



30 October 2013

The Hon. Greg Smith
Attorney General, and Minister for Justice
By email: office@smith.minister.nsw.gov.au

Dear Attorney General,

NSW Crimes (Domestic and Personal Violence) Amendment Bill 2013

1. We are writing to express concerns about the Crimes (Domestic and Personal Violence) Amendment Bill 2013 introduced on 23 October 2013.
2. We submit that any proposed changes to the *Crimes (Domestic and Personal Violence) Act* should be delayed until a decision is made on whether or not further legislative distinction will occur between Apprehended Domestic Violence Orders (ADVOs) and Apprehended Personal Violence Orders (APVOs). At that time, an Exposure Draft Bill should be released for comment with an adequate consultation period and a commitment by government to consider submissions.
3. We outline additional concerns with the Bill below.

Existing police powers are adequate

4. We note that s 89 of the *Crimes (Domestic and Personal Violence) Act* currently provides police with the power to detain a person who they believe will refuse to remain at the scene for the purpose of serving an apprehended violence order. The situation of leaving the victim and defendant in an unsafe environment while the police go back to the station to seek the order should therefore not currently be the case.
5. The current system of requiring an authorised officer to approve a provisional ADVO provides an accountability mechanism for NSW Police.
6. Therefore we do not believe there is a need to extend police powers to enable a senior police officer to issue provisional (interim) ADVOs.
7. Our service has been advising and representing women in applications for ADVOs for over 25 years. Over those years, we have seen a significant improvement in police responsiveness to domestic violence –with now almost all applications for ADVOs being taken out by police, rather than privately.
8. However, in the past 5 years our practice has changed significantly to one where the majority of our clients are women who are initially defendants to police ADVOs, but on further enquiry into their circumstances are victims of domestic violence – the primary aggressor being her partner and the person the police initially assessed as being the ‘person in need of protection’.



9. We are concerned that increased police powers to issue interim ADVOs may result in a further increase in the number of women defendants when they are the primary victim.
10. We do not agree with the provisions in Schedule 1, item 5 which provide that where it is 'not practicable' for the applicant officer to make the application by telephone, facsimile or other communications device directly, the application for a provisional order 'may be transmitted to the authorised officer or senior police officer by another person on behalf of the applicant officer.'
11. If the issuing of interim ADVOs by a senior police officer proceeds despite our concerns, we submit that the senior officer must be able to speak to the applicant officer before issuing an interim ADVO. This allows the senior officer to ask questions of the applicant officer and seek clarification if required and reduces the likelihood of errors being made; and in addition to training for all police about the nature and dynamics of domestic violence, NSW Police should be required to carry out spot audits to assess the extent to which police officers are implementing the primary victim policy.

Ensuring the referral of appropriate APVOs to mediation

12. WLS NSW supports the use of mediation in appropriate APVO matters and supports the court having power to direct parties to attend mediation, as in the Victorian model. It is essential that referrals to mediation are made after an assessment that such a referral is appropriate, rather than automatically.
13. We are however concerned that the presumption in favour of mediation for APVO matters, unless there is 'good reason not to do so', may see the referral of matters that are not appropriate for mediation.
14. We note that 'sexual harassment' is not included in the list of factors in the current s21(2) *Crimes (Domestic and Personal Violence) Act*. This should be included. We oppose the referral of matters relating to sexual harassment or other forms of sexual violence to mediation.
15. We are particularly concerned that the removal of the requirement that particular matters not be referred to mediation and the introduction of Schedule 2 item 3 that 'the existence of any one or more of the factors referred to in subsection (2) (which previously could not be referred to mediation) does not prevent a court from referring a matter to mediation' will result in referrals to mediation in situations of an imbalance of power. Whether legal and other support is available to the person seeking the APVO and provisions requiring consent to mediation should be considered in these cases.
16. We further submit that there is a lack of evidence that such mandatory mediation would have prospects of securing a workable outcome for the parties.
17. The *Interim review of frivolous and vexatious apprehended violence orders – from the Review of the Crimes (Domestic and Personal Violence) Act 2007 (Interim review)* refers to a NADRAC ADR Resource Paper from 2004 as suggesting 'outcomes are at least as positive for mandated mediation as it is for voluntary referrals' and to a 2011 NADRAC paper which 'asserts there is no evidence to support that 'bad behaviour' by participants is prevalent or undermines the overall integrity of ADR processes'. What is not clear from these assertions is the substance of the dispute and the extent to which power imbalances were assessed or disclosed. If the worst forms of 'bad behaviour', such as discrimination and/or harassment,

violence and crime have previously been excluded from mandatory mediation with the aggressor, then the findings of previous research about mandatory mediation may not be more broadly applicable.

Criminalisation of providing false and misleading information in APVO applications

18. We note, as acknowledged in the *Interim review*, that the recent BoCSAR report concluded ‘vexatious and frivolous APVO applications are not nearly as frequent in NSW as some commentators have suggested.’ The need for criminalisation on the grounds of providing false and misleading information in APVO applications has therefore not been established.
19. Additionally, we are concerned that the criminalisation of providing false and misleading information in APVO applications will act as a deterrence to applying for an APVO in circumstances where such an order is warranted.
20. We believe the current costs orders already act as a significant deterrent to clients considering applying for APVOs, and we are concerned that the proposed amendments will disproportionately affect applicants with language barriers or disabilities.
21. If provisions to create an offence proceed, we submit that the provision should mirror the offence of public mischief in s547B of the *Crimes Act*, namely that it be limited to ‘knowingly making a false representation’, and not include ‘or misleading’.
22. It is acknowledged in the *Interim review* in response to the proposal of providing a means to prosecute protected persons for false or vexatious APVO applications that no one commented on the proposal to amend the *Crimes Act*, but rather those stakeholders who supported this proposal only referred to the option about the requirement for the applicant to file a statutory declaration or affidavit upon making an application.
23. We therefore oppose Schedule 2, item 5, the insertion of ‘false or misleading applications for apprehended personal violence order’.

Possible change to the definition of ‘domestic relationship’

24. We note with concern that this Bill has been introduced prior to a decision as to whether there will be further legislative distinction between violence within a domestic relationship (ADVOs) and violence outside a domestic relationship (APVOs). This question will be considered in the Review (not the Interim Review) and so is yet to be determined.
25. We have advocated for the retention of flatmates, carers and residential facilities within the definition of ‘domestic relationship’, as well as the inclusion of new partners of ex-partners. The reasons for this are outlined in our submission to the Statutory Review: Crimes (Domestic and Personal Violence) Act 2007 which is available on our website or we would be happy to provide to you upon request.
26. We are particularly concerned that a change to the current definition may mean that the presumption of mediation applies to more parties than currently proposed in circumstances that may not be appropriate for mediation.

Delay Bill and release an Exposure Draft for public consultation

27. We therefore recommend that the Crimes (Domestic and Personal Violence) Amendment Bill 2013 be delayed until a decision is made on whether or not further legislative distinction will occur between an ADVO and an APVO. The review of the Act should occur as a whole, not in piecemeal amendments where the interaction of changes cannot be properly considered. At that time, an Exposure Draft Bill should be released for comment with an adequate consultation period and a commitment by government to consider submissions.

Should you have any questions, please contact me or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor

CC: The Hon. Barry O'Farrell, Premier
The Hon. Pru Goward, Minister for Women
The Hon. Paul Lynch, Shadow Attorney-General
The Hon Sophie Cotsis, Shadow Minister for Status of Women
Reverend the Hon. Fred Nile, MLC
Mr David Shoebridge, MLC
Dr Mehreen Faruqi MLC