are similar to Part 15A.

2.17 Legislation and practice concerning domestic violence prevention in other jurisdictions has a focus beyond restraining orders, reflecting an "international recognition that tinkering with reform in discrete sectors of the legal system is an inadequate response".[31] In DP 45, the Commission discussed the New Zealand model, which has a rehabilitative focus, attempting to address the violent behaviour itself through compulsory referral to perpetrator programs,[32] as well as delivering sanctions for breach.

2.18 The following comments on the proposal were raised in submissions and consultations.

Views in favour

2.19 A number of submissions favoured the creation of new domestic violence legislation encompassing ADVOs.[33] The majority of those supported legislation along the lines of the *Domestic Violence Act 1995* (NZ) ("the NZ legislation"), which implements a system of rehabilitation and counselling programs in addition to legal sanctions.[34] These submissions expressed the view that domestic violence is radically different from violence in other relationships, revolving around power and control, and usually involving more serious levels of violence.[35] Having ADVOs and APVOs together "muddies the waters and detracts from the

30. 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 and Family Violence Protection Act 1989* (Qld); *Peace and Good Behaviour Act 1982* (Qld); *Domestic Violence Act 1994* (SA); *Summary Procedure Act 1921* (SA); and *Crimes (Family Violence) Act 1987* (Vic).
31. R Hunter and J Stubbs, "Model laws or missed opportunity? Recent proposals concerning domestic violence law reform" (1999) 24(1) *Alternative Law Journal* 12.
32. *Domestic Violence Act 1995* (NZ) s 32(1).
33. Blue Mountains Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Mt Druitt and Area Community Legal Centre, *Submission*; NSW Department of Education and Training, *Submission*; NSW Police Service, *Submission*; University of Newcastle Legal Centre, *Submission*; Western NSW Community Legal Centre, *Submission*; Young Lawyers Criminal Law Committee, *Submission*.
34. Blue Mountains Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Mt Druitt and Area Community Legal Centre, *Submission*; Western NSW Community Legal Centre, *Submission*.
35. Young Lawyers Criminal Law Committee, *Submission*. According to a study by the NSW Bureau of Crime Statistics and Research, 83.4% of ADVO applicants had been pushed, grabbed or shoved by the defendant, whereas only 37.3% of APVO applicants were similarly treated. Also 42.9% of ADVO applicants had been slapped by the defendant, compared with 15.7% of APVO applicants: L Trimboli and R Bonney, *An evaluation of the NSW Apprehended Violence Order scheme*, (NSW Bureau of Crime Statistics and Research, Sydney, 1997) at 29-30.

seriousness and particular dynamics of domestic violence".[36] NSW Police see the creation of separate legislation to be a "logical step".[37] It was noted that media criticism about the abuse of AVOs through the making of frivolous complaints does not distinguish between APVOs and ADVOs, which trivialises domestic violence and undermines the integrity of the AVO legislation.[38]

2.20 The possibility that the creation of a separate Act will create the perception that domestic violence is "de-criminalised" is a significant one. However, some submissions considered that, on balance, the creation of a separate Domestic Violence Act would not have this effect. It was pointed out that it is not unusual for serious criminal offences to be provided for in legislation other than the Crimes Act, for example, the *Drug Misuse and Trafficking Act 1985* (NSW), and there does not seem to be a public perception that these offences are less serious than those contained in the Crimes Act.[39]

2.21 The NSW Police Service supports establishing separate domestic violence legislation for a number of reasons. First, it would be simpler for police to enforce. Part 15A has been amended numerous times, resulting in a confusing and unclear combination of sections. A separate Act would allow clarity and the insertion of a table of contents. Secondly, clearer links could be made to other relevant legislation.[40] Thirdly, the relationship between the definition of domestic relationship in s 562A(3) and the definition of personal violence offence in s 4(1) of the Crimes Act make the various domestic violence offences unclear. A new Domestic Violence Act could contain a clear definition of domestic violence, which would emphasise its criminal nature.[41] Finally, the creation of a separate Domestic Violence Act allows for the development of broader objects covering ADVOs and domestic violence offences.

2.22 Some submissions which advocated separate domestic violence legislation also proposed that the law should continue to provide for APVOs (perhaps being renamed "personal protection orders" to avoid confusion[42]), but under distinct legislation.[43]

Views against

2.23 Some submissions expressed strong arguments against the creation of separate domestic violence legislation, preferring the current legislative framework.[44]

36. Blue Mountains Community Legal Centre, *Submission*.
37. NSW Police Service, *Submission*.
38. Young Lawyers Criminal Law Committee, *Submission*; *Bourke consultation*.
39. NSW Police Service, *Submission*; Western NSW Community Legal Centre, *Submission*.
40. Such as: *Bail Act 1978* (NSW); *Evidence Act 1995* (NSW); *Firearms Act 1996* (NSW); *Law Enforcement (Powers and Responsibilities) Bill 2002* (NSW); and *Local Courts (Criminal and Applications Procedure) Rule 2003* (NSW).
41. NSW Police Service, *Submission*.
42. Law Society of NSW, Criminal Law Committee, *Submission*.
43. Blue Mountains Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Young Lawyers Criminal Law Committee, *Submission*.
44. AVLICC, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Family Law Reform Association, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*;

2.24 There was also significant opposition to using the New Zealand Domestic Violence Act as a model:

> There is a danger that separate legislation relegates the issue of domestic violence to a non-criminal field, strongly influenced by medical and therapeutic ideas of pathologising violent behaviour. Domestic violence behaviour must be criminalised not pathologised.[45]

2.25 Some were of the view that the strengths of separate legislation have not been borne out by the New Zealand experience in terms of its effectiveness in preventing or reducing violence.[46] While it is necessary to have an holistic approach with the provision of adequate support services complementing legislation, it was stated in some submissions that it may not be appropriate for such programs to be underpinned by legislation whose main objective is to provide access to protection orders.[47] There has been much debate about whether perpetrator programs have been successful, and there is no clear evidence to indicate success.[48] Even though attendance at a program by a defendant is compulsory under the New Zealand legislation, the numbers of defendants completing or even starting rehabilitation programs is well below expectations.[49]

2.26 One submission cited the following difficulties with the type of approach used in New Zealand:

- defendants may rely on the "successful" completion of a perpetrator program to argue that a final protection order is no longer required, as has happened in New Zealand;[50]
- the problems with enforcing directions to attend programs could weaken the enforcement of other aspects of the legislation, such as AVOs;
- it could encourage the view that violence is a therapeutic issue rather than a crime; and

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Legal Aid NSW, *Submission*; NSW Health, *Submission*; Julie Stubbs, *Submission*; Jane Wangmann, *Submission*.

45. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*. See also Jane Wangmann, *Submission*.
46. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; NSW Health, *Submission*; Jane Wangmann, *Submission*; Margrette Young, *Submission*.
47. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*.
48. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; NSW Health, *Submission*; Jane Wangmann, *Submission*. See Keys Young, *Ending domestic violence? Programs for perpetrators* (National Crime Prevention, Barton, ACT, 1999), which found that the evidence of the effectiveness of these programs is still not fully demonstrated. 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.
49. Jane Wangmann, *Submission*; Margrette Young, *Submission*. See para 2.36 below for further discussion on this point.
50. Jane Wangmann, *Submission*. See also H Barwick, A Gray and R Macky, *Domestic Violence Act 1995: process evaluation* (NZ, Ministry for Justice and Department for Courts, 2000) at 363.

- programs for women and children who are victims of violence should be available outside legislation, whether or not an AVO has been applied for.[51]

2.27 Concern has been expressed that the introduction of separate legislation may also add to the complexity of practice in the area. Already those working in domestic violence prevention need to address the multiple and sometimes competing or conflicting provisions of the Crimes Act, the *Family Law Act 1975* (Cth) and child protection legislation. Adding a new Act may do nothing substantive for a client who faces poor enforcement practices, poor implementation and inter-jurisdictional problems. Also ADVOs are often made in the context of criminal proceedings because they contain allegations of criminal conduct which makes it convenient for domestic violence matters to be dealt with in the Crimes Act.[52]

2.28 Accordingly, the overall view expressed in submissions is that the most effective sanction against domestic violence has been proven to be a strong legislative response.[53] It was also suggested that change of this nature should not occur purely for change's sake, but only if it would benefit victims of domestic violence.[54]

2.29 The Family Law Reform Association also strongly opposes separate domestic violence legislation, but for a different reason from the views discussed above. The Association considers that, while domestic violence is a serious issue, to separate ADVO provisions from other serious crimes would be to "elevate domestic violence onto an artificial level of its own".[55]

The Commission's view

2.30 The arguments for retaining the AVO provisions in the Crimes Act or removing them to separate legislation are persuasive either way. On one hand, separate legislation would clarify that AVOs are civil rather than criminal matters, and so remove the fear held by some applicants and defendants that an AVO will bring to bear the full weight of the criminal law. That fear may result in people in need of protection being reluctant to apply for an AVO, and so expose them to ongoing danger. It may also make it less likely for defendants to consent to an AVO, and so force the matter to go to a final hearing. On the other hand, the decision to leave AVOs to be governed by Part 15A of the Crimes Act reflects the underlying notion that AVOs are primarily grounded in, and are designed to prevent, criminal behaviour.

2.31 Similarly, there are cogent arguments for enacting separate holistic domestic violence legislation. Separate legislation could deal specifically with this particularly difficult crime, which differs in nature from all others. Such legislation could provide for ADVOs to be granted, as well as facilitating access to rehabilitation and perpetrator programs to attempt to address the root causes of domestic violence. It would also provide an opportunity to streamline what is currently quite complex and cumbersome legislation. However, the danger that separate domestic violence legislation could create the impression that domestic violence is no longer a crime, as expressed in a number of submissions, is concerning.

51. Jane Wangmann, *Submission*.
52. Julie Stubbs, *Submission*.
53. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
54. Jane Wangmann, *Submission*.
55. Family Law Reform Association, *Submission*.

Programs for perpetrators and victims

2.32 One of the more significant arguments for separate legislation is the capacity for such legislation to have a broader focus than would be appropriate under the Crimes Act, encompassing education and rehabilitation programs for perpetrators of domestic violence, and other programs to assist victims. As noted earlier, New Zealand is an example of a jurisdiction which has broadly-based domestic violence legislation.

2.33 When the court makes a protection order under the NZ legislation, it must direct the defendant to attend a specified program, unless the court considers that there is a good reason for not making such a direction.[56] Further, a person protected by an order may request that a program be provided for his or her benefit, or for the benefit of a child of his or her family.[57] Where such a request has been made, the Registrar of the court must arrange for referral to a program provider without delay.[58]

2.34 The *Domestic Violence (Programmes) Regulations 1996* (NZ) set out the goals of the programs and the requirements for approval as a program provider. For example, in order to be approved, a program provider must, among other things, have knowledge and understanding of the nature and effects of domestic violence and the dynamics of violent domestic relationships,[59] and must belong or be accountable to, a professional body with a code of ethics, an effective complaints procedure and an appropriate level of continuing education.[60]

2.35 The primary goal of every perpetrator program approved under the NZ legislation is to stop or prevent domestic violence.[61] In addition, every program must aim to change the behaviour of the perpetrator by increasing understanding about the nature and effects of domestic violence, including the impact on the victim and any children involved, and increasing awareness of the objects of the legislation, the effect of protection orders and the consequences of breaching them.[62] The programs must also aim to assist the perpetrator to develop skills to deal with potential conflict in non-abusive ways. Programs for adult protected persons must have as their primary objective the protection of those persons from domestic violence, and must also be aimed at empowering them to deal with the effects of violence and to put in place strategies to maximise that person's safety.[63] The Regulations also provide for programs for children subject to domestic violence. Those programs must aim to assist children to deal with the effects

56. *Domestic Violence Act 1995* (NZ) s 32.
57. *Domestic Violence Act 1995* (NZ) s 29.
58. *Domestic Violence Act 1995* (NZ) s 29(3).
59. *Domestic Violence (Programmes) Regulations 1996* (NZ) cl 15. That clause also provides that a person cannot be approved as a program provider if he or she has had a protection order taken out against him or her, or been convicted of a domestic violence offence, within three years immediately prior to making an application for approval. Where a prospective program provider has applied for a protection order, or been the victim of domestic violence, within that three year period, the applicant must show that he or she has addressed the effects of domestic violence on his or her own life.
60. *Domestic Violence (Programmes) Regulations 1996* (NZ) cl 16.
61. *Domestic Violence (Programmes) Regulations 1996* (NZ) cl 32(1).
62. *Domestic Violence (Programmes) Regulations 1996* (NZ) cl 32(2).
63. *Domestic Violence (Programmes) Regulations 1996* (NZ) cl 28.

of domestic violence, to help them to express their feelings, and to develop a sense of normality and build self-esteem.[64]

2.36 An evaluation of the operation of the *Domestic Violence Act 1995* (NZ) revealed that those who had attended the programs were positive about their experiences. However, the non-completion rate for perpetrator programs was high, despite the mandatory nature of the programs.[65] Judges and court staff also expressed concern that the quality of content of the perpetrator programs had not been reviewed, and no studies had been done to assess whether the programs affected the rate of recidivism.[66] Further, the take up rate of programs by those protected under restraining orders was extremely low.[67]

2.37 The development of perpetrator programs in NSW is in its infancy, and is yet to be fully evaluated.[68] The Commission is of the view that, if properly funded and regulated, such programs, as well as those for victims of domestic violence, have the potential to be enormously beneficial as violence prevention measures. Despite the difficulties experienced with the New Zealand legislation, other studies have concluded that the most effective model for best practice is an integrated and "co-ordinated approach between government and non-government services".[69] Consequently, the Commission is of the view that suitable programs for perpetrators and victims of domestic violence should continue to be developed and piloted in conjunction and consultation with existing support services, such as the WDVAS and DVLOs.

2.38 However, the Commission is persuaded by the arguments against underpinning or mandating those programs in Part 15A. Access should be available whether or not an ADVO is being sought. As the experience of the *Domestic Violence Act 1995* (NZ) has shown, mandating

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64. *Domestic Violence (Programmes) Regulations 1996* (NZ) cl 30.
65. 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: H Barwick, A Gray and R Macky, *Domestic Violence Act 1995: process evaluation* (NZ, Ministry for Justice and Department for Courts, 2000) 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.
66. Barwick, Gray and Macky at para 10.1
67. Barwick, Gray and Macky at para 10.2. Reasons given for the low rates of attendance included lack of information or awareness about the programs and their potential benefits, the inability to commit to a program lasting months during a time of upheaval, and the perception that participation in a program implies that the protected person is part of the problem: at para 10.2
68. The Commission understands from the NSW Police submission that the Government is piloting a perpetrator program as part of a sentence for domestic violence offenders. The Pilot Program consists of a 16-week perpetrator education program, which is mandated, with referral to the program forming a sentence imposed on male perpetrators found guilty of, or pleading guilty, to a domestic violence offence. Support services are offered for the partners or former partners of men attending the program.
69. Auditor General for Western Australia, *A measure of protection: management and effectiveness of Restraining Orders* (Report No 5, 2002).

rehabilitation programs in legislation will not necessarily ensure that resources are available to fund sufficient appropriate programs, particularly in rural areas, or that defendants will actually attend.

AVO provisions to remain in the Crimes Act

2.39 The question of whether the AVO provisions should remain in the Crimes Act is a vexed and controversial one. So is the related but distinct issue of separate domestic violence legislation. As noted above, there are cogent arguments both for recommending change and for retaining the *status quo*. Having considered all views, the Commission recommends that, on balance, both ADVOs and APVOs should continue to be included in Part 15A of the Crimes Act, for now at least. That decision is based on the recognition that the core policy objective of AVO legislation should be to protect against actual or threatened domestic and personal violence. The Commission also notes that many of the issues raised in support of separate legislation, such as greater clarity, could be addressed administratively by better education and training programs on the nature and purpose of AVOs in general and Part 15A in particular,[70] and clearer statements of legislative policy.[71]

2.40 Consequently, while there are benefits in enacting separate legislation, there is no pressing need for such a reform at this time. In view of this decision, the Commission's recommendations in this Report are aimed at ensuring that the existing structure and provisions of Part 15A better reflect the policy objectives of that Part. However, the Commission is of the view that the issues of separate AVO legislation, and/or separate domestic violence legislation, should be revisited in any future reviews of Part 15A for the following reasons.

2.41 First, the Commission notes that the construction of Part 15A is confusing and unwieldy, due largely to incremental amendments over a number of years. The enactment of separate AVO legislation would provide an opportunity to simplify and streamline the provisions to enhance their accessibility. Secondly, while many AVOs involve serious violence, a number of applications are made (particularly with regard to APVOs) based on disputes that could be said to be quite trivial. In Chapter 5, the Commission recommends an increased role for mediation in relation these types of matters. As such, it may become increasingly inappropriate for such a legislative focus to be included in the Crimes Act.

2.42 Finally, so far as separate domestic violence legislation is concerned, the danger that this could result in domestic violence being seen as less of a crime is worrying. However, the need for the criminal justice system to develop a specialist response, in conjunction with other government and non-government support agencies, to the particular problem of domestic violence is also a priority. In paragraph 2.46-2.49 below, the Commission recommends the trial of a specialist panel of Magistrates, to be established initially at one local court, to deal specifically with domestic violence matters, including ADVOs. Depending on the outcome of that pilot program, it may be appropriate to revisit the issue of separate domestic violence legislation at a later date.[72]

70. For a detailed discussion of implementation issues, see Chapter 3.
71. See Recommendations 3-7 and the preceeding discussion at paras 2.66-2.73 below.
72. See para 2.49.

Specialist domestic violence panel

2.43 By leaving both ADVOs and APVOs in Part 15A, other practical and administrative ways of recognising the unique nature of domestic violence need to be examined. Domestic violence, including the granting of ADVOs, requires a response from police and judicial officers distinct from that required for violence in other types of relationships.

2.44 Specialisation already exists in a number of courts across a variety of practice areas. For example, Western Australia has the Joondalup Family Violence Court project, which adopts an integrated approach between various government and non-government agencies in dealing with restraining orders and all criminal matters related to family violence.[73]

2.45 While NSW does not have a specialist domestic violence jurisdiction, specialisation exists in a number of other areas. Some jurisdictions are established under their own legislation with specialist judicial officers appointed to them, such as the Drug Court[74] and the Children's Court.[75] Others are less formal jurisdictions within the existing court structure and do not have legislative underpinning. An example is the recently established Child Sexual Assault Division of the Local and District courts being piloted at Parramatta.[76] The initiative was recommended late last year by the Legislative Council Standing Committee on Law and Justice as a way of responding more appropriately to the particular needs of children in child sexual assault proceedings.[77] Cases will continue to be listed normally before either the Local or District Court, with child sexual assault matters being identified early and referred to the specialist Division. All judicial officers rostered to sit in the Sydney West Registry of the District Court are taking part in the pilot project, and specialised training in childhood development and child sexual assault issues is being made available through the Judicial Commission. The pilot will gradually be extended to further locations and evaluated upon its conclusion in August 2005.[78]

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73. For an evaluation of the Court, see Western Australia, *Joondalup Family Violence Court final report* (Department of Justice and Western Australian Police Service, February 2002).
74. The Drug Court is governed by the *Drug Court Act 1998* (NSW), and emerged as a result of the growing disenchantment with the ability of traditional criminal justice approaches to dealing with crime associated with long-term drug use.
    The Court has both Local Court and District Court jurisdiction, and operates from the Parramatta Court complex. The Drug Court aims to assist drug-dependent offenders to reduce their dependency and their criminal activity:
    see «http://www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/index».
75. The Children's Court is established by the *Children's Court Act 1987* (NSW).
    Its procedure is governed by Chapter 6 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). The Children's Court has its own Senior Magistrate appointed by the Chief Magistrate of the Local Court, and a number of specialist Children's Magistrates chosen for appointment because of their "knowledge, qualifications, skills and experience in the law and the social or behavioural sciences, and in dealing with children and young people and their families": see *Children's Court Act 1987* (NSW) s 7(2)(b).
76. "Child-sex court for NSW" *Australian Financial Review* (22 November 2002) at 56.
77. Parliament of NSW, Legislative Council Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002) Recommendation 43 at para 7.38.
78. Information supplied by the Legislation and Policy Division of the NSW Attorney General's Department.

2.46 The Commission is of the view that domestic violence is a key area where the development of specialist expertise amongst Magistrates would be of enormous benefit. Some submissions suggested that a practice of separate list days should be instigated in all courts, which would enable more specialisation and concentrated support for domestic violence victims.[79] This is currently the practice in a number of local courts.
The Commission recommends that this specialisation should be taken one step further through the development of a specialist panel of Magistrates trained specifically in domestic violence issues. Magistrates would continue to be appointed as normal to the Local Court generally, and the Chief Magistrate could draw from them to constitute the panel. That panel could hear ADVO applications and deal with substantive criminal offences within the ordinary jurisdiction of the Local Court. As with the Child Sexual Assault Division, the domestic violence panel could be trialed as a pilot program in a Local Court with a high number of ADVOs, such as Fairfield, Liverpool, Sutherland, or the Hunter or Illawarra regions,[80] and could be set up administratively with no need for separate legislation. If successful, the pilot program could be extended to other local courts throughout the State.

2.47 One drawback with the creation of a specialist domestic violence panel could be that some applicants and defendants may be reluctant to attend due to the stigma of the domestic violence label. Another possibility is that some defendants may feel a sense of bravado in being separated out from the Local Court's general jurisdiction, and consequently view their behaviour as being less serious.

2.48 In the Commission's view, however, the development of a Bench with specialist expertise in dealing with domestic violence would greatly assist in overcoming many of the problems raised in submissions concerning the implementation of Part 15A. For example, Magistrates would develop a greater appreciation of the particular issues and power imbalances involved in domestic violence. They would also become more adept at identifying ADVO applications that are not genuine. A specialist panel would also help to overcome some of the problems currently experienced with inconsistency between Magistrates in the interpretation of Part 15A. While resources would be needed to provide the appropriate training, there would also be administrative efficiencies achieved through specialisation.

2.49 Since the proposed trial would occur within the existing structure of the local court, it can be undertaken without additional or separate legislation. However, should this pilot program be expanded, this would see an increasing specialisation of domestic violence matters at a practical level. At that time, it may be appropriate to underpin that practice with separate legislation. It is to be hoped that this specialisation would emphasise the unique problems associated with domestic violence and the measures being undertaken to address them, rather than being seen to diminish its significance. Accordingly, the Commission is of the view that, while the timing is not yet right for separate domestic violence legislation, the issue should be revisited at a future date following the evaluation of the recommended pilot program.

RECOMMENDATION 1

79. Erin's Place for Women and Children, *Submission*; *Newcastle consultation*.
80. According to the Bureau of Crime Statistics and Research, these areas recorded a high number of recorded ADVOs in 2002: «http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/lc_2002_avo».

The Commission recommends that the AVO provisions remain in the Crimes Act for the time being. However, the issue of separate AVO legislation, and/or separate domestic violence legislation, should be revisited at a later date.

RECOMMENDATION 2

The Commission recognises that domestic violence raises different issues from violence in other relationships, and requires a specialised legal response. Accordingly, the Commission recommends that a panel of Magistrates with specialist training in domestic violence issues be established as a pilot project in a Local Court with a high turnover of domestic violence matters. That panel should deal with all aspects of violence, intimidation, harassment and stalking in domestic relationships, including ADVOs.

POLICY OBJECTIVES OF PART 15A

Objectives applicable to ADVOs

2.50 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.[81]

2.51 Originally designed to protect against physical violence in domestic relationships, Part 15A currently provides for Apprehended Domestic Violence Orders, and also Apprehended Personal Violence Orders to be granted where the applicant fears that he or she will be the victim of some form of physical, psychological or emotional abuse.[82] 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[83] or the provisions containing the offences of stalking and intimidation.[84]

2.52 Currently, the stated objects of the ADVO provisions, contained in Division 1A, 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

81. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 9 November 1982 at 2368.
82. See para 1.17-1.25 and DP 45 para 2.2-2.22 for a discussion of the development of AVO legislation.
83. Crimes Act Part 15A Div 1B.
84. Crimes Act s 562AB.

- to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women.[85]

2.53 Part 15A provides that 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.[86] 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.[87]

2.54 In DP 45, the Commission asked whether the current objects of Division 1A of Part 15A are appropriate, and whether they should be extended to apply to APVOs also. The following views were expressed in submissions and consultations.

Views in submissions and consultations

Appropriateness of objectives

2.55 The majority of submissions and views expressed during consultations on this issue indicated that the policy objectives in Division 1A applicable to ADVOs are appropriate.[88] The importance of an objects clause was stressed in some submissions:

> [N]ot only can an objects clause provide critical guidance to magistrates/judges – it also can play a key role in how lawyers, or police prosecutors, acting for victims of domestic violence, can articulate the violence that she has been experiencing, where otherwise it may not be seen as "violent" but rather trivial and even "meaningless".[89]
>
> The r*aison d'etre* of the objects clause is to guide those who exercise power conferred by Part 15A to exercise that power in accordance with the community's objection to domestic violence.[90]

2.56 Given the importance of the objects, some considered that they should go further in condemning the use of violence: perhaps stating that no one deserves violence; that there are no excuses for violence; that violence is a crime, and that women have the right to be safe and

85. Crimes Act s 562AC(1).
86. Crimes Act s 562AC(2).
87. Crimes Act s 562AC(3).
88. See eg AVLICC, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Legal Aid NSW, *Submission*; NSW Health, *Submission*; NSW Police Service, *Submission*; Young Lawyers Criminal Law Committee, *Submission*; Julie Stubbs, *Submission*; Jane Wangmann, *Submission*; *Newcastle consultation*; *Wollongong consultation*.
89. Jane Wangmann, *Submission*.
90. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.

live free from violence.[91] It was also suggested that the objects should make it clear that the ADVO provisions are a supplement to the criminal law.[92]

2.57 In addition, the view was expressed that the objects should include a clause that outlines the paramount consideration when a court is deciding whether or not to make an interim or final AVO:

> While this may appear obvious – nowhere is the paramount consideration of the safety of the complainant and or the child(ren) of the relationship, articulated in the NSW legislation. A provision of this kind is contained in the Protection Orders Act 1991 (ACT), s 6(1)(a):
>
> In deciding an application for a protection order, the paramount consideration is –
>
> (a) for a protection order … – the need to ensure that the aggrieved person is protected from domestic violence; …
>
> Such a statement may provide more critical guidance to the court when considering applications for interim orders and exclusion orders for example.[93]

2.58 One issue that emerged consistently in submissions and consultations was the need to recognise the particularly vulnerable position of children in the AVO process, as applicants and defendants.[94] It was thought that the objects should specifically recognise the impact of domestic violence on children's life outcomes and opportunities, and the importance of protecting children against the effects of domestic violence, either as victims or witnesses.[95] To reinforce the commitment to children's rights to live free from violence, it was suggested that the objects could refer to the United Nations Convention on the Rights of the Child.[96]

2.59 Another submission stated that there should be an additional objective stating that Parliament recognises that domestic violence occurs in non-traditional settings, such as group homes and institutions.[97]

2.60 Some submissions were of the view that the objects should be extended to provide for a more rehabilitative focus, making reference to perpetrator programs and victim support services.[98] If the objects were to be extended in this manner, some submissions considered that the New Zealand legislation is a useful model.[99] Others, however, were strongly against enshrining referral to perpetrator programs in AVO legislation, considering that most of the

91. Hawkesbury Nepean Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*.
92. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
93. Jane Wangmann, *Submission*.
94. NSW Commission for Children and Young People, *Submission*.
95. NSW Commission for Children and Young People, *Submission*; University of Newcastle Legal Centre, *Submission*; *Newcastle consultation*.
96. NSW Commission for Children and Young People, *Submission*.
97. Intellectual Disability Rights Service Inc, *Submission*.
98. Multicultural Disability Advocacy Association, *Submission*.
99. Chief Magistrate, Local Court of NSW, *Submission*; Multicultural Disability Advocacy Association, *Submission*.

existing programs have never been evaluated, and that access to them should be available outside of an AVO context.[100]

2.61 The reference currently contained in the ADVO objectives to the fact that most domestic violence is perpetrated by men against women, generated some controversy. Some considered its inclusion essential to the proper interpretation of Part 15A,[101] noting that the "law has rarely recognised the gendered nature of certain offences".[102] The retention of the reference to the Declaration of the Elimination of Violence Against Women was also considered to be desirable, as it demonstrates the NSW Government's commitment to upholding international agreements.[103]
It was also suggested that Magistrates should be given ongoing education about the Declaration and the nature of gendered violence.[104] NSW Police were of the view that the reference in s 562AC(1)(c) to "certain principles underlying the Declaration of the Elimination of Violence Against Women" should be defined and clarified to give more effective guidance to police officers in exercising their role under Part 15A.[105]

2.62 The alternative view was also put to the Commission, with some being of the opinion that the gendered reference is inappropriate as "[v]ictims who come into the system who do not fit within this precept are immediately marginalised from the philosophy which underpins the very objects of the legislation".[106] The suggestion was also made that the reference to men committing the majority of domestic violence is inaccurate, and understates the violence perpetrated by women against men, children and other women, by men against men, and violence as between children.[107] Those submissions recommend that the objects should be based on the premise that unlawful violence against anyone (whether in a domestic context or not) is unacceptable, and that all victims are entitled to protection to the same degree.[108]

100. NSW Police Service, *Submission*; Julie Stubbs, *Submission*; Jane Wangmann, *Submission*.
101. NSW Police Service, *Submission*; University of Newcastle Legal Centre, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; Jane Wangmann, *Submission*; Young Lawyers Criminal Law Committee, *Submission*; *Wollongong consultation*.
102. Jane Wangmann, *Submission*.
103. NSW Police Service, *Submission*; University of Newcastle Legal Centre, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; Jane Wangmann, *Submission*; *Wollongong consultation*.
104. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
105. NSW Police Service, *Submission*.
106. Children's Magistrate, Lidcombe Children's Court, *Submission*. See also Family Law Reform Association, *Submission*; and Mt Druitt and Area Community Legal Centre, *Submission*.
107. Children's Magistrate, Lidcombe Children's Court, *Submission*. The Family Law Reform Association asserts that reliable studies have shown that between 30% and 50% of violence in and around the home is perpetrated by women: see Family Law Reform Association, *Submission* and the discussion at para 2.70-2.71 below.
108. Children's Magistrate, Lidcombe Children's Court, *Submission*; Family Law Reform Association, *Submission*.

Should the objects be extended to cover APVOs?

2.63 A small number of submissions expressed a favourable view of extending the ADVO objects to cover APVOs also.[109] The majority view was that the objects should remain specifically focused on domestic violence.[110] Having separate objects correctly reflects the "special category of domestic violence".[111] To make them more general would detract from the emphasis rightly placed on domestic violence.[112]

> Domestic violence is not just violence, it is abuse of a position of power and trust against those least able to protect themselves within the privacy of their own home. It is complex and overladen with community and cultural imperatives that influence the behaviour of both perpetrator and victim/s. The victims therefore require the community to be more, not less vigilant and more available to support and protect them. Further, the wide ranging and intergenerational effects of domestic violence demand that it is specifically recognised within the legislation. Naming this commitment in an objects clause names the crime and gives the victims credibility through this acknowledgement.[113]

> [T]he objects clause inserted in the legislation serves a number of important purposes. It has a symbolic value signalling to the community that domestic violence is taken seriously. It is consistent with the Declaration on the Elimination of Violence against Women.
> It serves an important pedagogical purpose in instructing police, lawyers, magistrates and others responsible for the implementation of the legislation about domestic violence and in providing them with some underlying principles that might guide the exercise of the discretions inherent in their work.[114]

109. Multicultural Disability Advocacy Association, *Submission*; Parkes Community Health Centre, *Submission*.
110. Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; Julie Stubbs, *Submission*; NSW Women's Refuge Movement, *Submission*; Jane Wangmann, *Submission*.
111. Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; Jane Wangmann, *Submission*; Young Lawyers Criminal Law Committee, *Submission*.
112. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; NSW Women's Refuge Movement, *Submission*; Jane Wangmann, *Submission*.
113. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
114. Julie Stubbs, *Submission*.

2.64 It was suggested that consideration should be given to strengthening the current ADVO objects rather than applying them to APVOs.[115] It was also considered that the objects should be more specific and a better aid to interpretation for the courts.[116]

2.65 Some submissions conveyed the opinion that separate objects should apply to APVOs in Division 1B.[117] A separate statement of objects for APVOs may assist in clarifying their focus as a means of preventing violence and intimidation rather than resolving neighbourhood disputes.[118]

THE COMMISSION'S VIEW

2.66 The Commission agrees with the views expressed in submissions concerning the importance of objects clauses to define legislative policy and intent, and to guide its interpretation. Having determined that both ADVOs and APVOs should continue to be regulated by Part 15A, the question remains as to whether the current policy objectives contained in Part 15A relating to ADVOs are an appropriate indicator of the rationale and purpose of that Part and, if so, should those objects be extended to apply to the whole of Part 15A?

Policy objectives specifically for ADVOs

2.67 While the concept of having a single statement of objectives for the whole of Part 15A, covering both ADVOs and APVOs, would be more streamlined and less complex, the Commission is persuaded by the arguments in favour of retaining separate policy objectives for ADVOs. Domestic violence is intrinsically different in nature from other types of violence, and requires a distinct type of legislative recognition. A unique set of difficulties, attitudes and preconceptions accompanies domestic violence, all of which influence the actions and decisions of police, lawyers and judicial officers to a greater or lesser extent. To broaden the focus of the policy objectives in Division 1A of Part 15A would be to dilute and weaken their force in terms of how ADVOs are interpreted and implemented by those whose job it is to do so. Accordingly, it is appropriate that a strong legislative statement of policy be targeted specifically at ADVOs. The retention of a separate statement of objectives is also desirable given the recommendation by the Commission that a separate domestic violence panel of the local court be piloted.[119]

Changes to the substance of ADVO objectives

2.68 So far as the substance of those objectives and how they are to be achieved is concerned, the Commission supports retaining the current provisions in s 562AC, and expanding upon them to encompass some of the suggestions raised in submissions. For example, the Commission also agrees with the suggestion that recognition be given to the fact that domestic violence occurs in all sectors of the community in traditional and non-traditional settings.

115. Jane Wangmann, *Submission*.
116. Mt Druitt and Area Community Legal Centre, *Submission*.
117. AVLICC, *Submission*; NSW, Department for Women, *Submission*; NSW Health, *Submission*.
118. NSW, Department for Women, *Submission*; NSW Police Service, *Submission*.
119. See Recommendation 2 and preceeding discussion at para 2.43-2.49.

Recognising the vulnerable position of children and young people

2.69 An increased awareness of the negative impact of domestic violence on children and young people who experience or witness it, and their position of powerlessness in the context of domestic violence, should also be a paramount consideration in the minds of those responsible for implementing Part 15A.[120] Hence, the Commission agrees with the suggestion to include specific reference to the position of children in domestic relationships where violence is a problem. The Commission recommends that recognition should be given to the particularly vulnerable position of children who are exposed to domestic violence as victims or witnesses, and the impact that such exposure can have on their current and future physical, psychological and emotional well-being. Furthermore, one of the objects of Division 1A should be to enact provisions consistent with the United Nations Convention on the Rights of the Child, as suggested by the NSW Commission for Children and Young People.[121] While State governments are not signatories to international treaties, such a reference is a strong public statement that NSW is intent on legislative measures that are consistent with one of the most important international statements of policy regarding the rights of children.

References to violence against women

2.70 Regarding the gender specific references in the objects and Parliamentary recognition statement, the Commission notes the view that this could marginalise men. Violence committed by anyone is clearly unacceptable. However, a policy decision was taken in 1999 specifically to recognise the gendered nature of domestic violence. The inclusion of this reference does not preclude men, women or children from applying for or being granted ADVOs if they fear violence, intimidation or harassment by a women with whom they have a domestic relationship.[122] What it does is reflect the majority of studies and statistics that indicate that women and children are more likely to experience domestic violence perpetrated by men,[123] and

120. Much has been written on this topic: see L Laing, *Children, young people and domestic violence* (Australian Domestic and Family Violence Clearinghouse, Issues Paper 2, 2000); National Crime Prevention, *Young people and domestic violence: national research on young people's attitudes and experiences of domestic violence fact sheet* (Australia, Department of Education, Training and Youth Affairs, Partnerships Against Domestic Violence, 2000); J McIntosh, "Thought in the face of violence: a child's need" in Partnerships Against Domestic Violence, *National Forum: the way forward: children, young people and domestic violence* (Australia Office of the Status of Women, 2000); and NSW Parenting Centre, "Domestic violence and its impact on children's development" «http://www.parenting.nsw. gov.au/public/S02_what_new/research.aspx?id=333» (April 2003).
121. In particular Article 19, which provides that signatories shall "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".
122. Women accounted for 70% of ADVO applicants in 2001 (representing an increase of 5% on the previous year), while men applied for 18% and children 12%: based on unofficial and unaudited statistics provided to the Commission on a confidential basis by Local Courts.
123. Studies note that the violence committed by men in domestic relationships is more severe than that committed by women; that women are more likely to be killed by their current or former partners than by anyone else; and that violence by women is more likely to be in self-defence or following years of being subjected to violence by their partners. These

requires the police and the courts to have regard to this when implementing Division 1A of Part 15A.

2.71 While the Commission notes studies suggesting that domestic violence committed by women is under-acknowledged,[124] an insufficient case has been made out to justify removing the gender specific references in the objects and Parliamentary recognition statement. Those references serve an important role in helping to overturn deeply-held negative attitudes to domestic violence: namely, that violence against women in their own homes is a private matter, and not one demanding urgent attention from the criminal justice system.[125] Accordingly, the Commission recommends the retention of the gender specific references in s 562AC.

Objectives should not refer to perpetrator programs

2.72 At paragraphs 2.30-2.49, the Commission decided not to recommend separate AVO or domestic violence legislation with a more holistic focus providing for referral to perpetrator programs. For the same reasons expressed there, references to rehabilitation programs should not be included in the ADVO objectives. While those programs should continue to be developed, funded, piloted and evaluated, access to them should not be dependent on AVO legislation. Reference to them in the objects may also cloud the central focus of the ADVO provisions. The Commission recommends, however, that the legislation should recognise that domestic violence is best addressed through an integrated framework of prevention and support, in which legislation is only one element.

Policy objectives for APVOs

2.73 The Commission recommends that a new set of objectives be included in Division 1B of Part 15A applying to APVOs. The paramount object of that Division should be to ensure the safety and protection of people who experience personal violence outside of a domestic relationship.

The Commission also recommends that the objects of the Division should be achieved by enabling APVOs to be made when appropriate to protect

people from serious violence, intimidation, stalking and harassment.

In Chapters 3 and 4, the Commission discusses the need to re-focus the APVO provisions to make it clear that their primary objective is to protect against serious violence, rather than dealing with less serious matters that may be better resolved through mediation. Accordingly, the objects should refer to the need to ensure other avenues of dispute resolution are encouraged, except in cases of serious violence.

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studies also noted that women are more likely to be intimidated by or fear men than the reverse: see eg Australian Bureau of Statistics, *Women's safety Australia* (Canberra, 1996); R E Dobash, R P Dobash, M Daly and M Wilson "The myth of sexual symmetry in marital violence" (1992) 39(1) *Social Problems* 71; J Mouzos, *Femicide: an overview of major findings* (Australian Institute of Criminology, 1999); D Bagshaw and D Chung, *Women, men and domestic violence* (Partnerships Against Domestic Violence, 2000).

124. See eg M Woods, *Domestic violence and the demonising of men* (unpublished paper, 20 March 2003); and B Heady, D Scott and D de Vaus, *Domestic violence in Australia: Are men and women equally violent?* (Melbourne Institute of Applied Economic and Social Reseach, 1999). See «http://www.mensrights.com.au» for relevant web links.
125. The Commission discusses the problems in implementing Part 15A due to certain negative attitudes associated with domestic violence in Chapter 3.

RECOMMENDATION 3

The Commission recommends that the current policy objectives applying to apprehended domestic violence orders in Division 1A be retained and expanded. Section 562AC(1) should provide that the objects of the Division are:

- to ensure the safety and protection of all persons (especially children) who witness or 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; and
- to enact provisions that are consistent with the United Nations Convention on the Rights of the Child.

RECOMMENDATION 4

Section 562AC(2) should be retained and expanded to provide that Division 1A aims to achieve its objects by:

- empowering courts to make apprehended domestic violence orders to protect people from domestic violence; and
- ensuring that access to courts is as speedy, inexpensive, safe and simple as is consistent with justice.

RECOMMENDATION 5

Section 562AC(3) should be retained and expanded to provide that, in enacting Division 1A, Parliament recognises:

- that domestic violence, in all its forms, is unacceptable behaviour; and
- that domestic violence extends beyond physical violence, and may involve the exploitation of power imbalances and patterns of abuse over many years; and
- that domestic violence is predominantly perpetrated by men against women and children; and
- that domestic violence occurs in all sectors of the community in traditional and non-traditional settings; and
- the particularly vulnerable position of children who are exposed to domestic violence as victims or witnesses, and the impact that such exposure can have on their current and future physical, psychological and emotional well-being; and
- that domestic violence is best addressed through an integrated framework of prevention and support.

RECOMMENDATION 6

The Commission recommends that a separate statement of objects applicable to APVOs be included in Division 1B. The objects of that Division should be to ensure the safety and protection of people who experience personal violence outside of a domestic relationship.

RECOMMENDATION 7

The Commission recommends that Division 1B should state that it aims to achieve its objects by:

- empowering courts to make apprehended personal violence orders in appropriate circumstances to protect people from serious violence, intimidation, stalking and harassment; and
- ensuring that access to courts is as speedy, inexpensive, safe and simple as is consistent with justice; and
- ensuring that other avenues of dispute resolution are encouraged where appropriate.

3. Implementation issues

- Police attitudes and practices
- Attitudes and practices of magistrates, court staff and lawyers
- Community attitudes
- Aspects of the court process

3.1 The Commission's brief is to assess the validity of the policy objectives of Part 15A, and the adequacy of the provisions of that Part in giving effect to those objectives. In the previous chapter, the Commission examined the current policy objectives of Part 15A, and determined them overall to be valid statements of the nature, purpose and intent of AVO legislation.[1] In Part 2 of this Report, the Commission recommends changes to the provisions of Part 15A to ensure that the legislation reflects the policy objectives more effectively. However, no matter how valid the policy or how well drafted the legislation, Part 15A will only be truly effective if it is interpreted and implemented consistently and appropriately. While this is true of any law, it is particularly the case with AVOs, given the difficult and delicate nature of the subject matter.

3.2 The general consensus of views expressed in the submissions and consultations is that, while there are aspects of the legislation that require fine-tuning and some amendment, the main problems lie with its implementation and interpretation.[2] Many of these implementation problems can be resolved to some extent by the amendments to Part 15A recommended by the Commission.[3] However, other issues, such as the attitudes and responsiveness of police and Magistrates, transcend the legislation, and will continue to be problematic regardless of any legislative reform. Given the impact that the implementation of Part 15A has on the achievement of the policy objectives of that Part, it is important that problems are recognised and appropriate measures be taken to address them.

3.3 It must be noted in this context, that the Commission is well aware that the police, Magistrates, courts and all others involved with administering AVOs have made much progress over the years since domestic and personal violence were first recognised as problems in need of attention. However, there are still areas that call for further improvement.

3.4 Some commentators claim that the problems are mainly the result of attitudinal and procedural inefficiencies and inconsistencies. For example, a recent study of women negotiating child contact and residence against a background of domestic violence[4] has found that domestic violence is often trivialised within the broader community and the legal system, that police responses to domestic violence are inconsistent and ADVOs are often not enforced.[5] Factors said to improve the effectiveness of the legislation include good policing (such as respectful dealings with parties, taking complainants seriously, prompt attention to calls for assistance, timely service of summonses, warrants and orders); access to courts and legal representation;

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1. See para 2.67-2.73, where the Commission recommends that the current objectives applying to ADVOs be retained and expanded, and similar but separate objectives be developed for APVOs.
2. AVLICC, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; NSW Commission for Children and Young People, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Shoalcoast Community Legal Centre, *Submission*; Young Lawyers Criminal Law Committee, *Submission*; Manly Warringah Women's Resource Centre, *Submission*; Jane Wangmann, *Submission*; NSW Women's Refuge Movement, *Submission*; Family Law Reform Association, *Consultation*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; *Newcastle consultation*.
3. See Chapters 4-12.
4. M Kaye, J Stubbs and J Tolmie, "Domestic violence and child contact arrangements" (2003) 17 *Australian Journal of Family Law* 93.
5. Julie Stubbs, *Submission*.

legal representation that responds to clients' needs; court support schemes; enforcement of breaches; efficient court practices; safe facilities at courts; and improved co-operation across jurisdictions
(for instance between Family Court and Local Courts).[6] Factors that hamper the effectiveness of the legislation would be the obverse of the above.[7] Many other submissions have made similar observations.[8]

3.5 The Commission's consultations have revealed that the major factors promoting the effectiveness or otherwise of AVOs in general, and Part 15A in particular, can be categorised as:

- police attitudes and practice;
- attitudes and practices of judicial officers, court staff and lawyers;
- community attitudes; and
- aspects of the court process.

3.6 The Commission makes no specific recommendations for change in this chapter. Instead, the Commission considers the views expressed in submissions and consultations, and presents its own views on a range of options that may improve implementation. Each of the perceived problem areas is dealt with below.

POLICE ATTITUDES AND PRACTICES

The role of the police

3.7 The police play a crucial role in all aspects of the AVO process.
They may either apply for an AVO on behalf of an applicant, or may provide information to people about how they may apply on their own behalf. If police lodge an application on someone's behalf, they will be actively involved in the entire process, from the time of making the application, through the courts and for as long as the AVO is in force. Part 15A provides that police must apply for an AVO on behalf of a person in need of protection if they suspect or believe that a domestic violence,[9] stalking[10] or child abuse offence[11] "has been or is being committed, or is imminent, or is likely to be committed, against the person for whose protection

6. Julie Stubbs, *Submission*.
7. M Kaye, J Stubbs and J Tolmie, *Negotiating child residence and contact against a background of domestic violence* (Griffith University, Families, Law and Social Policy Research Unit, Working Paper, forthcoming) Chapter 3.
8. AVLICC, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; NSW Commission for Children and Young People, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Shoalcoast Community Legal Centre, *Submission*; Young Lawyers Criminal Law Committee, *Submission*; Manly Warringah Women's Resource Centre, *Submission*; Jane Wangmann, *Submission*; NSW Women's Refuge Movement, *Submission*; Family Law Reform Association, C*onsultation*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; *Newcastle consultation*.
9. See Crimes Act s 4(1).
10. See Crimes Act s 562AB.
11. As defined in *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 227.

an order would be made".[12] The police must also apply for an AVO where the applicant is under the age of 16 years.[13]

3.8 Statistics show that the vast majority of ADVO applications are brought by the police.[14] Police are also seen as the first port of call when there is violence in the home or neighbourhood. It has also been suggested that the AVO process is more effective when police lay the complaint as there is a perception that the matter is serious and a police prosecutor acts for the applicant.[15] Also, defendants are said to be more likely to consent without admissions which makes it easier to have an AVO in place.[16] It is, therefore, of vital importance that the police are approachable, responsive and efficient in the manner in which they handle AVO matters.

Views in submissions

3.9 The Commission has received many submissions presenting diverse views with regard to the police and the manner in which they do and should conduct their role under Part 15A. Some express the view that police are not proactive enough, leaving people in danger without adequate protection. Some consider that police inactivity, both in initiating AVOs and acting on breaches,[17] is still one of the greatest barriers to the effectiveness of AVOs. Indeed, the role of police is seen as being one of the major factors in the success or failure of the AVO system.[18] On the other hand, there is also a concern that AVOs are granted too readily and that police should be able to exercise more discretion in deciding whether or not to apply for an AVO. Many submissions recognised the vital role police play in the AVO process and acknowledged that police have greatly improved their service delivery over the years.[19]

Reluctance to act on complaints

3.10 It has been suggested that there is a reluctance to act upon complaints of violence, intimidation, stalking and harassment offences,[20] that police do not use their legislative powers to give adequate protection to victims,[21] and that domestic violence is tolerated to an extent that personal violence is not.[22]

12. Crimes Act s 562C(3) and s 562H(2A).
13. Crimes Act s 562C(2A).
14. In 2001, 78.15% of ADVOs were issued to police applicants: Local Courts unofficial and unaudited figures provided to the Commission on a confidential basis.
15. AVLICC, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; Local Court NSW, *Submission*.
16. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
17. Shoalcoast Community Legal Centre, *Submission*.
18. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Shoalcoast Community Legal Centre, *Submission*; WDVCAS Network Meeting (5 March 2003).
19. *Bourke consultation*; *Orange consultation*; *Moree consultation*; Campbelltown Benevolent Society, Domestic Violence Unit, *Consultation*; WDVCAS Network Meeting (5 March 2003).
20. AVLICC, *Submission*.
21. Manly Warringah Women's Resource Centre, *Submission*.
22. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.

3.11 In a Report by the NSW Ombudsman on the policing of domestic violence, it was acknowledged that:

> despite broad legislative and procedural change over the past twenty years, misinformed and stereotyped attitudes to domestic violence, such as the perception that 'it is a private matter that should be handled within the family', still persist in the community. It is not surprising that these stereotypes and misunderstandings also continue to influence the attitudes of some police.[23]

On the other hand, there is also evidence that this attitude is changing in some areas.[24]

3.12 There appear to be many reasons for this perceived or real inactivity. One view is that police have a propensity to play "judge and jury" by making inappropriate assessments of whether the applicant is telling the truth.[25] It has also been suggested that police are advising people to make private applications for AVOs through a Chamber Magistrate, even in cases of serious violence.[26] It has been suggested to the Commission that police should be more proactive in taking out applications in relation to serious personal violence offences.[27]

3.13 The relationship between AVOs and criminal offences based on the same grounds can also prove to be an issue. The Commission heard that domestic violence victims seeking to have an offender charged with assault or other violent incident have been advised by the police to seek an AVO as a substitute for criminal prosecution, whereas AVOs should be supplementary to criminal prosecution of domestic violence offences.[28]
In other cases, it has been suggested that police are more willing to charge the defendant with an offence where an ADVO is already in place.[29]

3.14 Apart from the reluctance to act generally, it has been suggested that police react inconsistently to women with a disability (particularly a mental illness or an intellectual disability), or from culturally diverse backgrounds.[30] There also appears to be a reluctance on the part of police officers to initiate applications for ADVOs on behalf of children and young persons separate from complaints involving the mothers of those children and young persons. Often police officers are said to be unaware that they are able to initiate such applications.[31] The Commission also heard that there were problems in some rural areas with smaller social

23. NSW Ombudsman, *Policing of domestic violence in NSW* (1999) at 13. See also NSW Ombudsman, *Submission*.
24. *Wollongong consultation*.
25. Shoalcoast Community Legal Centre, *Submission*.
26. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*.
27. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; *Newcastle consultation*; *Wollongong consultation*.
28. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
29. Mt Druitt and Area Community Legal Centre, *Submission*.
30. Multicultural Disability Advocacy Association, *Submission*.
31. NSW Department of Community Services, *Submission*.

networks. Police may know the defendant, giving rise to the perception of reluctance to take action on behalf of the victim.[32]

3.15 The view was also put to the Commission that the number of police applications against women is increasing, without adequate investigation into who the primary aggressor may be.[33] Another related issue is that situations arise where two parties involved in a domestic violence incident both complain to the police about each other. This places police in the sometimes difficult situation of having to determine who is the perpetrator and who is the victim. The Commission has heard that police sometimes adopt the practice of making an ADVO application on behalf of the party who made the first complaint, without conducting further investigation. If that party is in fact the perpetrator of the violence, then the victim is precluded from having the police bring the action. The victim is also precluded from having police prosecutors handle the hearing and must make a private application through a Chamber Magistrate, represent themselves or pay for a solicitor if they do not qualify for legal aid.[34]

Lack of response to breaches

3.16 The way in which police respond to breaches of AVOs is a key element in their effectiveness.[35] There is evidence that police do not always act on breaches.[36] For example, the Commission heard reports that women contacted police numerous times to report breaches of AVOs, and then discovered that no record had been made.[37] If the police do not enforce the law when there is a breach, this sends a clear message to perpetrators that they are above the law, thereby leaving the victim less safe.[38] It has also been suggested that some police treat violence at changeover times during contact visits as a family law issue rather than a criminal breach.[39] This raises the issue of whether police need more training on the interrelationship between ADVOs and family law contact orders.[40]

3.17 The Commission has heard of instances where police have not taken action for "technical" breaches, that is, ones not involving actual physical violence.[41] It was also suggested that there should be provision for review of any decision not to act on a breach.[42]

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32 *Moree consultation*; *Orange consultation*; *Bourke consultation*; Campbelltown Benevolent Society, Domestic Violence Unit, *Consultation*.

33. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
34. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
35. Recommendations concerning legislative reform with regard to breach are discussed at para 10.11-10.46.
36. *Moree consultation*; *Orange consultation*; *Bourke consultation*; AVLICC, *Submission*; Jane Wangmann, *Submission*. See also 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* (Prepared for the Northern Rivers Community Legal Centre, 2000).
37. Hawkesbury Nepean Community Legal Centre, *Submission*.
38. Legal Aid NSW, *Submission*; Margrette Young, *Submission*.
39. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
40. Jane Wangmann, *Submission*.
41. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
42. AVLICC, *Submission*. This is discussed further in Chapter 10.

3.18 On the other hand, in some areas, police have expressed their frustration that there is often insufficient evidence to substantiate a criminal charge for breach, or the victim does not want to proceed, and the prosecution will fail without her evidence.[43] Police also complain about lack of response from Magistrates when breach charges are brought before a court.[44]

Insufficient numbers of DVLOs

3.19 Domestic Violence Liaison Officers ("DVLOs") are attached to 165 police patrols across NSW, in either a full or part time capacity. DVLOs are specially trained in domestic violence issues to ensure that victims receive proper advice about legal matters and other support services.[45]

3.20 During its consultations, the Commission met with a number of active and committed DVLOs, and heard many positive comments from refuge workers and Magistrates concerning their role and performance. However, the Commission heard that there are areas, such as Moree, without DVLOs.[46] In such areas, general duties officers are called upon to respond to AVO issues. Even in areas where there are DVLOs, it has been suggested that police culture is such that they are given little or no validation and support within the police service. This would make it difficult to continue to attract dedicated staff to the position of DVLOs to the disadvantage of those who depend on their assistance.

Quality of representation

3.21 Another concern expressed in submissions was with regard to the quality of representation provided by police prosecutors. This may be to do with time constraints and the large caseload borne by police prosecutors.

It has been suggested that both at the mention stage and at final hearings, it is not uncommon for prosecutors to be unfamiliar with important facts and legislative provisions. Often police prosecutors are said to obtain several files on the morning of the hearing, and are therefore not able to be adequately prepared for the hearing or to provide the applicant with proper advice or support.[47] A further concern expressed during consultations is that some prosecutors can be insensitive to the circumstances of domestic violence victims and may make inappropriate remarks.[48]

Inconsistent practices

3.22 Another significant problem appears to be the inconsistency in police practices. The police are technically guided by their Standard Operating Procedures Manual. This Manual provides guidance and instruction on how the police should interpret and implement the

43. *Wollongong consultation*.
44. Jane Wangmann, *Submission*.
45. See «http://www.police.nsw.gov.au/text/prevention/detail.cfm?ObjectID=91&SectionID=prevention».
46. This is despite the fact that Moree has a high percentage of indigenous residents where a designated Aboriginal DVLO would be beneficial: *Moree consultation*.
47. AVLICC, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Manly Warringah Women's Resource Centre, *Submission*; Jane Wangmann, *Submission*; NSW Women's Refuge Movement, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; *Bourke consultation*; *Moree consultation*; *Orange consultation*.
48. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.

legislation. However, the Commission has found that the guidelines provided in the Manual are not implemented consistently across New South Wales.

3.23 For instance, the Standard Operating Procedures Manual prescribes that police should not ask the victim if he or she wants to proceed with a charge where they attend a situation of alleged domestic violence, as the onus should not be placed on the victim.[49] However, the Commission has heard that this practice is not uncommon. Also the Commission is aware of situations where the victim does not want the defendant to be charged for a number of reasons. In such situations, some police use their initiative and proceed to charge the defendant if the circumstances indicate that it is the best course of action to protect the victim, and as a matter of public interest.[50] However, there appears no consistent practice in this regard. Similarly, some police officers give reasons to the victim when deciding against seeking an AVO, while others do not. The question of whether police should be able to proceed with an AVO despite the opposition of the applicant, is discussed in Chapter 9.

3.24 Police action or inaction on alleged breaches is another area which lacks a consistent approach.[51] Much depends on the particular officer in charge, and his or her attitudes and views on domestic violence, which makes it difficult for the parties or other agencies working with the police to know what to expect, and gives rise to inconsistent interpretation and implementation of the legislation.

Problems associated with service of documents

3.25 Failure to serve an AVO on a defendant emerged as one of the major problems impacting on the effective implementation of Part 15A. It is a significant problem since AVOs do not take effect until such service has occurred, leaving the applicant without protection. This contributes to the applicant feeling disempowered, and undermines the effectiveness of the entire AVO process. There have been reports of many hearings having to be adjourned due to failure to serve.[52] The Commission heard personal accounts of people having as many as four AVOs lapse due to the failure to serve them on the defendant. Applicants must keep applying and returning to court. This often happens in the most serious cases of violence and abuse, creating the irony that it is often harder to make an AVO enforceable in the most serious cases.[53] The high withdrawals rate in AVO proceedings could be partly attributable to difficulties in effecting service of an AVO.[54]

3.26 Concern was expressed to the Commission that police do not treat service of an AVO as a priority.[55] Currently, the police or other authorised persons serve documents on the defendant personally or by leaving them with someone else at the defendant's last or most usual place of residence.[56]

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49. NSW Police, *Domestic violence policy and standing operating procedures* (April 2000) at para 3.2.
50. AVLICC, *Submission*.
51. NSW Department of Community Services, *Submission*.
52. Hawkesbury Nepean Community Legal Centre, *Submission*.
53. *Newcastle consultation*; *Wollongong consultation*.
54. Jane Wangmann, *Submission*.
55. *Bourke consultation*; *Moree consultation*. The Commission makes a recommendation for amendments to Part 15A regarding service at para 11.57-11.61 (Recommendations 51-52).
56. See Crimes Act s 562J; Local Court NSW, *Submission*.

It was also suggested that where an initial failed attempt at serving an AVO personally is made, police are unwilling to pursue other methods of substituted service.[57] Police, on the other hand, have expressed their frustration with the difficulties they experience in effecting service as defendants often go to significant lengths to avoid service.[58]

Views held by the police

3.27 The NSW Department of Police provided a detailed response to the issues raised in DP 45. The response was developed through a consultation process that involved Commanders, DVLOs, officers in the field and other agencies within the NSW Police. From a strictly implementation perspective, it is noteworthy that they have expressed some concern about the "large and escalating number of AVOs, particularly ADVOs, applied for by the NSW Police force" and the need to streamline the workload associated with the implementation of the legislation.

3.28 The submission states that the police review and redevelop their Standing Operating Procedures to reflect any new legislative provisions, and then develop training and information campaigns to implement the new provisions. The submission also notes the workload involved in training some 14000 officers on legislative amendments. In this context, the submission suggests that qualitative and quantitative research should be conducted into the effectiveness of the legislation (after the next set of amendments following this Report) before any further legislative change is undertaken, presumably to reduce the need for constant updating and training.

3.29 On the issue of effectiveness of the AVO legislation, the submission states that anecdotal evidence from many officers indicates that AVOs are generally effective. Responses from those involved in the consultation process for the preparation of the submission indicated that the effectiveness of AVOs in protecting victims is hampered for the following reasons:

1. Difficulties in serving ADVOs, as defendants often go to significant lengths to avoid service.

2. The number of withdrawals/ dismissals of AVO applications which is of significant concern to police.

3. Defendants can lack understanding of the nature of an AVO and the conditions imposed in an order.

4. What some police consider to be "inappropriately low" penalties for breach of an AVO.

5. Inconsistencies and confusion arising from the nexus between ADVOs and Family Law contact orders.

6. The length of time police officers spend applying for interim ADVOs and the limits placed on the availability of Telephone Interim Orders.

57. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; *Newcastle consultation*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
58. NSW Police Service, *Submission*.

7. A reliance on victim's statements in court of their fear (or lack of fear) of further violence, rather than a reliance on other relevant evidence.

3.30 Many of the recommendations arising from those concerns require a legislative response, and are discussed in Part 2 of this Report.

The Commission's view

3.31 The Commission's views are underpinned by recognition of the fact that the issues raised above are largely a question of perspective. However, as long as the issues have been raised in many submissions, the Commission believes there is a need to consider how the problems identified can be redressed.

3.32 Given that the role of the police is crucial to the effectiveness of AVOs, the Commission believes that there is a need for the police service to conduct a regular internal review of their policies and practices in relation to AVOs. While some of the issues raised above, particularly those listed by the police in their submission can be improved by legislative amendments (dealt with in Part 2 of this Report), the Commission is of the view that there are still many attitudinal misconceptions that can only be improved by more regular, hands on training and education. Such training and education should cover issues such as the objects of the legislation, the type of behaviour AVOs are designed to address, the consequences of granting and not granting AVOs and the actual provisions of Part 15A.

3.33 Inconsistency in police practice and in the exercise of police discretion appears to be an issue of concern. Often, it seems that a decision whether or not to act depends on the views of the officer in charge or the particular police officer attending the scene of a domestic violence incident.

While regular education and training would be beneficial, it is important that such education and training be targeted at specific issues, with case studies on how the police ought, and ought not, to react in given situations. In so doing it would be important to ensure that the Standard Operating Procedures Manual, which provides guidelines for the police, reflects the objects of the legislation, is regularly updated and followed consistently across New South Wales. Inconsistency and inefficiency in the way police respond to issues of domestic violence, including ADVOs, has been highlighted in a Ministerial Inquiry into Police Processes.[59] That Inquiry has found that the COPs database is antiquated, complex and consequently does not allow police officers to process ADVO applications expeditiously or efficiently.[60]

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59. That Inquiry is being conducted by former police officer Michael Drury at the direction of the Minister for Police.
60. The Inquiry is suggesting that the COPs computer program be enhanced and updated to enable police to process ADVOs and access information more efficiently. The Inquiry has also found that there are many instances when junior police officers are instructed to deal with "serious" crimes, rather than spend time on ADVOs. The Inquiry recommends the need for greater awareness within the police force of the seriousness of ADVOs such that domestic violence responses will not be compromised. The Inquiry has also recommended an extension of police powers in relation to service of documents (which the Commission deals with in Chapter 11): information supplied directly to the Commission by Michael Drury.

3.34 DVLOs perform a vital role in dealing efficiently with AVO matters. As such, it may be prudent to consider increasing the number of DVLOs, ensuring that every area has at least one male and one female DVLO on duty and available to deal with AVO matters. The comments made at paragraph 3.32 above with regard to the need for regular training and education will have particular value and relevance for DVLOs.

3.35 Training and education will also benefit police prosecutors in how they ought to handle AVO matters. They need to have adequate time to prepare AVO matters which should in turn reflect positively on the quality of their representation.

ATTITUDES AND PRACTICES OF MAGISTRATES, COURT STAFF AND LAWYERS

3.36 Like the police, Magistrates, court staff and lawyers practicing in the area are also actively involved in ensuring the effectiveness or otherwise of the AVO process. Again, attitudes are a vital factor and can work for or against achieving the objectives of Part 15A.[61] Clearly, the legislation will work most effectively if it is understood and used consistently by all Magistrates and prosecutors.[62]

Views in submissions

Dealing with the complaint

3.37 The Commission received submissions from a cross section of the community, including individuals, interest groups, lawyers, Magistrates and Chamber Magistrates. Submissions suggest that problems can occur at a number of stages in the AVO process. At the initial enquiry stage, for example, court staff may not be fully aware of AVO procedures or sufficiently sensitive to issues concerning violence. When making complaints through Chamber Magistrates, it appears that some applicants have been turned away, with the Chamber Magistrate directing them instead to the police.[63] It was also reported in submissions that some Chamber Magistrates asked applicants to sign a form noting the possibility that costs may be awarded against them.[64] Others set the mention date four weeks in advance in anticipation of the matter being withdrawn.[65]

3.38 At the stage of determination by the bench Magistrate, it appears that some Magistrates have an inadequate understanding of the power dynamics of domestic violence.[66] Some Magistrates focus on the purely legal aspects of whether the defendant has broken the law,

61. Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*; Jane Wangmann, *Submission*.
62. Manly Warringah Women's Resource Centre, *Submission*; NSW Women's Refuge Movement, *Submission*.
63. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission.*
64. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*.
65. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission.*
66. NSW, Department for Women, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; *Newcastle consultation*.

rather than appreciating the elements of power and control that may constitute violent relationships.[67] This can result in applicants being treated with disbelief and disrespect.[68]

3.39 Submissions have also suggested that many Magistrates see domestic violence as a family law matter. The Commission has heard of ADVO matters being referred to the Family Court, when in fact they are quite separate issues.[69] There is also concern that some Magistrates defer issuing an ADVO until the resolution of family law matters, leaving people without protection at a crucial time.[70]

3.40 Another issue of concern is that many Magistrates do not appear to be using the existing powers under s 68T of the *Family Law Act 1975* (Cth) ("FLA") to alter family law contact orders to accord with the terms of an ADVO.[71] Courts appear to be unwilling to consider even minor changes to contact orders, such as varying the place of changeover, which can make a big difference to the safety of an applicant.[72] This issue is also often overlooked by unrepresented litigants, police prosecutors and solicitors, which means that the issue of varying a contact order is not brought to the court's attention.[73]

3.41 Another issue frequently identified in submissions is the inconsistency between the approaches adopted by different Magistrates.[74] Some require more evidence than others before making interim orders.[75] For example, it has been reported that some Magistrates require physical evidence of abuse before granting an interim order, giving insufficient consideration to the damage caused by psychological and emotional abuse.[76] Some Magistrates require a complainant to be present in court, even when no evidence is required and a fully instructed solicitor is appearing, while others do not.

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67. University of Newcastle Legal Centre, *Submission*.
68. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
69. AVLICC, *Submission*; NSW, Department for Women, *Submission*; *Newcastle consultation*; Manly Warringah Women's Resource Centre, *Submission*; Jane Wangmann, *Submission*.
70. NSW, Department for Women, *Submission*. In a 1999 Survey of Magistrates concerning AVOs, 40% said that they agreed with the practice of deferring granting a final AVO where there were concurrent family law proceedings: see J Hickey and S Cumines, *Apprehended Violence Orders: a survey of magistrates* (Judicial Commission of NSW, Monograph Series 20, 1999) ("Magistrates Survey 1999") at 35; M Kaye, J Stubbs and J Tolmie, *Negotiating child residence and contact against a background of domestic violence* Families (Griffith University, Law and social Policy Research Unit Working Paper, forthcoming) Chapter 3.
71. See also M Kaye, "Section 68T Family Law Act 1975: Magistrates' powers to alter Family Court contact orders when making or varying ADVOs" (2003) 15(1) *Judicial Officers' Bulletin* 3 at 3. AVLICC, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*; *Newcastle consultation*; Manly Warringah Women's Resource Centre, *Submission*; Blue Mountains Community Legal Centre, *Submission*.
72. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
73. Blue Mountains Community Legal Centre, *Submission*.
74. Blue Mountains Community Legal Centre, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; *Newcastle consultation*; *Wollongong consultation*.
75. *Chamber Magistrates consultation*.
76. *Newcastle consultation*.

3.42 The approach and demeanour of Magistrates is also crucial to the overall effectiveness of an AVO.[77] Negative attitudes can make the applicant feel that the process is worthless, and fail to convey the seriousness of the matter to the defendant. The Commission has been told of pressure being brought to bear on applicants by legal counsel and sometimes Magistrates to accept undertakings from the defendant rather than proceed with the AVO, without making it clear to the applicant that the undertakings are unenforceable.[78]

The orders

3.43 Some submissions stated that ADVOs are often inappropriately drafted and may result in unworkable, vague and unclear orders being made, which are then difficult to enforce,[79] and create unrealistic expectations and a consequent burden on police and court resources.

3.44 Also, the orders are not always properly explained to parties.
For example when an AVO provides that the defendant must not go within 100 metres of the complainant's residence or workplace, complainants often incorrectly believe that the AVO means the defendant is not allowed within 100 meters of the complainant. Also, terms contained in Standard Orders like "loiter" and "molest or otherwise interfere with" are said to be unclear. Such misunderstandings can work against both parties and may also result in making a complaint to the police about an alleged breach when in fact there was no actual breach.

3.45 There is little point in rushing through the AVO process in court if the result for the applicant and especially for the defendant is simply an unintelligible piece of paper. Women from some cultures have suggested that the public humiliation of having a Magistrate explain to the defendant in open court the conditions of the AVO and the consequences of breaching those conditions, may be more effective in bringing about a change in behaviour than actually making the AVO and serving a copy on the defendant.[80]

The Commission's views

3.46 The Commission is of the view that regular training for Chamber Magistrates, court staff and lawyers will assist greatly in alleviating many of the problems mentioned above. It is noted that some training programs already exist, but more are needed.[81] The training would need to focus generally on the nature of domestic and personal violence issues, and how they differ from one another. Specific training could be given on particular difficulties experienced by some groups. For example, specific issues concerning same sex domestic violence, barriers faced by people with a disability and violence in indigenous and rural communities.[82] In addition, specific attention could also be given to the relationship between ADVOs and family law, as well as the need for consistency in procedure and decision-making.

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77. Jane Wangmann, *Submission*. See also James Ptacek, *Disorder in the court: judicial demeanor and women's experience seeking restraining orders* (PhD Dissertation, Brandeis University, Massachusetts, 1995).
78. Correspondence to the Commission from the Violence Against Women Specialist Unit (21 March 2003).
79. University of Newcastle Legal Centre, *Submission*; Julie Stubbs, *Submission*.
80. Multicultural Disability Advocacy Association, *Submission*.
81. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Erin's Place for Women and Children, *Submission*; Jane Wangmann, *Submission*.
82. See discussion below at para 3.54-3.62.

3.47 While training for all judicial officers is essential, the Commission recommends in Chapter 2 the establishment of a specialist panel to be piloted within a local court, comprising Magistrates specially trained in domestic violence issues. The Commission is of the view that such specialisation will help to address many of the problems noted above.

COMMUNITY ATTITUDES

3.48 Most people consider AVOs to be generally effective as a means of preventing violence, intimidation and harassment.[83] However, the Commission has also received many submissions that reflect community concerns with the AVO regime.

3.49 In this section, the Commission considers the views expressed by individuals, and agencies representing them, on the practical difficulties and barriers they face in gaining access to the protection afforded by the AVO regime. This section also considers the views of individuals and groups who are of the view that the system is being abused, particularly in the context of family law proceedings, and generally because AVOs are perceived to be too easy to obtain.

Views in submissions concerning barriers to access

General community perceptions

3.50 There were many submissions that expressed the view that victims, mainly women, are reluctant to make a complaint because of their fear of the repercussions. Given the power imbalance that can exist in violent relationships, and the exploitation of that imbalance by the stronger partner, women fear that they may be worse off if they report an incident of domestic violence. Often it is only after many years of tolerating such behaviour that women seek help.

3.51 Another practical difficulty is the lack of sufficient resources and support services,[84] such as the Women's Domestic Violence Court Assistance Scheme ("WDVCAS"), DVLOs, and interpreter services, particularly in rural areas.[85] Where such resources do exist, the AVO regime is said to be working well.[86]

3.52 Victims of violence, particularly in domestic relationships, may also be subject to financial and cultural pressures that keep them from taking action. For example, the misconception that an AVO will result in the defendant having a criminal record and losing a job prevents some women from applying due to the financial hardship this would cause for them and their children.

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83. AVLICC, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Legal Aid NSW, *Submission*; NSW Commission for Children and Young People, *Submission*; NSW Police Service, *Submission*; Jane Wangmann, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; *Newcastle consultation*; *Wollongong consultation*.
84. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
85. Hawkesbury Nepean Community Legal Centre, *Submission*. See also para 3.54 below.
86. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*.

Community perceptions about the application process and consequences of AVOs also differ widely based on geographical location, educational and cultural background and access to assistance, as is discussed below.

3.53 Lack of information generally, and for defendants in particular, has been raised as an issue in a number of telephone submissions made to the Commission. For many, answering the door to a police officer, or being served with a summons, is the first contact they have ever had with the legal system, which can be daunting. People claim they have consented to orders they didn't fully understand, and have had insufficient information about the AVO process including procedures for applying for revocation and appeals. There is also a need for more information sheets in a range of languages,[87] perhaps even in video format. Pamphlets and posters could also be targeted specifically, for example, at violence in same sex relationships, to show that this is also covered by AVO legislation.[88]

Barriers for people living in rural New South Wales

3.54 In rural New South Wales, the Commission found that women were extremely fearful of seeking help or going to court unless there were support services available.[89] For example, it has been reported that there is a need for more WDVCAS services in many areas outside Sydney,[90] and the expansion of those services to enable greater co-ordination of legal representation.[91] Another problem is that, given the nature and size of country towns, a defendant may socialise with the local police, making it harder for an applicant to pursue a complaint.[92] The "fear" element and consequent need for support affects most people experiencing domestic violence, but particularly people who live in regional areas because of their geographical isolation, irrespective of their socio-economic status or educational background.[93] Distances also make transport to and from the courts difficult for many women living in rural and regional areas.

Often, the defendant and victim are forced to travel in the same train or bus, increasing the risk of further violence. Sitting in the same courtroom with the defendant staring at the victim was also cited as an intimidating experience.[94]

Barriers for Aboriginal communities

3.55 Some indigenous people may have difficulty reporting matters of domestic violence to the police, because of deeply-rooted suspicions concerning the criminal justice system. This appears to be the case both in metropolitan and country areas. The police are working on projects to address this issue.[95] The Aboriginal Strategic Direction Policy Document launched in August 2003 is one such initiative. One of the key targets is to strengthen communication and understanding between the police and Aboriginal communities to better deal with family violence by establishing Aboriginal consultative committees in local area commands. The committees will

87. AVLICC, *Submission*.
88. Inner City Legal Centre, *Submission*.
89. *Bourke consultation*; *Orange consultation*; *Moree consultation*; *Gosford consultation*.
90. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
91. Legal Aid NSW, *Submission*.
92. *Moree consultation*; *Bourke consultation*; *Orange consultation*; Campbelltown Benevolent Society Domestic Violence Unit, *Consultation*.
93. *Orange consultation*.
94. *Bourke consultation*; *Orange consultation*; *Gosford consultation*; *Moree consultation*.
95. NSW Police Service, *Submission*.

be chaired by the local area commander. Members of Aboriginal communities will be invited to identify crime and violence issues and to develop action plans for dealing with such issues.[96] While it should not be assumed that indigenous people never seek the assistance of the criminal justice system,[97] it is hoped that better communication will help break down the barriers even further. Indeed, the Commission found that increasing numbers of Aboriginal women are seeking AVOs in areas where support staff and case workers help them to understand the issues.[98]

3.56 The experiences of Aboriginal women who have been victims of family violence in Wagga Wagga, Bourke and Dubbo, have been examined in a recent report by the Centre for Rural Social Research at the Charles Sturt University.[99] In addition to noting the general limitations of the criminal justice system in addressing the problems of violence in indigenous communities, that Report notes some specific limitations of the AVO scheme in relation to Aboriginal women. The first limit is the lack of consensus on the definition of family violence. While the broad view that such violence includes psychological and emotional damage may be favoured by academics and policy makers, the report notes an inability or reluctance in the communities consulted to view anything other than actual physical assault as family violence.[100]

3.57 The Report also discusses the negative experiences that some indigenous people have of the formal justice process, including the difficulties that may sometimes arise for applicants trying to obtain legal representation,[101] and problems associated with AVOs not being properly enforced.[102]

Barriers for people from culturally diverse backgrounds

3.58 People from culturally diverse backgrounds have also submitted other reasons for the limited effectiveness of AVOs.[103] Women believe that if they want to obtain relief from domestic violence they have to leave the family home. However, they are not usually in a position to leave home and seek refuge because of the number of children they have, language difficulties,

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96 Such committees have already been established in the mid-North coast and in Orange. Many other schemes that offer support and assistance exclusively to Aboriginal victims and offenders are also in operation around the state: the DV support group in Kempsey, the Lismore Perpetrator Program, the Dubbo Aboriginal Women's Group, the West Dubbo men's group, the Manning Great Lakes Police and Aboriginal women's refuge partnership, Operation Choice in Nowra are examples of projects aimed at building communication and understanding between the Police and Aboriginal communities within the context of family violence.

97. Julie Stubbs, *Submission*.

98. *Bourke consultation*; *Orange consultation*; *Moree consultation*; *Gosford consultation*.

99. E Moore, *Not just court: family violence in rural New South Wales; Aboriginal women speak out* (Charles Sturt University, Centre for Rural Social Research, 2002).

100. E Moore at vii.

101. The Report states that the Aboriginal Legal Services (ALS) has a practice of representing only one party to a legal proceeding to avoid a conflict of interests. If the police do not act for the victim and the defendant has already approached the Aboriginal Legal Service, then the victim may be denied any legal representation: E Moore at viii.

102. E Moore at ix.

103. Mt Druitt and Area Community Legal Centre, *Submission*; Multicultural Disability Advocacy Association, *Submission.*

financial dependence on the violent spouse, cultural views and values about bringing shame to the family, or uncertainty about immigration status.

3.59 In some communities women may be completely ostracised for involving police and other public officials in what can often be regarded as a "private matter". Separation and divorce, regardless of the reason, also result in ostracism for women (but not necessarily for men) in some communities. Women in these circumstances are often in a dilemma about whether to apply for an ADVO. They may endure domestic violence and abuse for many years rather than face complete social isolation.

3.60 Domestic violence issues for migrant women are sometimes complicated by their immigration status. Women who have been sponsored to Australia by their husband or fiancé are usually completely dependant on them for financial support and information about their legal rights and immigration status. This dependency can result in a reluctance to invoke the ADVO provisions for various reasons. For example, there may be the fear of jeopardising the chances of attaining permanent residence unless there is clear evidence of domestic violence (of the kind required by the immigration regulations). Women on a temporary or bridging visa may also fear that bringing an ADVO complaint against their violent partner may result in loss of income support.

3.61 A significant barrier to people from culturally diverse backgrounds accessing AVOs is that of language. Many people are unable to explain their situation to police or Chamber Magistrates. Taking statements or preparing a summons is therefore very slow and complex.[104] Although s 562GC(4) requires that orders be explained in a language likely to be readily understood by the parties, the Commission has heard that this provision is not always complied with, due to a lack of interpreter services.[105] Even where interpreter services are available, there are so few that it is not uncommon to have a single interpreter assist both parties.[106] There have also been instances where only the defendant has been asked if an interpreter service was needed.[107] The interpreters must also be experienced in dealing with domestic violence issues. It has been reported to the Commission that, in some instances interpreters can impose their own cultural, religious or social views on the client.[108] It has also been suggested that the information sheets must be provided in a range of languages if they are to service people from culturally diverse backgrounds adequately.

Barriers for people with a disability

3.62 People with a disability are extremely vulnerable to physical abuse both within their domestic relationships and from strangers.

This vulnerability is exacerbated for people with a disability, particularly if that person is also from a non-English speaking background, or where a victim has a child with a disability. They are often unaware of, or unable to access the services and mechanisms available in NSW to protect

104. Mt Druitt and Area Community Legal Centre, *Submission*.
105. AVLICC, *Submission*; NSW, Department for Women, *Submission*; Multicultural Disability Advocacy Association, *Submission*, *Newcastle consultation*; *Wollongong consultation*.
106. NSW, Department for Women, *Submission*; *Wollongong consultation*.
107. AVLICC, *Submission*.
108. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.

them from abuse.[109] It may also be difficult to find sufficient support services, such as refuges and counselling, to meet the special needs of people with a disability.

The Commission's views

3.63 Many of the issues raised in submissions could be addressed by improvements in community education about the nature and purpose of AVOs, and through the continued and enhanced provision of adequate support services. While there has been much progress in the area of community education and support, the barriers that some people evidently still face in accessing AVOs indicate that there is more that can and should be done. Education campaigns and support services should be developed in conjunction with the community following extensive consultation to ensure that the information and support being offered is appropriate to meet identified needs. Some submissions expressed the view that more funding would see an improvement to access and effectiveness,[110] and could be targeted to women from non-English speaking backgrounds, indigenous women, and women with disabilities (all of whom are currently under-represented as WDVCAS clients),[111] and to gay men.[112] Given the success of services such as the WDVCAS, DVLOs and interpreter services particularly, the continued development and expansion of those programs would be beneficial.

Abuse of AVOs

3.64 There is ongoing community concern that AVOs are too easy to obtain and that they are often abused. Some submissions expressed the view that AVOs in themselves were an abuse of the legal system since they can expose a defendant to criminal liability for engaging in behaviour that is not in itself criminal, such as making telephone calls.[113] The perception of abuse applies both to ADVOs and APVOs. In the ADVO context, the abuse referred to is mainly that women seek ADVOs in the course of family law proceedings to gain some tactical advantage in property settlements or to preclude or limit the defendant's access to his children.[114] In the APVO context, anecdotal accounts suggest that a large percentage of APVO applications are unmeritorious and frivolous.

Domestic violence and family law

3.65 As stated above, there is concern that some people, mainly women, are seeking ADVOs in the course of family law proceedings to gain an advantage or punish the defendant by limiting contact with his children. There is also a view that solicitors encourage parties to take out an AVO when there is a family law matter on foot to gain some tactical advantage.[115]

3.66 The Criminal Law Committee of the Law Society of NSW stated that:

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109. Multicultural Disability Advocacy Association, *Submission*.
110. Legal Aid NSW, *Submission*; Jane Wangmann, *Submission*.
111. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
112. Inner City Legal Centre, *Submission*.
113. See eg Cameron Beaumont, *Submission*.
114. Family Law Reform Association, *Submission*, and a number of confidential personal submissions.
115. *Orange consultation*.

> ADVOs are very often used as a tool by one, other or both of the parties following a separation. They can be especially important in relation to matters pertaining to occupation of the matrimonial home and in respect of children's issues. The separation of a marriage is an inherently stressful situation and parties may well be more inclined to behave inappropriately at such times. … The abuse of the system in the circumstances undermines the real value of Part 15A of the *Crimes Act* and the objectives stated there".[116]

3.67 However, that submission also contained the following rider:

> The views in respect of this issue do not necessarily reflect the views of Family Lawyers. We understand that their view is that these orders are used to protect the weaker party and children at these sometimes volatile times in their lives. The number of AVO's in these circumstances is rarely seen by Family Lawyers as a "tactic" to aid their case.[117]

3.68 The Children's Magistrate at Lidcombe Children's Court suggests that it would be "naïve to assume some complainants do not institute ADVO proceedings (where they would not otherwise have done so) in order to take advantage of such an order or to 'puff up' a genuine but otherwise minor incident and then seek an order".[118] He also considered that AVOs may potentially have a significant influence in a contested residency/contact dispute in the Family Court.[119]

3.69 In DP 45, the Commission discussed some previous studies that have considered the allegations of abuse of ADVOs in the family law context, and noted that those studies have not found those allegations to be substantiated.[120] This comment elicited a strong negative response in a number of submissions. For example, the Family Law Reform Association[121] was critical of the studies referred to by the Commission, stating that they were "highly subjective and inconclusive".[122]

Other written and oral submissions from those who have been defendants in ADVO matters stated that the ADVO system had been manipulated through allegedly spurious applications that operated to deprive them of contact with their children and rights to their property.[123]

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116. Law Society of NSW, Criminal Law Committee, *Submission*.
117. Law Society of NSW, Criminal Law Committee, *Submission*.
118. Children's Magistrate, Lidcombe Children's Court, *Submission*. He also acknowledges, however, that ADVOs are beneficial in responding to violence that erupts during the course of protracted family law disputes, and that it would be wrong to suspect that such cases always, or even often, are the result of ulterior motives: see para 3.75 below.
119. Children's Magistrate, Lidcombe Children's Court, *Submission*.
120. See DP 45 at para 5.15.
121. The Family Law Reform Association is an organisation representing the interests of members who have grievances with aspects of family law, including the alleged misuse of ADVOs.
122. Family Law Reform Association, *Submission*.
123. See Chapter 1 for an explanation of the Commission's policy of confidentiality regarding submissions which reveal personal details.

3.70 It has been suggested that more filtering needs to occur before ADVOs are granted,[124] and that the presumption against refusing to issue process in ADVO matters should be removed.[125] The Family Law Reform Association proposes that, except in cases where actual violence has occurred, a mandatory investigation into the circumstances in each ADVO application be conducted within a specified period, such as seven days. The investigation would determine if the interim ADVO should remain and be listed for hearing, or be withdrawn with either the parties being referred to some form of mediation, or no further action taken.[126]

3.71 The Domestic Violence Advocacy Service notes that there may be a small number of women who may take out ADVOs as a tactical measure, often recommended by their solicitors. However, they are usually dissuaded by the threat of costs.[127] Even if this practice does occur, the onus ought to be on practitioners to ensure that they are not aiding their clients to abuse AVO provisions.[128] In the Service's experience, unmeritorious ADVO claims are usually cross-applications.[129]

3.72 The Commission has also received a large number of submissions that vehemently opposed the view that ADVOs are being abused.
Those submissions expressed concerns that such assertions were generally unfounded,[130] and the perception of abuse of the ADVO system is a "myth" that needs to be "exploded".[131] Further, it is seen as a denial of the problem of violence against women, a refusal to listen to and accept women's experiences, an attempt to trivialise and minimise the reality of violence for women,[132] and a belief that it is a private issue between the individuals concerned.[133]

3.73 Submissions expressed the view that instead of investigating allegations of abuse of ADVOs, perhaps questions should be asked about why women exercising their legal rights are depicted in such a pejorative sense,[134] particularly because ADVOs are not easily available and require the establishment of a reasonable apprehension of violence.[135] Another submission noted that the assertion that AVOs are misused for family law purposes is similar to the assertion that AVOs are used for immigration purposes. Both arguments are said to detract from the real issues of power and control in abusive relationships.[136]

3.74 Submissions assert the view that the fact that many ADVOs are taken out at the time of separation does not imply that they are being used as weapons, but that the risk of violence

124. Family Law Reform Association, *Submission*.
125. Family Law Reform Association, *Submission*.
126. Family Law Reform Association, *Submission*.
127. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
128. Western NSW Community Legal Centre, *Submission*.
129. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
130. Legal Aid NSW, *Submission*.
131. AVLICC, *Submission*. See Jane Wangmann, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
132. South West Sydney Legal Centre, *Submission*; Redfern Legal Centre, *Submission*.
133. Hawkesbury Nepean Community Legal Centre, *Submission*.
134. Jane Wangmann, *Submission*.
135. South West Sydney Legal Centre, *Submission*; Redfern Legal Centre, *Submission*.
136. Redfern Legal Centre, *Submission*.

increases at the time of separation.[137] Coincidence of timing may contribute to unwarranted concerns.[138] Violence has occurred on changeover visits.[139] The Domestic Violence Advocacy Service and Women's Legal Resources Centre ("DVAS/WLRC") argue that domestic violence and family law proceedings are inextricably linked and that AVOs are not lodged to give them advantage in family law disputes:

> Rather it may reflect women's much needed and overdue access to legal and other support in separating from her violent partner and taking steps to protect herself and her children.[140]

3.75 When instances of violence occur during the course of protracted Family Court litigation, people find their way to the Local Court for speedy resolution. In such cases, one submission noted that "it is a good thing that the Local Court can respond so effectively. It would be wrong to regard such cases always (or even often) with suspicion of ulterior motives".[141]

3.76 The emergence and resilience of this view is seen by some as damaging to women seeking protection as it can influence the attitudes of police, lawyers and magistrates, ultimately having an impact on the level of protection that can be afforded.[142] Also it fails to recognise the highly negative impact that living in a household with domestic violence has on children and young people.[143]

3.77 Submissions also referred to a recent research study[144] which found no evidence of women using allegations of domestic violence or seeking ADVOs maliciously or for purely strategic reasons. The research also indicated that obtaining an ADVO is not as easy as some people perceive it to be, with the overwhelming majority of the women interviewed (82.6%) having experienced difficulties and delays. For example, more than half reportedly had been to

137. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; Jane Wangmann, *Submission*. See also BOCSAR 1997 evaluation at 31 and forthcoming study by M Kaye, J Stubbs and J Tolmie, *Negotiating child residence and contact against a background of domestic violence families* (Griffith University, Law and Social Policy Research Unit Working Paper, forthcoming) at 36 (studies indicate violence is at its peak immediately following separation); University of Newcastle Legal Centre, *Submission.*
138. Legal Aid NSW, *Submission*.
139. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; *Newcastle consultation*; *Wollongong consultation*.
140. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
141. Children's Magistrate, Lidcombe Children's Court, *Submission*.
142. Jane Wangmann, *Submission*.
143. Jane Wangmann, *Submission*. See also Children's Magistrate, Lidcombe Children's Court, *Submission*; NSW Commission for Children and Young People, *Submission*; and L Laing, *Children, young people and domestic violence* (Australian Domestic and Family Violence Clearinghouse, Issues Paper 2, 2000).
144. Julie Stubbs, *Submission* quoting from M Kaye, J Stubbs and J Tolmie, *Negotiating child residence and contact against a background of domestic violence families* (Griffith University, Law and Social Policy Research Unit Working Paper, forthcoming).

court on several occasions, typically five or six times. It was also found that women who had experienced violence were more likely to downplay that violence.[145]

3.78 Other submissions supported the view that the existence of an AVO has little impact on the outcome of family law proceedings: it is not proof of the existence of domestic violence, rather it is only proof of the existence of an AVO.[146] Further, submissions noted that the Family Court favours a presumption of contact even if there is an AVO, so there would theoretically be little tactical advantage in obtaining one.[147]

3.79 The submission from the Hawkesbury Nepean Community Legal Centre stated that, in its experience, an AVO can in fact be detrimental in legal proceedings as many Magistrates may view it as a tactic.[148]

3.80 Some submissions also asserted the view that the abuse works the other way: that defendants and solicitors use the FLA to undermine the effect of an AVO.[149] Defendants allegedly "use the court process, in both AVOs and family law, in an attempt to exert power and control and prolong the abuse the woman has suffered within the relationship".[150]

Abuse of APVOs

3.81 In similar vein, concerns about unmeritorious and frivolous APVOs have arisen regularly over the past two years. That perception alone creates problems as it can impact on the effectiveness of ADVOs, since a great deal of the benefit derives from community respect for the seriousness of the AVO process.[151] Although it appears that the numbers of APVOs are on the increase, there is a dearth of any empirical data or qualitative research on the types of orders being sought and granted, the nature of the violence, intimidation or harassment giving rise to the orders, or how effective they are in preventing or stopping such behaviour. It has been suggested that more studies are needed on the type and nature of APVO applications[152] and on the effectiveness of the implementation of APVOs.[153]

3.82 Apart from the need to conduct more studies on APVOs, it has also been suggested that other methods of resolving problems should be encouraged. For instance, the Commission has examined whether the discretion to refuse to issue process in APVO matters is being exercised appropriately by authorised justices, and the role that mediation should play in the resolution of APVO disputes.[154] These matters would require legislative amendment and are dealt with in Chapter 5.

145. See Julie Stubbs, *Submission*.
146. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
147. University of Newcastle Legal Centre, *Submission*.
148. Hawkesbury Nepean Community Legal Centre, *Submission*.
149. Erin's Place for Women and Children, *Submission*.
150. Hawkesbury Nepean Community Legal Centre, *Submission*.
151. Legal Aid NSW, *Submission*.
152. Jane Wangmann, *Submission*.
153. NSW Police Service, *Submission*.
154. NSW Commission for Children and Young People, *Submission*.

The Commission's views

3.83 Like all laws, there is undoubtedly scope for Part 15A to be used inappropriately or even abused. In relation to ADVOs, the Commission has heard of instances where they were clearly sought in an attempt to gain a tactical advantage in family conflict situations. However, the Commission disagrees with the view ADVOs should be made more difficult to obtain. In keeping with the policy objectives recommended in Chapter 2, Part 15A needs to provide a mechanism for people genuinely in fear of violence, intimidation of abuse to seek protection by means of an ADVO. It would be a retrograde step to insert additional legislative or administrative barriers making it more difficult for people to receive the protection they need in order to prevent isolated instances of abuse of the system.

3.84 The Commission agrees with the Chief Magistrate's view that whether abuse exists must remain a matter for determination in each case, with the costs provisions acting as a disincentive.[155] Rather than assume that ADVOs are taken out to gain advantage, it may be necessary to consider systems that will avoid such perceived advantages materialising, such as facilitating contact in the interests of the children with utmost safety precautions during the time of change over. Submissions from community legal centres have confirmed this view.[156]

3.85 While there are a few studies concerning ADVOs,[157] and the experience of domestic violence victims and their dealings with the Family Court,[158] the Commission is concerned that there is a lack of empirical or qualitative research in relation to APVOs generally, and a dearth of useful or reliable statistics.[159] It appears that we still know very little beyond anecdotes about how APVOs are operating. Thus, any assessment of the effectiveness of APVOs is limited due to the lack of available information in key areas.

3.86 Given that current data collection by police and local courts appears to be inadequate and inconsistent, the Commission is of the view that more integrated data collection would help to isolate patterns and inform future reviews of the effectiveness of both ADVOs and APVOs, to

155. Chief Magistrate, Local Court of NSW, *Submission*.
156. Shoalcoast Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*.
157. See J Stubbs and D Powell, *Domestic violence: impact of legal reform in NSW* (NSW Bureau of Crime Statistics and Research, 1989); S Egger and J Stubbs, *The effectiveness of protection orders in Australian jurisdictions* (National Committee on Violence Against Women, AGPS, Canberra, 1993); and L Trimboli and R Bonney, *An evaluation of the NSW Apprehended Violence Order scheme* (NSW Bureau of Crime Statistics and Research, Sydney, 1997); 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).
158. H Rhoades, 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); K Rendell, Z Rathus and A Lynch, *An unacceptable risk: a report on child contact arrangements when there is violence in the family* (Women's Legal Service Inc, Brisbane, 2000).
159. Jane Wangmann, *Submission*.

identify the gaps, provide more appropriate alternatives, and assess the need for greater support services.[160]

3.87 In particular, the Commission agrees with the views expressed in submissions that more accurate information ought to be available on the following issues:

- the type of people who apply for APVOs and the nature of their complaint;
- whether the discretion to refuse to issue process in APVO matters is being used and what are the results;
- the types of matters that are sent to mediation and the results;
- the number of ADVO applications in same sex relationships;
- the need for refuge accommodation for gay men who experience domestic violence (be means of a feasibility study);
- the numbers of people from culturally diverse backgrounds and indigenous people who use the legislation;[161]
- the number of children protected on orders;
- the reasons for withdrawals (which may shed light on why there are so many);
- more cross-matching of data to check on multiple and cross applications;
- the use of the stalking and intimidation provisions; and
- the use of exclusion orders.

3.88 There is also a need for more research on the specific issue of the experience of children and young people in the AVO process, which has not been covered in past reviews.[162]

3.89 Overall, the Commission believes that better databases need to be maintained. A central index should be established registering all AVOs and breaches of AVOs, as well as orders made under the FLA, to assist both local courts and the Family Court to deal with conflicts between orders.[163] This would also help notify courts and police of cross and multiple applications.[164] Also, the Commission believes that copies of all domestic violence complaints and ADVOs which are currently required to be forwarded to the Commissioner of Police,[165] should be required to be recorded on the Police Domestic Violence Central Bank computer system.[166] This would provide a history of violence, including complaints made but not proceeded with, which would provide police attending an incident of domestic or personal violence with a long term background and context.[167]

160. *Wollongong consultation*.
161. Jane Wangmann, *Submission*.
162. NSW Commission for Children and Young People, *Submission*.
163. Chief Magistrate, Local Court of NSW, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
164. NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
165. Under Crimes Act s 562J(3).
166. Erin's Place for Women and Children, *Submission*.
167. Erin's Place for Women and Children, *Submission*.

ASPECTS OF THE COURT PROCESS

3.90 Many aspects of the court process have been identified as areas in need of reform. Some of these matters require legislative reform, and are dealt with in Part 2 of this Report. From an implementation perspective, one of the most crucial issues at a practical level is the need for greater vigilance during court attendances in order to provide the applicant with better protection, both in terms of physical safety and protection from further psychological harm. Attending court is a traumatic experience for most people escaping domestic violence, particularly if it involves seeing the defendant and giving evidence in court.[168] Submissions and consultations revealed that AVOs may be breached while parties are attending court. The Commission has been told of many instances where an application for an AVO was withdrawn because the applicant could not face seeing the defendant in court and because she did not feel that her safety at court could be guaranteed.[169]

3.91 Currently, the only recognition that the court process is traumatic for victims of domestic violence is the provision for a support person to be present in court.[170] There are no facilities for applicants to give evidence by closed circuit television. Also, considering the sensitivity attached to domestic violence, there is no requirement that courts should be closed to the public during AVO proceedings.[171] Cross examination of the applicant can also be intimidating, particularly given that a number of defendants represent themselves in AVO proceedings.[172] The Northern Territory has introduced measures to address these issues, such as providing for the defendant to cross examine the applicant through a third party, and for a screen to be placed between the applicant and the defendant.[173]

3.92 The need to attend court numerous times is another problem faced by applicants. Apart from being time consuming and emotionally draining, it requires the applicant to come face to face repeatedly with the defendant.[174] It has been suggested that a standard practice should be developed of not requiring the attendance of the applicant at court if he or she is represented by legal counsel and does not need to give evidence.[175] It has also been suggested that, where the

168. Redfern Legal Centre, *Submission*; *Bourke consultation*; *Orange consultation*; *Moree consultation*; WDVCAS Network Meeting (5 March 2003).
169. In one particular instance, a court was unable, due to resource constraints, to provide security for an applicant, despite that fact that she had been assaulted by the defendant during a previous court appearance: Redfern Legal Centre, *Submission*.
170. See Crimes Act s 562ND.
171. Where an order, or an application to vary an order, is sought to protect a child under 16 years of age, that hearing is to take place in the absence of the public unless the court otherwise directs: Crimes Act s 562NA.
172. See NSWLRC, *Questioning of complainants by unrepresented accused in sexual offence trials* (Report 101, 2003) for a discussion of relevant concerns regarding cross examination by unrepresented defendants.
173. Redfern Legal Centre, *Submission*.
174. Redfern Legal Centre, *Submission*; *Bourke consultation*; *Orange consultation*; *Moree consultation*; WDVCAS Network Meeting (5 March 2003).
175. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.

applicant's presence is required, he or she should be able to sit in a support room, rather than inside the courtroom.[176]

The Commission's views

3.93 In order for AVOs to be truly effective, it is important that the diminution of fear and of the threat of violence be an objective of the court processes as well as the legislation. Fear of going to court is said to be a factor in the high rate of withdrawal of AVO applications.[177] In recognition of this element of fear, courts should make provision for the victim not to have to be exposed to the defendant, particularly where there has been a history of violence. The Commission is of the view that consideration should be given to the suggestion made in submissions and consultations that a standard practice be developed of not requiring the attendance of the applicant at court if he or she is represented by legal counsel and does not need to give evidence. Where the applicant is required to attend court, measures such as closed circuit TV, the placing of a screen between the applicant and defendant, or requiring that the court be closed to the public in certain circumstances when hearing an AVO application, may be of assistance.

176. Redfern Legal Centre, *Submission*; *Orange consultation*; *Bourke consultation*.
177. Redfern Legal Centre, *Submission*.

4. Definitional issues

- Definition of domestic violence
- Definition of personal violence
- Definition of domestic relationship

4.1 The definitions relevant to Part 15A are contained in s 562A and in s 4 of the Crimes Act. The three crucial definitions considered in this chapter are "domestic violence", "personal violence offence" and "domestic relationship".

4.2 Currently, Part 15A provides that 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] An ADVO may also be issued in such circumstances, but only if the personal violence offence is committed against a person who is in a domestic relationship with the offender.[2] Part 15A also provides that an AVO (either an ADVO or an APVO) may be issued to protect a person from the offence of stalking and intimidation.[3]

4.3 A personal violence offence is defined in s 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. A domestic violence offence is defined in s 4 of the Crimes Act as a personal violence offence committed against a person who has a domestic relationship with the person who commits the offence. There is no express definition of domestic violence in the Crimes Act.

4.4 A general issue raised in submissions and consultations was that definitions must be written in plain English such that all parties, particularly a person from a non-English speaking background will have a clear understanding of what constitutes an offence.[4]

4.5 Another general issue raised was that all relevant definitions should be easily located within Part 15A.[5] Currently, users of the legislation are required to refer to each of the 37 sections of the Crimes Act which list the personal violence offences, as well as Parts 1 and 15A for the definition of a domestic relationship, to be able to determine the meaning of domestic violence. The separation of each of these facets of a definition of a domestic violence offence can be confusing. It has been suggested that locating the components of a domestic violence offence, including the definition of domestic relationship and the naming of each relevant personal violence offence in the beginning of Part 15A would be of great benefit.[6]

DEFINITION OF DOMESTIC VIOLENCE

"Domestic violence"

4.6 In DP 45, the Commission raised the issue of the need for further clarification of the meaning of "domestic violence". Opposing views were expressed in submissions and

1. Crimes Act s 562AI.
2. Crimes Act s 562AE.
3. Crimes Act s 562AB. There is significant overlap between AVOs and stalking and intimidation. This is dealt with in more detail in Chapter 12.
4. Multicultural Disability Advocacy Association, *Submission*.
5. NSW Police Service, *Submission*; *Moree consultation*; *Bourke consultation.*
6. NSW Police Service, *Submission*.

consultations. While some felt no amendment was necessary,[7] others suggested that there should be a separate definition of "domestic violence" that is not linked to the definition of a personal violence offence, since actual or threatened domestic violence is the basis for granting an ADVO.[8] There is also a concern that the current definition of domestic violence does not focus adequately on the impact of psychological harm which is often prevalent in situations of domestic violence. Currently, the only reference to psychological harm is via the stalking and intimidation provisions which do not cover all circumstances where psychological harm occurs in a domestic context.

Other jurisdictions

4.7 All Australian States and Territories have legislation similar to Part 15A of the *Crimes Act 1900* (NSW) which establish some form of an apprehended violence order or restraining order regime. In each of these jurisdictions, except for Tasmania and Western Australia, the legislative framework for such orders makes express reference to "domestic violence" or violence within "domestic relationships" or between "family members".[9] The definitions differ marginally from each other, but they all involve some form of actual or threatened personal injury or property damage, and intimidating, harassing and otherwise indecent or inappropriate behaviour.

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7. NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
8. *Orange consultation*; *Bourke consultation*.
9. **ACT**: *Protection Orders Act 2001* (ACT). Section 9 defines "domestic violence" as behaviour that causes physical injury or damage to property or behaviour that is a domestic violence offence or is harassing or offensive to the relevant person.
   A domestic violence offence is defined as being a contravention of a protection order or certain specified offences under the *Crimes Act 1900* (ACT), the *Criminal Code* (Cth) or the *Road Transport (Safety and Traffic Management) Act 1999* (ACT). **Northern Territory**: *Domestic Violence Act 1992* (NT). The Act does not define domestic violence but provides protection for people who are in a "domestic relationship" with one another. Section 3 defines "domestic relationship" widely and s 4 sets out the circumstances when a restraining order will be granted to include where the defendant has assaulted or caused personal injury to the other person or damaged the other person's property, threatened to do the same, or behaved in a provocative or offensive manner that is likely to cause fear of violence to the other person. **Queensland**: *Domestic and Family Violence Protection Act 1989* (Qld). Section 11 defines "domestic violence" to mean wilful injury, wilful damage to property, indecent behaviour and a threat to commit the same against a person in a domestic relationship with the defendant. **South Australia**: *Domestic Violence Act 1994* (SA). Section 4 states that a defendant commits domestic violence if the defendant causes personal injury, property damage or loiters, gives offensive material or engages in other conduct that reasonably arouses fear of personal injury, property damage or any significant apprehension of fear. **Victoria**: *Crimes (Family Violence) Act 1987* (Vic). Section 4 states the circumstances when an intervention order may be made and requires the court to be satisfied that there the person assaulted a family member, caused damage to property, threatened the same or harassed or molested or behaved in an offensive manner toward the family member. The terms "family member", "spouse", "child" and "relative" have also been defined in the section.

4.8 In Tasmania and Western Australia the governing legislation does not define the terms "domestic violence" and "domestic relationship". In Tasmania, orders are issued on the basis of the safety of property and person.[10] In Western Australia, the focus appears to be on protecting the person from a violent personal offence and behaviour that will cause a fear of such an offence occurring. There is also a "catch all" provision which allows the granting of a violence restraining order in "appropriate circumstances".[11]

4.9 The New Zealand legislation[12] is unique in that it specifically defines domestic violence to include a reference to various forms of psychological abuse.[13] Special mention is also made of psychological abuse of children.[14] The Act also states that the person who suffers the abuse is not regarded as the person who caused the child to see or hear the abuse[15] (to ensure that the person suffering abuse is not unfairly targeted as causing harm to any children).[16] Further, the Act states that behaviour may be categorised as psychological abuse even if it does not involve actual or threatened physical or sexual abuse.[17]

Views expressed in submissions

4.10 Many submissions made reference to the exploitation of a power imbalance being an important element of any definition of domestic violence.[18] The exploitation of a power imbalance often manifests itself in psychological abuse with or without physical violence. Moreover, this power and control often continues even after separation in the case of a relationship where children are involved, particularly during contact visits. This is one of the distinguishing features between personal and domestic violence: in the former, geographical separation usually

10. *Justices Act 1959* (Tas): Part XA sets out a comprehensive regime with respect to restraining orders in that jurisdiction. Orders are granted under s 106B on the balance of probabilities if the justices are satisfied that a person has caused or threatened to cause personal injury or damage to property and if unrestrained is likely to cause such injury or damage or a threat of the same, or has behaved in a provocative or offensive manner or has stalked the person for whose benefit the application is made.
11. *Restraining Orders Act 1997* (WA) s 11.
12. *Domestic Violence Act 1995* (NZ).
13. *Domestic Violence Act 1995* (NZ) s 3 defines "domestic violence" to mean violence against that person by any other person with whom that person is, or has been, in a domestic relationship. "Violence" is defined to mean: (a) physical abuse (b) sexual abuse (c) psychological abuse, including but not limited to, (i) intimidation, (ii) harassment (iii) damage to property (iv) in relation to a child, abuse of the kind set out in subsection (3).
14. *Domestic Violence Act 1995* (NZ) s 3(3) provides that a person psychologically abuses a child if that person: (a) causes or allows the child to see or hear the physical, sexual or psychological abuse of a person with whom the child has a domestic relationship; or (b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring.
15. *Domestic Violence Act 1995* (NZ) s 3(3).
16. Western NSW Community Legal Centre, *Submission*.
17. *Domestic Violence Act 1995* (NZ) s 3(5).
18. Campbelltown Benevolent Society Domestic Violence Unit, *Consultation*; *Moree consultation*; *Orange consultation*; WDVCAS Network Meeting (5 March 2003); Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.

ameliorates the problem, whereas in the latter, the power and control does not necessarily end with the physical separation.[19]

4.11 Some submissions favoured the definition recommended in the Model Domestic Violence Laws Report,[20] which defined domestic violence 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;
- 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 a harassing or offensive way towards the protected person; or
- stalking the protected person.[21]

4.12 Others have suggested that specific reference must also be made to fear, physical assault, threats, sexual assault, harassment, including sexual harassment, causing or threatening to cause injury to people other than the protected person; verbal abuse; abuse during court proceedings, and causing emotional distress.[22] This would have the benefit of influencing the interpretation of what constitutes domestic violence away from the traditional belief that it includes only physical assault.[23] For many victims of domestic violence it is the economic, psychological and emotional abuse which causes the most fear.[24] The definition should also cover a situation where the abuse comprises social or cultural control, or financial control such as withholding money.[25]

4.13 Another issue raised in many submissions is the need to recognise the impact of domestic violence on children and young people. In this context, it has been suggested that the definition must also make reference to the damage done to children who witness violence between parents.[26] Further, it must include threats against children (including to abduct children) and against close family members who seek to support the applicant.[27]

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19. Campbelltown Benevolent Society Domestic Violence Unit, *Consultation*; WDVCAS Network Meeting (5 March 2003).
20. University of Newcastle Legal Centre, *Submission*.
21. Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, 1999) at 18.
22. Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*; South West Sydney Legal Centre, *Submission*; Parkes Community Health Centre, *Submission*.
23. Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*.
24. Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*.
25. Legal Aid NSW, *Submission*.
26. Manly Warringah Women's Resource Centre, *Submission*; NSW Women's Refuge Movement, *Submission*.
27. Julie Stubbs, *Submission* based on research by R Hunter and J Stubbs, "Model laws or missed opportunity? Recent proposals concerning domestic violence law reform" (1999) 24(1) *Alternative Law Journal* 12.

The Commission's views

4.14 Having considered the above, and given that the meaning of domestic violence is crucial to this Part, the Commission favours a separate definition of "domestic violence".

4.15 In developing a definition of domestic violence, the Commission has given serious consideration to the various elements necessary to constitute the definition. While personal violence is commonly associated with physical abuse and is widely accepted as a form of domestic violence, it is important to emphasise that non-physical violence such as psychological and emotional harm or abuse is also a common form of domestic violence. The current approach does make reference to intimidation, harassment and molestation[28] which causes psychological abuse. However, the Commission is of the view that there should be a specific focus on psychological harm to emphasise that such behaviour is unacceptable.

4.16 The Commission is also of the view that another notable element in a domestic violence situation is the power and control the perpetrator has over the victim. It is not just that there exists an imbalance of power which may characterise many relationships, but that that imbalance is exploited by the stronger partner. The power imbalance is also very relevant in relation to people with a disability, particularly where they are dependent on carers. Thus, the withdrawal of essential services, medication and other devices essential to the person's health and wellbeing may be a form of psychological abuse and thus amount to domestic violence.[29]

4.17 While the exploitation of the power and control element is often a characteristic of domestic violence, it should not be assumed that this is the case in every violent domestic relationship. There are many family relationships, where both parties are on an equal footing, yet a personality disorder or addiction may cause one party to be violent or abusive towards the other. In such situations, the violence and intimidation is no less real even though there is no power imbalance between the parties.

4.18 In framing a definition that includes all of the above, the Commission has been guided by the New Zealand definition of domestic violence. Accordingly, the Commission recommends that a separate definition of domestic violence be inserted in the Crimes Act, similar to that adopted in the New Zealand legislation. This new definition will cover physical violence by reference to the definition of personal violence offences (as is currently the case). It will also make specific reference to psychological harm as it affects the person in need of protection and psychological and physical damage done to children of the relationship.

4.19 Although largely based on the New Zealand definition, the draft definition differs in one aspect from the New Zealand provision by providing that the person who suffers abuse is exempt from being responsible for psychologically abusing a child of the relationship only if there is reasonable excuse. In contrast, the New Zealand provision provides a blanket exemption to the person who has suffered abuse, thus making it impossible for the person to be liable for causing or allowing the child to be at risk of seeing or hearing the abuse. In the Commission's view such a blanket exemption has the potential to be abused by victims of abuse.

28. Crimes Act s 562AE(1)(b) and s 562AE(1)(c).
29. Campbelltown Benevolent Society Domestic Violence Unit, *Consultation*.

4.20 With regard to the location of definitions within the Crimes Act, the Commission supports the approach currently adopted with regard to the definition of a domestic relationship where it is defined in s 562A of Part 15A and duplicated in s 4 within the current definition of a domestic violence offence. For present purposes, however, the Commission recommends that the new definition of "domestic violence" be inserted in s 562A of Part 15A of the Crimes Act.

4.21 Including a separate definition of domestic violence will necessitate the consequential amendment of s 562AE which currently provides the circumstances in which the court may make an ADVO. In the absence of a specific definition of domestic violence, this section implicitly describes the elements of a domestic violence offence: fearing the commission by the other person of a personal violence offence against the person, harassment or molestation, intimidation or stalking. The Commission is of the view that the current approach is somewhat indirect. The insertion of a new definition of domestic violence will not only clarify the meaning of the term but will also eliminate the need for listing the circumstances in which an ADVO may be made in preference to making specific reference to the new definition.

4.22 Apart from the above consequential amendment, the Commission also recommends that the wording of s 562AE(1) be clarified. Currently the section provides that the court may make an ADVO if on the balance of probabilities a person has "reasonable grounds to fear and in fact fears" the commission of an act of domestic violence. In the Commission's view, it is important that the court adopt a two step approach, that is, that it satisfies itself on the balance of probabilities that:

(i) facts exist which provide reasonable grounds to fear domestic violence; and

(ii) the person in fact fears domestic violence.

RECOMMENDATION 8

A new definition of "domestic violence" should be inserted in Part 15A by substituting the following for s 562A(2):

(2) For the purposes of this Part "Domestic Violence", means:

(a) violence against a person by another person with whom that person is, or has been, in a domestic relationship.

(b) In this section, "violence" means the actual or threatened commission of:
  (i) a personal violence offence (as defined in section 4),
  (ii) psychological abuse, including, but not limited to intimidation and threats to commit personal violence offence,
  (iii) damage to property belonging to, or in the possession of, or used by the person.

(c) Without limiting subsection (b)(ii), a person psychologically abuses a child if that person without reasonable excuse,
  (i) causes or allows the child to see or hear the commission of a personal violence offence or the psychological abuse of a person with whom the child has a domestic relationship; or
  (ii) puts or allows the child to be at risk of seeing or hearing that abuse occurring.

(d) Without limiting subsection (b) of this section, psychological abuse may be constituted by
  (i) a single act or a number of acts that form a pattern of behaviour, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial;
  (ii) behaviour which does not involve the actual or threatened commission of a personal violence offence.

RECOMMENDATION 9

Section 562AE (1) and (2) should be amended as follows:

562AE

(1) A court may on complaint, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that:
  (i) facts exist providing a person with reasonable grounds to fear domestic violence; and
  (ii) the person in fact fears domestic violence.

(2) Despite subsection (1), it is not necessary for the court to be satisfied that the person for whose protection the order is made in fact fears that such domestic violence will be engaged in if:
  (a) the person is under the age of 16 years, or
  (b) the person is, in the opinion of the court suffering from an appreciably below average general intelligence function.

Section 562AE(3) should be repealed.

DEFINITION OF PERSONAL VIOLENCE

"Personal Violence"

4.23 The only real criticism of the current definition of personal violence is that the particular offences are scattered through the Crimes Act.[30] It has been suggested that a new definition of personal violence be included in s 562A(1) along the lines of the definition in s 4 of the Crimes Act listing the various offences and section numbers in the Crimes Act that constitute personal violence offences. The Department for Women has suggested that the following offences be added to the list of personal violence offences:

- s 26 (conspiring to commit murder);

30. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*.

- s 31 (documents containing threats);
- s 35A (maliciously cause dog to inflict grievous bodily harm);
- s 65A (sexual intercourse procured by intimidation, coercion and other non-violent threats);
- s 80D (causing sexual servitude);
- s 86 (kidnapping);
- s 87 (child abduction); and
- s 93G (causing danger with firearm or speargun).[31]

The Commission's views

4.24 The Commission sees the value of Part 15A being as self contained as possible. There is, however, also a need to retain the definition of a personal violence offence in s 4 to allow for its general application across the Crimes Act. The Commission considers that the definition ought to list the name and section numbers of the various offences that constitute personal violence and that the additional offences suggested above should be included in the list.

RECOMMENDATION 10

The definition of a "Personal Violence Offence" in s 4 should be amended to list the various offences and section numbers in the Crimes Act that constitute personal violence offences. The list of offences should also be expanded to include the following:

s 26 (conspiring to commit murder);

s 31 (documents containing threats);

s 35A (maliciously cause dog to inflict grievous bodily harm);

s 65A (sexual intercourse procured by intimidation, coercion and other non-violent threats);

s 80D (causing sexual servitude);

s 86 (kidnapping);

s 87 (child abduction); and

s 93G (causing danger with firearm or speargun).

DEFINITION OF DOMESTIC RELATIONSHIP

"Domestic Relationship"

4.25 The definition of "domestic relationship" is pivotal because it determines whether a person should apply for an ADVO or an APVO. Currently, Part 15A provides that people are in a domestic relationship if they:

- are, or have been married;

31. NSW, Department for Women, *Submission*.

- 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 unpaid care; or
- are, or have been, relatives.[32]

4.26 The current definition was extended in 1999 to include same sex defacto partners, housemates (including tenants, boarders and people living in institutions or group homes), carers and former relatives, such as ex-in-laws.

Should the emphasis be on the existence of a "domestic relationship" or an exploitation of power and control?

4.27 While some submissions have expressed the view that the definition is adequate,[33] others have raised concerns about whether the existence of a "domestic relationship" (however defined) ought to be the distinguishing feature between an ADVO and an APVO. It has been suggested that the exploitation of a power imbalance can happen outside a domestic relationship but can have the same dynamics. For example, if elderly people, people with a disability, or people in Housing Commission accommodation are harassed by someone who is in a position of control, other than those with whom they have a domestic relationship, they will need to make an application for an APVO with limited support.[34]
One particular example cited to the Commission was where a person with a disability had been harassed by a relative of the carer. In this case, there was no domestic relationship between the victim and the perpetrator, but there was an abuse of power and control given the victim's physical disability and dependence on the carer. In this context, it has been suggested that the focus ought to be on whether the person is in a position of power and control and whether there has been an exploitation of that power and control irrespective of whether there is a domestic relationship.[35]

4.28 On the other hand, some submissions have expressed the view that the definition is now too inclusive and that applications that should be treated as APVOs are now being treated as ADVOs because they fall within the domestic relationship definition due to a technicality. It has been suggested that "factors unique to domestic violence are diluted",[36]
for example, prisoners taking ADVOs against warders.[37] Some think that paid carers or flatmates should not be included as this is a contractual rather than a domestic arrangement.[38] Again, it has been suggested that the determining factor should be the level of dependency and control[39] and that it is arguable that broadening the definition in 1999 has weakened the focus on the

32. Crimes Act s 562A(3).
33. NSW, Department for Women, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
34. *Gosford consultation*.
35. Campbelltown Benevolent Society Domestic Violence Unit, *Consultation.*
36. AVLICC, *Submission*.
37. *Chamber Magistrates consultation*.
38. AVLICC, *Submission*.
39. AVLICC, *Submission*.

particular problem of domestic violence.[40] People living in the same household and carer relationships were included due to the consequences of the split between ADVOs and APVOs and the need to provide these people with protection. However, the focus of ADVOs should be on violence in relationships with some "intimacy or familial context". Therefore, it has been suggested that the above two categories should be removed from the definition of domestic relationship, although they should still receive protection through APVOs.[41]

4.29 The Violence Against Women Unit disagrees, believing that the definition should remain inclusive, as some carers are hired and paid, yet others are family members. It could also have the potential to exclude people living in institutional settings, which would further marginalise people who are older and/or have disabilities. AVO legislation should reflect the varied ways in which people live their lives.[42]

Other relationships

4.30 The Commission received many submissions regarding the need to cover other relationships. For instance, some submissions have expressed the need to include kinship relationships that occur according to indigenous customs or contemporary practice, as in the Northern Territory and Queensland.[43]

4.31 Others have suggested that the definition should be broadened to include those who have "dated" but not had an intimate relationship,[44] situations where only one party believes there has been an intimate personal relationship (this apparently can be a problem in some stalking relationships),[45] and where there has been sexual assault.[46] Another category suggested for inclusion is an ex partner's new partner.[47]

4.32 Another category of relationship that is presently not covered is the foster carer of a child who is a ward of the State in relation to the child's natural parents. An example given to the Commission was an instance where the natural father of the children in foster care verbally abused the foster carer. The DOCS case worker was able to get the police to take an ADVO against father for the protection of the children but the foster carer was forced to take an APVO for her own protection against the natural father as she had no "domestic relationship" with the natural father of the children.[48]

40. Jane Wangmann, *Submission*.
41. Jane Wangmann, *Submission*.
42. Comments contained in correspondence to the Commission dated 20 February 2003.
43. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; NSW Commission for Children and Young People, *Submission*; Jane Wangmann, *Submission*; *Newcastle consultation*; *Wollongong consultation*.
44. Julie Stubbs, *Submission*.
45. South West Sydney Legal Centre, *Submission*.
46. Hawkesbury Nepean Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*.
47. *Orange consultation*; *Gosford consultation*.
48. *Moree consultation.*

Clarification of terminology

4.33 The definition of a domestic relationship in s 562A(3)(d) has been a source of concern for many police officers. In this section, a person has a domestic relationship with another person if the person "… is living or has lived in the same household or other residential facility as the other person". The term "other residential facility" has caused confusion, as there is no clear definition of the term within Part 15A or Part 1. Some police officers have questioned whether it could apply to correctional facilities, hospitals where patients are required to stay for extended periods or backpacker hostels. If persons living in such facilities are considered to have a "domestic relationship", then the police will be required to apply for an ADVO instead of an APVO if and when violence occurs between such persons.[49]

4.34 A similar concern was raised in a consultation with the Commission in relation to violence between students who live in a boarding school. Violence between the same students in the playground at school will call for an application for an APVO while violence in the boarding house would seem to call for an ADVO.[50]

The Commission's views

4.35 While an exploitation of power and control can happen in a range of circumstances beyond the boundaries of the immediate family and other specified relationships, anecdotal information suggests that it is often a distinguishing feature between domestic and personal violence, in that it may be more prevalent in the former than the latter. However, to use it as the only determinant could result in a limitless stream of ADVO applications that could have been treated as APVOs. Limiting domestic violence to identified relationships as is the current approach, will also mean that it will continue to reflect the "special category of domestic violence"[51] and not detract from the emphasis rightly placed on domestic violence.[52]

4.36 With regard to the need to extend the definitions further, the Commission agrees that the definition must include relationships that occur according to indigenous customs to ensure that the legislation provides protection for all Aboriginal people. The Commission also agrees that an ex-partner's new partner ought to be included in the definition for practical reasons. The definition of a carer should include a foster carer in relation to a child in foster care and the child's natural parents.

4.37 On the issue of the meaning of "other residential facility", the Commission is of the view that if people live in a facility that provides long-term accommodation, akin to a home, then such people should be considered to have a domestic relationship. Thus, violence between two patients in a hospital or in a backpacker hostel should be considered to be personal violence as such places do not provide long term accommodation. On the other hand, violence between two

49. NSW Police Service, *Submission*.
50. *Orange consultation.*
51. Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; Jane Wangmann S*ubmission*; Young Lawyers Criminal Law Committee, *Submission*.
52. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; NSW Women's Refuge Movement, *Submission*; Jane Wangmann, *Submission*.

students occupying the same dormitory or prisoners sharing a cell in a correctional institution may be considered domestic violence. However, violence between students who are boarders but who do not share the same dormitory may not be domestic violence, as they would fall into the category of neighbours rather than two people who share a common space. Similarly, violence between prisoners in the common yard may not be domestic violence. In the Commission's view, the focus ought to be on the duration of the accommodation provided and actual proximity in terms of living conditions. The deciding factor ought to be whether the facility provides accommodation that is a substitute for living in one's own home for a reasonable period of time.

RECOMMENDATION 11

The definition of a "domestic relationship" in s 562A(3) should be expanded to include:

(a) relationships according to indigenous customs;

(b) relationships between a person and his/her ex-partner's new partner.

RECOMMENDATION 12

The phrase "other residential facility" in paragraph (d) of the definition of "domestic relationship" in s 562A(3) should be clarified to mean any facility that provides long term accommodation. The relationship between people who live in a residential unit within such a facility should be considered a domestic relationship.

RECOMMENDATION 13

A carer for the purposes of paragraph (e) of the definition of "domestic relationship" in s 562A(3) should be clarified to include a foster carer.
The relationship between the foster carer and the natural parent of the foster child should be considered a domestic relationship.

RECOMMENDATION 14

The amendments in recommendations 11 to 13 should be reflected in the definition of "domestic violence offence" in s 4.

5. APVOs and mediation

- Discretion to refuse to issue process
- The role of mediation in APVO matters

5.1 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.[1] It has been alleged that APVOs are being sought regarding "trivial" issues, such as disputes over building being conducted in a neighbour's backyard,[2] or even for vindictive purposes such as blackmail.[3] 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 who genuinely fear personal violence or abuse, and taken AVOs too far away from their original purpose of protecting against domestic violence.[4] 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.[5] One of the major reasons given for this perception was the belief that APVOs were increasingly being used unmeritoriously in response to "trivial" matters.[6]

5.2 The Discussion Paper produced by the Criminal Law Review Division of the Attorney General's Department in 1999 ("the CLRD Discussion Paper') argued that there is "little empirical evidence either supporting or refuting the claim that APVOs are routinely being abused".[7] In Chapter 3, the Commission noted the views expressed in submissions and consultations concerning the abuse of the APVO provisions. The CLRD 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.[8] This argument is supported by the Magistrates Survey, in which 52% of Magistrates surveyed considered that APVOs would be better dealt with in other forums, such as Community Justice Centres ("CJCs") or other mediation or counselling services.[9]

5.3 To this end, the *Crimes Amendment (Apprehended Violence) Act 1999* (NSW) provided for an authorised justice to have a discretion to refuse to issue process in APVO applications, which does not exist in relation to ADVOs.[10] In DP 45, the Commission asked whether those provisions were being used effectively, and whether the role of mediation in APVO disputes

1. In 2002, 6,280 final APVOs were granted by local courts in NSW, representing approximately 39% of all final AVOs granted: Local Court NSW, *Annual review 2002* at 7.
2. *Wallin v Tiernan* [1999] NSWCA 353 (Meagher JA, Stein JA, and Davies AJA). See also J Hickey and S Cumines, *Apprehended Violence Orders: a survey of magistrates* (Judicial Commission of NSW, Monograph Series 20, 1999) ("Magistrates Survey 1999") at 44-45.
3. M McMillan "Should we be more apprehensive about Apprehended Violence Orders?" (1999) 37(11) *Law Society Journal* 48 at 56. See para 3.81-3.82.
4. NSW Women's Refuge Movement, *Submission*.
5. Magistrates Survey 1999 at 25-27. Conversely, all respondents to this survey considered that ADVOs were effective in responding to domestic violence.
6. Magistrates Survey 1999 at 25-27.
7. CLRD Discussion Paper at 11.
8. CLRD Discussion Paper at 11.
9. 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.
10. Crimes Act s 562AK.

should be enhanced. This Chapter examines these issues and recommends changes to Part 15A to enhance the effectiveness of the APVO provisions.

DISCRETION TO REFUSE TO ISSUE PROCESS

Current provisions

5.4 Where an APVO complaint is made by an applicant in person, an authorised justice (generally a Chamber Magistrate) has a discretion to refuse to issue process. An authorised justice exercises that discretion by declining to issue either a summons or a warrant under s 562AJ.[11]
That discretion does not apply where the complaint is made by a police officer.[12] An authorised justice may refuse to issue process if satisfied that the APVO complaint is "frivolous, vexatious, without substance or has no reasonable prospect of success".[13]

5.5 When introducing the amendment giving effect to this discretion, the then Attorney General, the Hon JW Shaw, QC, MLC, stated that the intention of the provision was to ensure that "genuine applicants for APVOs continue to have access to the courts for protection".[14] 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.[15]

5.6 In determining whether or not to exercise the discretion, an authorised justice 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;

(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;

11. Crimes Act s 562AK(2).
12. Crimes Act s 562AK(1).
13. Crimes Act s 562AK(3).
14. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3674.
15. Crimes Act s 562AK(4).

(e) the willingness and capacity of each party to resolve the matter otherwise than through an application 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.[16]

5.7 Where an authorised justice declines to issue a summons against a defendant, the complaint is listed before a Magistrate who may formally dismiss the complaint or, if it appears that there are reasonable grounds, order the issue of a summons.[17]

Views in submissions

5.8 Some submissions expressed the view that the current provisions were being used effectively and were adequate to deter unmeritorious complaints.[18] The contrary view was also expressed, with anecdotal information suggesting that, while it varies between Chamber Magistrates, process is generally still being issued in circumstances where it may not be appropriate.[19] It was considered that s 562AK in its present form does not adequately prevent unmeritorious cases from coming before the court.[20] Many have not noticed a difference in the last two years, with some expressing the view that the number of trivial APVOs appears to be increasing.[21] It was suggested that, since the courts are reluctant to use their implied powers to restrain abuse of process, there should be a legislative basis to stay or strike out such proceedings.[22]

5.9 Others considered that it was too soon to tell, given that the provision has only been in operation for three years, and there is insufficient data on which to base an assessment.[23] Another submission expressed the view that it was difficult to assess whether the discretion to refuse to issue process was being used effectively, but noted that there still appear to be too many frivolous APVOs.[24]

16. Crimes Act s 562AK(5).
17. Local Court NSW, *Submission*.
18. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Manly Warringah Women's Resource Centre, *Submission*; NSW Women's Refuge Movement, *Submission*; South West Sydney Legal Centre, *Submission*.
19. NSW, Department for Women, *Submission*.
20. Graham Johnson, Magistrate, *Submission*.
21. Law Society of NSW, Criminal Law Committee, *Submission*; *Newcastle consultation*.
22. Children's Magistrate, Lidcombe Children's Court, *Submission*.
23. NSW Police Service, *Submission*; Jane Wangmann, *Submission*. The Commission discusses the need for more research and data on APVOs at para 3.85-3.89.
24. Blue Mountains Community Legal Centre, *Submission*.

5.10 The Chief Magistrate commented that there is in practice a presumption against authorised justices exercising their discretion to refuse to issue process. He considered this to be understandable, given the protective objects of the legislation.[25]

5.11 Some submissions noted the need to recognise that, despite the anecdotes, not all APVOs are frivolous, and may involve serious issues of violence and intimidation.[26] Most submissions that discussed this issue expressed the view that the law needs to continue to provide for APVOs in such cases, but should also encourage diverting cases from court where other means of dispute resolution, such as mediation, would be appropriate.[27] Identifying and implementing alternative methods of resolving problems that form the basis of some AVO applications should be encouraged.[28]
It was also suggested that there should be legislative guidelines as to how the discretion to refer to mediation should be exercised,[29] and a need for more judicial training and education.[30]
Another submission expressed the view that s 562AK should give more guidance on what happens when an authorised justice refuses to issue process, and the matter proceeds to a Magistrate who also refuses process.[31]

5.12 It was also suggested that the discretion should apply to ADVOs as well,[32] with scope for the decision to refuse to issue process to be reviewed within seven days.[33]

View of Local Courts

5.13 Local Courts have advised the Commission that, since the commencement of the new provisions in April 2000 until September 2002, authorised justices have issued process in 34,287 APVO matters, and refused to issue a summons in 419 matters.[34]

5.14 Local Courts have suggested the low rate of refusal to issue process could be attributable to a number of factors. First, a Chamber Magistrate may suggest alternatives to proceeding with an APVO, and so the matter may be diverted from the court before process is formally refused. Secondly, Local Courts noted the limited basis offered under s 562AK on which the discretion to issue process may be based. For example, an authorised justice may only refuse if satisfied that the complaint is frivolous, vexatious, without substance or has no reasonable prospect of success. It is often very difficult to investigate these issues given the time constraints and the lack of substantive information or independent or corroborative evidence. Also, in some cases where the application is not frivolous, vexatious or without substance, mediation may still be a more appropriate way of resolving the matter than an APVO.[35] Local Courts suggest that

25. Chief Magistrate, Local Court of NSW, *Submission*.
26. NSW, Department for Women, *Submission*; Jane Wangmann, *Submission*.
27. Chief Magistrate, Local Court of NSW, *Submission*; Legal Aid NSW, *Submission*; NSW Commission for Children and Young People, *Submission*; Jane Wangmann, *Submission*.
28. NSW Commission for Children and Young People, *Submission*.
29. Blue Mountains Community Legal Centre, *Submission*.
30. AVLICC, *Submission*.
31. Graham Johnson, Magistrate, *Submission*.
32. Children's Magistrate, Lidcombe Children's Court, *Submission*.
33. Children's Magistrate, Lidcombe Children's Court, *Submission*.
34. Local Court NSW, *Submission*.
35. Legal Aid NSW, *Submission*; Local Court NSW, *Submission*.

s 562AK(3) be amended to include an additional ground of refusal: an authorised justice may refuse to issue process if satisfied that the matter may more appropriately be dealt with by mediation.[36] This would enable the more trivial APVOs to be diverted from the courts earlier.[37]

5.15 Further, the circumstances which give rise to the presumption against exercising the discretion contained in s 562AK(4) are very broad, covering the major reasons why APVOs are brought in the first place.
Local Courts suggested that s 562AK(4) be amended to provide that the presumption against exercising the discretion to refuse to issue process with regard to harassment only applies where there is a course of continuing conduct, that is, not on the basis of one comment by a neighbour. They also consider that the reference to complaints disclosing evidence of a stalking or intimidation offence[38] should be removed from s 562AK(4), as it causes difficulties for the Chamber Magistrate in ascertaining whether or not the defendant "intended" to cause the applicant to fear physical or mental harm.[39]

The Commission's view

5.16 In 2002, process was issued in relation to 13,640 APVO applications,[40] and refused in 174 matters.[41] As the comments made in submissions show, it is hard to draw definite conclusions from these statistics. While many, and indeed most, of those applications would have been justified, it would be fair to say that at least some matters may have been either at the trivial end of the spectrum, or may have been better dealt with through other means of dispute resolution.

5.17 Diverting such cases away from the court system is beneficial for several reasons. First, dealing with trivial or frivolous APVO applications places considerable strain on court time and resources. Secondly, this runs counter to the overall effectiveness of Part 15A in terms of achieving its primary policy objective of stopping or preventing serious violence, abuse or intimidation. Finally, and most importantly, granting an APVO may not be the best way of getting to the heart of and resolving these disputes, particularly where the parties need to live or work in close proximity.

5.18 The Commission is of the view that s 562AK could be amended in a number of respects to clarify when the discretion to refuse to issue process in APVO matters should be exercised.

Complaints made by police officers

5.19 The discretion to refuse to issue process does not apply where the complaint is made by a police officer. This is presumably because of the assumption that the matter must be fairly serious to warrant police involvement. However, the necessity of that provision is unclear given that s 562AK(4) provides that the discretion to refuse to issue process is presumed not to apply in relation to complaints alleging a personal violence offence, a stalking and intimidation offence

36. The role of mediation in APVO matters is discussed at para 5.25-5.52 below.
37. Local Court NSW, *Submission*. This accords with the view of Community Justice Centres.
38. See Crimes Act s 562AB.
39. See Chapter 12 for a discussion of the stalking and intimidation offence.
40. This represents approximately 30.43% of all AVO applications received in 2002: Local Court NSW, *Annual review 2002* at 7.
41. Local Court NSW, *Annual review 2002* at 7.

or certain kinds of harassment. Those categories are fairly broad, and it is difficult to imagine situations outside of those grounds where police would become involved in an APVO dispute, so process would be issued in these cases anyway. Even if there were cases outside the grounds specified in s 562AK(4), then as long as the complaint was not made frivolously or vexatiously, or does not lack substance or any reasonable prospect of success, the discretion to refuse to issue process would not apply in accordance with s 562AK(3).

5.20 At paragraph 5.23-5.24 below, the Commission recommends that a further ground should be added to s 562AK(3), namely that an authorised justice should have a discretion not to issue process if it appears that the matter would be better dealt with by mediation than through the granting of an APVO. The Commission is of the view that this provision should, *prima facie*, apply equally to complaints brought by police and by private citizens. As noted above, however, it is likely in practice that police would only become involved in APVOs of a serious nature that would not be suitable for mediation.

5.21 The Commission is also concerned that drawing a distinction between police and private applicant complaints, implies that complaints brought privately are necessarily of a less serious nature. That is not always the case. Indeed, concern over the lack of police involvement in serious instances of sexual assault and stalking in non-domestic relationships was conveyed to the Commission in submissions and during consultations.[42] Considering that only a small percentage of APVO complaints are initiated by police,[43] there is a likelihood that a number of private APVO complaints are made on the basis of very serious allegations.

5.22 Consequently, the Commission is of the view that the reference to police complaints in s 562AK(1) should be removed. The nature of the subject matter of the complaint should determine the appropriate legal response, not whether or not the complainant is a police officer. Instead, the Commission recommends that the fact that a complaint is brought by a police officer should be included in s 562AK(5) as a factor an authorised justice must consider in determining whether or not to exercise the discretion to refuse to issue process.

Circumstances where the discretion may be exercised

5.23 The Commission is persuaded by the argument that another circumstance where an authorised justice may exercise the discretion to refuse to issue process should be where a matter would be more appropriately dealt with by mediation.[44] It is conceivable that an APVO application may be neither frivolous, vexatious, or without substance or reasonable prospect of success, yet an APVO may not be the best way to proceed. However, there is currently no discretion to refuse to issue process in these circumstances.

5.24 Accordingly, the Commission recommends that s 562AK(3) be amended to provide that an authorised justice may exercise the discretion to refuse to issue process if satisfied that the complaint is:

1. frivolous; or

42. See, in particular, Jane Wangmann, *Submission*.
43. Local Courts do not keep statistics on the numbers of APVO complaints made by police as the percentage is too small.
44. The role of mediation in APVO disputes is discussed at para 5.25-5.52 below.

2. vexatious; or

3. without substance; or

4. has no reasonable prospect of success; or

5. where the matters referred to in the complaint may more appropriately be dealt with by mediation or other alternative dispute resolution.

RECOMMENDATION 15

Section 562AK(1) should be amended to permit an authorised justice to refuse to issue process in relation to complaints made by police officers. Whether or not the complaint was made by a police officer should be listed in s 562AK(5) as one of the factors an authorised justice must consider when determining if the discretion to refuse to issue process should be exercised.

RECOMMENDATION 16

Section 562AK(3) should be amended to provide that an authorised justice may exercise the discretion to refuse to issue process if satisfied that the complaint is:

- frivolous; or
- vexatious; or
- without substance; or
- has no reasonable prospect of success; or
- where the matters referred to in the complaint may more appropriately be dealt with by mediation or other form of alternative dispute resolution.

THE ROLE OF MEDIATION IN APVO MATTERS

5.25 The role of mediation is linked with the question of refusing to issue process in APVO matters, but is also a broader issue. In some cases, mediation may be a more suitable option than an APVO, and so it may be preferable that process does not issue. In other cases, however, mediation may be appropriate in addition to an APVO, following an application being made or an order being granted. Questions arise concerning the types of matters that would be suitable for mediation, and how authorised justices are to determine such matters; whether or not referral to mediation should be underpinned by legislation, and if so how; should referral be compulsory even if the parties do not agree to the matter being mediated; and at what stage of the APVO process should mediation occur. The views canvassed in submissions and consultations on these questions are discussed below.

Views in submissions

5.26 Most submissions expressed the view that mediation should play a greater role in the resolution of APVO disputes.[45] It was considered that mediation should be attempted at any stage during proceedings: police should receive training in alternative dispute resolution options rather than simply referring people to Chamber Magistrates to apply for APVOs,[46] and the availability of mediation should not be restricted after legal proceedings have commenced.[47] The Commission understands that a number of initiatives have already been piloted in an attempt to divert neighbourhood disputes away from the court system.[48]

5.27 Some submissions stated the view that mediation could be particularly useful where a person with an intellectual disability was involved as one of the parties in an APVO dispute, provided there were thoughtful guidelines in place.[49] Mediation would also be beneficial in suitable cases where children and young people were applicants or defendants.[50]

5.28 A few submissions raised the idea that referral to mediation should also be available in domestic violence disputes where the court considered that it would be beneficial to both parties and there is no threat to the applicant's safety,[51] although one of those submissions suggested that there should be a *presumption* against mediation in domestic violence.[52] However, others were against such an idea. The central theme of mediation and other forms of alternative dispute resolution is that of equality between disputants. Fear and the exploitation of inequality of power are at the heart of most domestic violence complaints. While there may be aspects of the

45. AVLICC, *Submission*; Blue Mountains Community Legal Centre, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*; Ed Laginha, *Submission*; Graham Johnson, Magistrate, *Submission*; Legal Aid NSW, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Local Court NSW, *Submission*; NSW Commission for Children and Young People, *Submission*.
46. Legal Aid NSW, *Submission*.
47. Local Court NSW, *Submission*.
48. For example, NSW Police told the Commission of a collaboration between the Tuggerah Local Area Command and the local Community Justice Centre ('CJC"). Running from July to November 2001, the project essentially aimed to intervene earlier in the response to and management of community disputes and reduce the number of repeated call outs police were required to make. Referrals from the police to the CJC were conducted on a voluntary basis, with parties retaining the option to access APVOs or other legal remedies. The project was considered to be successful, in that there was an increase in referrals to the CJC by police and a reduction in repeated call-outs of police to disputes. NSW Police is considering the merits of introducing the projects in other Commands: NSW Police Service, *Submission*.
49. Intellectual Disability Rights Service Inc, *Submission*. For guidelines, see J Simpson, "Guarded Participation: Alternative Dispute Resolution and People With Disabilities" (2003) 14(1) *Australian Dispute Resolution Journal* 31.
50. NSW Commission for Children and Young People, *Submission*.
51. Blue Mountains Community Legal Centre, *Submission*; Children's Magistrate, Lidcombe Children's Court, *Submission*.
52. Blue Mountains Community Legal Centre, *Submission*.

relationship breakdown which are suitable for mediation, such as residence, contact and property matters, attempts to mediate violence should never be made.[53]

Compulsory mediation for APVOs?

5.29 A significant number of submissions were of the view that mediation should be compulsory in the determination of APVO disputes.[54] It was considered that this would save court time and deter frivolous and vexatious applications.[55] However, all agreed that mediation should never be attempted where there has been physical violence or abuse.

5.30 Others strongly expressed the view that, while mediation may be useful, it should not be compulsory.[56] Mediation is only truly effective when both parties are amenable to it.[57] Mediation can be useful but the "wholesale imposition" of a general requirement for mediation would be counterproductive, as in some cases it would simply put the applicant, mediator and others in real or greater danger.[58] While mediation focused on the root causes of violence and could help to eliminate it,[59] it should never be attempted in situations involving violence, fear or inequality.[60]

5.31 It was also asserted that the introduction of compulsory mediation would result in another barrier for people with a disability from a non-English speaking background in obtaining APVOs. Adequate resources, including access to interpreters, would need to be guaranteed, as there is currently a lack of culturally competent mediation services available, together with a lack of knowledge among people from culturally diverse backgrounds with a disability about the processes and purposes of mediation.[61] The view was that more support services are needed rather than compulsory mediation.[62]

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53. See also Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*; NSW Department of Community Services, *Submission*; Jane Wangmann, *Submission*; *Bourke consultation*. See also H Astor "Domestic violence and mediation" (1990) 1 *Australian Dispute Resolution Journal* 143.
54. AVLICC, *Submission*; Blue Mountains Community Legal Centre, *Submission*; NSW, Department for Women, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Legal Aid NSW, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*; Western NSW Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*; *Bourke consultation*.
55. Western NSW Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*.
56. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Intellectual Disability Rights Service Inc, *Submission*.
57. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
58. Mt Druitt and Area Community Legal Centre, *Submission*.
59. Graham Johnson, Magistrate, *Submission*.
60. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; Jane Wangmann, *Submission*.
61. Multicultural Disability Advocacy Association, *Submission*. See Chapter 3 for a discussion of the need for greater resources, including culturally specific and appropriate services.
62. Multicultural Disability Advocacy Association, *Submission*.

A legislative basis for mediation?

5.32 Submissions that expressed support for an enhanced role for mediation in APVO disputes also considered that it should be underpinned by legislation, and that more formal structure and recognition should be provided.[63] As discussed earlier at paragraph 5.6, s 562AK(5) currently requires an authorised justice to consider whether a matter is suitable for mediation in deciding whether or not to refuse to issue process, but does not require APVO matters to be referred to mediation.[64] It was suggested that Part 15A should be amended to provide that all APVO matters must be referred to mediation unless a personal violence offence has occurred or is likely to occur.[65] This could obviate the need for imposing a filing fee as a means of deterring trivial APVO applications, and protect people at genuine risk.[66] It was also suggested that the legislation could give courts the power to direct parties to mediation in appropriate cases, backed up by interim orders where necessary, with the unreasonable failure to participate in mediation being a factor to consider when awarding costs.[67]

5.33 The Chief Magistrate also favoured amending the legislation to enable the court to direct parties to CJCs or other mediation services, in appropriate cases, even where they do not agree.[68]

5.34 It was also suggested that s 562D should be amended to provide that an AVO restricting approaches by the defendant to the applicant does not preclude the attendance of the defendant at an agreed formal mediation session between the parties.[69]

5.35 It was noted that closer, more formalised links between the court process and mediation already exist in areas like children's care and protection and residential tenancies.[70] While there would be resource implications, the view was expressed that this would be off-set by the savings involved in getting these matters out of the court system,[71] resulting in increased efficiency, reduced financial and other costs (eg stress to applicants and defendants), and would better meet people's needs.[72]

View of the CJC

5.36 CJCs have advised the Commission that they currently mediate in about 8% of applications for APVOs.[73] In the period 1 July 2002-31 December 2002, 486 CJC files were opened where an APVO had been sought by one or

63. Local Court NSW, *Submission*; Ed Laginha, *Submission*.
64. Legal Aid NSW, *Submission*.
65. AVLICC, *Submission*; Blue Mountains Community Legal Centre, *Submission*; NSW, Department for Women, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Legal Aid NSW, *Submission*.
66. AVLICC, *Submission*.
67. Graham Johnson, Magistrate, *Submission*.
68. Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*.
69. Local Court NSW, *Submission*.
70. Ed Laginha, *Submission*.
71. Law Society of NSW, Criminal Law Committee, *Submission*.
72. Ed Laginha, *Submission*.
73. NSW Local Courts Monthly Statistics (1 July 2002-31 December 2002).

more parties. A total of 625 APVOs were involved.[74] Approximately 80% of matters mediated result in an agreement between the parties.

5.37 CJC reports that the APVO matters referred to it relate in the main to neighbourhood disputes. A smaller number relate to work relationships, and, landlord and tenants conflicts. Disputes between people who know each other are often not just a legal issue. They may involve other members of the family or immediate community in some way.

5.38 The CJC submission noted that while the presenting problem with an APVO dispute may be perceived or actual violence, generally the parties have an ongoing relationship be that as neighbours, workers, friends, tenants or members of an incorporated association. CJCs allow the parties to explore the issues and tensions in the relationship that gave rise to the APVO. These issues may involve a long history of dispute between the parties in relation to matters that have never been properly communicated or resolved. For example, the barking dog, loud noise, parked cars, overgrowing trees, boundary fences, and so on. Alternatively, the dispute may be at a deeper level associated with prejudices between the parties, racial or ethnic differences or lifestyle conflicts.

5.39 There is a significant benefit for the parties in having the matter referred to mediation at the earliest opportunity as disputes tend to become more intractable as court attendance and further incidents occur between the parties. CJCs have found that APVOs can and are successfully mediated, where the parties have the capacity and the willingness to want to resolve the dispute.

5.40 CJC recognises that many matters suitable for mediation do not proceed to mediation. This may be influenced by the concerns of the parties about the effectiveness of the mediation process in assisting in their particular circumstances. It may also be due to Chamber Magistrates assessing a matter as not suitable for mediation when CJCs may assess it as being suitable. CJCs are of the view that suitable training can assist Chamber Magistrates and Magistrates to identify those matters obviously not suitable for mediation and that CJCs have a vital role in assessing those matters which are not so clear cut.

5.41 Some Chamber Magistrates have reported to CJCs that they believe that they have no legal framework in which to refer matters to mediation. In those circumstances, process will nearly always be issued.

5.42 Strengthening the relationship between APVOs and mediation would encourage co-operative assessment of matters between Local Courts and CJCs. To this end, CJCs make the following suggestions:

1. That APVO legislation provide that applications may be referred for mediation:
    - prior to the application being made to the court;
    - at the time the application is made;
    - at the time of the call-over; and

74. NSW, Community Justice Centres, *Submission*. The discrepancy between the number of files opened and the number of APVOs is because some of the files involved cross-applications.

- at the time of the hearing.

2. That an authorised justice have the discretion to refuse to issue process for an APVO so that the matter may be referred for mediation in the first instance.

3. That the authorised justice refer the matter to mediation unless there is good reason not to, such as a history of actual physical violence, or a previous failed attempt at mediation.

4. That a clause be included in the standard APVO stating that the parties may not approach each other except for the purposes of mediation.

5. That Local Courts advise CJCs electronically that an application for an APVO has been made, and the names and addresses of the parties involved, so that they may be contacted by CJC to offer mediation.

6. CJCs may assess a dispute as not suitable for mediation.

7. That information sheets on APVO processes and the role of CJCs in that process, be provided to applicants and defendants by the Court at appropriate stages.

5.43 CJC estimates that, should these recommendations be implemented, the resource implications would amount to an increase in total mediation costs of approximately $425,000 per annum.[75]

The Commission's view

5.44 The Commission considers the issue of mediation to be one of particular importance in APVO disputes. This view is held not only in terms of limiting the opportunity for the system to be abused, but because, in many cases, mediation may be a more appropriate solution than, or a valuable complement to, an APVO. Many of the issues raised in submissions may be dealt with through continued improvements in judicial training and education and better administrative procedures. To the extent that those issues involve more effective implementation, they are discussed in Chapter 3.

5.45 The Commission is also of the view that mediation in APVO matters should have a legislative basis. Accordingly, the Commission recommends that a new provision should be included in Part 15A specifically empowering authorised justices to refer suitable APVO matters to mediation. That provision should state that matters may be referred at any time during the APVO process, and should clearly state the types of matters in which mediation should not be attempted. The major principles that should guide the legislative power to refer APVO disputes to mediation are discussed below.

75. CJCs base this estimate on the assumption that the percentage of APVO referrals from Local Courts would increase from 8% to 40%: NSW, Community Justice Centres, *Submission*.

Referrals to mediation should be able to be made at any time in the AVO process

5.46 In some circumstances, it may be apparent to an authorised justice at the outset that mediation may be a more suitable alternative to an APVO. For example, in a neighbourhood or work dispute where there is a need to preserve a harmonious relationship, there are identifiable issues capable of resolution, and there is no immediate threat of violence. In such a case, an authorised justice may choose to use the discretion to refuse to issue process to initiate an APVO on the ground that the matter is more suitable for mediation, in conjunction with the power to refer the matter to mediation recommended here. Where this occurs, the authorised justice may inform the parties that a summons may issue if mediation does not resolve the dispute. Such a provision would enable more APVO matters to be diverted before proceeding to a Magistrate for determination.

5.47 In other cases, the issue may not be so clear cut. An authorised justice may consider it appropriate to issue process in addition to referring a matter to mediation. Furthermore, issues amenable to mediation may not be apparent at the start of proceedings, but may emerge later during the course of the hearing to determine if an interim or final APVO should be granted. Consequently, the Commission is of the view that the power to refer a matter to mediation should be available at any stage of proceedings, before or after an APVO is granted. It should also be available in lieu of, or in addition to an APVO being granted. For while some issues involved in a dispute may be responsive to mediation, there may also be underlying threats of violence which should be responded to by way of an APVO. Mediation cannot be used as a substitute for protection.

5.48 At paragraph 5.19-5.22, the Commission recommends that a distinction should not be drawn between police and private complainants in terms of the discretion to refuse to issue process. The Commission is of the view that the same principle should apply to referring matters to mediation. While it may be safe to assume that the circumstances where police make a complaint for an APVO on an applicant's behalf would most likely be too serious to refer to mediation, the Commission is of the view that that decision should be based on the nature of the subject matter rather than the identity of the complainant.

5.49 While mediation would be most effective where both the parties were amenable and consented to the mediation, the Commission is of the view that the legislation should enable the court to refer suitable APVO matters to mediation even where one or both of the parties do not agree to the matter being mediated. As CJCs noted, reluctance to accept mediation may be due to scepticism concerning its effectiveness, which may be overcome once the mediation process is underway. Should the attempt at mediation fail, the parties would still have the opportunity to proceed with the APVO. Part 15A should also provide that a matter should not be referred to mediation where there has been a previous failed attempt at mediation in relation to the same matter.

Violence should never be mediated

5.50 It should be emphasised that this section deals exclusively with mediation of APVO disputes. The Commission is of the view that mediation should not be encouraged in relation to ADVOs. The Commission concurs with the arguments put in submissions that the fear and imbalance of power typically characterising domestic violence makes mediation in ADVO matters unsuitable, unproductive and unsafe.

5.51 In encouraging greater recourse to mediation in APVO disputes, the Commission recognises that not all APVOs are based on trivial complaints. Many involve serious physical and sexual violence and intimidation.
In these cases, mediation should never be attempted. Accordingly, the new provision recommended by the Commission should specifically and clearly state that matters should not be referred to mediation where there is a history of, or allegations of, personal violence, or conduct amounting to serious harassment. Not only would mediation in these circumstances exacerbate the danger for the applicant, it would also present a threat to the mediator.

5.52 As noted in the CJC submission, sometimes the presenting issue may appear rather trivial, but issues of violence or harassment may emerge on further investigation. For this reason, the new provision should also enable the mediation service to determine that a matter referred to it is in fact not suitable for mediation.

RECOMMENDATION 17

A new section should be included in Part 15A to empower a Chamber Magistrate or a Magistrate to refer suitable APVO matters to an appropriate mediation service. That referral should be able to be made at any time, either before or after process has been issued, and in any circumstances where the court deems mediation to be appropriate, whether or not the parties consent to the matter being mediated.

That section should state that matters should not be referred where:

- there is a history of physical violence; or
- there are allegations of a personal violence offence; or
- there is conduct amounting to harassment relating to the complainant's disability (including HIV/AIDS status), race, religion, homosexuality, or transgender status; or
- there has been a previous failed attempt at mediation in relation to the same issue; or
- the mediation service has assessed that a dispute is not suitable for mediation.

The terms of a standard APVO should also be amended to provide that parties may contact each other for the purpose of arranging or engaging in mediation.

6. Parties to AVO proceedings

- Applications by third parties
- Police applications

6.1 One of the stated objectives of the legislation is to ensure "that access to court is as speedy, inexpensive, safe and simple as is consistent with justice".[1] At present, people seeking help or advice about obtaining an AVO 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. Having received advice from one or some of the above, the person in need of protection or the police can apply for an AVO.[2] If the police make the application, they can arrange for a police prosecutor to represent the person in need of protection. People who apply for an ADVO on their own behalf can represent themselves, or arrange for legal representation through legal aid, the Domestic Violence Advocacy Service or by hiring their own solicitor. Legal aid is not available for APVOs and for defendants in any AVO proceedings.

APPLICATIONS BY THIRD PARTIES

6.2 Some people may be more vulnerable than others in terms of applying for an AVO. This means that the AVO process is not accessible for those people. Recent research[3] has found that only a very small number of women (10 out of 142) applied for AVOs although the vast majority (about 90%) went to the police. This indicates that there are significant barriers which may be due to various reasons including lack of knowledge about process or fear.[4] The barriers faced by marginalised groups such as indigenous people, people from a non-English speaking background and/or who live in rural and remote areas, people with a disability, older people and children are discussed at length in Chapter 3 from an implementation perspective.

6.3 While the Commission has suggested various practical solutions that may help to remove the barriers to access in Chapter 3, another relevant issue that was raised in DP 45 was whether there is value in considering a legislative amendment to allow for third party applications, that is, people apart from the police who can apply for an AVO on behalf of a person in need of protection. The Commission received many submissions on this issue, both in respect of ADVOs and of APVOs.

Views in submissions

6.4 Some submissions expressed the view that the position ought to remain unchanged, that is, that only the police should be able to make third party applications.[5] It has also been suggested that police should be *required* to assist in applications made by people who may be particularly vulnerable.[6] Others suggested that the ambit of their powers be extended such that police should be required to make applications for APVOs on behalf of people with an intellectual

1. Crimes Act s 562AC(2)(b).
2. Crimes Act s 562C(2).
3. M Young, J Byles and A Dobson, *The effectiveness of legal protection in the prevention of domestic violence in the lives of young Australian women* (Australian Institute of Criminology, Trends and Issues in Criminal Justice No 148, 2000) at 3.
4. Margrette Young, *Submission*.
5. NSW, Department for Women, *Submission*; Manly Warringah Women's Resource Centre, *Submission;* Legal Aid NSW, *Submission*.
6. Blue Mountains Community Legal Centre, *Submission*.

disability who have experienced or are at risk of non-domestic personal violence.[7] It was also suggested that the same obligation should apply in relation to children and young people, especially in relation to APVOs for schoolyard bullying where police may currently be reluctant to initiate proceedings.[8]

6.5 Others suggested that third parties should be able to apply on behalf of those with special difficulties such as people with intellectual disabilities, the elderly or children,[9] people with other disabilities like agoraphobia,[10] pregnant women who are at a notoriously high risk of abuse, and those who may find it difficult making repeated visits to court.[11]

6.6 It has also been suggested that the range of persons who can take out AVOs be extended to include employer corporations as well as individuals. For example, the Department of Housing is of the view that it ought to be able to take out an AVO on behalf of an employee.[12] Similarly, the Department of Health expressed concern about whether an employer can take out an APVO on behalf of an employee if the employee is threatened at work, for instance where a patient threatened the staff in a hospital.[13]
Such threats could also be made against other employees, for example, court staff and refuge staff.[14] The Department of Education and Training raised a similar concern where a school teacher is in need of protection. They suggested that it is preferable that a third party such as a Departmental officer should make the application as this will also reinforce the notion that the behaviour is deemed unacceptable at Departmental level and is not simply the view of the teacher. The legislation could include as the third party a departmental officer prescribed by the regulations.[15]

6.7 The role of a support person is an associated issue. Section 562ND provides that a party who gives evidence in a proceeding in relation to an AVO complaint or application (except children to whom s 27 of the *Evidence (Children) Act 1997* (NSW) applies), may have a support person, for example, a relative, friend, guardian, carer or interpreter, near them in court when giving evidence. It has been suggested that this section be expanded or clarified to enable the support person to speak on behalf of the applicant in order to assist or expedite matters before the court.[16]
Although there is support and advice available from police prosecutors, Chamber Magistrates, DVLOs and WDVCAS, court rooms can add stress to what is already a traumatic situation, and

7. NSW, Department for Women, *Submission*.
8. Local Court NSW, *Submission*.
9. Blue Mountains Community Legal Centre, *Submission*; Graham Johnson, Magistrate, *Submission*.
10. Hawkesbury Nepean Community Legal Centre, *Submission*.
11. Hawkesbury Nepean Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*.
12. NSW Department of Housing, *Submission*, citing an independent report by the Australian Institute of Criminology ("Reducing risks of Occupational Violence in the NSW Dept of Housing" which suggested that the Department of Housing have standing to take out an AVO on behalf of a member of staff).
13. *Orange consultation*.
14. *Gosford consultation*.
15. NSW Department of Education and Training, *Submission*.
16. Erin's Place for Women and Children, *Submission*.

mistakes can be made.[17]
Various examples have been cited to the Commission of parties agreeing to conditions in ignorance.

The Commission's views

6.8 The Commission does not support the general availability of third party applications. However, the Commission acknowledges that there are some groups that are disadvantaged by their lack of understanding or physical incapacity who would benefit from third party applications being made possible. Each such group is considered below.

6.9 With regard to the role of a support person, while there may be value in permitting the support person to speak on behalf of the applicant, the Commission is reluctant to recommend such an amendment as it may lead to abuse. The Commission is satisfied that the current provision which allows a support person to be present serves the requisite purpose.

People with an intellectual disability

6.10 The Commission has been informed of the difficulties faced by people with an intellectual disability in obtaining an AVO. As applicants they are more likely than others to be victims of violence.[18] They may have less access than others for a range of reasons including their limited capacity to protect themselves; the perception that they are an easier target because they may be less likely to complain; their lack of or limited knowledge about AVOs; fear where the perpetrator is a carer or fellow resident or staff member in a supported accommodation facility or carer; and lack of support.[19] Difficulties to do with communication skills may be compounded by their limited capacity to move out of an abusive situation due to their lack of financial or social resources.

6.11 AVOs also cause difficulties for people with an intellectual disability as defendants. When AVOs are taken out against a person with an intellectual disability, the person may lack the capacity to understand the conditions imposed on them. It would not only be unfair to grant an order against someone who did not understand its terms, but would also offer no protection to the applicant.[20]

6.12 This issue was considered by the Commission in 1996 in its Report on *People with an Intellectual Disability and the Criminal Justice System*.[21] One of the possible solutions considered was that matters involving a complainant with an intellectual disability should always be brought by the police, as is the case for children under the age of 16 years. However, the Commission did not support this option, as such a blanket rule may be inappropriate if police did not believe the person bringing the complaint, or had difficulty obtaining instructions from the person. As an alternative, the Intellectual Disability Rights Service ("IDRS") suggested that in

17. Erin's Place for Women and Children, *Submission*.
18. Intellectual Disability Rights Service Inc, *Submission*.
19. Intellectual Disability Rights Service Inc, *Submission*.
20. Intellectual Disability Rights Service Inc, *Submission*.
21. NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report 80, 1996) at para 8.45-8.48

limited circumstances another person should be allowed to provide the supporting information on oath. With regard to defendants with an intellectual disability, the IDRS argued that AVOs should not be made against persons who do not have the capacity to understand and comply with the conditions imposed. The Commission suggested no legislative amendments to the Crimes Act on this issue but recommended that AVOs involving people with an intellectual disability be the subject of further consideration by the police and the Department of Community Services.[22]

6.13 The IDRS has again expressed its support for third party complaints on behalf of people with an intellectual disability.[23] The IDRS finds it incongruous that Part 15A provides that an AVO may be granted to people with a disability even though they do not in fact fear immediate violence or abuse, yet does not provide for assistance for such a person to make a complaint.[24] The submission identified circumstances where the police will not make a complaint on behalf of a person with an intellectual disability, for example, where there has been intimidation but no actual violence.
Yet, such a person may be unable to make an application themselves due to the significant nature of their disability.[25] The submission also noted that it is not sufficient only to allow the Public Guardian to apply on behalf of people with a disability. The Office of the Public Guardian sees its role as securing legal representation, but not actually extending to taking out an AVO.[26] There will also be many instances where people may face barriers in applying for an AVO due to their disability, but do not have a guardian appointed under the Guardianship Act.[27]

6.14 Although the IDRS recognises the need for third party applications to be made available for people with an intellectual disability, they acknowledge the risk that such a provision could be used to interfere with the autonomy of the person. For instance, it may sometimes be used inappropriately where parents want to control the lives of adult children.[28] However, the IDRS believes the risk can be minimised by requiring evidence to substantiate the complaint.

6.15 Accordingly, the IDRS has suggested a limited category of third parties (close friends, relatives, service providers, appointed guardians and advocates) who would have standing to apply for AVOs on behalf of people who lack capacity to make the complaint themselves.[29] Others have suggested that the category should be restricted to people appointed as enduring guardians.[30] Still others have suggested that the category of third parties be limited to the Protective Commissioner, Guardianship Board and DOCS, to guard against abuse.[31] The IDRS has also suggested that the following requirements be included as an additional safeguard:

- The court must be satisfied that the person lacks legal capacity to bring the complaint themselves (IDRS notes that the majority of people with an intellectual disability will have the capacity); and
- police have refused to make the complaint; and

22. NSWLRC Report 80, Recommendation 35.
23. Intellectual Disability Rights Service Inc, *Submission*.
24. Intellectual Disability Rights Service Inc, *Submission*.
25. Intellectual Disability Rights Service Inc, *Submission*.
26. Intellectual Disability Rights Service Inc, *Submission*.
27. *Wollongong consultation*.
28. AVLICC, *Submission*; Legal Aid NSW, *Submission*.
29. Intellectual Disability Rights Service Inc, *Submission*.
30. Local Court NSW, *Submission*.
31. Graham Johnson, Magistrate, *Submission*.

- the court is satisfied that the application is in the interests of the person with an intellectual disability.[32]

6.16 With regard to defendants with an intellectual disability, it has been suggested that s 37(2A) of the *Bail Act 1978* (NSW) may be a useful precedent. Under that provisions, the court must be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the defendant to understand or comply with the condition.[33] It has been suggested in this regard that in ADVO matters, the onus of proving incapacity should be on the defendant. In APVOs,

if the defendant submits on reasonable grounds that he or she has an incapacity due to a disability, the onus should be on the applicant to show that the defendant is capable of understanding the terms of the AVO.[34]

The rationale for the differentiation is the fact that people with an intellectual disability are more vulnerable to inappropriate APVOs being brought against them.[35]

6.17 A related issue is to do with adults under guardianship orders who may have difficulty obtaining an AVO. These people often live in the community and are vulnerable to exploitation and harassment.

There should be a provision in the legislation for guardians to apply on their behalf without having to make a special guardianship application to obtain the authority of a guardian *ad litem*.[36] Some submissions suggested that the Act should also be amended to allow third parties to apply for an AVO on behalf of a person under public guardianship. Third parties should be the public guardian, private guardians and enduring guardians, as well as family members and friends of a person with a disability. This would negate the possible perception that the people with disabilities in need of protection must be placed under the restrictive provisions of a guardianship order.[37]

The Commission's views

6.18 The Commission is convinced that there is a gap in the law in terms of the protection afforded to people with an intellectual disability. The Commission is also aware of provisions allowing for third party applications in other jurisdictions.[38] However, the Commission shares the concerns of some agencies about permitting parents, friends, relatives and service providers who are not officially appointed as guardians to apply for an AVO on behalf of a person with an intellectual disability or others under guardianship.[39]

32. Intellectual Disability Rights Service Inc, *Submission*.
33. Chief Magistrate, Local Court of NSW, *Submission*; Intellectual Disability Rights Service Inc, *Submission*.
34. Intellectual Disability Rights Service Inc, *Submission*.
35. Intellectual Disability Rights Service Inc, *Submission*.
36. University of Newcastle Legal Centre, *Submission*.
37. Office of the Public Guardian, *Submission*; NSW Police Service, *Submission*.
38. See *Domestic and Family Violence 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.
39. Multicultural Disability Advocacy Association, *Submission*.

6.19 If a guardianship order has been made and it encompasses several areas of functioning, such as decision-making about accommodation and medical matters, the officially appointed guardian should have authority to apply for an AVO.

6.20 With regard to defendants with an intellectual disability, the Commission considers that it is implicit in the legislation that a person with a severe intellectual disability will be incapable of understanding the terms of an order and "knowingly" breaching the order.[40]

6.21 If Part 15A is amended to allow certain third parties to make applications on behalf of others, then consequential amendments should also be made to s 562F to allow a third party to apply to vary or revoke an order,[41] s 562WA to allow a third party to bring an appeal,[42] and to s 562N[43] re the making of costs orders against a third party.[44]

RECOMMENDATION 18

Authorised third parties should be allowed to make applications on behalf of people with an intellectual disability, people under Guardianship orders and people with certain physical disabilities.

Children

6.22 Children are particularly vulnerable to abuse, both in terms of experiencing it themselves and witnessing others being abused, even if the violence is not directed at them or is not "intended".[45] Many studies have been done on the detrimental effects of such violence on children, even where they are not directly experiencing or witnessing it.[46] The Child Death Review Team Annual Report[47] notes the number of instances when child deaths have occurred in a familial context. The report has recommended the provision of sustained professional visiting for all high risk families for up to two years and that the Government should consider options to ensure that instances of children and young people at risk of harm are reported to the Department of Community Services.[48] Currently, Part 15A imposes an obligation on the police to

40. See also discussion on breaches at para 10.11-10.46
41. See Recommendation 36.
42. See Recommendation 53.
43. See Recommendation 54.
44. Intellectual Disability Rights Service Inc, *Submission*.
45. Children's Magistrate, Lidcombe Children's Court, *Submission*.
46. T Brown, M Frederica, L Hewitt and R Sheehan (ed), *Violence in families. the management of child abuse allegations in custody and access disputes before the Family Court of Australia* (1998).
47. NSW Department for Children and Young Persons, *Child Death Review Team Annual report 2001-2002*.
48. NSW Department for Children and Young Persons, *Child Death Review Team Annual report 2001-2002*, Recommendations 1 and 2.

apply for an AVO if the person for whose protection the order would be made is a child under the age of 16 years.[49]

6.23 The Commission has received many submissions that express the view that officers of the Department of Community Services ("DOCS officers") should also be able to apply for AVOs on behalf of children through the local court or the Children's Court.[50] The rationale for this suggestion is that DOCS officers have a comprehensive understanding of the children at risk. Additionally, it would streamline the currently cumbersome process where DOCS officers request police to make applications for children.[51] Some submissions have suggested that DOCS should be *required* to make a complaint to the police if they believe violence has occurred, or is likely to occur.[52] The Commission is also aware that the Children's Court Advisory Committee is currently considering whether or not the Children's Court should have the power to make AVOs against parents and others when dealing with care proceedings under the *Children and Young Persons (Care and Protection) Act 1998*.[53]

6.24 In practice, it appears that there is some variation across the State with regard to DOCS involvement in ADVO matters. There is currently no requirement that DOCS officers inform police about a domestic violence incident as a matter of course. However, Police Standard Operating Procedures require that police inform DOCS when there is a matter that impacts on children. It appears that when Police contact DOCS via the help line, DOCS in turn enquire into the matter and prepare a "risk of harm" report that is sent to the local community support centre for further follow up action.[54] Some Magistrates also currently require DOCS involvement if children are present when the violence occurred. For instance, the Magistrate in Bourke requires that DOCS be notified if children are affected. DOCS make a notification on the records and get the Police to take out orders for children. This is however not a procedure that is followed consistently.[55]

6.25 Clearly there is reason for concern about the well-being of children in a home where domestic violence is prevalent. This is consistent with the provision in the *Children and Young People (Care and Protection) Act 1998* (NSW) which requires consideration to be given to whether there is or should be an AVO when children are to be removed from a scene of domestic violence.[56] The advantage of DOCS involvement is that the children are monitored and protected against further violence. This raises two issues for consideration: whether DOCS

49. Crimes Act s 562C(2A).
50. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*. See Parliament of NSW, Legislative Council Standing Committee on Social Issues, *Care and support: final report on child protection services* (2002), Recommendation 57 at 131, where it is recommended that DOCS be empowered to apply for an AVO on behalf a child or young person under the age of 16. See also NSW Police Service, *Submission.*
51. NSW Police Service, *Submission*.
52. AVLICC, *Submission*.
53. Chief Magistrate, Local Court of NSW, *Submission*.
54. Telephone conversation with DOCS Domestic Violence Helpline Manager and Lisa Casternelly, Acting Manager Child Protection Policy Review Directorate
55. *Bourke consultation*.
56. See eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 40, s 43, s 45(4) and s 233(2)(a)(ii).

officers should be authorised to make third party applications and whether they should be required to refer matters of concern to the Police.

6.26 One view is that DOCS workers are investigation officers not prosecuting officers and that AVO applications should only be made by police.[57] Others believe that police and DOCS officers ought to be able to apply but no one else.[58] Still others suggest that people such as parents and guardians should be able to assist a young person over 16 to make an application.[59] Those against DOCS involvement are of the view that it would cause problems for the mother if DOCS sought an AVO on behalf of a child against his or her father as it could cause further violence and may be unenforceable if the mother would not report breaches anyway.[60] Those in favour of DOCS involvement say that protection offered to children should not be dependent on their good relationship with the police; many young people most vulnerable to violence are also the most marginalised from mainstream agencies.[61] It is noted that a review of Western Australian domestic violence legislation recommends that social workers be able to apply for protection orders on behalf of a child who has been exposed to, or risks exposure to, domestic violence.[62]

6.27 A related issue once the matter is investigated is whether separate applications must be made on behalf of the children or whether they should be included in the parent's application. There are differing views on this issue. Some feel that they should be included in the parent's application,[63] while others believe they should be subject to a separate AVO.[64] Currently, it is common practice that children are attached to the parent's AVO.
This can cause many practical difficulties. Listing children on the mother's AVO can have the effect of denying the father's contact with the child/ren. Also, if the parent decides to vary or withdraw the application, then there will be no protection for the child/ren.[65] However, the legislative requirement in the *Children and Young People (Care and Protection) Act 1998* (NSW) that DOCS be notified when an application for withdrawal or revocation is made which concerns children appears to be working well in Newcastle.[66]

The Commission's views

6.28 Children exposed to domestic violence whether directly or otherwise must be afforded maximum protection. The Commission is concerned that this may not always be the case in practice.[67] While there is no doubt that DOCS officers are the most aware of situations where

57. *Orange consultation*.
58. Manly Warringah Women's Resource Centre, *Submission*.
59. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
60. *Wollongong consultation*.
61. NSW Commission for Children and Young People, *Submission*.
62. See Western Australia, *Report on a review of legislation relating to domestic violence* (Department of Justice, November 2002) Recommendation 11 at 22.
    See also NSW Commission for Children and Young People, *Submission*.
63. South West Sydney Legal Centre, *Submission*.
64. *Bourke consultation*; *Orange consultation*.
65. Children's Magistrate, Lidcombe Children's Court, *Submission*; NSW, Department for Women, *Submission*; *Newcastle consultation*.
66. *Newcastle consultation*.
67. See also discussion on the proposed definition of domestic violence at para 4.6-4.22 and recommendation 8 regarding psychological abuse of a child.

children are at risk, the Commission does not favour their direct involvement by being authorised to make third party applications. Their role is primarily of an investigative nature and not that of a prosecuting officer. However, given their experience, knowledge and expertise the Commission is of the view that they should work together with the police and refer all domestic violence matters involving or adversely affecting children to the police for further investigation. The Commission does not believe that such a requirement can or should be legislatively imposed. However, it is a matter for further consideration by DOCS.

6.29 With regard to whether or not Police should be required to make separate applications for children, the Commission is strongly of the view that children should be afforded protection independently of any decisions the parents may choose to make regarding withdrawal or variation. However, to require the police to make separate applications at the outset may be unnecessary given that appropriate protection becomes necessary only at the point of withdrawal or variation (by the protected parent).
As such, to ensure protection at the time of withdrawal, the Commission recommends that a separate application should be made by the Police on behalf of child/ren only at the time of withdrawal or variation.

RECOMMENDATION 19

The Police should be required to make separate AVO applications on behalf of a child/ren, where the child/ren are on the protected parent's AVO and the parent seeks to withdraw or vary the AVO.

POLICE APPLICATIONS

6.30 Police officers must apply for an AVO if they suspect or believe that a domestic violence,[68] stalking[69] or child abuse offence[70] "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".[71] This requirement does not apply where the person is at least 16 years of age and intends to make the complaint themselves. This provision appears to have resulted in a significant improvement in police responsiveness with over 70% of ADVO applications brought by the police.[72]

6.31 However, Police officers need not apply if they believe there is good reason not to do so.[73] It has been suggested that this discretion is not always used appropriately and that police should use their powers under Part 15A more effectively.[74] There is evidence that some police refer people in need of protection to the court registry to take out their own ADVOs which should

68. See Crimes Act s 4(1).
69. See Crimes Act s 562AB.
70. As defined in *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 227.
71. Crimes Act s 562C(3) and s 562H(2A).
72. Jane Wangmann, *Submission*.
73. Crimes Act s 562C(3A) and s 562H(2B).
74. NSW Ombudsman, *Policing of Domestic Violence in NSW* (1999) at 13.

not happen.[75] Some police do not have an adequate understanding of their powers under the Act.[76]

Is there a preference for police applications?

6.32 Anecdotal information suggests that the AVO process is generally more effective when police lay the complaint.[77] Police applications have the benefit of being presented by the police prosecutor, so the applicant does not need to satisfy legal aid guidelines or engage private counsel.[78] There is also an added educative benefit in that the defendant and the community see the officer in uniform or the prosecuting officer initiating the proceedings. This conveys the message that the offending behaviour in question is a crime.[79]

6.33 There is also costs insulation for the applicant where the Police lay the complaint. The victim can also distance themselves from the orders sought, which leaves less room for the defendant to place pressure on the complainant to withdraw than would be the case if they applied in person.

6.34 On the other hand, some find the process disempowering as they feel they have lost control and have no say about whether exclusion orders are sought or not, and what orders are sought generally.[80] Some applicants may also choose to take out their own ADVOs for various other reasons, such as where they do not want to contact police at first instance or in cases where the defendant socialises with police. In a small number of cases police action may actually escalate the violence.[81]

Police discretion in relation to ADVOs

6.35 One of the major drawbacks to the effectiveness of police applications appears to be in their use of discretion. While there is a legislative requirement that police apply for AVOs in certain circumstances, there is still a degree of police discretion involved.

Arguments in favour of less discretion

6.36 The Commission has received many submissions expressing a wide range of views on the use of police discretion. Some are of the view that current provisions should be strengthened to provide for less police discretion in making complaints under s 562C and 562H(2A).[82] Some

75. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*.
76. Local Court NSW, *Submission*.
77. AVLICC, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; Local Court NSW, *Submission*.
78. Hawkesbury Nepean Community Legal Centre, *Submission*; Julie Stubbs, *Submission*; Redfern Legal Centre, *Submission*.
79. Shoalcoast Community Legal Centre, *Submission*; Redfern Legal Centre, *Submission*.
80. Mt Druitt and Area Community Legal Centre, *Submission*.
81. Law Society of NSW, Criminal Law Committee, *Submission*.
82. NSW, Department for Women, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*.

fear that the use of police discretion could have detrimental effects on people with an intellectual disability.[83] There is a view that police are not applying for orders in circumstances where they should be.[84] There also appears to be a degree of variation in the approach of different police patrols which signals the need for more guidance on the exercise of discretion.[85]

6.37 Local Courts have submitted that the current provision whereby the police do not have to take out a complaint if the applicant intends to do so, is inappropriate. Often the applicant may express the desire to take out an AVO without realising the full range of options including the fact that police could make the application for them.[86] As such, it has been suggested that s 562C(3A) should be qualified to provide that the person "expresses a desire to initiate apprehended violence proceedings without the assistance of the police".[87]

6.38 Similarly, it has been suggested that the exception whereby police need not apply for an AVO if they believe there is "good reason" not to, needs to be considered further.[88] Some submissions consider this exception inappropriate.[89] It is claimed that more guidelines on circumstances that may constitute "good reason"[90] must be provided, as inappropriate exercise of discretion could prejudice already vulnerable groups, for example, children and young people.[91] It may be preferable that the discretion be exercised by a more senior officer above the rank of sergeant or by the officer in charge of the police station.[92]

Police applications where the person in need of protection does not consent

6.39 A somewhat controversial issue raised in submissions and consultations is the question of whether the police should be able to proceed with an application where they are convinced that violence has occurred, or there is imminent danger of violence occurring, but the person in need of protection does not want to proceed. Some police are guided by that person's wishes, even when there has been violence or where there have been repeated call-outs. There are also many instances when the matter has gone to court previously and the applicant has said she or he has no "fear", which is frustrating for the police.[93]

6.40 In such cases the question is whether the applicant should have any say at all. Some submissions have suggested that the onus should *not* be on the person in need of protection to decide whether or not to proceed with an application. He or she may be under pressure given a power imbalance or may wishfully think the problem will resolve itself once the actual violence or immediate threat has stopped.[94] The experience of some agencies is that the applicant who

83. Intellectual Disability Rights Service Inc, *Submission*.
84. Hawkesbury Nepean Community Legal Centre, *Submission*.
85. Legal Aid NSW, *Submission*.
86. Local Court NSW, *Submission*.
87. Local Court NSW, *Submission*. See also Blue Mountains Community Legal Centre, *Submission*.
88. NSW Commission for Children and Young People, *Submission*.
89. Local Court NSW, *Submission*.
90. Blue Mountains Community Legal Centre, *Submission*; Local Court NSW, *Submission*.
91. NSW Commission for Children and Young People, *Submission*.
92. Local Court NSW, *Submission*.
93. *Newcastle consultation*.
94. NSW, Department for Women, *Submission*; *Newcastle consultation*.

would not pursue an AVO on her own behalf, is relieved that the responsibility for taking action is assumed by the police.[95] For this reason it has been suggested that it should be mandatory for police to apply for ADVOs unless the officer knows there is already an AVO in place.[96] Police should have the discretion to issue an AVO without the consent of the applicant[97] where it appears the victim does not want the AVO out of fear of retaliation, making it clear to the defendant that the AVO is police-initiated.[98] There is little real difference between police alleging the need to make an application for an AVO and the prosecution of a criminal offence; both may override the wishes of the complainant and rely on the officer's good intent to act lawfully and fairly.[99] Yet, domestic violence is a matter of community concern and may have far-ranging detrimental effects on children,[100] so consent ought not to be necessary or relevant.

Arguments in favour of police discretion

6.41 On the other hand, some submissions suggest that the exercise of police discretion in s 562C(3) should require the suspicion or belief to be reasonably based.[101] Police should have sufficient discretion either to proceed with the matter or not: sometimes the person in need of protection just wants help from the police to manage a difficult situation.[102] The police should also have the discretion to withdraw a complaint upon the giving of appropriate undertakings by both parties.[103]

Police views

6.42 The police in their submission to the Commission have stated that they received mixed responses from the field on the issues of police discretion and applicant's consent. While they acknowledge that the applicant's consent is not required to proceed with an application, police experience shows that the applicant's statement at the time of the incident can often be different to what is said in evidence later. According to the police, it is a well documented dynamic of domestic violence that the perpetrator makes promises not to repeat the violence which the person in need of protection believes and then some time later the victim is again at risk of violence. Yet when the application is pursued in court the victim often denies that she or he fears the person causing the violence.

6.43 In an effort to address this problem, police in certain commands have implemented a comprehensive, well-researched operation, whereby victims of domestic violence and "persons of interest" are "risk-assessed" and determined to be high, medium or low risk. Where the situation is deemed high risk, police gather additional evidence to establish to the court that the applicant does in fact fear and has reasonable grounds to fear.
The operation was developed in consultation with domestic violence victims support services in the area. In this operation, consultation with police prosecutors and the magistrate has resulted in procedures taking into account evidence other than the applicant's statement in court.

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95. NSW, Department for Women, *Submission*; *Newcastle consultation*.
96. NSW, Department for Women, *Submission*.
97. Elizabeth Leathbridge, *Submission*.
98. Law Society of NSW, Criminal Law Committee, *Submission*.
99. Elizabeth Leathbridge, *Submission*.
100. NSW, Department for Women, *Submission*; Elizabeth Leathbridge, *Submission*; *Newcastle consultation*.
101. Children's Magistrate, Lidcombe Children's Court, *Submission*.
102. Law Society of NSW, Criminal Law Committee, *Submission*.
103. Law Society of NSW, Criminal Law Committee, *Submission*.

This operation can clearly be seen to be guided by the objects of ADVOs, 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".[104]

6.44 While it is clearly preferable for a victim of domestic violence to consent to assist in the process, the police have suggested that police discretion in applying for AVOs should remain unchanged.[105]

Police and APVOs

6.45 Currently, there is no requirement that police must make a complaint for a personal violence offence, unlike the requirement in relation to a domestic violence offence. However, police are not precluded from making an application for an APVO. Anecdotal information suggests that police have refused to apply for an APVO because they say they are "not allowed" to apply.[106] It has been suggested that s 562C should be amended to make it clear that police can apply for an APVO[107] and that police must apply in APVOs where there is evidence of serious assault.[108]

The Commission's views

6.46 The Commission is mindful that the prevention of domestic and personal violence is a matter of public interest. Accordingly, there is a strong argument that police should be able to proceed with an AVO application where there is an imminent threat of violence, even where a person is reluctant to proceed with the complaint and at the cost of ignoring his or her wishes. The Commission is opposed to the police practice of asking the victim of domestic violence, in the presence of the defendant, if she or he wants an AVO. The Commission believes that the police must make that decision as a matter of course and that the complainant's reluctance to proceed ought not be treated as a good reason not to make the complaint. The effect of this course of action would be that there would be no discretion in relation to acts or imminent acts of physical violence, for ADVO and APVO applications. Possible criteria for proceeding with making an AVO application despite the reluctance of the applicant would be where:

- there is a clear, immediate threat to the person's life; or
- the person requiring protection has a clearly diminished capacity to apply for an AVO because of severe intellectual disability or a mental health episode that affects their cognitive functioning and has no guardian or other person qualified to make a third party application.

6.47 Where there is no immediate threat of violence, police should continue to have a discretion whether to apply for an AVO or not. In such a case, if the police decide not to make an application, they should be required to make a written record of reasons and a record on the COPS system. This would enable a record to be kept of the officer involved and the reasons

104. NSW Police Service, *Submission*.
105. NSW Police Service, *Submission*.
106. Jane Wangmann, *Submission*.
107. Jane Wangmann, *Submission*.
108. Blue Mountains Community Legal Centre, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.

given, which would offer greater accountability. The record would also assist in identifying behaviour patterns in persistent cases.[109]

RECOMMENDATION 20

Section 562C(3A) should be amended to state that the victim's reluctance to make a complaint is not in itself a good reason for the police not to make a complaint, in situations where:

- violence has occurred; or
- there is a significant threat of violence; or
- the victim is a person with an intellectual disability who has no guardian.

109. Erin's Place for Women and Children, *Submission*.

7. Types of orders

- Telephone Interim Orders
- Interim orders
- Final orders
- Ancillary Property Recovery Orders

7.1 This chapter deals with the three types of AVOs currently available under Part 15A: telephone interim orders, interim orders and final orders. In addition this chapter makes recommendations regarding a new type of order named an ancillary property order which may be made for the recovery of personal property from the family home.

TELEPHONE INTERIM ORDERS

7.2 When introducing the AVO legislation into Parliament, the then Premier, the Hon Neville Wran, QC, MP stated that the intention of AVO provisions was to "provide effective and *immediate relief*".[1] Telephone Interim Orders ("TIOs") are the way in which such "immediate" relief is provided as they are available by telephone[2] when it is not practicable for a court to make an immediate order because of the time or place at which the incident occurs. Only police are permitted to apply for such orders[3] and can do so if, when attending an incident, they 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".[4] Such orders may either be to protect a person from personal violence or domestic violence. 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",[5] unless the person is at least 16 years of age and intends to make the complaint themselves, or if the police officer believes there is good reason not to apply for a TIO.[6]

Effectiveness of TIOs

7.3 In DP 45, the Commission asked whether the TIO provisions were operating to achieve their aim of providing sufficient and immediate protection against actual and threatened violence. Overall, the submissions received suggested that the grounds for, and terms on which TIOs are granted are satisfactory,[7] although one submission suggested that in some cases, it is too easy for the police to get TIOs.[8]

7.4 There was some concern expressed about police not applying for TIOs when they are clearly needed.[9] Some suggested the need for further police guidelines as to when to apply for

1. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 9 November 1982 at 2368.
2. "Telephone" includes radio, facsimile and any other communication device: Crimes Act s 562H(16).
3. Crimes Act s 562H(1).
4. Crimes Act s 562H(2).
5. Crimes Act s 562H(2A).
6. Crimes Act s 562H(2B).
7. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
8. Mt Druitt and Area Community Legal Centre, *Submission*.
9. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*; Mt Druitt and Area Community Legal Centre, *Submission.*

them.[10] Others suggested that it should be mandatory to apply for a standard TIO if the police charged a person with a domestic violence offence,[11] and that s 562H(2A) should be strengthened to require police to apply for a TIO where they believe a domestic violence offence has been committed or is imminent, unless the officer knows an AVO is already in place.[12] There is also concern that a TIO does not result in the suspension of a firearms licence, whereas it should given that the circumstances in which TIOs are granted are often very volatile.[13] It was also suggested that TIOs should be made final if the defendant does not appear in court.[14]

7.5 There is also a view that there should be a presumption in favour of granting a TIO, pending determination of a final order. Such a presumption should apply where a domestic violence offence has been committed, the application has been brought by the police and the officer is concerned for the safety of the victim, unless the court considers that there is a good reason for not issuing an AVO.[15] An authorised justice must record reasons for not issuing a TIO under such circumstances.[16]

7.6 The concern was also expressed that courts do not grant TIOs during court hours.[17] This means that an application for an ordinary interim order must be made during those times, which can involve delays involving hours, even days. Indeed, the Commission heard that if an incident occurs at 10am, it is often quicker for police to wait until after 5pm to apply for a TIO than to apply for an ordinary interim order immediately at 10am.[18]

7.7 Where a TIO is applied for after hours and police seek to exclude the defendant from the home, this cannot be done if there is an existing AVO that does not provide for exclusion, as police do not have the power to vary the existing order. Some agencies have suggested that the police should have the power to vary an existing AVO in order to provide the necessary protection to the applicant.[19] The reverse of this situation has also been reported where the defendant is arrested on assault charges, bail is refused and a TIO has been taken out. In such a case, if the TIO provides that the defendant is excluded from the home, the bail court judge cannot vary this condition, even if the applicant wants it varied. To alleviate such problems, it has been suggested that TIOs, ADVOs and criminal charges all be heard on the same date.[20]

7.8 Section 562H(12) provides that the police have the power to arrest and detain the defendant at the scene of the incident, or, where the defendant refuses to remain at the scene of the incident, take the person to the police station for the purpose of serving the TIO. However,

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10. Hawkesbury Nepean Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*; Manly Warringah Women's Resource Centre, *Submission*.
11. AVLICC, *Submission*; NSW, Department for Women, *Submission*; *Newcastle consultation*.
12. NSW, Department for Women, *Submission.*
13. AVLICC, *Submission*; NSW, Department for Women, *Submission*.
14. *Moree consultation*.
15. NSW, Department for Women, *Submission*.
16. NSW, Department for Women, *Submission*.
17. NSW Police Service, *Submission*; *Chamber Magistrates consultation*; *Newcastle consultation.*
18. Consultation with Michael Drury (18 August 2003).
19. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*.
20. Law Society of NSW, Criminal Law Committee, *Submission*.

there appears to be no power to require the defendant to vacate the premises where, for instance, the defendant wishes to remain at the scene at the risk of jeopardising the safety of the applicant.[21]

7.9 There is also some concern about s 562H(2)(c), which refers to the "police officer attending the incident". Some authorised justices interpret this provision to mean that a police officer must attend the place where the incident occurred. This excludes incidents where a person in need of protection attends the police station immediately after the incident. For example, where a person in need of protection is being followed by the defendant in a car, and attends the police station as a means of gaining refuge, or where a person escapes a dangerous situation and attends a police station immediately. While the above provision may cover both these situations, it seems capable of a more restrictive interpretation and may benefit from clarification.[22]

7.10 The Police have also sought clarification about inconsistencies in the wording of s 562H. For example, s 562H(5A) states that a TIO is taken, for the purposes of this Part, to be a complaint for an order under s 562C. However, s 562H(13) states that s 562C-562GC and s 562J-562N do not apply to TIOs.[23]

7.11 It has also been suggested that dismissed or lapsed TIOs and Interim Orders should be removed from the police data records. This is because police, the Department of Community Services and others, have been known to retain and use these records against defendants in a variety of ways. There is a strong argument that an order so easily obtained ex-parte should be entirely removed from the COPs databases or other files in a similar way to the removal or destruction of fingerprints and other records on a successful acquittal.[24]

Duration

7.12 A TIO lasts for 14 days, unless the court revokes it, makes an interim order or dismisses the 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]

7.13 Various views were expressed in submissions. Some suggested that all TIOs should run for 28 days unless the defendant is present and objects.[26] It was also suggested that the variable time limit (14 or 28 days), is confusing and that it should be 28 days for all TIOs.[27] Still others stated there should be no time limit, but that a TIO should remain in force until it is replaced with a final order, or withdrawn or revoked.[28] In some regional centres, it was pointed out that the expiry of a TIO can be dangerous because it places the defendant on notice: the defendant simply does not turn up to the hearing and absconds so the order cannot be served; the TIO

21. AVLICC, *Submission*.
22. NSW Police Service, *Submission*.
23. NSW Police Service, *Submission*.
24. Mt Druitt and Area Community Legal Centre, *Submission*.
25. Crimes Act s 562H(9) and s 562H(9A).
26. AVLICC, *Submission*.
27. NSW, Department for Women, *Submission*.
28. *Newcastle consultation*; *Wollongong consultation.*

expires, and there is then no protection for the applicant.[29] Another problem can arise where a TIO is made, and the defendant is charged concurrently with a personal violence offence, and neither the applicant nor defendant appear at court, resulting in the making of a fresh order based on a criminal charge pursuant to s 562BE.[30] If there is a problem serving the fresh AVO, and the TIO expires after 14 or 28 days, the applicant will be left unprotected until the new order is served. In such circumstances the question arises whether the Magistrate should be able to extend the TIO until service of the new order has occurred, or have power to issue a warrant under an operative TIO, since one would lie in respect of the criminal offence anyway.[31]

TIOs and property

7.14 An application for a TIO may be made if the police officer attending an incident has good reason to believe that 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.[32] The TIO provides that the defendant must not assault, molest, harass, threaten or otherwise interfere with, the protected person.[33] Section 562H(5) specifies a list of further restrictions that may be placed on the defendant, one of which is prohibiting the defendant from destroying or deliberately damaging or interfering with the protected person's property.[34] However, that restriction may only be imposed where the police officer applying for the TIO has good reason to believe that the safety of the protected person is in imminent danger from the defendant.[35] The result of this combination of provisions appears to be that, while an application for a TIO may be made on the basis of damage to property alone, the terms of the order may only protect the property of the protected person where the safety of that person is in imminent danger, and not otherwise. This is inconsistent with other interim and final orders, which may operate to protect property whether or not the safety of the protected person is in immediate threat.[36]

7.15 Many submissions expressed the view that this anomaly should be rectified to be consistent with other types of orders.[37] Others suggested that TIOs should not be extended to cover property alone, as it would run counter to the primary of purpose of AVO legislation which is to prevent violence against the person.[38]

7.16 Some submissions suggested that the current provisions offer inadequate protection.[39] In particular, it was suggested that condition 11 of the Standard Orders (protection of property)

29. *Newcastle consultation*; *Gosford consultation.*
30. Elizabeth Leathbridge, *Submission*.
31. Elizabeth Leathbridge, *Submission*.
32. Crimes Act s 562H(2)(c).
33. Crimes Act s 562H(4).
34. Crimes Act s 562H(5)(d).
35. Crimes Act s 562H.
36. See Crimes Act s 562AE(3) and s 562AI(3).
37. Graham Johnson, Magistrate, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; NSW, Department of Women, *Submission*.
38. Law Society of NSW, Criminal Law Committee, *Submission*; Mt Druitt and Area Community Legal Centre, *Submission*.
39. NSW, Department for Women, *Submission*.

should form part of all TIOs.[40] The Chief Magistrate considers, however, that TIOs already provide adequate protection for property in most cases.

7.17 There is also concern that, in rural areas, TIOs may result in unwarranted injustice for the defendant. For example, to restrain the defendant from being within a specified distance of a particular address could mean that the defendant has to leave town. While this may be justified in some cases, it can operate unfairly in others.[41] It was suggested that s 37(2A) of the Bail Act be considered as a useful precedent in this regard where the order does not impose conditions that are any more onerous than is required for the protection of the person and in the circumstances of the defendant.[42]

The Commission's views

7.18 In making recommendations with regard to TIOs, the Commission has been guided by the fact that the purpose of TIOs is to provide protection in emergency situations. It is important to recognise that having a TIO in place may make the difference between safety and acute danger, particularly for victims of domestic violence.

7.19 The Commission is concerned that TIOs may not always be available in emergencies. It may be difficult to reach the authorised justice on
TIO duty, or, as the Commission heard in consultations, TIOs may not be available during court hours. Section 562H(2)(b) provides that an application for a TIO may be made where it is not practicable to make an immediate complaint for an interim order because of the time at which, or the place at which, the incident occurs. This has been interpreted in some courts as meaning that a TIO will only be available outside court sitting times, or where distance precludes visiting a court. Otherwise, an ordinary interim order must be sought. However, applying for an interim order may involve waiting at a local court for hours, which may not be feasible or desirable in situations requiring immediate action. The Commission is of the view that this provision should be amended to reflect the emergency nature of a TIO. The provision should state that an application for a
TIO may be made 24 hours a day where the police officer making the application has good reason to believe that a person requires immediate protection under such an order, and it is not practicable to lodge a complaint for an interim order.

7.20 For the same reason, the Commission also believes that s 562H should be amended to make it clear that a police officer must apply for a TIO where a defendant is charged with a domestic violence offence, unless an AVO is already in place.[43] Additionally, where an authorised justice cannot be contacted, police officers (that is, duty officers above the rank of Inspectors) ought to be able to grant a TIO.[44] Such a TIO should only be in force for 48 hours. It is envisaged that this would be similar to the power police currently have to impose bail

40. AVLICC, *Submission*.
41. Chief Magistrate, Local Court of NSW, *Submission*.
42. Chief Magistrate, Local Court of NSW, *Submission*.
43. This provision already exists in relation to interim AVOs under s 562BF, but clarification in s 562H that it also applies to TIOs would be beneficial.
44. This recommendation is consistent with a recommendation that is being made by the Ministerial Inquiry for the Minister for Police dealing with Police Investigations and Processes being conducted by former police officer Michael Drury.

conditions. It is not intended that police ought to be able to issue exclusion orders under a TIO without the approval of an authorised justice. While some may view this as a move to making such orders too easy to obtain, the Commission believes that the public and individual benefit from making an urgent order, outweighs any risk of a miscarriage of justice.

7.21 The Commission is of the view that TIOs should afford no less protection than other types of AVOs. Consequently, the Commission recommends that s 562H(5) be clarified to bring it into line with s 562AE(3) and s 562AI(3) to provide that a TIO may operate to protect a person's property regardless of whether the safety of that person is in imminent danger.

7.22 In relation to the duration of a TIO, the Commission is of the view that the variable limit of 14 to 28 days is confusing. The Commission favours imposing a standard time limit of 28 days which may be extended if the matter has not been heard. In other words, the TIO should not lapse unless the victim is provided with an alternative mode of protection by way of an interim or final order unless the matter has been withdrawn or revoked.

7.23 The Commission is also of the view that s 562H should be clarified to avoid the inconsistencies referred to in paragraph 7.10 above. Accordingly, s 562H(13) should be amended to remove the reference to s 562C.

RECOMMENDATION 21

Section 562H(2)(b) should be amended to clarify that TIOs are available on a 24 hour basis (whether or not the court is sitting) in circumstances where the police officer making the application has good reason to believe that a person requires immediate protection under such an order, and it is not practicable to lodge a complaint for an interim order.

RECOMMENDATION 22

Section 562H should be amended to clarify that a police officer must apply for a TIO where a defendant is charged with a domestic violence offence, unless an AVO is already in place.

RECOMMENDATION 23

Where an authorised justice cannot be contacted, a police officer above the rank of Inspector may grant a TIO which shall be in force for 48 hours.

RECOMMENDATION 24

Section 562H(5) should be amended to provide that a TIO may prohibit destruction of, deliberate damage to or interference with the property of the protected person regardless of whether the safety of that person is also in immediate danger.

RECOMMENDATION 25

Sections 562H(9) and (9A) should be amended to provide that all TIOs should remain in force for up to 28 days (and extended at the discretion of the Magistrate).

RECOMMENDATION 26

Section 562H(13) should be amended to provide that s 562C applies to TIOs, but s 562D-s 562GC and s 562J-s 562N do not.

INTERIM ORDERS

7.24 An interim AVO can be made to provide protection for the period between making the complaint and the hearing to ensure that the person in need of protection is afforded the necessary protection until the matter is resolved in court. An interim AVO may be made in circumstances involving personal or domestic violence and can be made whether the defendant is present or not. However, it does not take effect until it has been served on the defendant. If the defendant is present in court when the interim order is made it takes effect immediately.[45] If an interim order is made in the absence of the defendant, the court summons the defendant to appear at a further hearing as soon as practicable to decide on whether to make a final order. The court can confirm, vary or revoke the interim order, whether or not the defendant is present at the hearing.[46] While in force, the interim order has the same effect as a final order.[47]

Grounds for interim orders

7.25 An interim order can be made "if it appears to the court that it is necessary or appropriate to do so in the circumstances".[48] This statement provides little or no guidance to the court on how to exercise the power.
As such, the interpretation varies from case to case and Magistrate to Magistrate.

Other jurisdictions

7.26 Other jurisdictions employ more specific tests. For instance, 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 final order is decided".[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".[50] 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".[51] In Tasmania, the test is less precise in that justices may make an interim order

45. Crimes Act s 562BB(1A)-(3), s 562I(2).
46. Crimes Act s 562BB(4).
47. Crimes Act s 562BB(6).
48. Crimes Act s 562BB(1).
49. *Protection Orders Act 2001* (ACT).
50. *Domestic and Family Violence Protection Act 1989* (Qld).
51. *Crimes (Family Violence) Act 1987* (Vic) s 8(1).

"if they see sufficient cause to do so".[52] In Western Australia, the grounds for an interim order are the same as for a final order, that 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 will cause fear of such an offence.[53]

Views expressed in submissions

7.27 Some submissions expressed the view that interim orders are not being granted when they should be.[54] Magistrates sometimes place bail conditions on defendants instead of granting an AVO which is not as beneficial for the applicant.[55] It has been suggested that the grounds should be clarified and that it should be easier to get an interim order than a final order.[56] It has also been reported that in emergency circumstances where an order is contested, Magistrates have been known to decline to make an immediate interim order but list the matter for hearing, leaving the applicant unprotected in the meantime.[57] Some suggest that there should be a presumption in favour of granting an interim order under s 562BB pending determination of a final order where a domestic violence offence has been committed, and the application has been brought by the police and the officer is concerned for the safety of the applicant, unless the court considers that there is a good reason for not issuing an interim AVO.[58]
An authorised justice should also be required to record reasons for not issuing.[59] Overall, submissions expressed the view that the grounds for an interim AVO should be clarified to focus on the safety of the applicant,[60]
as there is still too much scope for uncertainty and varying interpretations by different Magistrates.[61] Others have suggested that clear and more specific grounds would provide greater certainty but discretion by Magistrates should not be limited so as to lead to constraining Magistrates too far and losing the benefit of their views in a particular set of unique circumstances.[62]

7.28 The Chief Magistrate is of the view that the wide discretion should remain, and that grounds should not be made more specific, but that the threshold should be raised. Thus, instead of granting an interim order if the court considers it "appropriate *or* necessary", it should be granted if it is appropriate *and* necessary".[63]

7.29 It has also been suggested that the criteria for granting an interim ADVO for all domestic violence victims should be the same as for children and for people with an appreciably below average general intelligence function, to remove the need for a victim of domestic violence

52. *Justices Act 1959* (Tas) s 106D.
53. *Restraining Orders Act 1997* (WA) s 11.
54. AVLICC, *Submission*; NSW, Department for Women, *Submission*.
55. AVLICC, *Submission*; *Chamber Magistrates consultation*.
56. AVLICC, *Submission*.
57. NSW, Department for Women, *Submission*.
58. NSW, Department for Women, *Submission*.
59. NSW, Department for Women, *Submission*.
60. Blue Mountains Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
61. Blue Mountains Community Legal Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission.*
62. Mt Druitt and Area Community Legal Centre, *Submission.*
63. Chief Magistrate, Local Court of NSW, *Submission*.

actually to fear the commission of a domestic violence offence.[64] The rationale for this is that it is often unreasonable to expect a victim to be able to articulate her or his fears: constant systematic abuse means that the same protection should be offered to domestic violence victims as to those in society who are less able to protect themselves.[65] This would allow police to present evidence to court seeking an order even if the victim did not feel they needed protection.[66]

7.30 Others have suggested that interim orders are being sought too readily: a defendant is often met with a smorgasbord of interim orders which are sought on the first return date of an AVO, orders that on any reasonable view of the matter would not be sustained at a final hearing. As such, it has been suggested that interim orders should only be issued if they are necessary to ensure the safety of the victim until the application for a final order is decided.[67]

The Commission's views

7.31 With regard to clarifying the grounds upon which an interim order may be granted, the Commission favours the current flexibility that attaches to Magistrates being able to use their discretion. The Commission is of the view that many of the issues raised can be resolved by better implementation and understanding of the spirit of the legislation. To that extent, the comments made by the Commission in Chapter 3 are applicable.

Procedure

7.32 The issue of procedural fairness in dealing with interim AVO complaints was raised in a number of submissions and consultations. Magistrates are concerned about how far they need to go in the interests of procedural fairness when interim orders are opposed and how much scope they should give the defendant to argue the case and present evidence.
A defendant's solicitor's request for an adjournment needs to be balanced with the protection that must be afforded to the applicant. Some Magistrates follow *Smart v Johnston*[68] strictly. This case holds that it is a denial of natural justice for an interim order to be made without giving both parties the opportunity to lead evidence and a reasonable opportunity to cross-examine.[69] Some feel this introduces untenable delays, leaves applicants without protection while the hearing continues for days,[70] and can be used as leverage by the defendant to get the applicant to

64. Erin's Place for Women and Children, *Submission*.
65. Erin's Place for Women and Children, *Submission*.
66. Erin's Place for Women and Children, *Submission*.
67. Law Society of NSW, Criminal Law Committee, *Submission*.
68. *Smart v Johnston* (NSW Supreme Court, No 12228/1998, Dunford J, 8 October 1998, unreported).
69. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; *Chamber Magistrates consultation*.
70. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.

withdraw. At the same time, given the overburdened AVO lists, it is important to ensure that it does not "blow out into a mini-hearing".[71]

7.33 The Chief Magistrate suggests that the practice in *In the Marriage of C*[72] be followed, where the Full Court of the Family Court upheld the decision of the judge at first instance, who followed the usual practice of determining an interim custody application on the basis of affidavits alone, without allowing cross-examination.[73]

7.34 There is also a view that this is a matter of a few Magistrates following inappropriate case law, and does require legislative amendment.[74] Another view is that where a standard order is sought[75] that does not involve excluding the defendant from the family home, there should be no scope for cross-examination as the order largely prohibits what the defendant should not be doing anyway. However, there should be more scope for presenting evidence where an exclusion order is being sought, or where firearms are an issue, or if the order would place undue restrictions on the defendant's living arrangements or access to his or her children.[76]

7.35 It has been suggested that the court should have the discretion to suspend the rules of evidence, and inform itself on a matter in any manner it considers fit, including enabling the use of video cameras and creating more flexibility for people with a disability.[77] It has also been suggested that an added safety measure be introduced in situations where the applicant fails to appear at court on the date set down for mention. In those circumstances, the Magistrate should adjourn, but not dismiss, the matter to enable the police to investigate the reasons for the non-appearance by the applicant.[78]

7.36 The Children's Magistrate at Lidcombe Children's Court recommends that the entire procedure for applying for AVOs be overhauled and brought more into line with civil proceedings generally:[79]

> The order should be sought on application (replacing a complaint) that sets out clearly the orders sought and the grounds upon which the orders are sought. Supporting material should be by way of affidavit with the flexibility that in interlocutory proceedings (ie interim orders) the court may proceed on any material (in whatever form it is presented) that the court considers sufficiently reliable … There is definitely a need for some pre hearing disclosure of proofs of evidence of witnesses (subject to

71. Chief Magistrate, Local Court of NSW, *Submission*; Correspondence between Jillian Orchiston, Magistrate, Central Local Courts, and Peter Hennessy, Executive Director, Law Reform Commission (3 July 2002).
72. *In the Marriage of C* (1995) 128 FLR 100.
73. Chief Magistrate, Local Court of NSW, *Submission*; *Newcastle consultation*.
74. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
75. That is, the defendant must not contact, stalk, harass, etc, the applicant.
76. *Wollongong consultation*.
77. Erin's Place for Women and Children, *Submission*.
78. Erin's Place for Women and Children, *Submission*.
79. Children's Magistrate, Lidcombe Children's Court, *Submission*.

safeguards such as non disclosure of addresses). This is desirable simply as a matter of fairness.[80]

7.37 The legislation should also contain a power to make rules of procedure and practice directions in relation to both ADVO and APVO interim proceedings, so as to get these more procedural elements out of the legislation, promote flexibility and improve consistency between Magistrates.[81]

7.38 The Commission is of the view that these procedural issues do not warrant legislative amendment and would be best dealt with through judicial training and education.

The duration of an interim order

7.39 An interim order remains in force until it is withdrawn, dismissed or revoked, or until a final order has been made.[82] Thus, an interim order may last for months, even years.

Approach adopted in other jurisdictions

7.40 There has been some concern regarding this potentially unlimited duration given that an interim AVO may impose significant restrictions on the defendant. In some jurisdictions, legislation has addressed this concern by imposing time limits on the duration of interim orders. In the ACT for instance, 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 8 weeks, as long as it will not be in force for more than 16 weeks in total.
A further interim order can only be made in exceptional circumstances.[83]
In Tasmania, an interim order cannot exceed 60 days.[84] In Western Australia, there is a presumption in favour of finalising an interim order. Once an interim order is made, the defendant has 21 days to object and if within that period there is no objection, then the interim order automatically becomes a final order. However, the defendant's right to contest the order is preserved.[85] A similar approach is adopted in New Zealand where a protection order is first issued as a "temporary order". If within three months the order is not defended, it automatically becomes a final order.[86]

Views expressed in submissions

7.41 Some submissions expressed the view that the duration of interim orders should be limited.[87] It was suggested that matters are generally finalised within three months[88] and that legislation should provide that a matter must be withdrawn, dismissed or finalised within 6 months of making the application, unless the court otherwise orders or exceptional circumstances exist.[89] It is understood that this could help where some Magistrates defer

80. Children's Magistrate, Lidcombe Children's Court, *Submission*.
81. Children's Magistrate, Lidcombe Children's Court, *Submission*.
82. Crimes Act s 562E(4).
83. *Protection Orders Act 2001* (ACT) s 52, s 54, s 58 and s 59.
84. *Justices Act 1959* (Tas) s 106D(2).
85. *Restraining Orders Act 1997* (WA) s 16(2).
86. *Domestic Violence Act 1995* (NZ).
87. AVLICC, *Submission*; NSW, Department for Women, *Submission*.
88. NSW, Department for Women, *Submission*.
89. AVLICC, *Submission*.

finalisation of an AVO pending the outcome of Family Law proceedings (anecdotal information suggests this may be happening).[90] Imposing a time limit would also prevent circumstances where the applicant is forced to attend court where a matter keeps being adjourned.[91] Similarly, imposing a time limit may prevent lawyers from seeking the continuation of interim orders claiming that they have not been breached, nullifying the need for seeking a final order.[92] There is also the concern that interim orders are often obtained ex parte which in the absence of a maximum time limit can be disadvantageous to the defendant.[93]

7.42 Others disagreed that there should be a time limit[94] and suggested that the duration should be at the discretion of the court.[95] It was suggested that if a matter is listed as soon as practicable to determine the final order, there should be no need to place limits on the duration of the interim order.[96] On the other hand, as the court determines when the hearing on the charge will occur, the duration of the interim order can be lengthy. Limiting the duration of interim orders in these circumstances may place the applicant at risk of further violence. Where an interim order is made and served, and then the final order is made *ex parte*, the final order must be served on the defendant. Police officers' experience indicates that defendants often avoid service of the final order. In these cases, ensuring that the interim order is enforceable until the final AVO is served protects victims from further violence.[97]

7.43 Limiting the duration of an order may also have the effect of restricting Magistrates' flexibility to use longer orders where there are difficulties with service, etc.[98] Longer orders (3-6 months) can be useful, for example, where parties agree to interim orders to help settle a situation pending resolution of a property/custody contact dispute; while they attend mediation or counselling, or while one party is seeking alternative accommodation.[99] Also parties may not then need to proceed to a final order, and so avoid the long-term impact on the defendant's ability to hold a firearms licence.[100] Either party can have the matter relisted and set down for hearing, or apply to vary the interim order.[101] Also, s 562BF requires the Court to make an interim order where a person is charged with a domestic violence offence, which is to remain in

90. AVLICC, *Submission*.
91. NSW, Department for Women, *Submission*.
92. Manly Warringah Women's Resource Centre, *Submission.*
93. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation.*
94. Blue Mountains Community Legal Centre, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Graham Johnson, Magistrate, *Submission*; University of Newcastle Legal Centre, *Submission*; Local Court NSW, *Submission*; Jane Wangmann, *Submission*; Mt Druitt and Area Community Legal Centre, *Submission*; NSW Police Service, *Submission*.
95. Blue Mountains Community Legal Centre, *Submission*.
96. Julie Stubbs, *Submission*.
97. NSW Police Service, *Submission*.
98. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
99. Chief Magistrate, Local Court of NSW, *Submission*.
100. Chief Magistrate, Local Court of NSW, *Submission*.
101. Chief Magistrate, Local Court of NSW, *Submission*.

place until the finalisation of the charge. It would be unfair to the applicant if that order expired before the charge was finalised.[102]

7.44 Longer interim orders of 6-12 months are usually the result of successive adjournments or concurrent legal proceedings. It would be unfair and impracticable to impose an arbitrary term for interim orders, and would not satisfy the safety needs of the complainant.[103]

Automatic conversion to final order

7.45 Many submissions expressed support for the automatic conversion of interim orders into final AVOs after a specified time period has elapsed.[104] Some suggested that the orders be made final after 14 days.[105] Where no notice is given to defend the action, it has been suggested that the order should convert within 3 months,[106] provided service has taken place on the defendant and there is a clear and appropriate procedure set out (that parties are aware of) for disputing the final order where necessary, especially where the interim order was made ex-parte.[107]

7.46 Some of the advantages of automatic conversion are said to be that it circumvents the problem of a defendant avoiding service,[108] and may have the effect of reducing withdrawal rates.[109] It may also spare the applicant the stress and expense of preparing for a hearing on the assumption that it will be defended and the defendant does not appear.

7.47 The NSW Police Service was particularly in favour of this proposal, as it would reduce police time spent at court seeking the final order, and time spent serving the final order, provided the defendant has had a specified period to make representations to court to contest the order. It was suggested that TIOs could also be included in this proposal, further streamlining the process, while not diminishing protection afforded to the applicant. Variations to the order could then be made through the current processes.[110] Concerns about the defendant not understanding, or purporting not to understand, the conditions of the order may be exacerbated by an automatic conversion, although stricter provisions on information to be provided to defendants would diminish this possibility.

102. Chief Magistrate, Local Court of NSW, *Submission*.
103. Jane Wangmann, *Submission*.
104. AVLICC, *Submission*; NSW Police Service, *Submission*; Blue Mountains Community Legal Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*.
105. *Moree consultation*.
106. AVLICC, *Submission*; South West Sydney Legal Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*.
107. Mt Druitt and Area Community Legal Centre, *Submission*.
108. Hawkesbury Nepean Community Legal Centre, *Submission*; Blue Mountains Community Legal Centre, *Submission*.
109. NSW Police Service, *Submission*.
110. NSW Police Service, *Submission*.

7.48 There were however many submissions that opposed this option.[111] It was felt that different grounds do and should continue to apply for interim and final AVOs.[112] If automatic conversion occurred, Magistrates may become reluctant to issue interim orders, and fewer defendants may consent, which would not contribute to the desired level of protection.[113]

7.49 There is also a risk that an interim hearing, listed quickly for safety reasons, may not have the benefit of medical records and other forms of evidence that would be available with time.[114] Also, the implications for firearms licence holders are much greater if a final AVO is granted than if an interim order is granted. Firearms holders may therefore be less likely to consent to interim orders if there was a prospect of them automatically converting to final orders.

Who should be able to issue interim AVOs?

7.50 There are a number of apparent difficulties associated with issuing interim orders quickly in an emergency.

7.51 Various suggestions have been made in this regard. One option was that the police[115] should have the power to issue interim orders on the spot in certain specific situations such as:

- when charging someone with an offence under s 562AB or a domestic violence offence, in the same way that they can impose bail conditions.[116] In these circumstances, the court must make an AVO under s 562BF, and the applicant will receive immediate protection without having to wait for a Magistrate to be available or an authorised justice to be contacted after hours.[117] It could also form part of the bail conditions relating to the charge.[118]
- where no charges are being laid and only a standard AVO is being sought. It has been suggested that in those circumstances, police should not be able to issue an AVO with more specific conditions, such exclusion orders, which should still have to be listed before an authorised justice.[119]

7.52 It has further been suggested that police should also have the power to arrest and detain for the purpose of serving an interim AVO, as they do in relation to TIOs.[120]

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111. Chief Magistrate, Local Court of NSW, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; University of Newcastle Legal Centre, *Submission*.
112. Chief Magistrate, Local Court of NSW, *Submission*.
113. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
114. Julie Stubbs, *Submission*.
115. AVLICC, *Submission*; *Chamber Magistrates consultation*; *Newcastle consultation.*
116. AVLICC, *Submission*; Local Court NSW, *Submission*; *Chamber Magistrates consultation*; *Newcastle consultation*.
117. Local Court NSW, *Submission*.
118. AVLICC, *Submission*.
119. Local Court NSW, *Submission*.
120. See Recommendation 52. The Commission understands that this proposal is being endorsed and recommended by the Ministerial Inquiry into Police Processes (2003) being conducted by Michael Drury.

The Commission's views

7.53 The Commission is of the view that interim orders should not automatically convert to final orders but should have a time limit of 6 months attached to them. Accordingly, s 562E should be amended to provide that an interim AVO will cease to have effect after 6 months, unless it has previously been revoked, confirmed as a final AVO, or the complaint is withdrawn or dismissed. Imposing such a time limit may also have the benefit of forcing the courts to deal with the matters more expeditiously.

7.54 The Commission agrees that the police ought to have the power to arrest and detain for the purpose of serving an interim AVO.[121]
The Commission's recommendation that police officers be authorised to issue TIOs on a 24 hour basis will alleviate the problems discussed above in relation to difficulties associated with issuing interim orders in an emergency.

RECOMMENDATION 27

An interim AVO should remain in force for 6 months or until the circumstances listed in s 562E(4) take effect, whichever first occurs.

FINAL ORDERS

7.55 A final order can be made where both parties consent to the order, or where the order is contested after a hearing. As with interim orders, a final order is not effective until it is served on the defendant. Once served, the final order remains in force for the period specified by the court to ensure the protection of the applicant. If no period is specified, the order remains in force for 6 months.[122]

Adequacy of the default duration

Other jurisdictions

7.56 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. A final personal protection order remains in force for a specified period or 12 months if no period is specified.[123] In the Northern Territory an order remains in force for the specified period with no default duration.[124] 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.[125] In Tasmania, the order remains in force for whatever period the court considers

121. See Recommendation 52.
122. Crimes Act s 562E(1)-562E(3).
123. *Protection Orders Act 2001* (ACT) s 35, s 36.
124. *Domestic Violence Act 1992* (NT) s 4(1A).
125. *Domestic and Family Violence Protection Act 1989* (Qld) s 34.

necessary to protect the person for whose benefit the order is made.[126] In Victoria, an intervention order remains in force for the time specified or, if no period is specified, until it is revoked.[127] In Western Australia, a final violence restraining order remains in force for the specified period or if no period is specified, for 2 years. 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.[128]

Views expressed in submissions

7.57 Given that the courts usually specify the duration of a final order, some submissions suggested that the default duration should remain unchanged.[129]

7.58 However, others suggested that 6 months is insufficient because of the nature of the disputes and frequent involvement of children in the circumstances. A particular problem with the 6 month default period appears to be that applicants who are not legally assisted have to return to court within 4 to 5 months to make an application for an extension or variation of their order.[130] It has therefore been suggested that the default period should be increased to 12 months to reflect reality.[131] It also appears that the default duration usually becomes relevant where the applicant is self-represented, since in most other cases a duration is specified in the AVO, and particular care needs to be taken to ensure that unrepresented applicants are not disadvantaged.[132] Others suggested that the default duration should be 2 years,[133] consistent with the ACT, Queensland and Western Australian legislation.

7.59 Another view was that consideration could be given to changing the wording to state that orders should ordinarily be granted for 6 months and that orders for a longer period would be granted only if "substantial" reasons are given to justify the making of such an order. The rationale for this view is that AVOs can present a major restriction on a person's liberty and freedom and defendants should have these restrictions imposed for the minimum period necessary whilst keeping in mind the need to protect the applicant.[134]

7.60 In sharp contrast, it has also been suggested that in some circumstances lifetime AVOs are appropriate[135] as many women need to keep coming back to court to apply for extensions.[136] In

126. *Justices Act 1959* (Tas) s 106B(6).
127. *Crimes (Family Violence) Act 1987* (Vic) s 6.
128. *Restraining Orders Act 1997* (WA) s 16 and s 37.
129. Chief Magistrate, Local Court of NSW, *Submission*.
130. University of Newcastle Legal Centre, *Submission*.
131. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Graham Johnson, Magistrate, *Submission*; Jane Wangmann, *Submission*.
132. Jane Wangmann, *Submission*.
133. AVLICC, *Submission*; NSW, Department for Women, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*.
134. Law Society of NSW, Criminal Law Committee, *Submission*.
135. AVLICC, *Submission*.
136. Hawkesbury Nepean Community Legal Centre, *Submission*.

Western Australia, a permanent protection order was granted under the *Restraining Orders Act 1997* (WA), where violence extended for a period in excess of 12 years.[137]

7.61 Where a final order needs to be extended without notice of the application having been served on the defendant, such an extension can only be granted if the application has been lodged at least 21 days before the order is due to expire and it is listed for mention 14 days after the application was lodged.[138] However, in practical terms court delays can leave the applicant without protection if the original order expires in the interim. Once expired, technically there is nothing to extend. This leaves the applicant with no protection while the final order is being extended.[139]

7.62 In practice it also appears that where an AVO which is valid for 2 years is not breached during that time, it is very unlikely that an extension will be granted. However, it is often after the expiration of the order that the harassment and stalking begins again. It has been suggested that in such circumstances, the victim should be able to apply for an extension within 3 or 6 months after the expiration of an order. Another option is to be able to apply for an extension any time before the expiration of an AVO. Either way, there must be consistency among Magistrates with regard to this matter.[140]

Grounds

7.63 The court can make a final AVO when 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

(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 the conduct that, in the opinion of the court, is sufficient to warrant the making of the order.[141]

7.64 The grounds for making a final order are quite broad. They are both subjective and objective. The court must be satisfied that there are "reasonable grounds" to fear personal

137. Auditor General for Western Australia, *A measure of protection: management and effectiveness of restraining orders* (Report No 5, October 2002) at 20. See also "Rape victim seeks permanent restraint" *West Australian* (Wednesday, 15 January 2003) at 33.
138. Crimes Act s 562F(8).
139. *Moree consultation*.
140. *Gosford consultation*.
141. Crimes Act s 562AE(1) and s 562AI(1).

violence and that the applicant does in fact fear the defendant. If the subjective element is missing, an AVO will not be granted.[142] There are three exceptions to this: where the applicant is under 16; where the applicant has a general intelligence function which is appreciably below average or where the defendant consents to the AVO.[143]

Other jurisdictions

7.65 Some jurisdictions such as South Australia use a "reasonable fear" test. The court may make a domestic violence restraining order if there is a reasonable apprehension that the defendant may, if not restrained, commit domestic violence and the court is satisfied that the making of the order is appropriate in the circumstances. In deciding whether to make an order, the court must consider a range of factors including the need to ensure family members are protected from domestic violence, the accommodation needs of family members, and any relevant family contact order.[144]

7.66 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.[145] A similar test is applied in Queensland with the additional requirement that the violence is likely to happen again.[146]

7.67 In Western Australia, the "reasonable fear" and "specific act" tests are combined. Thus the court may make a violence restraining order if it is appropriate in the circumstances and it is satisfied that, unless restrained, the respondent is likely to commit a personal violence offence against the applicant, or act in a manner that could cause fear of such an offence.[147]

7.68 The tests that focus on the "specific act" have been criticised as they require the applicant to have suffered violence before an order can be granted.[148] The requirement to show that an act of violence is "likely" to happen again, has also been criticised as it may have the effect of denying protection to people in situations where violence is not "likely" but is still a real possibility.[149]

142. *Wallin v Tiernan* [1999] NSWCA 353.
143. Crimes Act s 562AE(3) and s 562AI(3).
144. *Domestic Violence Act 1994* (SA) s 6.
145. *Protection Orders Act 2001* (ACT) s 40.
146. *Domestic and Family Violence Protection Act 1989* (Qld) s 20. Similar provisions apply in Tasmania: *Justices Act 1959* (Tas) s 106B(1); and Victoria: *Crimes (Family Violence) Act 1987* (Vic) s 4.
147. *Restraining Orders Act 1997* (WA) s 11. A similar mixed test also applies in the Northern Territory: *Domestic Violence Act 1992* (NT) s 4.
148. R Hunter and J Stubbs, "Model laws or missed opportunity? Recent proposals concerning domestic violence law reform" (1999) 24(1) *Alternative Law Journal* 12.
149. Domestic Violence Legislation Working Group, *Model domestic violence laws* (Report, 1999) at 65.

Views in submissions

7.69 Overall, the submissions expressed the view that the grounds require no change[150] as they relate back to the objects of the Part: the safety of the applicant.[151] It was also asserted that they cover a wide range of behaviour which reflects an understanding that domestic violence is not limited to physical violence.[152] The requirement that the person in need of protection "has reasonable grounds to fear and in fact fears" is particularly important as it guides the court to consider the nature of domestic violence as being about power and control causing fear.[153]

7.70 Some submissions have suggested that it may be useful to consider a provision similar to that used in New Zealand which draws attention to the cumulative fear that arises from what may appear to others to be pleasant actions, for example, sending flowers.[154] The court must have regard to the "perception of the applicant" and the effect of that behaviour on the applicant.[155]

7.71 For high risk, or "repeat" victims, where police have attended incidents involving the parties a number of times, Police have argued that other grounds for making an AVO should be considered. In this context the court should consider the following factors in making an AVO to enhance applicants' safety, particularly for repeat incidents:

- the history of police attendances at the incident involving these parties in question; and
- whether the police hold fears for the applicant's safety.

7.72 The issue of whether the applicant in fact fears is also said to be difficult to assess in situations where repeat incidents of domestic violence occur. In such circumstances, the likelihood of the applicant stating in court (often with the defendant present) that she or he "in fact" fears the defendant may be decreased. The applicant may fear retribution and further violence, and believe promises by the defendant that he or she will not repeat the violence. In these circumstances, where situations of domestic violence have repeatedly come to the attention of police, it has been suggested that the weighting given to the applicant's statement in court regarding fear should be lessened and the weighting of other factors increased.[156]

7.73 Considering that, in matters where a charge is being heard, the determination of the final AVO may be delayed for some months, the factors detailed above should apply to interim orders. It has also been suggested that the weighting given to the applicant "in fact" fearing the defendant be lessened in those applications where there is a history of police attendance at

150. AVLICC, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Graham Johnson, Magistrate, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Legal Aid NSW, *Submission*; Jane Wangmann, *Submission*.
151. Jane Wangmann, *Submission*.
152. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
153. Jane Wangmann, *Submission*.
154. Such a provision is found in the New Zealand legislation: *Domestic Violence Act 1995* (NZ) s 14(5).
155. *Domestic Violence Act 1995* (NZ) s 14(5); Jane Wangmann, *Submission*.
156. NSW Police Service, *Submission.*

incidents between the two parties.[157] Police should also have power to arrest and detain for the purpose of serving final AVOs.[158]

7.74 There is also evidence that court have failed to make an interim or final AVOs where the defendant has pleaded guilty to, or been found guilty of, a domestic violence offence, even though Part 15A requires that they be issued.[159] The court can decline to make an order if it "is not required", but there is no provision for a Magistrate to give reasons for not issuing an AVO.[160] Courts have reportedly declined to make orders in these circumstances if bail conditions exist, even though they do not have the same effect as an AVO.[161] This should be clarified to state that an interim or final AVO must be issued where there is a domestic violence charge or conviction, respectively, except perhaps if the applicant specifically opposes an AVO and the court is satisfied that there are no safety concerns.[162]
It has also been suggested that the circumstances where a court must make an AVO should be expanded, including some judicial guidance on the type of behaviour that would give rise to a reasonable apprehension of violence.[163] Written reasons should also be required in these circumstances.[164]

Procedure

7.75 It is recognised that the normal rules of evidence should apply to a final hearing (unlike an interim hearing)[165] but the court should have the discretion to dispense with strict evidentiary rules where the best interests of a child are at stake.[166] It has also been suggested that Part 15A should contain a provision similar to s 10 of the *Domestic Violence Act 1992* (NT) regarding cross examination of complainants by unrepresented defendants.[167]

Orders by consent

7.76 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 of the order.
By consenting to the order, the defendant does not admit to any of the particulars of the complaint. Where the parties do 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.[168]

157. NSW Police Service, *Submission.*
158. See Recommendation 52. The Commission also understands that this proposal is being endorsed and recommended by the Ministerial Inquiry into Police Processes (2003) being conducted by Michael Drury.
159. Blue Mountains Community Legal Centre, *Submission*.
160. Blue Mountains Community Legal Centre, *Submission*.
161. Blue Mountains Community Legal Centre, *Submission*.
162. Blue Mountains Community Legal Centre, *Submission*.
163. Hawkesbury Nepean Community Legal Centre, *Submission*.
164. Blue Mountains Community Legal Centre, *Submission*.
165. Children's Magistrate, Lidcombe Children's Court, *Submission*. See para 7.32-7.38.
166. Children's Magistrate, Lidcombe Children's Court, *Submission*.
167. Jane Wangmann, *Submission*.
168. Crimes Act s 562BA.

7.77 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.[169] However, only the court can make a final order.[170]

7.78 Granting an AVO by consent is clearly expedient because the matter does not have to proceed to a final hearing. It also allows for immediate protection for the applicant because it does not need to be served on the defendant. However, the risks attached are that the parties may not have fully understood the consequences that follow and may agree to matters because of a lack of understanding. Lack of information for defendants has been raised in a number of telephone submissions made to the Commission. People claim they have consented to orders they did not fully understand, and have had insufficient information about the AVO process including procedures for applying for revocation and appeals. This would be a particularly crucial issue for people with an intellectual disability.[171]

7.79 There is also concern in the community that consenting to an order may result in adverse consequences for the parties in other proceedings.
It has been reported to the Commission that some defendants are reluctant to consent to ADVOs because they feel it will adversely affect them in family law proceedings.[172] While there may be little substance in this fear, it does nevertheless limit the likelihood of defendants consenting to orders. It has been suggested that the legislation should include a specific provision stating that consent without admissions does not having any bearing on family law matters.[173]

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

7.80 This is an issue that has received a mixed response. Some were opposed to authorising clerks of the court to issue final AVOs by consent[174] as it could be seen as playing down the role of AVOs.[175] A recent US research study indicates that judicial demeanour in dealing with such applicants can be an important factor in stressing the seriousness of the matter and in empowering the complainant.[176] Also, Magistrates have an important role in making sure

169. Crimes Act s 562BBA and s 562BBB.
170. Crimes Act s 562BA.
171. Intellectual Disability Rights Service Inc, *Submission*.
172. Graham Johnson, Magistrate, *Submission*.
173. Graham Johnson, Magistrate, *Submission*.
174. Chief Magistrate, Local Court of NSW, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Intellectual Disability Rights Service Inc, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Jane Wangmann, *Submission*; Redfern Legal Centre, *Submission*; Campbelltown Benevolent Society Domestic Violence Unit, *Consultation*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
175. Chief Magistrate, Local Court of NSW, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*; Julie Stubbs, *Submission*.
176. Julie Stubbs, *Submission* referring to J Otacek, *Battered women in the court room: the power of judicial responses* (Northeastern University Press, 1999).

defendants give informed consent,[177] and make the defendant aware of the serious consequences that can flow from a breach.[178] The court room setting is also important as it is a place where the defendant is not in control.[179] It has also been suggested that there may be a danger that defendants with an intellectual disability may be reluctant to disclose the nature of their disability, and agree to the order without fully understanding the terms. These risks would be better guarded against if the orders were made in court.[180]

7.81 Other submissions were in favour of clerks of the court issuing final AVOs by consent.[181] The main advantage is said to be that it would get through the lists faster, reduce the applicant's stress and the amount of time the applicant needs to spend at court.[182] It would also provide the applicant with protection sooner.[183] Clerks have other commensurate duties, are sufficiently well-trained[184] and can fully explain the consequences to both parties.[185] It would be particularly good for young defendants who may have to miss school to wait around for the court to determine the matter.[186] It has been suggested that the applicant could be asked if he or she wants the matter to be heard in chambers.[187]
Another suggestion was that the clerk could issue the AVO in a courtroom to "avoid diminishing the seriousness of the matter".[188] It is also necessary to clarify that the orders have the same degree of seriousness as if made in the courtroom.[189] Power to revoke orders should still rest with the Magistrate, as the possibility of coercion exists.[190]

7.82 The police claim that implementation of this proposal would represent a significant saving of police time in terms of providing representation and support to the applicants, and serving orders, while still maintaining current levels of protection afforded to victims of domestic violence. The police suggested further that the legislation ought to reflect the following:

- a requirement for the clerk to explain the order fully, in the same manner as Magistrates are currently required to explain the order;
- that where the complaint is brought by police, police have the opportunity to discuss with the clerk any particular orders within the AVOs that may be required by the applicant;

177. Chief Magistrate, Local Court of NSW, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
178. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; South West Sydney Legal Centre, *Submission*.
179. Hawkesbury Nepean Community Legal Centre, *Submission*.
180. Intellectual Disability Rights Service Inc, *Submission*.
181. Blue Mountains Community Legal Centre, *Submission*; Graham Johnson, Magistrate, *Submission*; Local Court NSW, *Submission*; *Newcastle consultation*; *Wollongong consultation*; Manly Warringah Women's Resource Centre, *Submission*; NSW Police Service, *Submission*; *Orange consultation*.
182. Blue Mountains Community Legal Centre, *Submission*; Local Court NSW, *Submission*.
183. Blue Mountains Community Legal Centre, *Submission*.
184. Graham Johnson, Magistrate, *Submission*.
185. Blue Mountains Community Legal Centre, *Submission*.
186. *Newcastle consultation*.
187. *Newcastle consultation*.
188. NSW, Department for Women, *Submission*.
189. *Wollongong consultation*.
190. Local Court NSW, *Submission*.

- that current arrangements regarding transfer of information between Local Courts and NSW Police about the order should be continued in the new arrangements.[191]

The Commission's views

7.83 Final orders represent the culmination of many months, sometimes years of anxiety and abuse for applicants. They are a recognition by the courts that violence is unacceptable, that a person in need of protection must be afforded adequate protection and that the defendant will be committing a criminal offence if the order is breached. Given what it stands for, the duration of the order is of importance if it is to be of any value.
The Commission is of the view that it is preferable for the duration of an AVO to be specified in each order, since the circumstances of each case will require different approaches.[192] However, where the duration is not specified in the order itself, the legislation should continue to provide for a default duration. The Commission is satisfied that the default duration should be extended to 12 months to allow sufficient time for a matter to be resolved or reviewed without having to seek a variation soon after the order was made. In extending the default duration, the Commission has also been guided by the practice in other jurisdictions where the default period is always 12 months or more. It should be possible to extend an order at any time before it expires.

7.84 On the issue of the adequacy of the existing grounds, the Commission favours the current mixed test which requires reasonable grounds to fear and the applicant's actual fear of the defendant.

7.85 An issue of concern is the reported failure of the court to make interim and final orders where the defendant has pleaded guilty or been found guilty of an offence. The Commission is of the view that the provision allowing the court to decline to make an order should be strengthened through training and education whereby the Magistrate is required to give reasons for not issuing an AVO in such circumstances.

7.86 With regard to clerks of the court being authorised to make final orders by consent, the Commission regards this as an expedient course in the interests of justice. In the Commission's view all the arguments against this practice are mostly matters of perception. The Commission recognises that clerks currently do have commensurate duties and in any event this power will be subject to a right of review by the Magistrate. The provision will also state that the clerks must fully explain the order to the parties.
In addition, it is expected that the clerks will be given adequate and regular training. The power to revoke an order will continue to rest with Magistrates only.

7.87 The Commission also agrees with the view that legislative clarification is required to confirm that no adverse inferences can be drawn against parties in other proceedings from the making of consent AVOs without admissions. It is hoped that this provision will encourage people who may be otherwise unwilling to agree to consent orders to do so.

191. NSW Police Service, *Submission*.
192. This leaves the court with the discretion to grant an AVO for a short or lengthy duration, depending on the need in each case.

RECOMMENDATION 28

The default duration for final AVOs should be extended from 6 months to 12 months and that it should be possible to lodge an application to extend a final AVO anytime before the order expires with the leave of court.

RECOMMENDATION 29

Clerks of Court should be authorised to issue final consent AVOs with a power to review by a Magistrate.

RECOMMENDATION 30

The legislation should provide that no adverse inferences can be drawn against the parties in any proceedings from consent AVOs without admission.

ANCILLARY PROPERTY RECOVERY ORDERS

7.88 The Commission has been informed that, in many cases, AVO applicants who have been victims of domestic violence, particularly women and children, are forced to leave their homes quickly, without having had a chance to collect their personal property. Sometimes the defendant denies the applicant access to the property as a means of getting the applicant to return home. This can result in the children being deprived of clothing, toys and school books. There appears to be no effective means of responding to this very real difficulty. One option may be to return with a police officer, or pursue civil or family court action, but this can be slow, expensive and ineffective.

7.89 The problems associated with recovering personal property may also affect the defendant where the defendant is excluded from the family home.

7.90 It has been suggested that where the court is considering an AVO application, or where there is an existing interim or final order (not a TIO), the court should have the power to make an ancillary property recovery order.[193] Such an order may be made where:

(a) the applicant has recently left a residence where personal property is located; or

(b) the defendant has by order been excluded from such premises where personal property is located; or

(c) there are other circumstances in which the court thinks it is appropriate to do so.

7.91 The order would authorise a person (or nominee) to attend the specified premises to recover minor items of personal property required for that person's (or children's) immediate living (or means of income).
There could be a schedule by way of guidance of the types of property which can be included –

193. Children's Magistrate, Lidcombe Children's Court, *Submission*.

such as bedding, clothing, school books and utensils, toys, medicines, means of identity (pension card, drivers licence), and tools of trade.

7.92 The court could decline to make an order in respect of any particular item if it is satisfied that:

(a) title to the property is substantially and genuinely in dispute; or

(b) other more appropriate means are available and appropriate for the issue to be addressed.

7.93 An example of the latter case could be if there were ongoing property proceedings in the Family Court. An order would not vest title of the property in any person, it would only give possession of personal property.

7.94 In order to assist with the enforcement of the order the court when making an order could request the police to attend (effectively to keep the peace). This would be endorsed on the order. The order would not give a right to force entry. Failure to comply with an order would not be an offence (for example, the property may no longer be in the premises) but the wilful obstruction of a person executing an order would be an offence.[194]

7.95 This suggestion by the Children's Court Magistrate at Lidcombe Children's Court is not designed to "create a jurisdiction by stealth" for the Local Court to intervene in family court property disputes, but is an attempt to address a "practical legal vacuum" which arises almost everyday and can give rise to significant hardship.[195]

The Commission's views

7.96 The Commission agrees that refusing a person access to his or her personal property is unreasonable whether it affects the aggrieved person, the defendant or children. On the other hand, contact associated with recovering personal property may result in further violence, trauma or fear for one or both parties. The Commission is therefore of the view that where an AVO has been made, the court should be empowered to make an Ancillary Property Order and require the Police to attend where necessary to avoid a possible breach of the peace.

7.97 Before making an Ancillary Property Recovery Order, the court must be satisfied that the property in question belongs to the person applying for the order.

7.98 The order would be issued against the defendant or the applicant (as the case may be) and would prohibit any other person from interfering with the recovery of the property specified in the order.

RECOMMENDATION 31

194. Children's Magistrate, Lidcombe Children's Court, *Submission*.
195. Children's Magistrate, Lidcombe Children's Court, *Submission*.

The court should be empowered to make an Ancillary Property Recovery Order against the applicant or defendant where:

(a) an AVO has been made; and

(b) the applicant has recently left a residence where personal property is located; or

(c) the defendant has by order been excluded from such premises where personal property is located.

The Court should also be empowered to order that the Police attend the execution of an Ancillary Property Recovery Order.

8. Content of orders

- Factors to be considered when making an AVO
- Standard orders

8.1 The legislation sets out the circumstances when the court "may" make an AVO[1] and when it "must".[2] In relation to APVO proceedings, the court has a discretion to refuse to issue process.[3]

8.2 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, unless it is not required to do so (because an order has already been made or because the person in need of protection opposes the order).

8.3 In other circumstances, the court can decide whether or not to make an AVO. In deciding whether or not to make an AVO, the court must consider certain factors *if* the order is going to prohibit or restrict access to the defendant's residence.

FACTORS TO BE CONSIDERED WHEN MAKING AN AVO

8.4 If the order will have the effect of prohibiting or restricting access to the defendant's residence, the factors the court must consider are:

(a) the accommodation needs of all relevant parties;

(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.[4]

8.5 Where children are involved, the court is also required to consider issues relating to contact with children. Thus, a person seeking to apply for or vary an AVO must inform the court of any relevant family law contact order or any such pending order. In deciding whether to make 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

(b) have regard to any relevant family contact order of which the court has been informed.[5]

Other jurisdictions

8.6 The legislation in other jurisdictions appears to provide more comprehensive and/or structured guidance. For instance, the ACT legislation states that the paramount consideration in

1. Crimes Act s 562AE(1) and s 562AI(1).
2. Crimes Act s 562BE and s 562BF.
3. Crimes Act s 562AK.
4. Crimes Act s 562D(2).
5. Crimes Act s 562FA(2).

deciding whether to make a protection order is the need to ensure that the aggrieved person is protected from domestic violence.[6] 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 the property is protected from damage; and anything else that is relevant.[7]

8.7 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.[8]

8.8 In Western Australia, in violence restraining order proceedings, the court must consider, as matters of primary importance, 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 parties; the defendant's criminal record; any previous similar behaviour; and any other relevant matters.[9]

8.9 In Tasmania, the 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.[10]

Views in submissions

8.10 Many submissions expressed the view that the need to ensure the safety and protection of the applicant from domestic and personal violence should always be the paramount consideration.[11] Others have suggested that the safety of children should be the paramount factor in granting an AVO.[12]

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6. *Protection Orders Act 2001* (ACT) s 6(1)(a).
7. *Protection Orders Act 2001* (ACT) s 41.
8. *Domestic Violence Act 1994* (SA) s 6.
9. *Restraining Orders Act 1997* (WA) s 12.
10. *Justices Act 1959* (Tas) s 106B(4AAB).
11. Law Society of NSW, Criminal Law Committee, *Submission*; Graham Johnson, Magistrate, *Submission*; Julie Stubbs, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*.
12. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; *Newcastle consultation*; *Wollongong consultation*; Campbelltown Benevolent Society Domestic Violence Unit, *Consultation*.

8.11 While safety and protection issues are considered by the court, some submissions have suggested that there is currently too much emphasis on accommodation.[13] Provisions do not specifically refer to the need to consider the safety of the person in need of protection[14] and do not "position the safety and well being of children as a priority for the courts in the granting of orders".[15] A recent study revealed that accommodation was one of the main considerations of the court, particularly in contested cases.[16] It has been suggested in a submission that often it is the defendant's accommodation needs rather than the applicant's that the court considers.[17] The legislation currently requires the court to consider the accommodation needs of all parties. However, when translated into practice, the court appears to be caught up in considering whether it would be unfair to remove the defendant from the home, particularly if the defendant makes a statement about the lack of alternative accommodation which is not questioned in the court.[18] It has also been suggested that orders removing the defendant from the home can have family law implications regarding property settlement.[19] Such orders also pose complex issues where the property the defendant may be excluded from is their sole property and not property of a marriage or de facto relationship and is heavily mortgaged. The same issue can arise even where a home is jointly owned, as some defendants claim to be impoverished, excluded from their residence, or left with no money for rent.[20]

8.12 The policy of the Department of Housing regarding AVOs and accommodation is noteworthy in this context in that it requires the defendant to leave the house even if the house is in the person's name if the court has made an AVO (even an interim order) against the person. However, generally, the most common outcome is for the woman to be sent to a refuge[21] as more such accommodation is available for women than men. This practice is against the spirit of the legislation which is focussed on protecting aggrieved persons, usually women, not punishing them by removing them from their home for no fault of their own. This also has a detrimental effect on children in that they are moved to unfamiliar surroundings and may need to move school temporarily causing them disruption and embarrassment.[22]

8.13 Moving out of the family home means that the applicant and her/his children are not only victims of violence, but also homeless.[23] In cases where the applicant is currently in temporary accommodation such as a refuge or staying with friends, a Magistrate may mistakenly believe that the victim's accommodation needs have been met, allowing the defendant to stay on in the

13. AVLICC, *Submission*.
14. Jane Wangmann, *Submission*.
15. Australian Domestic and Family Violence Clearinghouse, *Submission.*
16. Australian Domestic and Family Violence Clearinghouse, *Submission*. Referring to a study of 32 court transcripts in Sutherland and Waverley Courts conducted by the NSW Strategy to Reduce Violence Against Women.
17. Australian Domestic and Family Violence Clearinghouse, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
18. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
19. *Wollongong consultation*.
20. Mt Druitt and Area Community Legal Centre, *Submission*.
21. *Bourke consultation*.
22. *Orange consultation*.
23. AVLICC, *Submission*; Australian Domestic and Family Violence Clearinghouse, *Submission*.

family home.[24] However, it has been noted that leaving a violent situation should not have to mean leaving (and depriving the children of) the family home.[25] Indeed, one agency with experience in this field has stated that "leaving the marital home is a strong indicator of post-separation poverty and that lack of alternative accommodation is central to women's and children's safety and their recovery from the effects of domestic violence".[26]

8.14 The emphasis on the accommodation needs of the defendant has resulted in the courts being reluctant to make exclusion orders.[27]
Often they are not sought by police prosecutors when appropriate,[28] possibly out of concern that property rights in family law proceedings may be affected.[29] There is a view that some Magistrates feel that exclusion orders relate more to property than safety, and should therefore be dealt with under the FLA, whereas an AVO complaint should trigger a question about exclusion orders.[30]

8.15 On a different note, some submissions have stressed the need to consider the impact on the defendant when making an AVO. It has been suggested that a provision similar to s 6(2) of the *Protection Orders Act 2001* (ACT) be included in Part 15A which states that "if a protection order is to be made on an application under this Act, it must be the protection order that is least restrictive of the personal rights and liberties of the Respondent as possible that still achieves the objective of the Act".[31] Ramifications of granting an AVO can be significant: in terms of costs, removal from home, and limitations on seeing children and these issues must be given due consideration.[32]

Weighting of factors

8.16 Some have suggested that the legislation should provide guidance on what weighting ought to be given to the listed factors.[33] More trivial conduct such as damaging property or making threats currently may have equal weight to severe physical assault. Such matters should clearly carry less weight, and be dealt with commensurate to the seriousness of the conduct. However, Magistrates should retain a discretion in all matters because each family violence dispute is different.[34]

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24. Legal Aid NSW, *Submission*. Legal Aid notes, however, that its experience has been that, despite this concern, Magistrates make appropriate orders in these cases.
25. Australian Domestic and Family Violence Clearinghouse, *Submission*; *Orange consultation*.
26. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
27. NSW, Department for Women, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
28. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
29. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*. Note though, that occupation of the family home is irrelevant under the *Family Law Act 1975* (Cth) for the purposes of property settlements: s 79(4).
30. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
31. Law Society of NSW, Criminal Law Committee, *Submission*.
32. Law Society of NSW, Criminal Law Committee, *Submission*; Family Law Reform Association, *Consultation*.
33. Manly Warringah Women's Resource Centre, *Submission*.
34. Mt Druitt and Area Community legal Centre, *Submission*.

8.17 On the other hand, others are opposed to weighting factors in the legislation as the circumstances in each case are different.[35] Besides, the objects of Part 15A are meant to be adequate in stating the primary focus of the legislation.[36]

8.18 Yet, others have suggested that other factors ought to be weighted in accordance with the specifics of individual cases as is the case in the ACT legislation.[37]

8.19 AVLICC with its diverse membership considers that the factors ought to be weighted with the paramount consideration being the safety of the children and the applicant. They have suggested that the factors the court must consider are:

- the effect of *not* making an order on the safety of any children living or ordinarily living at the residence; (believing this wording to be more appropriate as it places the emphasis on child safety)
- 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; and
- the accommodation *and safety* needs of all parties.[38]

8.20 It has also been suggested that evidence of violence and conduct by the defendant, the availability of alternative accommodation for both parties, the availability of funds and resources to both parties to provide accommodation, the reasons for wishing to remain in the premises and the proprietary interests of both parties may also be added to the list of factors to be considered.[39]

8.21 The Department for Women supports changing the emphasis away from accommodation and onto:

1. safety of children affected by the defendant's behaviour;

2. accommodation and other needs of the applicant and children, for example, income, assets, access to employment, healthcare, schooling; and

3. accommodation needs of the defendant.[40]

The Commission's views

8.22 The legislation has rightly distinguished between the grounds on which the court can make a final order and the factors the court must consider when deciding whether to make an order as is the case in other jurisdictions. However, the legislation only identifies factors relevant to the court's decision where the orders will prohibit or restrict access to the defendant's residence. In other jurisdictions factors are listed for the guidance of the decision maker in all

35. *Wollongong consultation*.
36. Legal Aid NSW, *Submission*.
37. Julie Stubbs, *Submission*.
38. AVLICC, *Submission*.
39. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
40. NSW, Department for Women, *Submission*; South West Sydney Legal Centre, *Submission*.

cases. The factors are considered whether or not the order has the effect of prohibiting or restricting access to the defendant's residence. The Commission favours this approach.
The factors to be considered should reflect the objects of the legislation and the grounds upon which an order may be granted.

8.23 The factors currently listed in the legislation[41] are clearly appropriate though they give the appearance of being weighted in favour of the accommodation needs of the parties and in particular the defendant.
To avoid this perception, the Commission is of the view that the factors should focus more generously on the protection of the applicant and any children who may be affected.

8.24 The Commission favours a combination of:

(a) the ACT approach which focuses on protection being the paramount consideration when making an order; and

(b) the approach suggested in some of the submissions that requires consideration of the effects or consequences of not making an order on the applicant and any children affected.

8.25 In keeping with the research on the ill effects of domestic violence on children and in recognition of the terms of the Convention on the Rights of the Child,[42] the Commission is convinced that equal weight should be given to consideration of the welfare and protection of children who may be affected.

8.26 While protection from domestic and personal violence is of paramount importance, the Commission is mindful that the defendant's personal rights and liberties must not be unduly compromised. Accordingly, the Commission favours adopting the provision in the ACT legislation which provides that an order "must be as unrestrictive on the personal rights and liberties of the defendant as possible, while still achieving the objects of the Act".[43]

41. Crimes Act s 562D(2) and s 562FA(2).
42. In particular Article 19, which provides that signatories shall "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". See para 2.69 and Recommendation 3, where the Commission recommends the inclusion of a reference to the United Nations Convention on the Rights of the Child in the policy objectives applicable to ADVOs.
43. *Protection Orders Act 2001*(ACT) s 41.

RECOMMENDATION 32

Section 562D(2) and s 562FA(2) should be repealed and a new section inserted to provide that the paramount consideration in deciding whether to make an order should be the safety and protection of the applicant and any child directly or indirectly affected from domestic or personal violence.
In making this determination, the court should consider:

(a) the effects and consequences on the safety of 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;

(b) any hardship that may be caused by making or not making the order, particularly on the person for whose protection the order would be made and any children;

(c) the accommodation needs of all parties and particularly the applicant and any children; and

(d) any other relevant matter.

The section should provide that the order must be as unrestrictive as possible on the rights and liabilities of the defendant while still achieving the objectives of the legislation.

STANDARD ORDERS

Statutory orders

8.27 Section 562BC sets out the statutory orders that a court can make. They are that:

(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.

8.28 The court is empowered to extend the application of these orders to a person with whom the protected person has a domestic relationship.[44]

8.29 The standard terms applicable to telephone interim orders are that the defendant must not "assault, molest, harass, threaten or otherwise interfere with the protected person".[45] While the terms as stated do not include a prohibition against stalking and do not extend to persons with whom the protected person may have a domestic relationship, this section is not intended to affect s 562BC.

8.30 In effect this would mean that the protection available under a TIO could be no less than that available under an interim or final order. However, there is some concern about the level of protection available under a TIO. The police service in their submission stated that the (perceived) differences in the application of the standard orders for different types of orders is confusing and

44. Crimes Act s 562BD(1).
45. Crimes Act s 562H(4).

makes the enforcement of breaches more difficult. Accordingly, they suggested developing common standard orders that apply equally to all final, interim and telephone orders.

The Commission's view

8.31 On a strict reading of s 562H(4) it would appear that there is no difference between the protection available under a TIO and other orders. The Commission agrees that different levels of protection are not justified particularly when TIOs are granted in emergency situations when the most protection is necessary. In the Commission's view, the counter argument that they are granted *ex parte* and therefore ought not to have the same extent of protection as other orders, is weak. Additionally, the concerns of the police service support the Commission's view that the same standard orders should apply to all types of AVOs whether final, interim or TIO.
To avoid any further confusion, the Commission is of the view that s 562H(4) must be clarified to state that the standard terms of a TIO are the same as those of other orders.

RECOMMENDATION 33

Section 562H(4) should be clarified to make it clear that the standard terms of a TIO are the same as those of other orders.

Other orders

8.32 In addition to the orders prescribed by statute, there are other standard orders[46] that have been drafted in consultation with Magistrates, lawyers and domestic violence agencies that are commonly used in the courts. These standard orders are referred to in the Local Courts Practice and Procedure Manual but are not contained in the legislation. Consequently they may vary from court to court. However, they provide some guidance and promote consistency and efficiency for the users: the parties, court staff and police.

Views in submissions

Observations regarding adequacy of other orders

8.33 There appears to be general agreement that the terms of the other standard orders should apply consistently for all types of orders.[47] However, there is a view that more urgency should be demonstrated for TIOs as they are granted *ex parte* without notice.[48]

8.34 With regard to the adequacy of the prohibitions, the general consensus appears to be that the standard orders do cover most issues[49] and that their existence promotes a degree of consistency making it easier for police to enforce and for the courts to administer.[50]

46. See Appendix B for a list of the Standard Orders.
47. AVLICC, *Submission*.
48. Graham Johnston, Magistrate, *Submission*.

8.35 On the other hand, there is concern that the list is not exhaustive[51] and is inadequate.[52] This view may be due in part to the need to finetune some of the specific orders as discussed below.

Observations regarding inclusion in legislation

8.36 Another general issue that was the subject of differing views was whether standard orders should be contained in the legislation.
Some suggested that they should be included[53] as a schedule to the Act[54] for the sake of consistency,[55] provided it is clear that they are a guide only.[56]
If they are included, it has been suggested that there be a provision which states that "the prohibitions and restrictions are recommended, but are not exclusive of any other prohibition or restriction the court sees as necessary or desirable to impose"[57] and that it does not prevent the making of special types of orders that would meet individual needs.[58]

8.37 On the other hand, those that oppose the inclusion of standard orders in legislation[59] are of the view that inclusion will make the orders inflexible[60] and entrenched resulting in Magistrates being reluctant to vary them, thus compromising the safety of the applicant.[61]

8.38 Clearly one of the greatest benefits of AVOs is their capacity to be individually tailored.[62] However, the Commission has heard of many instances where the capacity for individual tailoring has not been used to its best advantage. Where police apply for an AVO on behalf of a victim, the victim should be shown the list of conditions available and have input into them to make sure they are appropriate and workable. However, it appears that applicants are often not consulted about suitable conditions which means that where an impractical order has been made, an application for variation of the order necessarily follows.[63] Similarly, orders prohibiting a person from coming within a certain distance of another must take the particular circumstances

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49. AVLICC, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Jane Wangmann, *Submission*.
50. Jane Wangmann, *Submission*.
51. Jane Wangmann, *Submission*.
52. Australian Domestic and Family Violence Clearinghouse, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*.
53. NSW, Department for Women, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
54. South West Sydney Legal Centre, *Submission*; Manly Warringah Women's Resource Centre, *Submission*; NSW Department of Community Services, *Submission*; Multicultural Disability Advocacy Association, *Submission*.
55. Law Society of NSW, Criminal Law Committee, *Submission*.
56. NSW, Department for Women, *Submission*.
57. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
58. Jane Wangmann, *Submission*.
59. AVLICC, *Submission*; NSW Police Service, *Submission*.
60. AVLICC, *Submission*.
61. Jane Wangmann, *Submission*.
62. Jane Wangmann, *Submission*.
63. Erin's Place for Women and Children, *Submission*.

into account. The Department of Education and Training cited instances where the courts make an order preventing one student from coming within a certain distance of, or preventing them from attending, another student's school which proves difficult to enforce where both students attend the same school. Similarly an order that a student may not approach a teacher can also have the effect of preventing a student from attending school. These situations can have significant ramifications in country areas where the options for alternative schooling are limited. When making orders, courts must consider such factors and tailor the order carefully such that it is possible to implement.[64]

8.39 Rather than include the orders in the legislation, it has been suggested that the orders must be:

(a) flexible and capable of being tailored to suit the circumstances of each case;

(b) written in plain English, being careful of words like "intimidate", "harass", "interfere with" such that people from non English speaking backgrounds will understand the orders;[65] and

(c) translated into as many other languages as possible.[66], with disc translations available at all court registries.[67]

Specific clauses

8.40 The Commission has also received comments on the application and terminology of specific clauses in the standard orders.

8.41 Clause 1 states that the defendant must not "… molest …" the protected person. Given the common usage of the terms abuse and molest in the context of sexual abuse, one submission has suggested that the terminology be reviewed to distinguish sexual abuse and molestation from other sorts of conduct.[68] Similarly, some Magistrates tend to amend the general protection provided in this clause by removing words such as "assault" whereas the terms should be simplified and retained.[69]

8.42 Clauses 2, 3 and 4 randomly capture the concept of an exclusion order.[70] However there is no specific reference to exclusion orders. It has been suggested that the standard orders

64. NSW Department of Education and Training, *Submission*.
65. Julie Stubbs, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*; Jane Wangmann, *Submission*.
66. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; NSW, Department for Women, *Submission*.
67. Chief Magistrate, Local Court of NSW, *Submission*.
68. Mt Druitt and Area Community Legal Centre, *Submission*.
69. Jane Wangmann, *Submission*.
70. An exclusion order prevents the defendant from residing in, or restricts the defendant from approaching, the family home.

should make specific provision for exclusion orders to reflect international best practice and highlight their existence.[71]

8.43 Clause 6 refers to not contacting the protected persons for the purposes of arranging or exercising "access to children". It has been suggested that the order should refer to exercising "contact" with children rather than "access".[72]

8.44 Clause 7 prevents the defendant from *contacting* the protected person but does not prevent the defendant from *locating* the whereabouts of the protected person (for example, through a private investigator)[73] or *approaching* the person.[74] There is also no provision that prohibits the defendant from *loitering* which may be more practicable than prescribing an exclusion zone of 100 metres.[75] Further, in Chapter 5, the Commission recommends that the standard APVO should be amended to provide that parties may contact each other for the purpose of arranging or engaging in mediation.[76]

8.45 A related issue is whether the order must contain the address details of the victim given that the aim is to provide protection to the person in fear. While it can be argued that a defendant cannot avoid the victim if the defendant does not know where she or he lives, equally it can be argued that knowing the address can lead to breaches. One suggestion was that there ought to be no address details of the victim on the order and that if the defendant happened to find out, then, in keeping with the spirit of the legislation, the defendant must keep away.[77]

8.46 Clause 8 requires that the defendant surrender all firearms and related licences to the police. Many submissions have expressed concern about whether such restrictions should extend beyond the expiry of the AVO.[78]

8.47 Apart from the above with regard to specific clauses, there is a view that the standard orders contain too many conditions and are too complicated,[79] and that they are not drafted as well as they could be.[80] Some Magistrates have tried to redraft and classify them, depending on whether they are made by consent or not.[81] It has been suggested that the orders should separate home and work premises to delineate precisely the boundaries of the defendant's exclusion.[82] However, this would not be practical where the applicant and defendant work together.

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71. Australian Domestic and Family Violence Clearinghouse, *Submission*. See also discussion at para 8.10-8.15.
72. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Graham Johnson, Magistrate, *Submission*.
73. AVLICC, *Submission*.
74. WDVCAS Network meeting.
75. Graham Johnson, Magistrate, *Submission*.
76. See Recommendation 17.
77. *Bourke consultation*.
78. See para 10.6 and 10.10 for detailed discussion.
79. Law Society of NSW, Criminal Law Committee, *Submission*.
80. Graham Johnson, Magistrate, *Submission*.
81. Graham Johnson, Magistrate, *Submission*.
82. Graham Johnson, Magistrate, *Submission*.

The Commission's views

8.48 The Commission agrees that the standard orders ought not to be contained in the legislation or as a schedule to the Act. Such inclusion may result in losing the flexibility that is of great value when tailoring orders to suit the circumstances of the case.

8.49 There is currently no provision in the legislation that makes any reference to the non-statutory standard orders. While these conditions ought not to be included in the legislation, it is important that Magistrates are made aware of the role and purpose of standard orders.
The Commission is also of the view that the standard orders be redrafted simplifying the terminology and recommends that they be available in other languages.

8.50 In relation to the specific clauses, the Commission agrees that there should be a separate category of "exclusion orders", and that the amendments suggested above to clauses 6 and 7 be implemented.
However, the Commission disagrees with the view that the address details of the victim be withheld. While providing protection is the main focus, it is important that the defendant is not unjustifiably disadvantaged. In the Commission's view requiring a defendant to keep away from the victim in keeping with the spirit of the legislation will be more difficult to follow up.

RECOMMENDATION 34

There should be specific reference to Exclusion orders in the non-statutory Standard orders and that the following clauses be amended:

Clause 6 should refer to exercising "contact" with children rather than "access".

Clause 7 should prevent the defendant from contacting, locating and approaching the protected person or loitering in the person's presence.

9. Variation, revocation and withdrawal of orders

- Variation or revocation of orders
- Withdrawal from proceedings

9.1 An AVO is an order of the court. The prevention of domestic and personal violence is a matter of public interest and not just a private matter. Consequently, an AVO cannot be varied or revoked by the parties without the endorsement of the court. The applicant can, however, withdraw from proceedings before a final order is made. There is some concern that such withdrawal may be due to fear of, or coercion by, the defendant.

9.2 This chapter considers the special circumstances in which an order may be varied or revoked. It also considers how best to balance the undesirability of overpowering the will of an applicant to withdraw, against the need for continued protection against violence.

VARIATION OR REVOCATION OF ORDERS

9.3 An applicant, a defendant or a police officer can apply to have an AVO varied or revoked.[1] A police officer can apply only if the initial complaint was made by the police officer. Being an order of the court, an AVO cannot be varied at will. Parties must go to court to seek approval to vary or revoke an AVO. Conduct where both parties consent without the court's approval may amount to a breach.

9.4 The 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 for variation if it is satisfied that there has been no change in the circumstances and the application is in the nature of an appeal.[3] An AVO can be varied by extending or reducing its duration, or by changing, adding to or deleting the conditions in the order.[4] The variation or revocation will only take effect after the defendant has been served with notice of the application.[5]

Views in submissions

General issues

9.5 It is important that the decision to vary or revoke an order reflects the best interests of all persons in need of protection. It has been suggested that courts do not automatically revoke orders unless it is appropriate.[6] However, the issues are complex as it is difficult to ascertain whether the applications for variation or revocation are being prompted by coercion.[7]

9.6 It appears that some people may be unaware that they can apply to have the order varied if circumstances change.[8] As stated above, when variation is not sought and the parties merely consent to vary the order, the police sometimes take action against both parties for breaching the AVO.[9] Thus, information on how to vary or revoke an AVO is crucial to all parties.[10]

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1. Crimes Act s 562F.
2. Crimes Act s 562F(3).
3. Crimes Act s 562F(4A).
4. Crimes Act s 562F(4).
5. Crimes Act s 562F(6).
6. Graham Johnson Magistrate, *Submission*.
7. NSW, Department for Women, *Submission*.
8. *Bourke consultation*.
9. *Moree consultation*.

9.7 As discussed previously[11] care needs to be taken when varying or revoking orders where children are included with the applicant, as the children are vulnerable and are often left unprotected. Submissions suggest that an additional criterion needs to be considered where children are included on the victim's application, stating that the court should only approve variation or revocation after giving consideration to the safety of the children, particularly where the defendant resumes living in the family home.[12]

9.8 Care must also be taken to ensure that court processes and resource issues do not act as a deterrent to parties wanting to make an application for variation or revocation.[13] The NSW Police submission expressed the view that where an application to vary is made, there should be a requirement to inform the police regardless of whether the original complaint was police initiated.[14]

9.9 It was also suggested that s 562F should be amended to provide that an application to vary or revoke an AVO is a complaint for the purposes of Part 15A.[15] Difficulties have arisen in the past as some Magistrates do not feel that such an application is a complaint, which has implications so far as appeals are concerned.

9.10 The view was also expressed that it should also be possible to apply for revocation *after* an AVO has expired. This would then facilitate a revocation of the firearms prohibition if the defendant plans to enter the army or police service, after 6 or so years with no threats of violence.

When can variation be sought?

9.11 Currently, the court can refuse to accept an application to vary or revoke an AVO if there has been no change in the circumstances on which the original AVO was based, and if the court considers that the application is in the nature of an appeal against the original AVO.[16] However, it has been suggested that it should be possible to seek variation not only when circumstances have changed but also where the existing order has proved unworkable or ineffective even though circumstances have not changed. The Commission was told of a case where an AVO restricted a defendant's access to the family home even though there had been a longstanding agreement between the parties that the defendant cared for the children while the applicant was at work. The parties were not consulted on the suitability of such a condition being included in the AVO.

The circumstances had not changed between the time of making the order and applying for

10. The need for more information to be provided to parties is discussed in Chapter 3, particularly para 3.53.
11. See para 6.28-6.29 and Recommendation 19 for further discussion regarding the need to have separate AVOs taken out for children to avoid the risk of leaving them unprotected when an adult order to which the children are joined is varied or revoked.
12. NSW, Department for Women, *Submission*; *Newcastle consultation*; *Wollongong consultation*; NSW Police Service, *Submission*.
13. Julie Stubbs, *Submission*.
14. NSW Police Service, *Submission*.
15. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
16. Crimes Act s 562F(4A).

variation, and therefore no variation was ordered by the court. However, the order was unworkable given the particular circumstances and needs of the family.[17]

Who can seek variation or revocation?

The defendant

9.12 Currently both the applicant and the defendant can seek variation and revocation. However, it has been suggested that the defendant should be precluded from being able to have the order varied or revoked.[18]
Others have suggested that the defendant should be able to apply for variation or revocation[19] only if she or he consented to the order[20] and circumstances have changed[21] and an injustice would otherwise be created.[22] Otherwise, the view was expressed that an application to vary or revoke initiated by a defendant would amount to further harassment of the applicant.[23]

9.13 Another view was that a defendant should only be able to seek to vary or revoke an AVO where he or she consented to it being granted, but without understanding the implications of the order.[24] Otherwise, such an attempt to vary or revoke should be considered to be an appeal.[25] It has also been suggested that in circumstances where the applicant and defendant have reconciled, it is unrealistic to expect the applicant to apply to have the order varied or revoked.[26]

9.14 Some submissions consider that, where the AVO has been contested, the defendant should be able to apply for variation, but not revocation.[27] Others disagree, and consider that the defendant should be able to apply to vary or revoke where he or she consented and where the hearing was contested as circumstances may change.[28] However, there should first be a hearing to determine whether leave should be granted to make the application to vary or revoke the order. This would offer an added protection for the applicant to prevent the defendant using the courts to "legally harass" the applicant.[29]

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17. WDVCAS Network meeting (5 March 2003).
18. Comments contained in correspondence to the Law Reform Commission dated 20 February 2003. See also Manly Warringah Women's Resource Centre, *Submission*.
19. Erin's Place for Women and Children, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Intellectual Disability Rights Service Inc, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
20. NSW Police Service, *Submission*.
21. Julie Stubbs, *Submission*.
22. Blue Mountains Community Legal Centre, *Submission*.
23. Blue Mountains Community Legal Centre, *Submission*.
24. Manly Warringah Women's Resource Centre, *Submission*.
25. NSW, Department for Women, *Submission*; Intellectual Disability Rights Service Inc, *Submission*.
26. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
27. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
28. Graham Johnson, Magistrate, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
29. This is similar to *Restraining Orders Act 1997* (WA) s 49; Erin's Place for Women and Children, *Submission*.

9.15 The value of a presumption against revoking or varying an order if the application is made by the defendant against the applicant's will, was also canvassed in submissions.[30]

The police

9.16 There appears to be some inconsistency between s 562F(2) and s 562F(4B) over whether or not a police officer must apply to vary or revoke an AVO involving a child. Section 562F(2) states that where the person in need of protection is under 16 years of age, the police must make the application to vary or revoke. However, s 562F(4B) states that where an AVO covers more than one person, an application by one of the persons in need of protection to vary or revoke the order may affect the other persons if they are under 16, regardless of whether police make the application.
It is necessary that this provision be clarified to determine whether or not the application to vary or revoke an AVO for a child under 16 must be made by a police officer.[31]

9.17 There is also a view that where an application is made to vary or revoke an order which involves a child under 16, the police officer who handled the matter must be notified and have input into the court process to ensure that the court is apprised of all evidence regarding the needs of the child.[32] Often the real reasons for the desire to revoke or vary an AVO may not be apparent and police involvement in the matter may add an element of independence.[33]

9.18 Many submissions expressed the view that police should be able to apply for variation regardless of who made the initial complaint, if they believe their intervention is warranted in the circumstances.[34] Some of the reasons given for this view were that police may uncover information which cannot be immediately conveyed to the applicant, or the applicant may have gone into hiding, or be injured.[35] It has also been suggested that community response to AVOs often influences the police response to events and calls for assistance. Thus, where an AVO with an exclusion order is frequently breached, the Police should be able to seek instructions on its variation from the parties and approach the Court accordingly.[36]

9.19 It has also been suggested that private applications to vary or revoke should be brought to the attention of the police (if the original complaint was made by the police on behalf of an applicant) as this would makes it clear that the applicant still has police support.[37]

30. NSW, Department for Women, *Submission*.
31. Erin's Place for Women and Children, *Submission*.
32. Erin's Place for Women and Children, *Submission*.
33. Erin's Place for Women and Children, *Submission*.
34. AVLICC, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*; NSW Police Service, *Submission*; Manly Warringah Women's Resource Centre, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Graham Johnson, Magistrate, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
35. Chief Magistrate, Local Court of NSW, *Submission*.
36. Mt Druitt and Area Community Legal Centre, *Submission*.
37. Erin's Place for Women and Children, *Submission*.

The Commission's views

9.20 The Commission believes that the capacity to apply for variation of an order is of great benefit to all parties. While there should be more education about the circumstances in which an order may be varied, the Commission is of the view that if an order becomes unworkable, then a variation would be possible under a broad interpretation of the current provisions, since that in itself would be a change of circumstance.

9.21 Submissions expressed a range of views on whether the defendant should be allowed to apply for variation or revocation. In the Commission's view, this is ultimately a matter for the court to decide. To deny the defendant the capacity to apply for variation would amount to pre-judging the veracity of the defendant's application. There may be cogent reasons why a defendant may seek to vary or revoke an AVO. Consequently, the Commission is in favour of retaining the current provisions permitting all parties to apply for variation or revocation.

9.22 In addition to the current provisions, however, the Commission has recommended that authorised third parties should also be allowed to make applications for an AVO on behalf of employees and people with a disability, or people under Guardianship Orders.[38] It follows that those third parties should also be able to make applications for variation or revocation of those orders on behalf of the person for whom they made the application in the first instance.

9.23 So far as police applications are concerned, the Commission is of the view that police should be empowered to apply to vary or revoke an order regardless of who made the initial complaint. This recommendation is consistent with others in this Report which empower the police to make or proceed with a complaint without the consent of the applicant in certain circumstances.[39] The argument against this recommendation is that the applicant is denied control over his or her welfare, with this being another form of power exercised over the applicant. However, the Commission is satisfied that the benefit of affording protection to applicants far outweighs the perceived risk of police intrusion.

9.24 There are also some issues that require statutory amendment for the sake of clarity. The District Court has jurisdiction to hear appeals where a *complaint* made by an applicant has been dismissed by a Local Court or the Children's Court.[40] Section 562F needs to be amended to provide specifically that an application to vary or revoke an AVO is a complaint for the purpose of Part 15A, so as to clarify the situation regarding appeals.

9.25 The Commission also agrees that parties should be entitled to apply for revocation of an AVO after it has expired. In the absence of such a revocation, a firearms licence will continue to be either suspended or revoked even after the AVO has expired.[41] The Commission suggests that a reasonable time limit, for example, six months, should be apply between the date of expiry of the AVO and the application for revocation as a safety net for the victim. The application for revocation should be made by both parties to satisfy the Magistrate that the applicant has not been coerced.

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38. See Recommendation 18 and preceding discussion at para 6.2-6.21.
39. See Recommendation 20 and preceding discussion at para 6.39-6.44 and 6.46-6.47.
40. Crimes Act s 562W.
41. See para 10.4-10.10 and Recommendation 43 for a discussion on the revocation or suspension of a firearms licence.

9.26 The Commission agrees that any inconsistency between s 562F(2) and s 562F(4B) requires clarification. In recognition of the need to protect the interests of children, the Commission recommends that the relevant sections be amended to state that a police officer must be involved in *all* applications where one of the protected persons is a child under 16 years of age if the variation of an order is intended to affect the child.

RECOMMENDATION 35

Section 562F(1) should be amended to provide that police can apply to vary an order regardless of who made the initial complaint.

RECOMMENDATION 36

Either of the parties, or an authorised third party, should be able to make an application for variation.

RECOMMENDATION 37

Section 562F(4B) and (4C) should be amended to require that a police officer must be the applicant where one of the protected persons is a child under 16 years of age if the application for variation or revocation affects that child.

RECOMMENDATION 38

Section 562F should provide that an application to vary an AVO is considered to be a complaint for the purposes of Part 15A.

RECOMMENDATION 39

An AVO should be able to be revoked after it has expired where:

(a) the application is made jointly by both parties;

(b) a period of 6 months has lapsed since the expiry of the AVO; and

(c) the court considers it is appropriate to do so.

WITHDRAWAL FROM PROCEEDINGS

9.27 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.[42]

9.28 It is estimated that over 40% of ADVO applications are withdrawn or dismissed before the final hearing.[43] As noted in the Commission's Discussion Paper,[44] this figure is open to a number of interpretations and may occur for a number of reasons: some may be linked to the defendant, while some may be due to structural defects within the AVO process.

Reasons for withdrawal: views in submissions

9.29 A view expressed in one of the submissions was that "process factors" are a significant factor in causing applicants to withdraw their applications.[45] The following factors may be of particular significance:

- numerous adjournments;
- lack of service of complaints and orders;
- attitudes to domestic violence conveyed by the police and the magistrates;
- the lack of safety measures at local courts which leave some women feeling unsafe and intimidated by the defendant;
- lack of action on breach of an interim order; and
- the use of a cross application to negotiate mutual withdrawal.[46]

9.30 It has been suggested that the nature of domestic violence is such that victims in violent relationships rarely leave the relationship and stay away the first time. Often they apply for and withdraw or vary an AVO many times before finally proceeding with the action.[47] Fear of repercussions from the defendant, and lack of action on breaches, appear to be the two main factors that exacerbate the reluctance to pursue an action.[48]

9.31 In some cases, applicants may be pressured to withdraw an AVO by the defendant. The Commission was told of cases where applicants were forced to go to Chamber Magistrates with to withdraw their complaint.[49]

9.32 It was also suggested that, for many ADVOs applicants, fear of going through the court process is the main reason why applications are withdrawn. However, withdrawals may be

42. The Local Courts Practice and Procedure Manual advises that people who want to withdraw proceedings can discuss their concerns with the police officer who made the application, the police prosecutor or the police Domestic Violence Liaison Officer.
43. Figures provided by Local Court NSW, to the Commission on a confidential basis.
44. See DP 45 para 4.4 and para 8.17.
45. Jane Wangmann, *Submission*.
46. Jane Wangmann, *Submission*.
47. Parkes Community Health Centre, *Submission*.
48. *Orange consultation*.
49. Mt Druitt and Area Community Legal Centre, *Submission*.

deterred if court attendance was a pre-requisite for pursuing and withdrawing an application.[50] It would also enable courts to keep better data about why withdrawals happen.[51]

9.33 The Local Court is of the view that an explanation for the high rate of withdrawal of APVO applications is the intervention of mediation after the commencement of court proceedings. As discussed in the context of mediation,[52] the Local Court supports the idea that parties should be referred to mediation earlier.[53]

Views on possible changes to the withdrawal process

9.34 Some are of the view that the current provisions need no change.[54] They oppose specifying criteria for withdrawal of an AVO in the legislation[55] because legislative criteria may prevent withdrawal and further compromise an applicant's safety.[56]

9.35 Others have suggested that it would be beneficial if certain criteria had to be satisfied and there was a consistent process across all courts to avoid the currently haphazard process which depends greatly on the views of particular Magistrates.[57]

9.36 Others favour court attendance by an applicant so that the reasons for withdrawal can be explained.[58] Withdrawal should not be a mere "rubber stamping of the complainant's wishes".[59] It should require the Magistrate to be of the opinion that "the person in need of protection wishes to withdraw the complaint in the exercise of his or her own free will, and that undue influence, pressure or intimidation has not been brought to bear on that decision".[60] The court should be satisfied that police support the withdrawal, that the circumstances have changed and the applicant is no longer in danger,[61] or that the applicant has obtained independent advice.[62]

9.37 If the court is concerned that the application is a result of threat or coercion, it would be appropriate for the matter to be adjourned with a recommendation from the Magistrate that the applicant seek independent advice.[63] The Commission has been informed of situations where

50. AVLICC, *Submission*.
51. AVLICC, *Submission*.
52. See para 5.13-5.15.
53. Local Court NSW, *Submission*.
54. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
55. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
56. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission.*
57. Legal Aid NSW, *Submission*; *Newcastle consultation*.
58. AVLICC, *Submission*; Legal Aid NSW, *Submission*.
59. Chief Magistrate, Local Court of NSW, *Submission*.
60. Chief Magistrate, Local Court of NSW, *Submission*; Local Court NSW, *Submission*.
61. NSW, Department for Women, *Submission*; Local Court NSW, *Submission*.
62. Legal Aid NSW, *Submission*.
63. Legal Aid NSW, *Submission*.

Magistrates have refused to allow an AVO to be withdrawn because they believed the applicant had been threatened or pressured into seeking withdrawal.[64]

9.38 Some have suggested that an AVO should only be able to be withdrawn where the circumstances which gave rise to the original AVO have changed.[65] This test is similar to that regarding applications to revoke or vary an AVO.

9.39 Another suggestion was that, where criminal charges are laid concurrently with the granting of an AVO, the AVO should not be able to be withdrawn until those charges have been resolved.[66]

Withdrawal following mediation

9.40 Community Justice Centres ("CJCs") have raised a concern regarding the procedure for withdrawal of an APVO matter following mediation.[67] Currently, the parties consent to a copy of the mediation agreement being sent to the court, which is then attached to the court file. Parties also complete a form which states that they wish to withdraw from court action and undertake to cover their own costs. This is sent with the copy of the agreement.

9.41 This form has no real legal status and the actions on the APVO are not actually withdrawn until the next court date. Usually this is no more then three weeks although it may be as long as four months. Clients are advised by CJCs to check with the court to see if they are required to attend court. Local Courts usually advise the client to do so.

9.42 CJCs have advised the Commission that problems occur as a result:

1. The client has worked hard at resolving and then moving on from the dispute. Returning to court to advise they do not wish to continue with the APVO application is stressful, reminds them of why they felt the need for the APVO in the past, and may require them to lose time from work which may result in a rekindling of feelings of anger and resentment with the other person for being forced to do this.

2. Some clients choose to take the risk of not appearing and then having the matter simply taken off the list. For the most part this seems to work. However, there have been situations where one client has felt that the matter has been resolved and the other party changes their mind and proceeds with the application without the other party being aware of this. By not attending court clients risk having orders made in their absence. This can result in costly and distressing appeals processes.

9.43 CJCs suggest the introduction of a more streamlined process for withdrawing from court action which should occur before the next court date.

64. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission.*
65. Mt Druitt and Area Community Legal Centre, *Submission*.
66. WDVCAS Network meeting (5 March 2003).
67. See NSW, Community Justice Centres, *Submission*. While the issue of the role of mediation in the determination of APVO disputes is discussed in Chapter 5, this issue is a procedural one relating more to withdrawal and so is discussed here.

9.44 A period of one week should apply between agreeing to withdraw and the withdrawal taking effect. This would allow parties the opportunity to change their minds if it becomes immediately apparent that the matter is not resolved. If either party notifies the court within that period that they wish to continue with the application then the court should notify the other party as such and that they will need to attend court.

9.45 It is not anticipated that this will occur very often as feedback from clients indicates that the mediation has usually substantially resolved the situation.[68]

Should police be able to proceed against the wishes of the applicant?

9.46 This is a controversial issue that was hotly contested at consultations as it involves complex policy issues. The issues are similar to those raised and discussed in the context of whether police should be able to take out an AVO without the consent of the applicant.[69]

9.47 On one hand, there is the need to protect people from real threats of imminent violence. Applicants may want to withdraw because the threat of repercussions from the defendant is worse than the fear of not having the protection afforded by the AVO.[70] Police find this frustrating, particularly where they attend repeat incidents of domestic violence. In situations which repeatedly come to police attention, there is a significant risk that the defendant may use threats and/or violence to ensure the applicant does not proceed with the application. Developing ways to ensure that applicants are not threatened or coerced into withdrawing could have the effect of decreasing withdrawal rates. It may be useful to include withdrawal criteria for use by the courts aimed to determine whether the applicant fears reprisals if the application is heard, or has been coerced into withdrawing the application.[71]

9.48 The Commission also heard that in some cases, when police have acted, they have found the applicant is grateful that the decision whether or not to pursue the matter is taken out of his or her hands.[72]

9.49 On the other hand, there is validity in the argument that proceeding without the applicant's consent denies the applicant the right to make decisions about his or her own welfare. This can be seen as another form of power and control being exercised over the applicant.[73] Many victims of domestic violence become "experts at managing and surviving the violence they experience". As noted above, some decide to withdraw for fear of further reprisal from the defendant if they do not withdraw, and they are best placed to determine whether proceeding with the application will actually endanger their safety.[74]

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68. NSW, Community Justice Centres, *Submission*.
69. See para 6.39-6.44 and para 6.46-6.47.
70. Hawkesbury Nepean Community Legal Centre, *Submission*.
71. NSW Police Service, *Submission*.
72. *Newcastle consultation*; *Wollongong consultation*.
73. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*; *Wollongong consultation*.
74. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*.

9.50 Some submissions are of the view that, ultimately, if an applicant who has been informed of all the options wants to withdraw, it seems appropriate that their wishes be respected.[75] There is a need to question the use of an AVO brought against the wishes of the applicant.[76] If the AVO continues against the applicant's wishes, and the defendant knows this, it may be virtually meaningless since the defendant will ensure or know that breaches will not be reported by the applicant.[77]

9.51 While most applications brought by the police will be withdrawn at the direction of the person in need of protection, the Commission has heard that some prosecutors proceed regardless.[78] This may occur where police believe that the applicant is at significant risk or has been pressured into withdrawing.[79] Some submissions have suggested that it would be beneficial for police to be able to proceed in certain circumstances without the consent of the applicant (for example, the police would have to be satisfied that assault charges have been laid, or violence has occurred or there is a significant threat of violence),[80] although those circumstances would have to be carefully monitored as they may be open to abuse.[81] Some submissions are of the view that acting without the consent of the applicant is justified in certain circumstances since protection against violence is a matter of public policy rather than a private matter.[82] Others have suggested that it should occur only in circumstances where the police have reasonable grounds to believe there is an imminent threat of violence.[83] It has also been suggested that in withdrawal proceedings, the onus should be placed on the police prosecutor to voice any concerns he or she may have about the withdrawal application.[84]

The Commission's views

9.52 In the Commission's view there are two major issues of concern:

1. whether legislative criteria should be imposed to determine whether or not parties may withdraw proceedings;

2. whether the police should be empowered to proceed with a complaint without the applicant's consent.

9.53 In approaching both these issues, the paramount consideration ought to be the safety and protection of the person in need of protection and any children who may be affected by the circumstances. This consideration then needs to be balanced against the competing issue of the extent to which overriding the wishes of the applicant who seeks to withdraw may be justified.

75. Jane Wangmann, *Submission*.
76. Jane Wangmann, *Submission*.
77. *Wollongong consultation*.
78. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
79. Blue Mountains Community Legal Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
80. AVLICC, *Submission*; NSW, Department for Women, *Submission*.
81. Graham Johnson, Magistrate, *Submission*; Legal Aid NSW, *Submission*.
82. AVLICC, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*; *Newcastle consultation*.
83. Law Society of NSW, Criminal Law Committee, *Submission*.
84. Chief Magistrate, Local Court of NSW, *Submission*.

9.54 Some submissions and consultations have pointed out that appearing in court causes anxiety to many applicants. If it is required that an applicant must appear in court to withdraw an application, this may prevent some withdrawals, since a court appearance would be necessary whether the applicant proceeds with or withdraws the application.
A requirement to appear in court will also provide an opportunity to the Magistrate to satisfy him or herself of the genuineness of the reasons for withdrawal.

9.55 However, where violence has been prevalent, or is imminent, the Commission believes there is a need for the police to proceed with an action without the consent of the applicant, and indeed against his or her wishes. In the Commission's view, whether or not to proceed with an action requires the applicant to consider the same fears and issues that were considered at first when deciding whether or not to make a complaint.
In considering whether the police should make a complaint without the consent of the applicant, the Commission is convinced that public safety warrants such intervention where violence has occurred, or where there is a significant threat of violence, or where the victim is a person with an intellectual disability who has no guardian. The Commission is guided by the same criteria in deciding whether to empower the police to proceed with a complaint without the consent of the applicant.

9.56 The Commission also agrees with the suggestion made by CJCs to introduce a more streamlined process for withdrawing APVO applications following mediation. Rather than require the parties to attend court to formalise the settlement by withdrawing the action, the Commission sees value in prescribing a cooling off period of 7 days from the date of the agreement reaching the court with no additional requirement for the parties to attend court.

RECOMMENDATION 40

Police must proceed with an application, where:

(a) violence has occurred or there is a history of violence;

(b) there is a significant threat of violence whether communicated or not ;

(c) there are other grounds that give rise to a substantial risk of violence; or

(d) the victim is a person with an intellectual disability who has no guardian,

whether or not the victim wishes to withdraw an application.

RECOMMENDATION 41

An applicant seeking withdrawal must attend court to make the application in order to satisfy the court that it is a genuine application (except in exceptional circumstances).

RECOMMENDATION 42

Where a matter is mediated, the withdrawal of that matter shall take effect after a cooling off period of 7 days from the date of the agreement reaching the court with no additional requirement for the parties to attend court.

10. Consequences of granting and breaching an AVO

- Firearms licence
- Breach of an AVO

10.1 The grant of an AVO has consequences for both applicants and defendants. The main consequence for applicants is that the AVO provides protection from violence and other types of unpleasant behaviour such as threats and unwanted communication. For defendants, the grant of an AVO may prevent or restrict them from approaching the family home. Defendants must also dispose of any firearms in their possession and a licence or permit to possess a firearm will not be issued for a period of 10 years if the person has been subject to an AVO.[1] A defendant is also disqualified from serving on a jury for the duration of an AVO.[2]

10.2 Apart from the consequences of granting an AVO, another related issue is with regard to the consequences of breaching an AVO. While an AVO is a civil order and does not give the defendant a criminal record, the breaching of an AVO is a crime. Thus, the consequences of breaching an AVO can be significant for defendants.

10.3 This chapter focuses on the most controversial consequence of granting an AVO, that is, the restrictions imposed on issuing and holding a firearms licence and the consequences of breaching an AVO.

FIREARMS LICENCE

10.4 A firearms licence is automatically suspended if an interim AVO is taken out against the licence or permit holder.[3] It is automatically revoked if the interim AVO becomes final.[4] Defendants must dispose of any firearms in their possession or surrender them to the police,[5] and a licence or 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.[6] These provisions do not currently apply to Telephone Interim Orders ("TIOs").

Views expressed in submissions

10.5 This provision can have a significant impact on defendants who require a firearms licence for work as a security guard and for defendants who work in rural areas. Many women at rural consultations who had been victims of domestic violence expressed the view that it is not only detrimental to defendants but also to themselves as it impacts on the family income, thus restricting their freedom to seek protection from domestic violence.[7]

1. See discussion at para 10.4-10.10 below.
2. *Jury Act 1977* (NSW) Sch 1(3)(a).
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. Crimes Act s 562D(3).
6. Thus where an AVO expires, the defendant cannot hold a firearm licence for 10 years but this prohibition does not apply where the AVO has been revoked: *Firearms Act 1996* (NSW) s 11(5) and s 29(3)(b) and *Weapons Prohibition Act 1998* (NSW) s 10(3)(b).
7. *Bourke consultation*; *Orange consultation*; *Moree consultation*; Campbelltown Benevolent Society Domestic Violence Unit, *Consultation*.

10.6 The main criticism was with regard to the duration of the prohibition. Most people in rural areas were opposed to the 10 year period.[8] Some were of the view that any suspension should be enforced in 6 months blocks, while others suggested that firearms licences should only be suspended or revoked for the duration of the AVO. There was also a suggestion that the revocation of a gun licence should only apply where there has been physical violence or where the order has been breached.

10.7 Another issue that has been raised is with regard to access to explosives. While access to firearms and prohibited weapons is restricted under Part 15A, a defendant can still legally hold a Powderman's Certificate, a Shot Firer's Certificate and a Shot Firer's Permit, which gives the holders access to explosives, detonators, and detonating cord.
A NSW Police committee addressing these licensing issues reported instances where explosives were used, or threatened to be used, against victims of domestic violence. Accordingly, NSW Police recommends that consideration be given to the restriction of the Powderman's Certificate, a Shot Firer's Certificate and a Shot Firer's Permit in a similar fashion to the restrictions placed on defendants with firearms and prohibited weapons.[9]

10.8 Lastly, there is the issue of whether the restrictions should also apply when a TIO is granted. The rationale for lesser restrictions with regard to TIOs is that these orders are granted *ex parte* without a hearing.
The counter argument is that these orders are granted in emergency situations when the most protection is needed.[10]

The Commission's views

10.9 The Commission agrees that the restriction with regard to firearms and prohibited weapons is excessive, particularly when other restrictions such as the disqualification from serving on a jury apply only for the duration of the AVO.[11] The Commission considers that, while meant to protect applicants, the restriction appears to have an adverse effect on all parties, particularly in rural areas.

10.10 Accordingly the Commission recommends that the suspension apply only for the duration of the order and that it should apply to TIOs, interim and final orders. The Commission believes that the suspension ought to apply to holders of the Powderman's Certificate, a Shot Firer's Certificate and a Shot Firer's Permit for the duration of an AVO.

RECOMMENDATION 43

The *Firearms Act 1996* (NSW) and the *Weapons Prohibition Act 1998* (NSW) should be amended so that the 10 year prohibition on holding a firearms licence be replaced by a suspension of the licence for the duration of an AVO (whether TIO, Interim or Final Order) and that the suspension also be applied to holders of a Powderman's Certificate, a Shot Firer's Certificate and a Shot Firer's Permit for the duration of an AVO.

8. Campbelltown Benevolent Society Domestic Violence Unit, *Consultation*.
9. NSW Police Service, *Submission*.
10. See discussion on TIOs in chapter 7.
11. *Jury Act 1977* (NSW) Sch 1(3)(a).

BREACH OF AN AVO

10.11 If a person "knowingly" contravenes a prohibition or restriction specified in an order, the person is guilty of an offence. It is therefore a crime to breach an AVO.[12] If the defendant breaches any terms in the order, the applicant must report the breach to the police. If the police believe on reasonable grounds that the defendant has breached an AVO, they can arrest and detain the defendant without a warrant.[13] The person so arrested or detained must be brought before a court constituted by a Magistrate, as soon as practicable thereafter.[14] A person will not be found guilty of breaching an order unless the person was served with a copy of the order[15] or was present in court when the order was made.[16] The maximum penalty for breaching an AVO is 2 years imprisonment, a fine of $5500, or both.[17] If the person convicted of the offence is over 18 years of age, then the defendant must be sentenced to a term of imprisonment unless the court directs otherwise[18] and the court must give reasons if the offender is not imprisoned.[19]

10.12 Effective police response to breaches is the key to ensuring the safety of the protected person. It is also the key to maintaining confidence in the AVO regime. Indeed the effectiveness of AVOs is undermined where police response is inadequate. Police are instructed to "treat all breaches of AVOs seriously, no matter how minor".[20] While the provisions in the legislation are considered adequate,[21] many submissions have expressed general disappointment over police response to breaches of AVOs.[22]

10.13 A comparative analysis of the number of breaches of AVOs from 1998 to 2002 indicates that there has been a noticeable increase in the number of AVOs breached.[23] It is assumed that this figure refers to the number of breaches that have been recorded through the court's enforcement mechanism. The reasons for the increase may be attributed to a corresponding increase in the number of AVO applications. However, the figures do not include

12. Crimes Act s 562I.
13. Crimes Act s 562I(3).
14. Crimes Act s 562I(4) and (5).
15. Crimes Act s 562J and s 562H in the case of Telephone Interim Orders.
16. This is why effective service is crucial. See also para 11.39-11.61 regarding service.
17. Crimes Act s 562I(1).
18. Crimes Act s 562I(2A).
19. Crimes Act s 562I(2C).
20. *Police Service Handbook* (NSW Police Service, 2000) at D–22**.**
21. AVLICC, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Graham Johnston, Magistrate, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Jane Wangmann, *Submission*; Manly Warringah Women's Resource Centre, *Submission*.
22. See para 3.7-3.26.
23. See P Doak, *New South Wales recorded crimes statistics 1999* (NSW Bureau of Crime Statistics and Research, 2000) at 61; P Doak, J Fitzgerald and M Ramsay, *New South Wales Recorded Crimes Statistics 2002* (NSW Bureau of Crime Statistics and Research, 2003) at 70. According to this research, the total number of AVOs breached in 1998 were 9897 (or 156.3 per 100,000 population) and 12109 (or 185.4 per 100,000 population) in 2002.

the number of orders that have been breached but where no police or court action has followed. While an increase in breaches may be symptomatic of an ineffective AVO regime, the issue of greater community concern is that of breaches.

10.14 There are three major issues that have been raised in submissions that warrant further discussion. They are:

1. the proper enforcement of breaches;

2. the adequacy of penalties for breach;

3. whether there should be defences to a breach.

Views in submissions

Proper enforcement

10.15 By far, the greatest barrier to the effectiveness of AVOs is said to be police inactivity on reported breaches.[24] A general observation made in this regard was that "there appears to be a disjuncture between the level of action that police take in applying for ADVOs and the level of action they take in responding to breaches".[25]

10.16 Currently, whether there has been a breach or not depends largely on whether the person *intended* to breach the order. 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.[26]

10.17 While it may be reasonable to protect a defendant against being charged for a crime that was never intended, the views expressed in the submissions and the consultations is that too many allowances are made in the context of breaches. Consequently, the perception is that there is no purpose in applying for an AVO as breaches are not routinely acted upon.[27] Victims of alleged breaches have reported that the police sometimes make moral judgments about the circumstances of the breach.[28] It was also reported that when a breach is complained of, police are said to take no action on the basis that it is too trivial. The view expressed by members of the community is that any breach of the conditions is a breach that must be acted on, while the

24. AVLICC, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Margrette Young, *Submission*; Julie Stubbs, *Submission* referring to M Kaye, J Stubbs and J Tolmie, *Negotiating child residence and contact against a background of domestic violence* (Griffith University, Families, Law and Social Policy Research Unit, Working Paper, forthcoming) Chapter 3; Shoalcoast Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*; Manly Warringah Women's Resource Centre, *Submission*; Jane Wangmann, *Submission*.
25. Jane Wangmann, *Submission*.
26. *R v Sari* [1999] ACTSC 109 at para 25 (Crispin J).
27. *Moree consultation*; *Bourke consultation*; *Orange consultation*.
28. Shoalcoast Community Legal Centre, *Submission*.

severity of the penalty should be commensurate with the seriousness of the breach.[29] The Commission also received many submissions which provided examples such as the following:

> He was hitting me and I ran to the window and screamed. The neighbours could hear me and could see him hitting me. The Police arrived, and told him not to do it again.[30]

10.18 A recent research study[31] indicates that many women were dissatisfied with police responses to breaches of the orders. Of the 31 women who had ADVOs, 21 had reported breaches to the Police and in 13 of those cases, charges had been laid. Most of the women interviewed recounted repeated breaches of the orders that were not acted on by the police. Some women expressed dissatisfaction about the difficulty of proving that a breach had occurred.

10.19 Another issue of concern is that police do not follow up on breaches unless there is evidence, such as the 'black eye'.[32] Although breaches are often very difficult to prove, they are a part of a pattern of behaviour aimed at maintaining intimidation and control over the applicant. There was also some concern that breach provisions are more readily used when a woman is a defendant.[33]

10.20 In this regard, one suggestion was that police must be bound by law to investigate every breach. Another suggestion was that police must document all reported breaches and when three are reported they should be treated in combination as evidence of a pattern of behaviour that require investigation and appropriate criminal action.[34]

10.21 It was also suggested that Police may be reluctant to charge for a breach because they have to prove the breach beyond reasonable doubt, with the sanction that costs can be awarded against them.[35] Submissions have alleged that women have contacted police to report a breach, then found that police have not only not acted upon, but not even kept a record of the reported breach.[36] The Commission also received reports that police have problems accessing its databank outside business hours, which could impact on enforcement.[37] Police must make a written record of their decision whether or not to prosecute for breach under s 562I(6), but there is no provision for review of the decision not to proceed.[38] In this regard, the recommendation made in a report by the NSW Ombudsman suggesting that reasons for not taking action on

29. *Gosford consultation*.
30. South West Sydney Legal Centre, *Submission*.
31. M Kaye, J Stubbs and J Tolmie, *Negotiating child residence and contact against a background of domestic violence* (Griffith University, Families, Law and Social Policy Research Unit, Working Paper, forthcoming).
32. *Orange consultation*; *Bourke consultation*; *Moree consultation*.
33. WDVCAS Network meeting (5 March 2003).
34. Western NSW Community Legal Centre, *Submission*.
35. *Orange consultation*.
36. Hawkesbury Nepean Community Legal Centre, *Submission*.
37. Graham Johnson, Magistrate, *Submission*.
38. AVLICC, *Submission*.

breaches should be recorded and reviewed, has received support. [39] The recommendation states that:

(1) the Police Service review the reasons, as recorded in COPS, for taking no action in relation to domestic violence incidents, including a review of the adequacy of the reasons given;

(2) arising out of this review, the Police Service enhance current guidance for officers in making decisions not to act.[40]

10.22 The Commission also received reports of police treating violence at changeover times on contact visits as a family law matter rather than requiring the laying of a charge for breaching an AVO.[41] Police have also reportedly failed to act on allegations of breaches in respect of several ADVOs because they have said the ADVO was unclear when read in conjunction with the terms of the Family Law order.[42] In this context,
it has been suggested that there is a need to educate police that the existence of a family court contact order does not justify the breach of an ADVO.[43] It has also been suggested that there should be mandatory arrest for breach and that police discretion as to whether or not to charge should be removed.[44]

10.23 On the other hand, it has been suggested that police complain about the lack of response from Magistrates when breach charges are brought before a court.[45] It has also been reported that the police find it frustrating in many circumstances where penalties imposed seem, in the officer's opinion, to be inappropriately low.[46] For their part, the police claim to have made progress in training and information provision to officers regarding breaches and welcome further practical suggestions on how to enhance the enforcement of breaches.[47]

10.24 Some submissions also raised the issue of whether it is reasonable that a person with an intellectual disability be charged with contravening an order. It appears that although the legislation is not intended to cover such people, there have been instances where people with an intellectual disability have been charged for breaching an AVO. One submission has suggested that there should be a specific provision that states that a person with an intellectual disability cannot be guilty of "knowingly contravening" an AVO where they are incapable of understanding the prohibitions or restrictions.[48] The Chief Magistrate has suggested that a provision similar to

39. AVLICC, *Submission*; NSW, Department for Women, *Submission*.
40. NSW Ombudsman, *Policing of domestic violence in NSW* (1999) Recommendation 8.
41. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
42. M Kaye, J Stubbs and J Tolmie, *Negotiating child residence and contact against a background of domestic violence* (Griffith University, Families, Law and Social Policy Research Unit, Working Paper, forthcoming).
43. Jane Wangmann, *Submission*. The need for eduction and training is discussed in Chapter 3.
44. AVLICC, *Submission*; NSW, Department for Women, *Submission*.
45. Jane Wangmann, *Submission*.
46. NSW Police Service, *Submission*.
47. NSW Police Service, *Submission*.
48. Intellectual Disability Rights Service Inc, *Submission*.

s 37(2A) of the *Bail Act 1978* (NSW) be used as a precedent.[49]
This provision requires the court to be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the defendant to understand and comply with the condition

Adequacy of penalties

10.25 Although the maximum penalty for breaching an AVO is 2 years imprisonment, a fine of $5,500, or both, it appears that these penalties are rarely imposed.[50] While some consider the penalties are adequate, others believe that the full range of penalties and sentencing options should be available.[51] The police consider the legislative provisions adequate but are concerned that the penalties imposed are inappropriately low.[52]

10.26 Some are opposed to the requirement that where a breach involves violence there should be a term of imprisonment unless the court orders otherwise. It has been suggested that there are sound criminological reasons why mandatory imprisonment must be opposed.[53]

10.27 There has also been some concern about the appropriateness of fines as a 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. Paying a fine out of household income would be clearly to the detriment of the applicant.[54] Further, it has been suggested that a fine may trivialise the seriousness of the breach.[55]

10.28 Other submissions consider it positive that there appears a greater propensity for Magistrates to hand down custodial sentences to offenders. However, it is noted that Magistrates are still reluctant to impose custodial sentences until the offender has come before them on many occasions.[56]

10.29 It has also been suggested that there is a need for guidelines for Magistrates on the setting of AVO conditions for defendants below 18 years of age, particularly regarding breach.[57] Young people should not be brought into the criminal justice system due to "inadvertent breaching" of AVOs.[58] Young defendants should have the opportunity to remain connected with their schooling and other important relationships.[59]

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49. Chief Magistrate, Local Court of NSW, *Submission*.
50. South West Sydney Legal Centre, *Submission*; Manly Warringah Women's Resource Centre, *Submission*; *Moree consultation*; *Bourke consultation*; *Orange consultation*.
51. Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
52. NSW Police Service, *Submission*.
53. Julie Stubbs, *Submission*.
54. Julie Stubbs, *Submission*.
55. H Douglas and L Godden "The decriminalisation of domestic violence" (2002) 11 *Australian Domestic and Family Violence Clearing House Newsletter* at 8.
56. Shoalcoast Community Legal Centre, *Submission*.
57. NSW Commission for Children and Young People, *Submission*.
58. NSW Commission for Children and Young People, *Submission*.
59. NSW Commission for Children and Young People, *Submission*.

Defences to a breach

10.30 Currently, there are no defences to breaching an order in NSW. Western Australia is the only Australian jurisdiction that provides for consent (of the person protected) as a defence to a breach.[60] "Consent" must be freely and voluntarily given and does not include consent obtained by force, threat, intimidation, deceit or any fraudulent means.[61] The defence is also not available where the protected person is a child or someone for whom a guardian has been appointed.[62] The court may revoke the restraining order where the defence is established.

10.31 The Commission received mixed responses as to whether or not there should be a similar defence in NSW. Some submissions expressed the view that there ought to be a defence similar to the Western Australian provision,[63] provided it is freely and voluntarily given and not obtained by force, coercion threat or any fraudulent means.[64] The defence should not be available where the person in need of protection is a child or person for whom a guardian has been appointed.[65]

10.32 Others suggested that (as a matter of practicality) consent ought to be a defence in relation to orders imposing physical restrictions, for instance "not to go within 500 metres". The stated rationale is that since the person whom the AVO protects makes the complaint to the police in relation to a breach, no breach ought to be recorded if there is genuine consent to breaching the terms of the order by both parties.[66]

10.33 Another view was that the defence of consent is a problematic issue that should only be available if the defendant has "not knowingly or intentionally breached the AVO".[67] Others suggested that it should only be available as a defence of emergency, if carefully drafted.[68]

10.34 The majority of submissions did not favour including any defence,[69] and particularly not consent.[70] Others stated that no defence of consent should be available for statutory orders A

60. *Restraining Orders Act 1997* (WA) s 62(1).
61. *Criminal Code* (WA) s 319(2)(a).
62. *Restraining Orders Act 1997* (WA) s 62(2).
63. Western NSW Community Legal Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
64. Law Society of NSW, Criminal Law Committee, *Submission*.
65. Law Society of NSW, Criminal Law Committee, *Submission*.
66. South West Sydney Legal Centre, *Submission*.
67. Blue Mountains Community Legal Centre, *Submission*.
68. Julie Stubbs, *Submission*.
69. AVLICC, *Submission*; Chief Magistrate, Local Court of NSW, *Submission*; NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Graham Johnson, Magistrate, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Intellectual Disability Rights Service Inc, *Submission*; Legal Aid NSW, *Submission*; Jane Wangmann, *Submission*; *Wollongong consultation*.
70. NSW, Department for Women, *Submission*; Intellectual Disability Rights Service Inc, *Submission*; Legal Aid NSW, *Submission*; Jane Wangmann, *Submission*; *Wollongong consultation*.

and B.[71] Consent is considered irrelevant to a breach, but may be relevant to penalty.[72] The Chief Magistrate was of the view that an "AVO is an order of the court, which cannot be discarded, flouted or varied at the wishes of the parties".[73] Success and effectiveness of AVOs depends on maintaining respect for them, which would be undermined if such a defence was brought in.[74]

10.35 Additionally, the WA experience shows that a consent defence is impossible to enforce,[75] and that police are reluctant to charge.[76]
Women have been charged with aiding and abetting when a defendant is charged with breach. The complexity of interpersonal relationships and domestic violence makes the concept of consent difficult.[77] Any response to domestic violence must encourage the perpetrator to be responsible for his or her actions.[78] Any issues of "consent" or "encouragement" by the victim should go to mitigation rather than to guilt. Responsibility for the violence and abusive behaviour must remain with the defendant. Providing a defence of consent may only facilitate an avenue whereby victims are manipulated and further held responsible for the violence and the decriminalisation of domestic violence.[79]

10.36 Moreover, the safety of protected persons would be jeopardised if any aspect of these orders is taken out of the court system and becomes the subject of private negotiation. This is particularly dangerous, given the power imbalance between the parties.[80] Should a domestic violence victim decide to return to the relationship, which may amount to allowing the defendant to breach the AVO, it is vital that the law should not condemn her for that decision.[81] Provisions dealing with variation or revocation
are sufficient.[82]

10.37 A consent defence would also operate unfairly against people with an intellectual disability who may not understand that they have allowed the defendant to breach an AVO.[83]

10.38 Police already have discretion in deciding whether or not to charge.[84] Given the low rate of charges for breach, it is unlikely that a charge would occur on the basis of an honest mistake made by the defendant.[85]

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71. South West Sydney Legal Centre, *Submission*; NSW, Department for Women, *Submission*; *Wollongong consultation*.
72. Chief Magistrate, Local Court of NSW, *Submission*.
73. Chief Magistrate, Local Court of NSW, *Submission*. See also Legal Aid NSW, *Submission*.
74. Legal Aid NSW, *Submission*.
75. Chief Magistrate, Local Court of NSW, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; NSW Police Service, *Submission*.
76. See Western Australia, Department of Justice, *Evaluation of the Restraining Orders Act 1997* (1998).
77. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Jane Wangmann, *Submission*.
78. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
79. Multicultural Disability Advocacy Association, *Submission*.
80. Legal Aid NSW, *Submission*.
81. Hawkesbury Nepean Community Legal Centre, *Submission*.
82. Jane Wangmann, *Submission*.
83. Intellectual Disability Rights Service Inc, *Submission*.

10.39 There is significant feminist literature on the difficulties of the construct of consent in the sexual assault context. It would be very unwise to introduce it in the domestic violence context. This is better addressed by making processes for variation or revocation of orders simple and timely, thus allowing for such applications to be reviewed before a court in the attempt to identify the genuine wishes of the parties.[86]

Aiding and abetting a breach

10.40 There is also opposition to charging victims with aiding and abetting a breach. The Police issued a circular to all police stating that charging victims of domestic violence with aiding and abetting was not police policy and should not be done. However, this approach is not in keeping with NSW Police policy according to the Standard Operating Procedures.[87]
Such charges continue to be made by police. It has therefore been suggested that the offence of "aiding and abetting" should not apply in relation to the person for whose benefit the order has been made.[88]

The Commission's views

10.41 Clearly the effectiveness of the AVO regime is closely linked to the appropriate enforcement of breaches. The community has expressed various concerns about this issue. Police inactivity may be due to many reasons, some valid and others not. Many submissions have expressed the view that an objective test should be applied to determine whether the order has in fact been breached and that all breaches should be acted on with the seriousness of the breach being relevant only for the purposes of the penalty.

10.42 On the other hand, a strict liability approach has been rejected in New Zealand. There, 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 that order.[89] 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. It is also a defence that the contravention was the result of an emergency and a similarly circumstanced ordinary person would have done the same.[90]

10.43 The Commission is of the view that it should be a defence to a breach that the defendant did not knowingly breach the order. Given that only the defendant will have knowledge of whether he or she knowingly breached the order, the Commission recommends that the onus must be on the defendant to prove the absence of knowledge on the balance of probabilities.

10.44 With regard to the adequacy of the penalties, the Commission is of the view that the current penalties are adequate. While the Commission appreciates the concerns regarding the perceived inappropriateness of imposing fines in relation to AVO matters, it does not favour restricting the penalty to custodial sentences only. However, the concerns regarding the

84. Jane Wangmann, *Submission*.
85. Jane Wangmann, *Submission*.
86. Julie Stubbs, *Submission*.
87. NSW Police Service, *Submission*.
88. WDVCAS Network meeting (5 March 2003).
89. *R v Police* [1999] 2 NZLR 501.
90. *Domestic Violence Act 1992* (NT) s 10.

imposition of inappropriately low penalties should be addressed by judicial and police education programs referred to in Chapter 3.

10.45 The Commission does not favour providing a defence of consent to the offence of breaching an order. The Commission notes that the Western Australian Department of Justice has recommended the removal of consent as a defence.[91] The Model Domestic Violence Laws Report also did not support including consent as a defence to breaching a protection order.[92] In any event, the Commission is of the view that providing such a defence will diminish the effect of an AVO. It is important that an order of the court should not be varied by an agreement between two individuals at will, particularly when a change of circumstances can be dealt with through variation by the court.

10.46 With regard to the offence of aiding and abetting, the Commission agrees with the view that it should not be applicable in relation to the person for whose protection the order is made. There may however be other circumstances when the offence is applicable in relation to persons other than the protected person.

RECOMMENDATION 44

Section 562I should be amended to specify that the defendant bears the onus of proving on the balance of probabilities that he/she did not knowingly contravene a prohibition or restriction specified in the order.

RECOMMENDATION 45

The offence of aiding and abetting in the Crimes Act should not apply in relation to the person for whose benefit the order is made.

91. Western Australia, *Evaluation of the Restraining Orders Act 1997* (Department of Justice, 1998) Recommendation 27.
92. Domestic Violence Legislation Working Group, *Model domestic violence laws* (Report, April 1999) at 215.

11. Procedural issues

- Cross applications
- Subsequent applications
- Evidence
- Service of an AVO
- Appeals

11.1 This chapter considers a range of miscellaneous issues that are of a procedural nature.

CROSS APPLICATIONS

11.2 A cross application occurs where the defendant in an AVO proceeding makes a complaint against the applicant. A cross application, may be genuine where both parties fear each other, where there is no power imbalance between the parties. In such circumstances, the conflict may be better resolved by mediation.

11.3 However, cross applications may also be made by a defendant who has no real cause for fear but who is intent on intimidating the victim or for other tactical reasons. This can undermine any beneficial effect the initial AVO application may have had.

11.4 Cross applications made in such circumstances are a cause for concern as they amount to an abuse of the AVO system. Another concern is that two parties may use different police stations resulting in police making applications on behalf of each party where they are unaware of the other party's application.

11.5 There is very little research done in Australia or overseas on the incidence and use of cross applications. However, the Commission has received many submissions that have addressed various aspects of this issue. One in particular suggests that there is an increasing array of cross applications initiated by the police on the basis that everyone must be treated "equally".[1]

Views in submissions

11.6 One of the preliminary issues considered is how to determine whether a particular application is a cross application. Some cross applications are lodged at around the same time as, and listed together with, the initial application at court. Others are made months after the initial application, but may still be retaliatory. The difficulty in determining the authenticity of a cross application makes it harder to develop a legislative response.[2]

11.7 There appears no doubt that some cross applications are instituted as an abuse of process brought in direct retaliation of a complaint made.[3]
They are often brought as a way of coercing the applicant to withdraw.[4] Vexatious cross applications cause a number of difficulties. For instance, police have a practice of making an application on behalf of whoever gets to them first (assuming the parties both go to the same station). If this is the perpetrator of the alleged violence, then the victim is blocked from having the police bring the action, or from having police prosecutors handle the hearing, and must make

1. Shoalcoast Community Legal Centre, *Submission*.
2. Jane Wangmann, *Submission*.
3. Chief Magistrate, Local Court of NSW, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; *Newcastle consultation*; *Wollongong consultation*.
4. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.

a private application through a Chamber Magistrate.[5] A vexatious cross application can also compromise employment in child-care related fields.[6]

11.8 Unwarranted applications, including cross applications, together with vexatious appeals and repeated attempts to vary or revoke orders can amount to "legalised" harassment of the applicant, a continuing attempt by the defendant to exert power and control.[7] Such behaviour should amount to breach of the original AVO, or be evidence of harassment to justify the granting of another order.[8]

11.9 Some have suggested that there should be a restriction on the right to apply for a cross-application.[9] The Chief Magistrate suggests:

- using the existing discretion to refuse to issue process in APVO matters;
- using the existing provisions for costs;
- imposing filing fees for cross applications;
- using the court's discretion to mandate mediation.[10]

11.10 It has also been suggested that prescribed forms could include trigger questions, such as whether the defendant has applied for an AVO against the applicant in the last 6 months.[11] Alternatively, parties should be required to reveal if other orders are in place or have been sought. It is important that applications are carefully assessed to ensure that the applicant does in fact fear the other party.[12]

11.11 On the other hand, some submissions have expressed the view that not all cross applications are vexatious or involve an exploitation of power imbalances.[13] The simple fact that a complaint is made first does not necessarily mean that it has more validity than a subsequent complaint.[14] Sometimes, albeit uncommonly, the cross application has been made out, in contrast to the original application.[15] Thus, cross applications should not be prevented by legislation.[16]

11.12 Submissions noted the difficulty in legislating to prevent unwarranted cross applications,[17] especially where they are lodged at different courts.[18] Restricting cross-applications could also have an adverse impact on access to AVOs when they are genuinely needed, since it needs to

5. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
6. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
7. Hawkesbury Nepean Community Legal Centre, *Submission*.
8. Hawkesbury Nepean Community Legal Centre, *Submission*.
9. Blue Mountains Community Legal Centre, *Submission*.
10. Chief Magistrate, Local Court of NSW, *Submission*.
11. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Jane Wangmann, *Submission*.
12. Julie Stubbs, *Submission*.
13. Graham Johnson, Magistrate, *Submission*.
14. Jane Wangmann, *Submission*.
15. Graham Johnson, Magistrate, *Submission*.
16. Jane Wangmann, *Submission*.
17. Graham Johnson, Magistrate, *Submission;* Jane Wangmann, *Submission*.
18. Jane Wangmann, *Submission*.

be remembered that not all cross applications are without foundation.[19] As discussed earlier,[20] this is an example where better use of technology to keep courts and police informed would be more effective than any legislative change.[21]

11.13 It must also be noted that the Legal Aid Commission has taken measures regarding cross applications. Prior to the amendments in 2002, the Legal Aid Commission's policy on eligibility for legal aid for ADVO matters provided that aid was available for all applicants, but only available for defendants in exceptional circumstances. Under that policy, legal aid was available to a cross applicant as well as the original applicant, but only available to the original applicant to defend the cross application in exceptional circumstances. The view of Legal Aid staff was that these cross applications were generally without merit, and formed part of a pattern of intimidating and harassing behaviour. Conscious of the growing number of retaliatory applications, the Legal Aid Commission has now adopted a policy which grants aid to the original applicant for the application and to defend any cross application, but does not grant aid to the cross applicant, except in exceptional circumstances. Legal Aid expressed support for any measures which would reduce the number of unmeritorious cross applications which are brought simply to harass and intimidate the applicant further.[22]

11.14 With regard to ADVOs, it has been suggested that more education programs need to provide information to lawyers, magistrates, police and domestic violence workers about the nature and incidence of cross applications, how they impact on victims of domestic violence, and how they tend to be resolved. Police should be educated not to apply on behalf of both parties due to the potential conflict of interest, and guidelines should be developed to assist police to determine who the person in need of protection is and who the perpetrator is.[23]

11.15 It has been also been suggested in a submission[24] that the granting of mutual orders (that is, each party has an order against the other) is a good way of removing any perceived advantage an applicant may have in terms of other legal proceedings, while still providing protection. However, the submission states that research indicates that they are not beneficial and may provide victims with less protection. They may also:

- reinforce myths about domestic violence (for example, that it is a relationship issue; or "mutual" violence);
- fail to place responsibility on the perpetrator of the violence;
- reinforce notions that the victim is somehow to blame for the violence that she has experienced – or in someway provokes it;
- create difficulties in future legal proceedings – particularly in Family Law matters were both applicants now present as "victims";

19. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; South West Sydney Legal Centre, *Submission*; NSW Police Service, *Submission*.
20. See para 3.87.
21. NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; *Wollongong consultation*.
22. Legal Aid NSW, *Submission*.
23. Jane Wangmann, *Submission*.
24. Jane Wangmann, *Submission*.

- create difficulties in enforcement – police may be unsure what to do when both parties allege a breach of their protection order against the other, resulting in police either taking no action or arresting both parties.[25]

11.16 In the USA and in New Zealand the laws providing for protection orders contain a presumption against the making of mutual protection orders as one outcome of a cross application. For example the *Domestic Violence Act 1995* (NZ) provides:

> Where the court grants an application for a protection order, it must not also make a protection order in favour of the respondent unless the respondent has made an application for a protection order and the Court has determined that application in accordance with this Act.[26]

It has been suggested that a provision of this kind should be adopted in New South Wales.[27]

11.17 There is similar concern about the making of mutual interim orders when there are cross applications. In some courts there is a practice of granting both parties interim orders as a measure to "keep the peace" or be seen to be treating each party equally.[28] While some parties consent to each other's interim order, this practice would appear not to satisfy the "necessary or appropriate test" in the light of the objectives of the legislation.[29]

The Commission's views

11.18 In the Commission's view, cross applications do present problems when they are made to retaliate against or intimidate the other party. While this is clearly a form of abuse of the AVO system, the Commission is mindful of the undesirability of limiting general access to the AVO system by attempting to restrict unwarranted cross applications. Indeed the Commission is of the view that the controls imposed on making cross applications should be no different or stricter than those imposed on all other applications.

11.19 Currently, costs are one method of preventing unwarranted cross applications. However, many disputes involve conduct by both parties and, therefore, cross applications can be beneficial as they could lead to mutual compliance.

11.20 Another possibility would be to introduce general disclosure provisions on the Summons as in family and children's matters. If the defendant is required to make a response then that may reduce the need for cross applications because the defendant would have had an opportunity to state his or her case. Including trigger questions on prescribed court forms will, in the Commission's view, be one solution to the problem.

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25. Jane Wangmann, *Submission*.
26. *Domestic Violence Act 1995* (NZ) s 18.
27. Jane Wangmann, *Submission*.
28. For example, see J Hickey and S Cumines, *Apprehended Violence Orders: a survey of magistrates* (Judicial Commission of NSW, Monograph Series 20, 1999) at 70, where in response to a hypothetical involving a cross application, while the majority of magistrates indicated that they would grant mutual interim orders provided they found that the fears of each party were reasonable, some magistrates made reference to preserving the *status quo*.
29. Jane Wangmann, *Submission*.

11.21 The Commission is also satisfied that this is an area that calls for more education and information as well as better technology to keep courts and the police informed of all applications made by parties. Police and courts can be kept informed of cross applications if they use central databases, and in much the same way as 'criminal record' evidence is adduced. However, the Commission believes that only those AVOs or complaints directly between the parties should be referred to. No evidence of AVOs or complaints involving third parties should be adduced by this process, as that would infringe human rights and the presumption of innocence.[30]

RECOMMENDATION 46

Court forms should be drafted to include relevant questions to determine if the applicant is, or has been, a defendant to AVO proceedings between the same parties.

SUBSEQUENT APPLICATIONS

11.22 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 is no provision to stop people from making such subsequent applications. When an application has been dismissed after a hearing and the circumstances have not changed, further applications should not be permitted.

Views in submissions

Should the right to reapply be limited where the application has been dismissed but the circumstances have not changed?

11.23 Many submissions expressed the view that there should be a limitation as it would otherwise be a form of "double jeopardy".[31]
This limitation should be expressly stated by making provision for Clerks of the Court or Chamber Magistrates not to accept applications where circumstances have not changed.[32]
Although there is support for limiting the right to reapply that should only be the case where an application has been dismissed after hearing and the circumstances have not changed.[33]

11.24 Subsequent applications with a series of dismissals are rare but not unknown. Parties should be required to seek leave of the court, and satisfy the court that there is a new circumstance justifying a further complaint against the same defendant within a specified time, for example, 6 months. This would be similar to the limitations placed on applications for

30. However, Police have indicated that to keep police and courts informed of cross applications would require a considerable scoping exercise to determine feasible options for recording of details of applications. It would not be possible to undertake this task without additional funding.
31. Law Society of NSW, Criminal Law Committee, *Submission*; Family Law Reform Association, *Consultation*; Western NSW Community Legal Centre, *Submission*.
32. Western NSW Community Legal Centre, *Submission*.
33. Law Society of NSW, Criminal Law Committee, *Submission*.

variation or revocation where there must be a change of circumstances if the court is to proceed with the application.[34]

11.25 The Chief Magistrate also suggests precluding further application by a party who has defaulted on a prior costs order, unless special circumstances exist.[35]

11.26 However, police officers have reported that some applications are dismissed because the applicant has not attended court. In some cases, the applicant may have good reason not to be present, and the police or applicants' advocate may not be aware of those good reasons. Where there has been no hearing and the application is dismissed, applicants should retain the right to reapply.[36]

11.27 There are other submissions that express the view that no such limitation should apply.[37] They consider it inappropriate to limit applications given that the object of an ADVO is to prevent violence.
The rules concerning vexatious litigants should be used to deal with the problems that arise.[38] Also, victims suffering from low esteem may appear unsure resulting in a failed attempt to obtain an AVO. The legal system must remain open to such victims if they feel able to seek assistance in the future to return to court and not be condemned for the previous attempt.[39]

11.28 While it appears reasonable to propose a restriction on the right to re-apply for an order where an application has already been dismissed and there are no new circumstances, this would not be reasonable if the application had been dismissed solely because the person had not been able to persuade the Magistrate that they needed the order. An application may be dismissed because the applicant does not present her or his case fully, again as a result of intimidation or coercion.[40] Part 15A is beneficial legislation which is designed to benefit a class of persons who face barriers in accessing the protection of the legislation.[41] A victim in this situation should not be barred from receiving the protection of an ADVO because he or she failed on an earlier occasion.[42]

11.29 If subsequent applications are frivolous, the defendant can always seek costs.[43] It is vitally important that access to AVOs is not reduced.[44]
For example, a person from a non English speaking background with a disability may not know about the need to provide evidence from witnesses, or other procedural issues, for instance, or may not have the English language skills to understand the proceedings fully or to explain their circumstances. If the person managed to get assistance to present their case at a later stage, it

34. See Crimes Act s 562F(4A) and para 9.3-26.
35. Chief Magistrate, Local Court of NSW, *Submission*.
36. NSW Police Service, *Submission*; *Orange consultation*; *Bourke consultation*; *Moree consultation*.
37. AVLICC, *Submission*.
38. Julie Stubbs, *Submission*.
39. South West Sydney Legal Centre, *Submission*.
40. Legal Aid NSW, *Submission*.
41. Legal Aid NSW, *Submission*.
42. Legal Aid NSW, *Submission*.
43. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
44. Hawkesbury Nepean Community Legal Centre, *Submission*.

would not be reasonable to preclude them from making a fresh application, even though their circumstances had not changed.[45]

11.30 Others have suggested that the problems of subsequent applications call for better technology to keep courts and police informed rather than legislative change.[46]

The Commission's views

11.31 Technically, it would seem appropriate that subsequent applications should not be entertained where there are no new grounds. However, there are many reasons why an application may be dismissed. It is, therefore, important that the court is not precluded from hearing subsequent applications merely on the basis that a previous application was dismissed and no new grounds exist. Clearly, a case by case assessment is required. The Commission suggests that the court must not dismiss a subsequent application on the face of it, but rather should be satisfied that there are no new grounds. New grounds may not only arise from a change of circumstances but other circumstances that justify a rehearing, such as earlier lack of understanding or lack of capacity to express the circumstances without fear. As in the case of cross applications, asking trigger questions may assist in ascertaining the appropriateness of entertaining the application.

RECOMMENDATION 47

Court forms should be drafted to include relevant questions to determine if the matter has previously been adjudged or withdrawn.

EVIDENCE

Sworn complaint instead of affidavit

11.32 Section 562BB provides that where a person is unable for any good reason to be present in court during proceedings for an interim order, evidence can be provided by affidavit. However, it appears that this provision is rarely used, primarily because the preparation of an affidavit usually requires the skills of a solicitor. It has been suggested that rather than require an affidavit, it should be sufficient for the sworn complaint to be relied on without attendance by the applicant being necessary. Alternatively a police statement should be sufficient.[47]

RECOMMENDATION 48

The Commission recommends that s 562BB(3) (which requires evidence to be tendered by affidavit) be amended to permit use of a sworn complaint or police statement instead.

45. Multicultural Disability Advocacy Association, *Submission*.
46. NSW, Department for Women, *Submission*; *Wollongong consultation*.
47. Redfern Legal Centre, *Submission*.

Children's evidence

11.33 Section 562NA provides that in all AVO proceedings that relate to an order for the protection of a child under the age of 16 years, there is a general presumption against proceedings being heard in public.[48]
Where such proceedings are heard in public, the court can direct any person other than persons who are directly involved in the proceedings to leave the place where the proceedings are being heard during the examination of witnesses.[49]

11.34 The section also provides for children to give evidence in limited circumstances at the discretion of the court. Section 562NA(3) states that in all AVO proceedings, a child "should not be required to give direct evidence about a matter unless the court is of the opinion that in the absence of the child's evidence insufficient evidence about the matter will be adduced". This section applies to all children who are called to give evidence, regardless of whether the child gives evidence in the capacity of a defendant or a protected person to an order, or as a witness to grounds that give rise to the making, variation or revocation of an AVO.

11.35 Current law provides that all children who are called as witnesses in proceedings in relation to a complaint for an AVO should give their evidence in accordance with Part 4 of the *Evidence (Children) Act 1997* (NSW).[50] Among other things, Part 4 provides that children must give their evidence by means of CCTV or similar technology unless the court is satisfied that it is not in the interests of justice for the child's evidence to be given by such means or the urgency of the matter makes their use inappropriate.[51] In the event that CCTV facilities are unavailable, children have a right to alternative arrangements that restrict contact (including visual contact) between the child and any other person by the use of screens and planned seating arrangements.[52]

11.36 Anecdotal information from local courts suggests that children are increasingly being called to give evidence and to be cross-examined. Notwithstanding the protections provided by the *Evidence (Children) Act 1997* (NSW), it is questionable whether these rules of evidence are in fact being applied to young witnesses in AVO proceedings. Children who are already traumatised by physical, sexual or psychological abuse may be exposed to further stress by having to give evidence about matters that most likely involve either or both of their parents. This outcome would appear to be contrary to the spirit of the legislation and harmful to the safety and well being of the very children the AVO regime is meant to protect and assist.

Views expressed in submissions

11.37 Many submissions have commented on this issue. It has been suggested that reforms should institute a total prohibition against children giving evidence in proceedings under Part 15A.[53] It has also been suggested that the court should be given a discretion to dispense with

48. Crimes Act s 562NA(1).
49. Crimes Act s 562NA(2).
50. *Evidence (Children) Act 1997* (NSW) s 17.
51. *Evidence (Children) Act 1997* (NSW) s 18.
52. *Evidence (Children) Act 1997* (NSW) s 24.
53. NSW Department of Community Services, *Submission*.

the rules of evidence when children are involved in AVO proceedings,[54] and, more specifically, that consideration ought to be given to the enactment of a provision that excludes the application of the rule against hearsay in such proceedings.[55] Other submissions, while acknowledging that s 562NA in its current form provides the court with some mechanisms to protect children who give evidence in AVO proceedings, reiterated that the safety and well being of children should be a paramount concern, and so suggested an additional safeguard that all proceedings involving children should be held in closed court.[56]

The Commission's views

11.38 The Commission is of the view that children who have been victims of or witnesses to violence should be spared the further trauma of giving evidence regarding that violence wherever possible. In keeping with the provisions of the *Family Law Act 1975* (Cth) and the *Evidence (Children) Act 1997* (NSW), the Commission believes that Part 15A should be amended to reflect the following:

- The court should have the power to close the court to the public in all AVO proceedings that involve children as witnesses or as protected persons. In the event that proceedings involving children are held in public, the court should have the power to direct any person, other than the parties to the proceedings, to leave the place where the proceedings are being heard during the examination of the witnesses.[57]
- Children should only be permitted to give evidence by affidavit or oral testimony in AVO proceedings by order of the court upon application by any party to proceedings. There should be a presumption against the making of orders that such evidence be given and the court should exercise its discretion under this section by reference to the interests of justice.[58]
- The protections afforded by Part 4 of the *Evidence (Children) Act 1997* (NSW) should be extended to apply to children who give evidence in proceedings regarding the variation and revocation of AVOs as well as those for the making of the order as currently provided.
- The perceived inadequacy of protections for children giving evidence in AVO proceedings largely appears to be an implementation issue. The Commission is of the view that explicit reference to the application of Part 4 of the *Evidence (Children) Act 1997* (NSW) in s 562NA would assist.

54. Chief Magistrate, Local Court of NSW, *Submission*.
55. *Newcastle consultation*.
56. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
57. See FLA s 97(2) as a model.
58. See FLA s 100B as a model.

RECOMMENDATION 49

Section 562NA should be amended to provide the following:

- subsection (1) should state that the section applies to all AVO proceedings that involve children either in the capacity of witnesses or protected persons.
- children should not give evidence in AVO proceedings, whether by way of oral testimony or sworn affidavit, unless the court orders otherwise in the interests of justice.
- children's evidence given under this section should be given in accordance with Part 4 of *Evidence (Children) Act 1997* (NSW).

RECOMMENDATION 50

Consequential amendments should be made to the *Evidence (Children) Act 1997* (NSW) (section 17(b)) to state that Part 4 of the Act applies to all proceedings in relation to AVOs.

SERVICE OF AN AVO

11.39 A number of different documents may be generated during the AVO process which must be served on the defendant (and, in some cases, on the applicant). The four major respects in which service of documents is relevant to AVOs are:

- service of a summons initiating AVO proceedings and requiring a defendant to appear before the court;
- service of a copy of the actual AVO when such an order is granted, varied or revoked by the court;
- service of notice of an application to vary or revoke an AVO; and
- service of a TIO.

11.40 Only some aspects of service are governed by Part 15A. For example, in relation to service of a *notice of an application* to vary or revoke an AVO, Part 15A provides that such variation or revocation will not have effect until a notice of the application is served on the other party.[59] The notice must be served personally on the other party, or in such other manner as the court directs.[60] So far as the summons initiating the AVO procedure is concerned, Part 15A states that where the court is satisfied, by evidence on oath or affidavit, that the summons cannot reasonably be served on the defendant as provided by law, service may be conducted in any manner the court directs.[61]

11.41 The procedure for service of an AVO summons is not governed by Part 15A, but by the general Rules relating to Local Court criminal proceedings.[62] Those Rules provide that service

59. Crimes Act s 562F(5) and (6).
60. Crimes Act s 562F(7).
61. Crimes Act s 562AF(6) and s 562AJ(6).
62. *Local Courts (Criminal and Applications Procedure) Rule 2003* (NSW). It is not clear whether the Rules apply to service of an application to vary or revoke an AVO. However,

may be effected by handing a copy of the summons to either the defendant, or to a person at the defendant's usual place of residence or business who is apparently of or above the age of 16 years.[63] If, on tender of the summons to a person, the person refuses to accept it, the summons may be served by putting it down in the person's presence after the person has been told of the nature of the notice. If the defendant fails to respond to the summons and does not attend court, an interim AVO may be made in his or her absence.[64]

11.42 The Commission considers the provisions of Part 15A relating to service of a summons to be adequate. Since the procedural aspects of service are not governed by Part 15A, they are not within the scope of this review. The provisions regarding variation and revocation of AVOs, including service of an application to revoke or vary, are discussed in Chapter 9.[65]

11.43 This section is primarily concerned with service on a defendant of a copy of an AVO, or the variation or revocation of an order after it has been made by the court.[66] The relevant provision is s 562J. Service of an AVO is one of the most crucial elements in the effectiveness or otherwise of an order, since an applicant will not be afforded any protection under the order, and defendants cannot be charged with contravention of an AVO, unless the order has been properly served.

11.44 When making, varying or revoking an AVO, a copy must be served on the defendant before the AVO will have any effect. If the defendant is present in court when the order is made, it can be served on him or her personally at that time,[67] or a copy of the order may be sent by post to the defendant or such other person as the clerk of the court thinks fit.[68] If the order is made ex parte, the clerk of the court must arrange for a copy of the AVO to be served on the defendant personally by a police officer, or such other person as the clerk thinks fit.[69] Section 562J further provides that service of a copy of the order may be effected in such other manner "as the court directs".[70] AVOs are usually served on defendants by police or another person, either by delivering it personally, or, if the defendant cannot be conveniently located, by leaving it with someone else at the defendant's last or most usual place of residence.[71]

11.45 This provision can be contrasted with that pertaining to service of a copy of a TIO on a defendant. In relation to TIOs, a copy of the order is required to be served personally on the

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the Commission has been advised by Local Courts that court staff have been instructed to follow the same provisions as for service of the original summons.

63. *Local Courts (Criminal and Applications Procedure) Rule 2003* (NSW) cl 6.
The Rules also provide that if the defendant is an inmate of a correctional centre, service is effected by handing a copy of the summons to the officer in charge of the correctional centre, or by sending it by post or facsimile or other electronic communication to the officer in charge of the correctional centre.
64. Crimes Act s 562BB(2).
65. See para 9.3-9.26.
66. However, the comments made by the Commission relating to substituted service have application to any document served in AVO proceedings.
67. Crimes Act s 562J(2).
68. Crimes Act s 562J(2AA).
69. Crimes Act s 562J(2A).
70. Crimes Act s 562J(2B).
71. Local Court NSW, *Submission*.

defendant by a police officer as soon as practicable after it is made.[72] However, police have additional powers of arrest and detention under Part 15A for the purpose of serving the TIO on the defendant. When applying for a TIO, police are empowered to direct a defendant to remain at the scene of the incident, and, if they refuse, police may arrest and detain the defendant at the scene, or may take the defendant to a police station until the order is made and served.[73]

11.46 In DP 45, the Commission asked whether the current provisions in s 562J for effecting service of an AVO, or the variation or revocation of such an order, are adequate.

Views in submissions

Problems with serving AVOs

11.47 Failure to serve AVOs on a defendant emerged in submissions and consultations as one of the major issues hampering the effectiveness of AVOs. The following three main problems with service were identified:

1. defendants avoiding attempts at service;

2. delays in affecting service caused by administrative, procedural or perceived attitudinal problems within the police service or the court system; and

3. insufficient or inadequate police powers to carry out service effectively.

11.48 Service of interim orders and final orders remains problematic and time consuming for NSW Police, representing a considerable workload. Police informed the Commission that while people other than police may serve an AVO, in practice, police continue to serve the majority of AVOs.[74] Obviously, where a defendant cannot be located, it makes the task of serving an AVO more challenging. Often, defendants have moved from their last known address, and the police are unable to find them.[75]
The police also told the Commission that some defendants often go to great lengths to avoid service.[76]

11.49 The view was expressed in submissions and consultations that there were extensive delays in effecting service.[77] The common perception is that police take too long to serve an AVO,[78] and that it is not considered a significant enough police priority. Redfern Legal Centre reported that they have found that it is not uncommon for many weeks or even months to pass before service is effected.[79] The Commission also heard that there are administrative problems in court registries that affect service. For example, orders can take some time to be forwarded to

72. Crimes Act s 562H(8).
73. Crimes Act s 562H(12).
74. NSW Police Service, *Submission*.
75. *Moree consultation*.
76. NSW Police Service, *Submission*.
77. Margrette Young, *Submission*.
78. *Bourke consultation*; *Moree consultation*; *Orange consultation*.
79. Redfern Legal Centre, *Submission*.

the appropriate police station.[80] It also appears to be difficult to ascertain whether service has occurred.[81]

11.50 Apart from criticism concerning delays in serving AVOs, some submissions conveyed criticism of police efforts to effect service. After an initial failed attempt to serve, there is a reported unwillingness on behalf of some police to pursue other methods of service.[82] It was asserted that orders for substituted service are not being sought by police.[83]
Other submissions noted that it is also sometimes difficult and time consuming to obtain alternative service orders.[84] A sworn statement must be made as to prior attempts at service,[85] and some Magistrates require the applicant to attend court several times or ask for some evidence of evasion on behalf of the defendant.[86] Nor are warrants for the arrest of the defendant used much as an alternative.[87]

11.51 An issue raised by police in several consultations is their lack of powers to assist them to effect service properly. For example, police cannot ask for identification evidence from a defendant. Consequently, where an attempt at service is made and the defendant claims to be someone else, police cannot demand that the defendant produce identification. Nor do police have the power to arrest and detain a person for the purpose of serving an interim or final AVO as they do with a TIO.[88]

Suggestions in submissions

11.52 Service needs to be treated as a priority by police and courts,[89] with more resources being devoted to ensure service is prompt and effective.[90]
A strong view was expressed that the procedures for effecting service should be made clearer and more flexible. For example, there should be one attempt at serving *ex parte* orders personally on a defendant, then it should be sufficient to serve by registered post to the last known address of the defendant,[91] or to the defendant's workplace or home of a family member.[92] Other means of serving AVOs, such as through Centrelink, were also suggested.[93]

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80. Redfern Legal Centre, *Submission*.
81. Redfern Legal Centre, *Submission*.
82. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; *Newcastle consultation*.
83. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*; Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*; *Newcastle consultation*.
84. South West Sydney Legal Centre, *Submission*.
85. Hawkesbury Nepean Community Legal Centre, *Submission*; Legal Aid NSW, *Submission*; Redfern Legal Centre, *Submission*; *Wollongong consultation*.
86. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
87. AVLICC, *Submission*.
88. NSW, Department for Women, *Submission*; *Newcastle consultation*; *Wollongong consultation*.
89. Jane Wangmann, *Submission*.
90. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
91. Blue Mountains Community Legal Centre, *Submission*; *Wollongong consultation*.
92. Blue Mountains Community Legal Centre, *Submission*; *Orange consultation*.

Where a defendant is not present in court but is represented by a solicitor, service on the solicitor should be deemed sufficient.[94] In relation to service on Aboriginal defendants living in rural areas, it was suggested that authorised Aboriginal Liaison Officers or DVLOs may be useful in finding the defendants and explaining the orders to them.[95]

11.53 The view was also expressed that Part 15A should give further guidance to the court on the circumstances when substituted service would be appropriate.[96] For example, the legislation could provide that an order for substituted service may be made if the applicant can provide information to the court about attempted service by the police if the police are not available to provide this evidence.[97]

11.54 Some submissions also asserted the need to consider the defendant's perspective. While the failure to serve orders can lead to problems for the protected person, the fundamental principles of law should not be overlooked, and without proof of service or attendance in court when orders are made, a defendant should not be held liable for breach.[98] Where the defendant is a person with a disability from a non-English speaking background, service should be carried out so that the person understands either what the documents mean or where they can get assistance to understand what they mean, for example, through interpreter assistance.[99]

11.55 A number of submissions expressed the view that police should be given more power under Part 15A to arrest and detain defendants for the purpose of serving interim and final AVOs, similar to the powers in relation to service of TIOs.[100] Police say it is frustrating when a defendant fails to appear at a hearing, so the order cannot be served at that time, and then the officer sees the defendant later that day but does not have a copy of the order with which to serve the defendant. There is currently no power to arrest the defendant for the purpose of taking him or her back to the police station to serve the order.[101] Greater use of warrants was also suggested to the Commission.[102]

11.56 Another view expressed in submissions was that a statutory time limit for service should be imposed. If that time limit is not met, police must show reasonable cause for non-service, and substituted service must be applied for.[103] A time limit of 48 hours was suggested.

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93. *Orange consultation*.
94. Redfern Legal Centre, *Submission*.
95. *Orange consultation*; *Moree consultation*.
96. Legal Aid NSW, *Submission*; South West Sydney Legal Centre, *Submission*.
97. Legal Aid NSW, *Submission*.
98. Mt Druitt and Area Community Legal Centre, *Submission*.
99. Multicultural Disability Advocacy Association, *Submission*.
100. Erin's Place for Women and Children, *Submission*; NSW, Department for Women, *Submission*; *Wollongong consultation*.
101. Erin's Place for Women and Children, *Submission*; *Wollongong consultation*.
102. Erin's Place for Women and Children, *Submission*. Warrants are issued in less than 1% of AVO applications: unauthorised and unaudited figures provided by Local Courts to the Commission on a confidential basis.
103 Redfern Legal Centre, *Submission*; *Moree consultation*; *Bourke consultation*; *Gosford consultation*; *Orange consultation*.

The Commission's views

11.57 Failure to serve an AVO has significant consequences the most serious of which is that the orders never take effect, leaving the applicant vulnerable and without protection. As such, it undermines the whole AVO process. If the defendant knows about the failed attempts at service it may also aggravate the violence and give the impression that the behaviour is being condoned. Failure to serve an AVO can also contribute to the feelings of disempowerment of the applicant. The Commission has heard reports of many hearings having to be adjourned due to the failure to serve,[104] forcing the applicant to keep returning to court. Ironically, this often happens in the most serious cases of violence and abuse, making it harder to enforce AVOs in these cases.[105]

11.58 The priority given by police and the courts to serving AVOs and applying for and granting orders of substituted service is largely an implementation issue, and as such is discussed in Chapter 3. However, some legislative change may be made to improve the effectiveness of serving an AVO in circumstances where the defendant is not present in court. The Commission is of the view that the best practice is for every effort to be made to locate the defendant in order to serve a copy of the order on him or her personally. Service effected in this manner makes it clear that the applicant has the protection of the AVO, and removes the capacity for the defendant to claim that he or she had no knowledge of the AVO in order to avoid prosecution for breaching the order. Serving an order personally may also help to ensure that the defendant understands the nature and seriousness of the AVO. This would be particularly beneficial in cases where the defendant is from a non-English speaking background or has a disability.

11.59 However, there will be situations where the defendant cannot reasonably be located. In that case, the court should be able to direct that an alternative means of service be carried out. The alternative means could include those set out in the *Local Courts (Criminal and Applications Procedure) Rule 2003* (NSW). A direction for substituted service should only be made where attempts to effect personal service have failed. Until the court makes such a direction, the police should remain under an obligation to serve the AVO personally. If the court considers it to be appropriate, a time period for effecting personal service may be specified, after which an application for substituted service must be made.

11.60 There will also be situations where police are able to locate the defendant at a time when they do not have a copy of the order with them and so are unable to serve it on the defendant. In the latter situation, the Commission recommends that police should be given a limited power under s 562J to arrest and detain the defendant for the purpose of serving an AVO. That power should be limited to arrest and detention at the scene where the officer observes the defendant, or for taking the defendant to the nearest police station. It should only be used after all other reasonable attempts to serve the AVO have failed, or where the defendant refuses to accompany the police officer willingly. This would bring s 562J more into line with s 562H(8) concerning TIOs.

11.61 The Commission understands that the NSW Police are currently developing proposals for streamlining and improving service of a range of court documents. One such proposal is the

104. Hawkesbury Nepean Community Legal Centre, *Submission*.
105. *Newcastle consultation*; *Wollongong consultation*.

development of a Field Court Notice Book which would be used to serve already existing, but unserved, court notices on a person of interest. When police come in contact with a person, they would do a background check and establish that the person in question has an unserved Court Notice. Police would then obtain relevant details via the radio, fill in a Notice using the Field Court Notice Book, and then serve this upon the person in question. Police would then update the computerised police database ("COPS") stating that the person has been served.[106] Should such a system be implemented, a defendant would only need to be detained for a few minutes.

RECOMMENDATION 51

Section 562J should be amended to provide that every reasonable attempt must be made to serve a copy of an AVO, or a variation of an AVO, personally on a defendant. The court should be able to direct that an alternative means of service may occur only after all reasonable attempts to serve the AVO personally on the defendant have failed.

RECOMMENDATION 52

Section 562J should grant a limited power to police to arrest and detain a defendant for the purpose of serving a copy of an interim or a final AVO, or a variation of an AVO, personally on that defendant. That power should only extend to arresting and detaining the defendant for the purpose of serving the order:

- at the place where the defendant happens to be when confronted by the police officer; or
- in order to take him or her to the nearest police station.

The power should also apply where the defendant refuses to remain at the scene referred to above or to accompany the officer to the nearest police station.

APPEALS

11.62 Section 562W and s 562WA deal with local court review and District Court appeals regarding AVOs.[107]

Local court review

11.63 If a local court makes an AVO *ex parte*, the defendant may apply to the court for a review of that decision by lodging a written application for an annulment of the order with a registrar of a local court.[108]

106. NSW Police Service, *Submission*. The Commission also understands that this proposal is being endorsed and recommended by the Ministerial Inquiry into Police Processes (2003) being conducted by Michael Drury.
107. Note that the provision was recently amended by the *Justices Legislation Repeal and Amendment Act 2001* (NSW), which came into force on 7 July 2003.
108. Crimes Act s 562WA(1). The procedure for review follows that set out in Part 2 of the *Crimes (Local Courts Appeal and Review) Act 2001* (NSW).

An application for review must be made within two years after the order is made,[109] and can only be made once.[110] A local court must grant an application for an annulment if it is satisfied the defendant was unaware of the original court proceedings until after the proceedings were completed, was otherwise hindered from taking part in the original proceedings by accident or misadventure, or it is in the interests of justice to do so.[111]

11.64 The granting of an annulment is significant because it has the effect of making the order void *ab initio*. Thus, upon annulment the AVO ceases to have effect and any enforcement action previously taken, such as restrictions like the prohibition on the possession of firearms, will be reversed.[112] In contrast, a mere revocation of an AVO does not have such wide-ranging effects.

11.65 Where the court grants an annulment of an order, there is nothing to hinder the complainant from lodging another application for a new AVO. In such instances, the local court is to deal with the new application afresh, as if no order had been previously made.[113]

11.66 Although s 562WA(1) makes it clear that only defendants to an AVO can seek an annulment, the issue has been raised as to whether the right should be extended to the person whose complaint gave rise to the AVO.[114] The situation contemplated is where a complainant, by reason of accident, misadventure, illness or such like fails to present at court for the hearing of the AVO proceedings. This failure to attend may mean that, in the opinion of the judicial officer, there is insufficient evidence to warrant the making of an AVO, resulting in an order dismissing the complaint. This would result in a new application for an AVO needing to be made.

District Court Appeals

11.67 The defendant to an AVO can appeal as of right to the District Court against the making of an AVO.[115] If the order was made by consent, the defendant can only appeal by leave of the court.[116] An AVO applicant whose complaint is dismissed by the court also has a right of appeal against that decision in the District Court.[117] In all cases, the person has 28 days to lodge the appeal.[118]

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109. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 4(2)(a).
110. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 4(3). However, the section provides that further applications for annulment in respect of the same matter may be made by leave of the court.
111. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 8.
112. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 10.
113. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 9.
114. This concern has been raised directly with the Commission by an officer of Local Courts in a telephone conversation on 14 July 2003.
115. Crimes Act s 562WA(2).
116. Crimes Act s 562WA(3).
117. Crimes Act s 562W.
118. Crimes Act s 562W(2) and *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 11(2). Section 13(1) provides that an appeal can be brought outside the 28 day period in certain circumstances, such as in the interests of public policy: *Stanton v Jordan* (NSW, Supreme Court, No 13001/1997, Donovan AJ, 22 April 1998, unreported).

Procedure for hearing appeals

11.68 Appeals are heard in accordance with Part 3 of the *Crimes (Local Courts Appeal and Review) Act 2001* (NSW).[119] However, since an AVO appeal is treated as a "conviction or a sentence" for the purposes of Part 3, the procedure by which the appeals are heard is unclear. Whether an AVO is treated as a sentence or as a conviction under Part 3 has important procedural implications.

11.69 An appeal against sentence is held by way of re-hearing of evidence given in the local court or children's court proceedings.[120] The appellant may also give fresh evidence.[121] An appeal against conviction, on the other hand, is by way of review of the transcripts of evidence from the original proceedings.[122] In limited circumstances, fresh evidence may be given with leave of court.[123] The court may also direct evidence to be given in person, but only if the order relates to an offence involving violence against that person and the court is satisfied that there are special reasons why, in the interests of justice, the person should be called;[124] or in any other case, if there are substantial reasons why, in the interests of justice the person should give evidence.[125]

11.70 In appeals brought by AVO applicants, the District Court may, without further hearing admit into evidence any evidence that was admitted in the original proceedings.[126] Further evidence can only be given with leave.[127]

11.71 Parties to an AVO may also appeal as of right against an order made by the local court or the children's court varying or revoking an AVO or refusing to vary or revoke an AVO.[128]

Presumption against stay of operation of the order

11.72 The lodging of a notice of appeal under s 562WA is presumed not to have the effect of staying the operation of the order concerned.[129] However, upon application by the defendant, the original court that made the order may decide to stay the operation of the order until the appeal is finally determined, if it is satisfied, having regard to the need to ensure the safety of the protected person or any other person, that it is safe to do so.[130]

119. Crimes Act s 562WA(2) and s 562WA(3).
120. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 17.
121. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 17.
122. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 18(1).
123. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 19(1)(a).
124. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 19(1)(b).
125. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 18(2).
126. Crimes Act s 562W(3).
127. Crimes Act s 562W(4).
128. Crimes Act s 562WA(4).
129. Crimes Act s 562WB(1).
130. Crimes Act s 562B(2) and s 562B(3).

Appeals against costs

11.73 Under the previous s 562WA, any party to AVO proceedings could appeal to the District Court against an order for costs.[131] The new s 562WA does not provide for appeals of this nature. Although appeals against costs awarded in AVO proceedings were not lodged very often, they did occur and often involved large sums of money. Local Courts has raised the omission of this ground of appeal as a concern.[132]

Views in submissions

11.74 There were many submissions that expressed the view that the appeals process does not give rise to any problems.[133] It was also suggested that few orders are appealed,[134] possibly due to the large number of unrepresented parties.[135]

11.75 On the other hand, some have stated that the appeals process is confusing and complex. They suggest that a right of appeal should be available only after the matter has been heard on its merits. If the proceedings were anything short of a full hearing in the first instance, then there should be a re-hearing in the Local Court before going on appeal[136]

11.76 Currently, there is no provision for appeal to the District Court from the making or refusal of an interim order. This is considered appropriate.[137] There is also a view that the applicant should have the right to appeal to the District Court against a Magistrate's refusal to include conditions sought by the applicant in an AVO that is granted.[138]

The Commission's views

11.77 The Commission is not convinced that the concern discussed above regarding the need to extend the right to seek an annulment to complainants warrants an amendment. The Commission is of the view that, in such circumstances, the applicant could just as simply lodge a new application for an AVO. Annulment of the order dismissing the person's complaint would serve no useful purpose for the complainant given that, in any event, a new application for an AVO will have to be made.

11.78 The Commission has recommended that authorised third parties should be allowed to make[139] and vary[140] applications on behalf of people with an intellectual disability, people under

131. See Part 5A of the now repealed *Justices Act 1902* (NSW) s 117 and s 120.
132. In a telephone conversation (17 July 2003).
133. NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Graham Johnson, Magistrate, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
134. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
135. Hawkesbury Nepean Community Legal Centre, *Submission*.
136. *Gosford consultation*.
137. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
138. Legal Aid NSW, *Submission*.
139. See Recommendation 18 and the preceding discussion at para 6.2-6.21.
140. See Recommendation 36.

Guardianship orders and people with certain physical disabilities. Consequential amendments should also be made to s 562WA to enable authorised third parties to bring an appeal and to s 562N to allow the court to award costs to authorised third parties.

11.79 With regard to appeals against costs, the Commission is of the view that, although anecdotal information suggests that few parties to AVOs bring an appeal solely on the basis of an award of costs, there is a possibility that some injustice may occur if there is no statutory provision. As such, the Commission recommends that a right to appeal on this basis should be inserted in s 562WA.

RECOMMENDATION 53

Section 562WA should be amended to:

(a) enable authorised third parties to bring an appeal; and

(b) provide a right to appeal against an award for costs.

RECOMMENDATION 54

Section 562N should be amended to allow the court to award costs to authorised third parties.

12. Stalking and intimidation

- Background
- Current law
- Views on effectiveness

12.1 An AVO may be granted to stop or prevent behaviour amounting to stalking or intimidation, but falling short of actual physical violence.
Every AVO the court grants must, unless otherwise stated, specifically prohibit the defendant from stalking or intimidating the applicant.[1]
There will be occasions, however, where redress under the criminal law is appropriate to punish persistent, unwanted attention that causes fear of violence. In some cases, that persistent attention may amount to a breach of the criminal law in itself, for example, knowingly sending a letter to someone containing threats to kill or harm that person.[2] In other cases, actions may not be criminal in themselves, but, when viewed in context, may create a fear of violence or harm.

12.2 The stalking and intimidation provisions in s 562AB of the Crimes Act were introduced in an attempt to bridge that perceived gap between AVOs and the criminal law. This accounts for their location in Part 15A, despite the fact that they are substantive criminal offences and Part 15A deals for the most part with civil processes. This chapter examines the adequacy of the elements which constitute the criminal offence of stalking and intimidation. As such, the terms "accused" and "victim" are used to describe the perpetrator and the target of the offence.

BACKGROUND

12.3 Stalking has only been recognised as a criminal offence relatively recently. In 1991, California became the first jurisdiction to create an offence of stalking following the stalking murder of an actress by an obsessed fan in 1989.[3] All Australian jurisdictions enacted anti-stalking legislation between 1993 and 1996,[4] and there is similar legislation in the United Kingdom, Ireland, Canada and New Zealand.[5]

12.4 In NSW, the stalking and intimidation offence originally only applied to people who were in a domestic relationship.[6] In 1994 this limitation was removed, recognising that stalking or intimidation can occur regardless of whether or not the parties are in a domestic relationship.[7] 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

1. Crimes Act s 562BC.
2. Such behaviour would contravene Crimes Act s 31.
3. See California *Penal Code* s 646.9. 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 US Department of Justice, *Stalking and domestic violence: the third annual report to Congress under the Violence Against Women Act* (1998).
4. See *Crimes Act 1900* (ACT) s 34A; *Criminal Code* (NT) s 189; *Crimes Act 1900* (NSW) s 562AB; *Criminal Code* (Qld) s 359A; *Criminal Law Consolidation Act 1935* (SA) s 19 and s 19AA; *Criminal Code* (Tas) s 192; *Crimes Act 1958* (Vic) s 21A; *Criminal Code* (WA) s 338D and s 338E.
5. See *Protection from Harassment Act 1997* (UK); *Non-Fatal Offences Against the Person Act 1997* (Ireland) s 10; *Criminal Code*, RSC 1985, c 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: Law Reform Commission of Hong Kong, *Stalking* (Report, 2000).
6. *Crimes (Domestic Violence) Act 1993* (NSW).
7. *Crimes (Threats and Stalking) Amendment Act 1994* (NSW).

aim to arouse fear of physical violence.[8]
As amended, it is an offence to cause fear of "physical or mental harm".[9]

CURRENT LAW

New South Wales

12.5 In addition to provisions relating solely to AVOs, Part 15A also creates the substantive offence of 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.[10]

12.6 "Intimidation" is defined more broadly as:

(a) conduct amounting to harassment or molestation,[11] 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.[12]

12.7 A person may be charged with either stalking or intimidation, or both.[13] An offence of stalking or intimidation will have been committed under s 562AB of the Crimes Act if the accused has done an act falling within one or both of the above definitions, with the "intention" of causing another person "to fear physical or mental harm".[14] It is not necessary to prove that the accused intended to cause fear, or that the victim *actually* feared physical or mental harm.[15] It is sufficient for the prosecution to satisfy the court beyond a reasonable doubt that the person "*knows* the conduct is likely to cause fear in the other person".[16] The offence includes causing a person to

8. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3676.
9. *Crimes Amendment (Apprehended Violence) Act 1999* (NSW).
10. Crimes Act s 562A(1).
11. Harassment and molestation are not specifically defined in the Crimes Act. However, Part 15A provides that for the purpose of making either an ADVO or an APVO, conduct may amount to harassment or molestation of a person 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 person: Crimes Act s 562AE(3) and s 562AI(3).
12. Crimes Act s 562A(1).
13. See eg, *R v Strong* [2003] NSWCCA 123, where the appellant received separate sentences for intimidation and for stalking.
14. The offence carries a penalty of imprisonment for up to 5 years, or a fine of 50 penalty units, or both: Crimes Act s 562AB(1).
15. Crimes Act s 562AB(4).
16. Crimes Act s 562AB(3).

fear harm to another person with whom he or she has a domestic relationship,[17] covering, for example, conduct which causes a person to fear for the safety of his or her child.

12.8 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.[18] 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".[19]

Other jurisdictions

12.9 Stalking provisions in other jurisdictions have different requirements for the physical and mental elements comprising the offence of stalking. For example, some jurisdictions require the accused to have engaged in a course of conduct before the offence will lie.[20] Some jurisdictions also have quite expansive, but non-exhaustive, lists of the type of conduct that will amount to stalking or harassment, including:

- following,[21] loitering near,[22] or approaching[23] a person;
- loitering near, watching, approaching or entering a place where the victim lives, works or visits;[24]
- keeping the victim under surveillance;[25]
- telephoning, sending electronic messages to, or otherwise contacting, the victim or any other person;[26]

17. Crimes Act s 562AB(2).
18. Crimes Act s 562A(2).
19. *R v Atroushi* [2001] NSWCCA 406 at para 33 (Carruthers AJ).
20. In Victoria, the offender must engage in a "course of conduct": *Crimes Act 1958* (Vic) s 21A(2)(a). The Australian Capital Territory, the Northern Territory and the United Kingdom require the particular conduct to have occurred on at least two separate occasions: *Crimes Act 1900* (ACT) s 34A(2); *Criminal Code* (NT) s 189(1); *Protection from Harassment Act 1997* (UK) s 7(3). The Queensland legislation requires the conduct to have been engaged in more than once. However, one act may constitute stalking if the conduct is protracted: *Criminal Code* (Qld) s 359B. In New Zealand, the offence of harassment applies if an act has occurred on at least two separate occasions within a period of 12 months: *Harassment Act 1997* (NZ) s 3. In California, harassment is defined in terms of a course of conduct constituting "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose: California *Penal Code* s 646.9(f).
21. *Criminal Code* (Qld) s 359B(c)(i); *Crimes Act 1958* (Vic) s 21A(2)(a); *Crimes Act 1900* (ACT) s 34A(2)(a); *Criminal Code* (NT) s 189(1)(a)(i); *Harassment Act 1997* (NZ) s 21(1)(b).
22. *Criminal Code* (Qld) s 359B(c)(i).
23. *Criminal Code* (Qld) s 359B(c)(i); *Crimes Act 1900* (ACT) s 34A(2).
24. *Crimes Act 1900* (ACT) s 34A(2)(b); *Criminal Code* (NT) s 189(1)(a)(ii); *Criminal Code* (Qld) s 359B(c)(iii); *Crimes Act 1958* (Vic) s 21A(2)(c); *Harassment Act 1997* (NZ) s 21(1)(d).
25. *Crimes Act 1900* (ACT) s 34A(2)(c); *Criminal Code* (NT) s 189(1)(a)(iv); *Crimes Act 1958* (Vic) s 21A(2)(f); *Harassment Act 1997* (NZ) s 21(1)(d).

- interfering with,[27] threatening[28] or hiding[29] property in the possession of the victim;
- giving offensive material to the victim or any other person, or leaving it where it will be found by, given to or brought to the attention of, the victim or another person;[30]
- stopping, confronting or accosting a person in a public place;[31] or
- forcibly hindering or preventing any person from working at or exercising any lawful trade, business or occupation.[32]

12.10 Some legislation specifically excludes certain conduct from the scope of the definition of stalking or harassment to ensure that legitimate activity is not inadvertently criminalised. 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.[33] In Tasmania and Victoria, it is not an offence if the person is performing his or her official duties,[34] while in Western Australia, it is a defence that the accused acted with lawful authority or reasonable excuse.[35]

12.11 So far as the *mens rea* element is concerned, legislation in other jurisdictions requires an intention by the accused either to cause harm, to intimidate, or to arouse fear or apprehension of a threat to safety, or to frighten the victim.[36] In some States, the prosecution must prove that the accused actually had such an intention.[37] In other States, it is sufficient to prove intent if the accused knows, or ought reasonably to know in the circumstances, that his or her conduct would be likely to cause harm or arouse fear in the victim.[38] In South Australia, an offence is committed where the accused is recklessly indifferent as to whether his or her actions generate fear in the victim.[39] It is further provided in Queensland that it is immaterial whether the

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26. *Crimes Act 1958* (Vic) s 21A(2)(b); *Crimes Act 1900* (ACT) s 34A(2)(f); *Criminal Code* (Qld) s 359B(c)(ii).
27. *Crimes Act 1958* (Vic) s 21A(2)(d); *Criminal Code* (NT) s 189(1)(a)(iii); *Crimes Act 1900* (ACT) s 34A(2)(d); *Harassment Act 1997* (NZ) s 21(1)(c).
28. *Criminal Code* (Qld) s 359B(c)(vii).
29. *Harassment Act 1997* (NZ) s 21(1)(c).
30. *Crimes Act 1958* (Vic) s 21A(2)(e); *Criminal Code* (Qld) s 359B(c)(v); *Crimes Act 1900* (ACT) s 34A(2)(e).
31. *Harassment Act 1997* (NZ) s 21(1)(e).
32. *Harassment Act 1997* (NZ) s 21(2).
33. *Criminal Code* (Qld) s 359D.
34. *Criminal Code* (Tas) s 192(3); and *Crimes Act 1958* (Vic) s 21A(4).
35. *Criminal Code* (WA) s 338E(3).
36. *Criminal Code* (Qld) s 359B(a); *Crimes Act 1958* (Vic) s 21A(2); *Crimes Act 1900* (ACT) s 34A(1); *Criminal Law Consolidation Act 1935* (SA) s 19(1)(b); *Criminal Code* (NT) s 189(1)(b); *Criminal Code* (WA) s 338E; *Harassment Act 1997* (NZ) s 21(1); California *Penal Code* s 646.9(a).
37. See eg *Crimes Act 1900* (ACT) s 34A(1) and *Criminal Code* (NT) s 189(1)(b).
38. *Crimes Act 1958* (Vic) s 21A(3); *Criminal Code* (Qld) s 359B(d) and s 359C(4); *Criminal Code* (WA) s 338E(2). Note that in NSW there is no reasonable circumstances test: see para 12.5-12.8 above.
39. *Criminal Law Consolidation Act 1935* (SA) s 19(1)(b).

accused intended the victim to be aware of the stalking, or if the accused mistook the identity of the victim.[40]

12.12 The requisite mental state of the victim also differs between jurisdictions. In Victoria, for example, the victim must have actually feared for his or her safety in order to ground the offence.[41] Legislation in other States is silent as to the mental state of the victim,[42] or, as in New South Wales, explicitly provide that it is not necessary to prove the effect of the accused's actions on the victim for the offence to be established.[43]
Western Australia has a two-tiered approach: where the accused acts in a manner that could reasonably be expected to intimidate, the victim must have in fact felt intimidated before an offence can be made out.[44]
However, if it can be proven that the accused actually intended to intimidate the victim, the mental state of the victim is irrelevant.[45]

VIEWS ON EFFECTIVENESS

12.13 In DP 45, the Commission asked how effective the stalking and intimidation provisions were, whether the "intent" provision was appropriate, and whether there should be any defences or exclusions.

Effectiveness of current provisions

12.14 Some submissions expressed the view that the current provisions were effective, striking the appropriate balance between conduct that amounts to nuisance and behaviour which is criminal.[46] It was also considered that the stalking and intimidation offences fill an important gap between the civil regime of AVOs and criminal offences involving actual personal violence.[47] Intimidation and stalking can be as terrifying as physical violence, and should remain as a substantive criminal offence.[48]
To emphasise this, it was suggested that the stalking offence should be included in the same place as other personal violence offences in the Crimes Act, since its location in Part 15A could be seen to lack the requisite prominence.[49]

40. *Criminal Code* (Qld) s 359C(1).
41. *Crimes Act 1958* (Vic) s 21A(2). Note, however, that this provision will be repealed by the *Crimes (Stalking) Bill 2003* (Vic), which no longer requires proof of the actual effect of the stalking on the victim, should that legislation proceed through the Victorian Upper House.
42. *Criminal Law Consolidation Act 1935* (SA) s 19; *Criminal Code* (NT) s 189; *Harassment Act 1997* (NZ) s 21.
43. *Crimes Act 1900* (ACT) s 34A(3); *Criminal Code* (Qld) s 359C(5).
44. *Criminal Code* (WA) s 338E(2).
45. *Criminal Code* (WA) s 338E(1).
46. AVLICC, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Law Society of NSW, Criminal Law Committee, *Submission*.
47. Chief Magistrate, Local Court of NSW, *Submission*.
48. Hawkesbury Nepean Community Legal Centre, *Submission*.
49. NSW Police Service, *Submission*.

12.15 The Chief Magistrate is of the view that the provisions do not appear to have caused difficulties for the prosecution proving the physical and mental elements of the offence, nor unfairness to defendants, and is increasingly used to protect police officers from intimidating behaviour.[50] However, other submissions expressed the view that the onus of proving the offence was too high given its shadowy nature, resulting in the stalking and intimidation provisions hardly being used.[51]

Definitions of stalking and intimidation

12.16 A number of submissions noted the need for the definitions of stalking and intimidation to include specific reference to technologically-assisted methods of contact, such as approaches made by email and mobile telephone text messaging. The Commission heard during consultations that some people do not understand that contact of this type can amount to stalking or intimidation.[52] The Chief Magistrate also suggested that the definition of stalking should make specific reference to the frequenting of schools or child care centres.[53]

Current test of intention

12.17 Some considered that the current requirement, whereby the prosecution must prove beyond reasonable doubt that the accused knew that his or her conduct was "likely to cause fear" in the other person, was appropriate.[54] However, others were of the view that that test is too narrow:[55]

> Often a stalker does not intend to cause fear of physical injury or psychological damage. Often the intention is to maintain control over an ex-partner or gain attention. Following a person about, watching them or repeatedly telephoning or writing to the person may not be done with the intention of causing physical or mental harm but may have a devastating effect on the person. It may be appropriate to amend the legislation to provide that it is an offence to stalk or intimidate a person with the intention of arousing apprehension in the victim for his or her safety.[56]

12.18 Others suggested that the test of "likely to cause fear" should be changed to a more objective one, such as the reasonable person test, or where the accused "ought to have known", as many people may not in fact understand that their actions would be likely to cause fear.[57] It was also noted that the intent requirement seems to be difficult to prove in the case of "celebrity

50. Chief Magistrate, Local Court of NSW, *Submission*.
51. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; South West Sydney Legal Centre, *Submission*; *Newcastle consultation*; *Wollongong consultation*.
52. Redfern Legal Centre and South Sydney Domestic Violence Unit, *Consultation*.
53. Chief Magistrate, Local Court of NSW, *Submission*;
54. AVLICC, *Submission*; Graham Johnson, Magistrate, *Submission*.
55. NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Legal Aid NSW, *Submission*; Mt Druitt and Area Community Legal Centre, *Submission*.
56. Legal Aid NSW, *Submission*. This is the case in other jurisdictions: see eg *Crimes Act 1958* (Vic) s 21A; and *Criminal Code* (NT) s 189.
57. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; *Gosford consultation*.

stalking". The test should be whether stalking or intimidation has occurred, regardless of whether the conduct occurs out of love, delusion, or harassment.[58]

Should the test be expanded to include detriment or distress?

12.19 In DP 45, the Commission noted that the test of intending to cause fear of physical or mental harm may not go far enough in recognising the full impact of persistent unwanted attention on a victim, even though no fear of actual harm is caused or would be likely to be caused.[59] For this reason, Queensland legislation defines unlawful stalking to include conduct that "causes detriment, reasonably arising in all the circumstances, to the stalked person or another person".[60] "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.[61]

12.20 A number of submissions were of the view that a similar provision should be included in the NSW stalking provisions,[62] to recognise that the perpetrator's behaviour impacts on all facets of the victim's life.[63] The view was taken that the Queensland example covers behaviour which affects psychological well-being, but falls short of causing fear, without criminalising "nuisance" behaviour.[64] Another submission suggested that the provision should be extended to include behaviour which is "likely to cause psychological detriment or fear of physical or mental harm", being less broad than the Queensland definition and therefore less likely to run the risk of criminalising behaviour which is merely irritating.[65]

12.21 However, other submissions noted the need for caution in ensuring that the offence of stalking is not trivialised, as this would undermine community respect for the law.[66] There is the risk that extending the requisite mental element to the intention to cause "detriment or distress" could capture minor incidents.[67] It was suggested that "serious detriment or distress" would be preferable, but this still leaves problem of interpreting the level of seriousness.[68] It was pointed out that behaviour which caused detriment, but not fear of physical or mental harm, and is therefore not serious enough to ground the offence of stalking, would be sufficient for obtaining an AVO, and continuation of the behaviour would be a breach.[69] It was considered that this

58. Mt Druitt and Area Community Legal Centre, *Submission*.
59. See DP 45 at ch 13.
60. *Criminal Code* (Qld) s 359B(d)(ii).
61. *Criminal Code* (Qld) s 359A.
62. AVLICC, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; NSW Health, *Submission*; South West Sydney Legal Centre, *Submission*; Mt Druitt and Area Community Legal Centre, *Submission*.
63. Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*.
64. AVLICC, *Submission*.
65. NSW, Department for Women, *Submission*.
66. Law Society of NSW, Criminal Law Committee, *Submission*; Legal Aid NSW, *Submission*.
67. Graham Johnson, Magistrate, *Submission*.
68. Graham Johnson, Magistrate, *Submission*.
69. Legal Aid NSW, *Submission*.

should provide sufficient protection to a person who is the victim of persistent unwanted attention, provided the police consistently take action with regard to breaches.[70]

Defences?

12.22 As noted above, some jurisdictions contain defences to a charge of stalking and intimidation.[71] One submission was of the view that similar provisions should be considered in New South Wales.[72] Others, however, were against this idea, expressing the view that they are either not necessary or would diminish the seriousness of the offence.[73]

The Commission's views

12.23 The offence of stalking and harassment is by nature imprecise, as behaviour which is otherwise considered quite ordinary becomes threatening in certain circumstances: "the difficulty in defining stalking as a concept lies in its paradoxical status as an act that is ambiguously located somewhere between crime and conformity".[74] As such, it can be difficult to clarify at what point the behaviour turns from being acceptable to deserving of criminal sanction.[75] For example, when should the criminal law determine when the legitimate pursuit of a love interest becomes frightening and intimidating?[76] It is generally agreed that stalking is quintessentially a crime of context:[77]

> stalking is a behaviour which gains its criminality from the context in which it occurs and the activities typifying these obsessions may appear as innocent commonplace human interaction when taken out of context.[78]

12.24 This inherent imprecision has led many commentators to the view that setting clear parameters in legislation is extremely difficult.[79]

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70. Legal Aid NSW, *Submission*.
71. See para 12.10 above.
72. Law Society of NSW, Criminal Law Committee, *Submission*.
73. NSW, Department for Women, *Submission*; Domestic Violence Advocacy Service and Women's Legal Resources Centre, *Submission*; Hawkesbury Nepean Community Legal Centre, *Submission*; Graham Johnson, Magistrate, *Submission*; NSW Police Service, *Submission*; South West Sydney Legal Centre, *Submission*; Mt Druitt and Area Community Legal Centre, *Submission*.
74. E Ogilvie, *Stalking: legislative, policing and prosecution patterns in Australia* (Australian Institute of Criminology, 2000) at 12.
75. Ogilvie at 7-14.
76. Ogilvie at 7-14.
77. See E Finch, "Stalking the perfect stalking law: an evaluation of the efficacy of the Protection from Harassment Act 1997" [2002] *Criminal Law Review* 703 at 708.
78. A Pearce and P Easteal, "The 'domestic' in stalking: policing domestic stalking in the Australian Capital Territory" (1999) *Alternative Law Journal* 30.
79. See E Ogilvie, *Stalking: legislative, policing and prosecution patterns in Australia* (Australian Institute of Criminology, 2000) at 53; Australia, Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5 non fatal offences against the person* (Report, 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*

12.25 The elements common to most stalking offences are the engagement by the accused in particular conduct which is intended to cause the victim to fear some kind of physical or mental harm or threat to his or her personal safety. Proof of the intention of the accused and the perception of the victim is not necessary in all jurisdictions. Those elements must be present in tandem to ensure that behaviour which is not intended or likely to cause fear, and provokes no apprehension in the victim, is not inadvertently criminalised.

Conduct amounting to stalking or intimidation

12.26 Clearly defining conduct that may amount to stalking or intimidation is problematic. While some types of behaviour, such as sending threatening letters or making obscene telephone calls clearly amount to dangerous and unacceptable conduct, other behaviour, such as sending gifts or flowers, is not in itself unacceptable. The fact that the *actus reus* of stalking or intimidation may fall well within the range of socially conformist behaviour sets these offences apart from many other crimes.

12.27 Since any conduct may feasibly give rise to the offences of stalking or intimidation if accompanied by the requisite mental elements on the part of the accused and the victim, the Commission is of the view that the definitions of stalking and harassment should be as broad as possible.

As noted above, the definitions of stalking and/or intimidation in other jurisdictions are more descriptive than the NSW legislation in terms of listing the type of conduct that may constitute the offences. Given the view expressed above that stalking and intimidation are primarily context-based offences, the Commission considers that the inclusion of such an expansive list in NSW is unnecessary.

12.28 The current definition of intimidation should, however, be amended to clarify that it includes conduct carried out through electronic means such as email or mobile telephone text messaging. The Commission heard during consultations that while many people were unaware that such actions could constitute intimidation. While the current definition of intimidation in s 562A refers to "repeated telephone calls" and "any conduct that causes a reasonable apprehension of injury", an explicit reference to the inclusion of technologically-assisted methods of contact would be valuable.

12.29 In his submission, the Chief Magistrate pointed out an apparent inconsistency between the definition of intimidation in s 562A as conduct that "causes a reasonable apprehension of injury", and the provision in s 562AB(4) stating that the prosecution need not prove that the victim "actually feared physical or mental harm" in order for the offence of stalking or intimidation to be established.[80] It is arguable that those provisions are not inconsistent, but have the effect of not requiring the prosecution to have to prove that the victim reasonably apprehended the injury. However, the Commission is of the view that the key element in the offence of stalking and intimidation should be the intention of the accused and not the mental state of the victim. Consequently, the Commission recommends that the concept of reasonableness be removed from the definition of intimidation.

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; E Finch, "Stalking the perfect stalking law: an evaluation of the efficacy of the Protection from Harassment Act 1997" [2002] *Criminal Law Review* 703.

80. Chief Magistrate, Local Court of NSW, *Submission*.

12.30 It was also suggested in submissions that the definition of stalking should be amended to include a reference to frequenting schools and child care centres. While the Commission agrees that frequenting such places with the intent to cause fear should give rise to the offence of stalking,
it does not consider it necessary to refer to them specifically.
The Commission recommends instead that the definition of stalking should be amended to replace the word "means" with the word "includes", so that the definition becomes inclusive rather than exhaustive. If this were done, there would be no need to refer specifically to particular places, as this could be read into the definition on a case by case basis.

12.31 The key factor in whether the offence of stalking has been substantiated should be the intention of the accused to cause the victim to fear physical or mental harm. Consequently, the conduct that may constitute stalking must have a sufficient nexus to the victim to enable such a fear to be aroused. The Commission is of the view that the current reference in the definition of stalking to the "following of a person about" provides such a nexus and is, therefore, appropriate. It would also cover following a person to a school or day care centre, or any other place a person frequents for whatever reason. Similarly, the current reference to a person's residence or place of work or business is also appropriate, as it provides a sufficient connection between the actions of the accused and the effect of those actions on the victim.

12.32 The definition would then read:

> Stalking includes 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.

12.33 Other legislation also requires there to be a "course of conduct", usually amounting to at least two instances, before the *actus reus* of stalking or intimidation will be satisfied. The NSW provision refers to "repeated" telephone calls as constituting harassment, and defines stalking as "frequenting" a person's residence or place of business. The view has been expressed in NSW that the word "frequenting" in the definition of stalking would require that there had been "more than a single visit to the complainant's place [or vicinity] of residence".[81] While it is envisaged that, in most cases, fear of physical or mental harm would only be experienced after a series of incidents, it should depend on the circumstances of each case. Consequently, the Commission does not make any recommendation for change on this point.

The requisite mental elements

12.34 Having an easily satisfied *actus reus* means that the mental elements are key factors in establishing the criminality of stalking or intimidating behaviour. The two major mental elements involved in the offences are:

1. the intention of the accused when engaging in the conduct that may amount to stalking or intimidation; and
2. the mental state of the victim.

12.35 Other factors need to be considered within those two elements, such as whether the accused needs in fact to have intended for his or her actions to cause fear, or whether more

81. *R v Piccin* [2001] NSWCCA 35 at para 73.

objective criteria should apply. Further, it needs to be determined whether or not the victim actually needs to have experienced fear, and, if so, fear of what?

12.36 In NSW, a person cannot be liable unless he or she intends to cause fear of physical or mental harm. This is not a strict test of intention, however, for a person will be liable if he or she *knows* that the conduct is *likely* to cause fear, whether or not that result was actually intended. As noted earlier, some jurisdictions require proof that the accused in fact intended to cause fear or apprehension,[82] presumably so that criminal liability could not arise where people inadvertently caused fear.[83] This has proved to be a significant barrier to prosecution, as it may be extremely difficult to prove beyond reasonable doubt that someone intends actions, such as sending presents, to cause fear.[84] 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.[85]

12.37 While an objective test would theoretically make it easier to obtain a prosecution, there is a concern that it may be lowering the threshold for criminal liability too far, particularly given the broad and imprecise nature of the *actus reus* of the offence.

12.38 So far as the mental state of the victim is concerned, some jurisdictions require the prosecution to prove that the actions of the accused actually caused the victim to experience fear. The advantage of this approach is that a person will not be accused of a criminal offence where they have engaged in conduct which may not in itself be criminal and has not in fact caused another person to fear that any harm would result.
In Victoria, the requirement to prove that the victim actually feared harm is balanced by an

82. See para 12.11 above.
83. 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: Australia, Model Criminal Code Officers Committee, *Model Criminal Code Chapter 5 non fatal offences against the person* (Report, 1998) at 61.
84. Need to prove intent under the strict subjective test in the ACT legislation has been identified by Australian Federal Police as a factor in deciding not to charge offenders under the ACT stalking provisions. A survey of AFP officers revealed that 91% stated that evidential inadequacy played *some* role in the decision not to charge, while 33% stated that the reason they did not use stalking legislation always derived from the intent element: see A Pearce and P Easteal, "The 'domestic' in stalking: policing domestic stalking in the Australian Capital Territory" (1999) *Alternative Law Journal* 30.
85. 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* (WA)] 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* (WA) s 338E(1) and s 338E(2).

objective test of intention on the part of the accused.[86] This approach has been criticised, however, on the basis that criminal liability would then be determined by whether or not the victim is stoic or easily frightened. New legislation has been introduced into Parliament removing the need to prove fear on the part of the victim:

> The evil in the offence is the actual stalking. The intention on the part of the offender to cause fear, or the fact that the offender ought to have understood that their target would be frightened, is the key factor that should make the behaviour criminal. The fact that a target of stalking is unaware or is not easily frightened should not prevent prosecution of the offence.[87]

12.39 The Commission agrees with the view that criminal liability for stalking or intimidation should not hinge on the particular mental state of each victim. The critical factor should be the intention of the accused to cause fear. While proving the intention of another is always difficult, the Commission considers that the current test in s 562AB, requiring the prosecution to establish beyond reasonable doubt that the accused knew his or her actions were likely to cause fear of physical or mental harm, is appropriate. Introducing a more objective test, or expanding the nature of the harm caused to include detriment and distress, may make it easier to secure a prosecution. However, the Commission is concerned that the threshold for criminal responsibility should not be lowered too far, particularly given the fact that the actual impact on the victim need not be proved and the offence carries a maximum penalty of five years imprisonment.

12.40 In response to concerns that the offence of stalking and intimidation is too shadowy and therefore too difficult to prove to the criminal standard, it should also be noted that an AVO will still be available to stop or prevent the conduct. Also, other offences under the Crimes Act or the *Summary Offences Act 1988* (NSW) may be applicable, for example, in circumstances where someone intends to peep or pry on another, or threatens to cause harm to a person or damage to property.[88]

12.41 Consequently, the Commission recommends no change to the provisions of s 562AB regarding the intention of the accused or the mental state of the victim.

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86. This approach has also been recommended for the ACT: see A Pearce and P Easteal, "The 'domestic' in stalking: policing domestic stalking in the Australian Capital Territory" (1999) *Alternative Law Journal* 30.
87. Victoria, *Parliamentary Debates (Hansard)* Legislative Assembly, 10 October 2002 at 531.
88. See eg, Crimes Act s 31 (maliciously sending documents containing threats); s 199 (threatening to destroy or damage property); s 545B (intimidation or annoyance by the use of violence); s 547C (peeping or prying); *Summary Offences Act 1988* (NSW) s 4 (offensive conduct) and s 11G (loitering by a convicted sex offender near premises frequented by children).

RECOMMENDATION 55

The definition of "intimidation" in s 562A should be amended to mean:

- any conduct amounting to harassment or molestation, or
- any conduct that causes any other person to fear for his or her safety, including damage to property.

Intimidation may include approaches conducted through technologically-assisted means, such as telephoning, emailing or mobile telephone text messaging.

RECOMMENDATION 56

The definition of "stalking" in s 562A should be amended as follows:

Stalking includes 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.

Appendices

- *Appendix A: Submissions*
- *Appendix B: Orders*

APPENDIX A

SUBMISSIONS

Written Submissions

See para 1.37 for the Commission's policy on publication of submissions revealing personal details

Attorney General's Apprehended Violence Legal Issues Co-ordinating Committee (AVLICC) (20 February 2003)

Australian Domestic and Family Violence Clearinghouse (31 January 2003)

Beaumont, Mr C (26 May 2003, 30 June 2003, 23 July 2003, 31 July 2003 and 1 August 2003)

Bhatt, Mr D (29 March 2003)

Blue Mountains Community Legal Centre (13 March 2003)

Carter, Carol, Local Courts NSW (4 April 2003)

Charles Sturt University, School of Humanities and Social Sciences (5 March 2003)

Chief Magistrate, Local Court of NSW (20 February 2003)

Community Justice Centres (14 March 2003)

Domestic Violence Advocacy Service and the Women's Legal Resources Centre (25 February 2003)

Erin's Place Inc. for Women and Children (20 February 2003)

Family Law Reform Association NSW Inc (20 February 2003)

Flanagan, John (4 April 2003)

Goldring, Judge John (23 January 2003)

Hawkesbury Nepean Community Legal Centre Inc (31 January 2003)

Inner City Legal Centre (20 February 2003)

Intellectual Disability Rights Service Inc (20 February 2003)

Johnson, Graham (14 February 2003)

Laginha, Ed (31 March 2003)

Law Society of NSW (7 April 2003)

Leathbridge, Elizabeth (28 February 2003)

Legal Aid, New South Wales (27 March 2003)

Lidcombe Children's Court, Children's Magistrate (18 March 2003)

Local Courts, NSW Attorney General's Department (17 February 2003)

Manly Warringah Women's Resource Centre (31 January 2003)

Mt Druitt and Area Community Legal Centre Inc (10 February 2003)

Multicultural Disability Advocacy Association of NSW (31 January 2003)

NSW Commission for Children and Young People (5 March 2003)

NSW Department of Community Services (26 February 2003)

NSW Department of Education and Training (13 April 2003)

NSW Department of Housing (7 March 2003)

NSW Department for Women (18 February 2003)

NSW Health (29 May 2003)

NSW Ombudsman (28 February 2003)

NSW Police (21 March 2003)

NSW Women's Refuge Movement (31 January 2003)

Office of the Public Guardian (17 February 2003)

Parkes Community Health Centre (undated, received 7 February 2003)

Redfern Legal Centre (27 February 2003)

Shoalcoast Community Legal Centre Inc (17 February 2003)

South West Sydney Legal Centre (24 January 2003)

Stubbs, Julie (3 March 2003)

The University of Newcastle Legal Centre (31 January 2003)

Wangmann, Jane (4 March 2003)

Western NSW Community Legal Centre Inc (17 February 2003)

Young Lawyers Criminal Law Committee (30 January 2003)

Young, Margrette (10 February 2003)

Consultations

Campbelltown Benevolent Society, Domestic Violence Unit (6 February 2003)

Family Law Reform Association NSW Inc (20 February 2003)

Redfern Legal Centre and South Sydney Domestic Violence Unit Community Consultation (20 February 2003)

Meeting with Chamber Magistrates (25 February 2003)

Moree consultations (27 February 2003)

Bourke Consultations (4 March 2003)

Women's Domestic Violence Court Assistance Scheme Network Meeting (5 March 2003)

Orange Consultations (6 March 2003)

Newcastle Consultations (17 march 2003)

Gosford Consultations (18 March 2003)

Wollongong Consultations (20 March 2003)

APPENDIX B

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*.

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

1. *Pursuant to section 562BC.*

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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