

10 May 2016

The Hon. Gabrielle Upton MP  
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SYDNEY NSW 2001

By email: [office@upton.minister.nsw.gov.au](mailto:office@upton.minister.nsw.gov.au)

Dear Attorney,

### **Crimes (Domestic and Personal Violence) Amendment (Review) Bill 2016**

1. Women's Legal Service NSW (WLS NSW) writes to commend the NSW Government on the introduction of the Crimes (Domestic and Personal Violence) Amendment (Review) Bill 2016 ('the Bill') and to raise some concerns and seek clarification of some issues relating to this Bill.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We provide specialist legal services including in the areas of domestic and family violence and sexual assault.

#### **Section 4 Meaning of "personal violence offence"**

3. In principle we support the expansion of the meaning of "personal violence offence" to include criminal offences that have a "personal violence offence" as an element.
4. We note the inclusion of s43A of the *Crimes Act 1900*: Failure of persons with parental responsibility to care for the child and s44 of the *Crimes Act 1900*: Failure of persons to provide the necessities of life. We seek clarification that these provisions will not be used as a tool to hold the adult victim of violence accountable for the perpetrator's violence and/or failure to provide and that consideration will be given to circumstances of poverty. Further, consideration should also be given to the impact of domestic violence on the parenting of the adult victim.<sup>1</sup>
5. We also seek consideration of the inclusion of additional offences that are not infrequently related to domestic violence matters. These include: s51A of the *Crimes Act 1900*: Predator driving, s53 of the *Crimes Act 1900*: Injuries by furious driving and s54 of the *Crimes Act 1900*: Causing grievous bodily harm.

<sup>1</sup> See for example, the ANROWS research project: Domestic and family violence and parenting: mixed



### Section 5 Definition of domestic relationship

6. We support the retention of the definition of "domestic relationship" and the addition of the new partner of an ex-partner.

### Section 16 Courts making an apprehended domestic violence order

7. We support the retention of the current wording in s16(2)(c)(i) of the *Crimes (Domestic and Personal Violence) Act 2007*.
8. We are concerned by the proposed amendment of section 16(2)(c)(i) to omit "*at any time*" and replace it with "*on more than one occasion.*" The change will increase the threshold such that a court will need to be satisfied that a person has experienced domestic violence on more than one occasion prior to the granting of an ADVO in circumstances where it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in.
9. We agree that victims of violence are often reluctant to express fear to Police. However, we are unclear about the purpose of proposed s16(2)(d). For a court to form a view that "*the person has reasonable grounds to fear*" it is foreseeable that it would have to undertake a reasoning exercise very similar to that which is undertaken in s16(2)(c). We are uncertain therefore as to whether the proposed sub-section is merely a duplication of the existing subsection 16(2)(c) but one which may be taken as an 'easier road' to require only mandatory orders and may be relied upon by defendants in submissions for a less restrictive ADVO particularly in those circumstances where more restrictive orders may be warranted in the types of matters when this section would be used: significant fear; entrenched coercion and control; and evidence of injury or property damage.

### Section 32 Duration

10. We support the proposed amendment to s32 that a provisional order will continue in force until it is revoked, it ceases to have effect because an interim or final apprehended violence order is made, or the application for a final apprehended violence order is withdrawn or dismissed. Previously a provisional order would expire after 28 days, benefiting defendants who had been served with a provisional order but who failed to attend court when an interim or final order was made or evaded service of the interim or final order within the 28 day period. The proposed amendment addresses the gap in protection which would otherwise exist until the interim or final AVO had been served. This will also allow a provisional order to continue beyond the first court date where it is appropriate to do so pending further investigation and taking of statements, without an applicant being forced into a contested interim AVO hearing potentially prejudicing the proper course of a police investigation.

### Section 35(2)(c1) Prohibitions and restrictions imposed by AVOs

11. We welcome inclusion of s35(2)(c1) "*prohibiting or restricting the defendant from locating or attempting to locate the protected person*". We recommend for clarity that this be expanded

to refer specifically to third parties and surveillance. Our suggested wording is: *"prohibiting or restricting the defendant from locating, attempting to locate, asking someone else to locate, following or keeping the protected person under surveillance"*.

12. We also suggest including an order specifically relating to the non-consensual sharing of intimate images. Our suggested wording is: *"The defendant is prohibited from directly or indirectly publishing or sharing, or threatening to publish or share images or videos of the protected person of an intimate nature"*.

### **Section 36 Mandatory orders**

13. We support mirroring the "Damage to Property" wording in section 195 of the *Crimes Act 1900* to read *"intentionally or recklessly destroys or damages property"*. However, we submit that in proposed section 36 of the Bill the expression *"belongs to, or is in the possession of"* is too narrow when linked to *"the protected person"* and should be drafted to ensure it also includes property that the protected person *"uses or benefits from"* (or similar wording).

### **Section 37 Ancillary property recovery orders may be made**

14. We support the implementation of the 2010 Australian and NSW Law Reform Commissions' *Family Violence - A National Legal Response Report* ('the Family Violence Report') Recommendation 16.11 that:

*state and territory family violence legislation should require courts, when considering whether to make personal property directions in protection order proceedings, to inquire about and consider any property orders under the Family Law Act 1975 (Cth) or pending application for such orders.*

15. However, we note that many of our clients do not use the provisions of the *Family Law Act 1975 (Cth)* to effect a property settlement. This can be for reasons such as small property pools, prohibitive litigation costs, ineligibility for legal aid or not being in a relationship long enough to meet de facto status. We are also concerned that awareness of or actual property proceedings under the *Family Law Act 1975 (Cth)* might result in state or territory courts electing to refrain from making ancillary property recovery orders. It is important to retain a clear distinction between *Family Law Act* property proceedings and the purpose of ancillary property recovery orders and the overriding objects of the *Crimes (Domestic and Personal Violence) Act 2007* in prioritising the safety of victims and their children.

### **Section 39 Final order to be made on guilty plea or guilt finding for serious offence**

16. We welcome the extension of the power of a court to make a final AVO in circumstances of a plea or finding of guilt beyond domestic violence offences to also include a serious offence.
17. However, there is a lack of clarity in how the District Court deals with AVOs after a successful all grounds appeal from the Local Court on a domestic violence conviction. This includes making, varying or revoking an AVO, whether or not there was an AVO made by the Local Court and whether or not the Defendant has specifically appealed the AVO along

with the charge matter. We submit that further consideration needs to be given to clarify and clearly resolve whether or not the District Court, when exercising its appellate jurisdiction, has the power to determine an AVO application, including making an AVO on its own motion.

### Section 40A AVO may be made in care proceedings

18. We support the Children's Court having the power to make, vary or revoke an AVO for the protection of the child the subject of care proceedings or any person who resides in the same property as the child. We support the limitation on this power where criminal proceedings are before another court and arose out of some or all of the circumstances that gave rise to the making of the order.

### Additional policy issue: Section 41A Vulnerable witness protection from direct cross-examination

19. We strongly urge NSW to take this opportunity to provide vulnerable witness protection from direct cross-examination, beyond the protection for a child provided for in proposed section 41A. We recommend protection from direct cross-examination extend to "any person against whom the respondent is alleged to have used family violence".

20. Such a provision would respond to the Family Violence Report Recommendation 18.3:

*the state and territory family violence legislation should prohibit the respondent in protection order proceedings from personally cross-examining any person against whom the respondent is alleged to have used family violence.*

21. Vulnerable witness protection is provided for in all other states and territories except NSW and ACT.

22. In jurisdictions such as Victoria, Tasmania, Western Australia and South Australia, an unrepresented accused person in a protection order matter cannot directly cross examine the protected person who is the subject of proceedings.<sup>2</sup>

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<sup>2</sup> Section 70 of the *Family Violence Protection Act 2008* (Vic) applies in Victoria. It provides an exception where the protected person is an adult, consents, and the court decides it would not have a harmful impact upon the protected person. The protection also extends to children, family members of the protected person, and anyone else declared to be a protected person. Section 8A(1) of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) applies in Tasmania. Section 3 provides that the protection applies to anyone giving evidence in respect of family violence as defined by the *Family Violence Act 2004* (Tas), as well as a number of those who are alleged victims of certain crimes enumerated in the Criminal Code, the *Sex Industry Offences Act 2005* (Tas) the *Police Offences Act 1935* (Tas) and the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas). Section 44C of the *Restraining Orders Act 1997* (WA) applies. The protection extends to any person who is in a family and domestic relationship or an imagined relationship with the defendant. Section 44C(2) provides that the section does not apply if the witness requests that it should not, or if the court considers that it should not apply in the interests of justice. Section 29(4)(a) of the *Intervention Orders (Prevention of Abuse) Act*

23. In Queensland and the Northern Territory, the Court has discretion to order that such cross-examination does not take place.<sup>3</sup>

24. The complexity and lack of certainty in NSW for applications for audio-visual link use by adult complainants in domestic violence matters further compounds this issue.

#### **Section 48(4A) Referring an application for an order to the Commissioner of Police**

25. We support in principle a court having the power to refer an application for an ADVO to the Police where the applicant is not a police officer. This is particularly important in the interests of justice where a victims of violence might need assistance in advocating for an ADVO, there are grounds for an ADVO to be made and Police have refused to apply for an ADVO.

26. However, there may also be good reasons why the victim of violence seeks a private ADVO – for example, a fear of police, poor relations with Police or complexity of matter. The legislation should be amended such that the court is required to seek and consider the views of the private applicant prior to referral to Police.

27. Proposed s48(4A)(b) should be clarified. Does this just include children expressly named on an ADVO or does it also include children who receive the protection of the mandatory orders as a result of being in a domestic relationship with the PINOP but who are not expressly named on the ADVO? We support the latter approach.

#### **Section 50(4)(c) Commencement of proceedings by application notice**

28. We support the application form including questions about current proceedings under the *Family Law Act 1975* (Cth), including parenting and property orders.

29. However, we oppose inclusion of proposed s50(4)(c): *“if a parenting order has been made under that Act and the application may affect that order – the basis on which the parenting order was made and the reasons why the applicant believes that the court (to which the application is being made) should intervene”*.

30. The Local Court can already exercise the Family Law jurisdiction through s68R of the *Family Law Act 1975* (Cth): Power of the court making a family violence order to revive, vary, discharge or suspend an existing order, injunction or arrangement under the Family Law

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2009 (SA) provides that the protection extends to a person against whom it is alleged the defendant has committed an act of abuse, or a child against whom abuse is alleged or who might be subject to abuse.

<sup>3</sup> Section 151 of the *Domestic and Family Violence Protection Act 2012* (Qld) applies. The court may, on its own initiative or on the application of a party, make an order that cross examination should not proceed if a protected person is likely to suffer emotional harm or distress or be so intimidated as to be disadvantaged as a witness. Section 150 provides that the protection extends to the protected person, a child, or a relative or associate of the protected person. Section 114 of the *Domestic and Family Violence Act 2007* (NT) provides that the court may, on its own initiative or on the application of a party, make an order that cross examination should not proceed where the defendant is in a domestic relationship with a witness.

Act.

31. Proposed s50(4)(c) requires additional information that is vague and onerous for the applicant to provide and likely to raise irrelevant matters arising from differing views on past contested legal processes. This requirement may also act as a barrier to making an application.
32. Proposed s50(4)(c) should be deleted.

### **Section 72 Definitions and Revocation of expired orders**

33. We note the definition of an interested party in the context of varying or revoking an AVO at proposed s72 includes:
  - a) each protected person under the order,
  - b) each guardian of a protected person under the order (where guardianship order applies),
  - c) in the case of a protected person who is a child:
    - i. each parent of a protected person under the order, and
    - ii. the Secretary of the Department of Family and Community Services,
  - d) the defendant.
34. We are concerned that proposed s72(c)(i) may be misused without adding to the court's assessment of the basis for fear. For example, in circumstances where a protected person may have their children also listed on the AVO and the children may have different parents. There may have been a history of domestic violence in a previous relationship, the parents of that child have separated and have little or no contact. Section 72(c)(i) could enable the violent parent to re-enter the lives of this family and continue to perpetrate domestic violence through intervening in court proceedings.
35. We submit there are already sufficient measures in place under the Act for relevant family law orders and children's court orders to be considered by the court.
36. We commend the government for the proposed repealing of sections 72(5) to (8). These provisions currently allow for the revocation of expired AVOs.

### **Additional policy issue: Other orders**

37. The NSW Standing Committee on Law and Justice recently released its *Remedies for the serious invasion of privacy in New South Wales Report*. The committee recommends "*consider[ing] additional potential remedies available to the Local Court to protect the privacy of individuals who have been or are seeking to be safeguarded by an apprehended domestic*

violence order".<sup>4</sup> This includes "take down orders and prohibitions on threatening or publishing or sharing of images or videos of an intimate nature".<sup>5</sup> We support this recommendation.

38. This Bill is an opportunity to implement this recommendation. If this is not possible, in the alternative, but our less preferred option, we recommend including for future monitoring and review of the *Crimes (Domestic and Personal Violence) Act 2007*.

#### **Amendment of Coroner's Act 2009**

39. We welcome the amendment of the definition of domestic relationship in the *Coroner's Act 2009* so that it is consistent with the *Crimes (Domestic and Personal Violence) Act 2007*. This is more inclusive particularly of women with disabilities and will enable the NSW Domestic Violence Death Review Team ('the DVDRT') to review domestic violence deaths in the context of people living in shared residential settings and where there is a dependency on carer relationship.

40. The DVDRT which is legislatively established includes both government department and non-government representatives.

#### **Section 101E Member of Team**

41. We note recommendation 3 in the Statutory Review of Ch 9A of the *Coroner's Act* report states:

*Amend Chapter 9A of the Coroners Act 2009 to better reflect the organisational structures of the Department of Family and Community Services and NSW Health, to ensure representation of the portfolios of housing, child protection, women, and ageing, disability and home care, to be nominated by the responsible Ministers.*

42. We recommend specific mention of the relevant portfolios in the legislation, namely of housing, child protection, women, and ageing, disability and home care rather than simply referring to Departments, the names of which frequently change. This promotes transparency and is a way of ensuring representatives from these portfolios participate in the DVDRT.

43. We further recommend inclusion of a representative from Aboriginal Affairs.

44. We note s101E(5) currently legislates for 4 non-government representatives on the DVDRT. More than double this number of government department representatives currently participate in the DVDRT.

45. While we are not opposed to the inclusion of the Commissioner of Victims Rights in the DVDRT, we note this position is not independent from government.

46. We submit there should be a greater balance between government and non-government

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<sup>4</sup> NSW Standing Committee on Law and Justice, *Remedies for the serious invasion of privacy in New South Wales Report*, 2016, recommendation 2.

<sup>5</sup> *Ibid*, para 3.58.



representatives.

### **Section 101E(6)**

47. We welcome the inclusion of an additional Aboriginal and/or Torres Strait Islander identified position on the DVDRT. We submit this should occur irrespective of whether there is *"no other member of the Team [who] is an Aboriginal person or Torres Strait Islander"*. This is aside from the person who is *"an Aboriginal person or a Torres Strait Islander and who is a non-government service provider representative as a member of the Team"* : s101E(6). We feel that to do otherwise is disrespectful.

48. Additionally, this is consistent with the NSW Attorney General's Second Reading Speech in which the Hon Gabrielle Upton MP states:

*An Indigenous representative will also be added to the team to assist in identifying gaps in service delivery and to provide information, expertise and perspectives on issues particularly affecting Indigenous populations.*

### **Section 101J Reports**

49. We refer to Recommendation 27 in the NSW Women's Alliance response to the Blueprint for the domestic and family violence response in NSW:

*The NSW DV Death Review Team to meet and publically report at a minimum every six months. Where recommendations of the review are not implemented, NSW Government should give reasons for not doing so. Recommendations from both the DV Death Review Committee and the Child Death Review Committee to inform reform processes intersecting with domestic, family and/or sexual violence including children protection.*

50. WLS NSW is a member of the NSW Women's Alliance.

51. We do not support the DVDRT preparing a report for Parliament only once every two years. We believe it is important that systemic issues are identified and made public in a timely manner so improvements which could save lives can also be made in a timely manner.

52. At a minimum the DVDRT should report annually to Parliament as is the current legislative requirement.

### **Greater accountability of government for implementation of DVDRT recommendations**

53. We note one of the reasons for the request of less frequent reporting by the DVDRT to Parliament is due to *"insufficient time to adequately monitor the implementation of the Domestic Violence Death Review Team's past recommendations"*.

54. Recommendation 7 in the Statutory Review of Ch 9A of the *Coroner's Act* report states:

*Note the difficulties raised by the Coroner in monitoring progress and responses from NSW Government agencies to previous DVDRT Annual Report recommendations, and consider*



*mechanisms to monitor their implementation, including by way of a Premier's Memorandum to require Ministers and government agencies to report back to the Attorney on any action being taken to implement the DVDRT's recommendations, within a reasonable timeframe.*

55. Rather than a Premier's Memorandum to require Ministers and government agencies to report back to the Attorney General on implementation of the DVDRT recommendations we submit there should be a legislative requirement for government to respond to DVDRT recommendations in a timely manner and where the government does not accept particular recommendations to provide reasons.

If you would like to discuss any aspect of these comments please contact me or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

**Women's Legal Service NSW**

**Philippa Davis**

**Acting Principal Solicitor**

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