

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

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The Director, Criminal Law Review
Department of Attorney General and Justice
GPO Box 6, Sydney NSW 2001
ag_clrd@agd.nsw.gov.au

Contact:

Heidi Fairhall
President, NSW Young Lawyers

Thomas Spohr
*Chair, NSW Young Lawyers Criminal Law
Committee*

Contributors:

Mina Aresh, Russell Boyd, Tim Bullivant,
Francois Brun, Thomas Barbat, Mark Davies,
Jared Ellsmore, Karen Espiner, Hanna Innes,
Sarah Johnson, Joanna Mansfield, Angie
McClung, Cecilia Tuaeleva, Sera Yilmaz and
Vania Holt

Editor-in-chief:

Alexander Edwards
*Submissions Co-ordinator, NSW Young
Lawyers Criminal Law Committee*

Reviewers:

Robert Hoyles, David Porter and Thomas
Spohr

Preface

The NSW Young Lawyers Criminal Law Committee ("the Committee") refers to the consultation paper ("the Paper") produced by the Australian and New South Wales Law Reform Commissions (the "Commissions") in response to the terms of reference referred by the Attorney-General on the review of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). This submission adopts all the acronyms and abbreviations used in the Paper.

NSW Young Lawyers is a Division of the Law Society of NSW. It is made up of legal practitioners and law students who are under the age of 36 or in their first 5 years of practice. Our membership is made up of some 13,000 members.

The Young Lawyers Criminal Law Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

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Summary of key recommendations

The Committee recommends:

- in the case of offences perpetrated upon other persons or things but *directed* at the subject person, such as animal cruelty and telecommunications offences, the definition should include a mechanism for determining that the offence in question was indeed a personal violence offence;
- for costs purposes, police officers be required to apply discretion in evaluating whether an AVO is appropriate as disclosed by the complaint and surrounding circumstances;
- the consideration of an election mechanism similar to Chapter 5 of the *Criminal Procedure Act* for the summary disposal of indictable offences for AVO applications involving 'serious offence' matters that are remitted to a higher court;
- the inequality of representation in AVO proceedings be addressed;
- legislative guidance is provided on the construction of 'approach' and 'contact'; and
- consideration be given to plain English drafting of standard and additional AVO conditions.

Expansion of personal violence offences

The definition of 'personal violence offence' informs the definition of domestic violence offence. It is the categorisation of an offence as domestic violence that results in particular consequences. Domestic violence often involves a wide range of associated offences. In the experience of the Committee, these offences include

- assaults;
- menacing or furious driving;
- telecommunications (Commonwealth);
- intimidate or influence witness;
- perverting the course of justice;
- break and enter;
- malicious damage;
- fire;
- fraud;
- animal cruelty;
- murder;
- theft;
- firearms; and
- sexual assault.

In particular, the Committee has observed an increase in the use of mobile telephones, text messages, internet and social media-type devices to threaten victims. Often, these offences are committed to deter the victim from pursuing a matter already before the court.

The Committee recommends that, in the case of offences perpetrated upon third persons or upon things but *directed* at the subject person, such as some animal cruelty offences, the definition should include a mechanism for determining that the offence in question was indeed a personal violence offence. The Committee specifically recommends that Commonwealth telecommunications offences and public justice offences should also be included because of their prevalence in domestic violence related offences.

Definition of 'domestic relationship'

The Act's definition of 'domestic relationship' is too broad. The consequences flowing from this, including automatic AVOs and the engagement of other provisions are not insignificant. The Committee recommends the clarification of section 5(d) – although it may be a useful *indicator* of the existence of a domestic relationship that two persons have lived in the same household together at some stage, the characterisation of *all* subsequent acts of violence as 'domestic violence' related is frequently unwarranted. Sections 5(e) and (f) are also broad, but it is the experience of the Committee that these sections do have particular utility in protecting vulnerable persons.

On a related matter, the current lack of a temporal restriction on the existence of a domestic relationship is important and should survive any amendment. In the experience of the Committee, the activities of ex-partners account for a large number of police complaints and ADVOs.¹

¹ See further Patrick Parkinson et al, 'The Views of Family Lawyers on Apprehended Violence orders and Parental Separation' (2010) 24 *Australian Journal on Family Law* 313.

Revocation of AVOs

Revocation of an AVO after the term of the order

The current test requires the court to consider the effect revocation of the expired order would have on the PINOP. To do this, the court needs evidence from the PINOP (or police in some cases) about the effect revocation would have on the PINOP. The PINOP must face court again – and consequently the defendant. There is no limitation on when this can occur so that conceivably it could be several decades after the order is made. As a consequence, a PINOP would only ever be free to put a matter entirely behind him or her after an order is revoked, which seems contrary to the objects of the Act.

Members of the NSW Police Force are occasionally a party to an AVO, whether it be an AVO taken out against a police officer by someone with whom they have a domestic relationship (a wife, girlfriend, child, husband, or mother) or commonly, an AVO may be taken out against police officers by members of the public who encounter police in the course of their duties. The latter category is often frivolous or vexatious.

While the Police Force Standard Operating Procedures provide that, if a police officer is the subject of an AVO, he or she shall have his firearm taken from him (see ss 17(2)(b) and 20(2)(b)), this is not necessarily the result. It is a matter to be assessed by his or her superiors. The solution usually adopted is that the police officer will lock up their gun in the gun-room of their police station and ask for the gun to be unlocked when he or she goes out. The Police Standard Operating Procedures indicates as much in the statement: “Bear in mind the duty of care when considering the return of a NSW Police Force firearm to an officer who is the subject of an AVO...”

The need for police officers to carry weapons is not a rationale for revocation. There are, however, policy reasons in favour of allowing revocation after expiry of an order. An order may no longer be required if it has been allowed to expire and has not been extended. Circumstances can change considerably between defendants and PINOPs due to the passage of time, the fact that they have aged (which is particularly relevant where a party to the AVO was a child) and in many cases the parties may be content to let the order lapse after, for example, changing jobs or moving cities. Lastly, policing is not the only profession which is required to carry or use a firearm regularly.

Where the provision for revocation should be located

The provisions for revocations should remain in the Act. For a number of reasons, it is inappropriate for the issue to be dealt with in the other legislation suggested:

- The Administrative Decisions Tribunal reviews certain decisions under the *Firearms Act 1996*. Tribunal members may not be familiar with criminal concepts and the AVO legislation, and will not normally have oversight of AVO legislation. Revocation of an AVO to enable a person to obtain a firearm or weapons licence should remain within the jurisdiction of Magistrates who have appropriate experience.
- The current test does not require the court to consider the effect on the defendant of being unable to obtain a licence or employment, though of course these may be persuasive in all the circumstances. However, if the provisions for revocation were moved to these acts, the focus would, in the Committee's view, inevitably change to a presumption in favour of licensing and employment, above the protection of the PINOP, which is the primary object of the Act.

What considerations should form part of a test to determine whether an application to revoke an expired order should be granted

As stated above, once an order has expired the presumption will usually be that a final order should not remain in force. However, if the use of firearms was an element in the conduct of the defendant which gave rise to the AVO, and the PINOP is affected by the defendant being able to obtain a firearm or weapon's licence, then this factor ought to be considered. The existing test allows for these considerations to be made, and it is appropriate that it remain as is.

Costs in AVO matters

Assessment of liability – costs orders against police

The Committee supports clarification of the circumstances in which costs orders should be issued against officers in AVO matters. The Committee (which has had the benefit of considering the Law Society's submission) is also aware that there is some disagreement between Law Society Committees in relation to the issue of costs – on which, see below.

Policy argues that police officers should not be liable for the initial decision to apply for an AVO, provided there has been no dishonesty or knowing misrepresentation (see *Constable Redman v Willcocks* [2010] NSWSC 1268). Whilst this is a less onerous requirement than s 214(b) of the *Criminal Procedure Act 1986* (NSW) ("the CPA"), it is consistent with the purpose of AVOs – to protect vulnerable persons from harm. To achieve this goal, officers must be free to immediately apply for orders and to seek interim orders where necessary.

However, it is the experience of the Committee that the threshold of 'dishonesty' is too high. An officer may apply for an AVO in completely inappropriate circumstances but in response to a genuine complaint and yet not be 'dishonest'. Further, police officers may proceed to apply for the AVO notwithstanding that the initial complaint has been withdrawn. In the case of ADVOs, there is solid policy reason for this, but, again, there is not sufficient justification for not holding officers to a reasonable standard of discretion. The Committee recommends that police officers apply some level of fair-minded discretion in evaluating whether an AVO is appropriate as disclosed by the complaint and surrounding circumstances.

The subsequent conduct of police officers *after* an application is made should be assessed against the standards set in Part 4 of the CPA. By that stage of proceedings, police have the time to fully assess the case and identify the correct course of conduct. Existing Practice Notes in the NSW Local Court mean that at least a mini-brief will need to be served within very short order, such that police ought to have solid evidence against which to make a determination. Whilst AVOs are incredibly important because they protect vulnerable parties, many other matters held to the standards in Part 4 are no less grave. Where possible, the Committee would support the importation into the Act of the provisions of Part 4.

As an addendum, any discussion of costs against police should be considered against the background of inequality of representation in AVO matters. As matters currently stand, the likelihood of a costs order against police who have brought an AVO is close to zero. The consequence is that defendants are much less likely to engage representation, since they will not be able to recoup those costs. Even in unfounded complaints, there will not be the chance to recover costs. Legal Aid is not normally available, nor does the Aboriginal Legal Service appear in AVO matters. Due to funding arrangements, some Community Legal Centres will not provide advice to the male party in an AVO matter.

AVOs exist for a reason, and fulfil a vital role. The PINOP should be afforded all possible protection and advocacy. However, that is not a sufficient reason to compromise the fairness of the process. Whatever the solution, the unfairness of representation in AVO proceedings must be confronted and may require reconsideration of the funding arrangements at Legal Aid and related organisations.

Assessment of quantum – relationship between the CPA and the *Legal Profession Act 2004*

The Committee understands that there are two differing positions expressed in the Law Society submission in respect of s 353(4) of the *Legal Profession Act 2004*. The Committee is inclined to agree with the position of the Law Society Criminal Law Committee on this issue.

Generally, costs orders would be simplified if there were greater specificity in the Act as to which provisions of Part 4 of the CPA are applicable. This could be achieved by identifying which provisions are imported by s 99(1) or, in the alternative, which provisions are not.

AVO applications that are remitted to a higher court

The Paper identifies three options to streamline AVO proceedings where a ‘serious offence’ has been charged and remitted to a higher court for determination, thereby avoiding unnecessary duplication of proceedings and the need for victims to give what is often similar evidence again in the AVO proceedings.

The Committee agrees that reform in this area is desirable. It is in the interests of justice that AVO proceedings be conducted as efficiently as possible, and it is consistent with the objects of the Act that victims not be subjected to the process of giving evidence more than necessary for the law to operate effectively. However, clearly any reform should be careful not to curtail the rights of defendants or undermine the integrity of either proceeding.

Option 1 – Two year final AVO ordered from the date of committal for trial

The Committee does not support this option.

It is significant that, although dealing with substantially similar subject matter, committal and AVO proceedings concern fundamentally distinct inquiries and burdens of proof. The objective of committal proceedings is to test the strength of the prosecution case and, by its executive function, does not seek to determine to finality a person’s guilt or otherwise. In practice, financial and forensic considerations of the defendant mean it is rare for defence evidence to be adduced at all.

The Committee is concerned that the making of a final AVO upon committal would occur without having first considered all available and relevant evidence, and may constitute a denial of procedural fairness.

Further, the prospect of a final AVO being made could create conflict for a defendant when making the forensic decision whether to adduce evidence at the committal stage. There may be evidence available that advances the defendant’s case in opposition to an AVO, but adducing it at committal may have a significant detriment to their case in the serious offence matter.

In the event of an acquittal of the serious offence, an additional step would more than likely still be required where a defendant seeks to have the final AVO withdrawn.

It is the Committee's view that the making of an interim order currently provided for by s 40(1) of the Act pending the outcome of a serious offence matter is sufficient. However, the Committee agrees that some modification may be required to ensure the offences to which ss 39 and 40 apply to are the same.

Option 2 – Enable the AVO matter to be remitted to a higher court for finalisation or permit the higher court to formally refer the matter back to the Local Court

The Committee supports Option 2 insofar as it would allow the serious offence and the related AVO matter to travel through the system together.

There would be two ways in which the AVO matter could be finalised if remitted to the higher court – either by operation of s 39 of the Act upon a finding of guilt or, in the case of an acquittal, by a determination based on the evidence adduced in the serious offence matter. The former is not controversial. However, the Committee notes significant difficulties with the latter.

No appeal as of right under s 84 of the Act.

Financial constraints alone mean this may have the practical effect of removing any opportunity of review for many defendants or private applicants where an appeal lies only to the Supreme Court or Court of Appeal. Similarly, this would impose budgetary constraints on prosecuting authorities in exercising their discretion whether or not to proceed with an appeal against the dismissal of an AVO. Otherwise meritorious cases may not be appealed, leaving victims and others unprotected in contradiction of the Act's objectives.

Evidence that is inadmissible in criminal proceedings may be admissible in AVO proceedings

Clarification would be required as to whether (and by what mechanism) either party is entitled to adduce further evidence in accordance with the civil nature of the AVO proceedings. The Committee is mindful that an acquittal of a serious offence on a narrow or technical basis would not of itself preclude the relevant test for making an AVO under ss 16 or 19 of the Act being satisfied.

Accordingly, the Committee favours enabling the higher court to formally refer the matter back to the lower court to finalise, together with any material to assist it. This option preserves the right of all parties to appeal the making of an AVO in a manner that is cost effective and promotes the objectives of the Act.

Option 3 – Provide for the transmission of evidence given in the higher court to the lower court and provide for the admissibility of that evidence in the AVO proceedings

For the reasons above, the Committee supports Option 3 and the transmission and provision for the admissibility of evidence given in the higher court to the lower court.

The Committee notes that concerns raised in previous reviews by the Australian Law Reform Commission surrounding the potential for prejudice where evidence of family violence proceedings is admitted in criminal proceedings do not arise to the same extent in reverse. However, it remains preferable that any evidence transmitted from the higher court only be admitted by consent or leave of the lower court, subject to the general rules of evidence and considerations of weight. Parties should have an opportunity to adduce further evidence given the broader focus of AVO proceedings and the different standard of proof. Parties should retain the right to cross-examine witnesses on any evidence transmitted from the higher court.

Further Options

The Committee is of the view that other options ought to be explored. One alternative could be an election mechanism similar to Chapter 5 of the CPA for the summary disposal of indictable offences.

Provision could be made for the higher court to make a final AVO under s 39 of the Act following a finding of guilt of the serious offence, rather than remitting to the lower court for the same order to be made. Where a defendant is acquitted and contests the AVO, either the defendant or the prosecutor could elect to have the matter remitted to the lower court along with any evidence. The admissibility of that evidence and the opportunity to adduce further evidence would then be determined in accordance with Option 3 above. If no election is made, then the higher court can determine the AVO matter.

This or a similar approach would preserve appeal rights of all parties where an election is made, avoid duplication and additional expense where no further evidence is to be adduced in the AVO matter (or there is little dispute about its admissibility), and reduce as much as possible the number of occasions on which victims are required to give evidence.

Referral to mediation

Identifying appropriate matters for mediation

Referral identification criteria in ss 21(4) and 53(6) of the Act reflect the general consensus² of the type of matters that are not appropriate for referral. This provides the Court with minimal guidance about what matters are appropriate for referral. Apart from experience, the s 21(4) report by the Director of Community Services is the only channel through which the Court can improve its skills in identifying appropriate cases for referral. Therefore, judicial attitudes inform referral decisions. Those attitudes may reflect beliefs about the potentials and limitations of mediation that contradict the experiences of mediators or have little empirical support. As well as the underutilisation of mediation, such a discretionary referral model can lead to automatic referral, which in turn can make parties feel coerced into mediation.

Community Justice Centres ("CJCs") have the relevant specialist training to identify appropriate matters for mediation. To ensure that all appropriate matters are referred, the Committee agrees with the CJC recommendation that authorised justices and Registrars should be provided with training by the CJC.

The requirement under the Victorian Model for a mediation assessment certificate provides the relevant expertise in ensuring appropriate referrals are made, and is essentially a cooperative assessment between Courts and CJCs.

Court directed mediation: The Victorian Model

The Committee recommends further study into the adoption of court directed mediation under the Act.

The 2007 Victorian Pilot Project, focused on the diversion of non-family intervention order cases, identified a major barrier to referrals as, "difficulty (by court staff) influencing clients with applications fitting the eligibility criteria to consider mediation as an alternative." Consistent with this finding, CJCs have found that on average, only 44% of parties to whom mediation is offered, consent to mediation.³

² See New South Wales Law Reform Commission, *Report 103 - Apprehended violence orders* (2003).

³ NSW Community Justice Centres, *Annual Report 2000-2001* (2001).

A factor relevant to poor levels of voluntary participation is that parties do not have the knowledge nor are they objectively placed to assess the effectiveness of mediation, assisting in their particular circumstances. Mandatory mediation may overcome the inhibition to voluntary participation by removing the sense that one party or the other has weakened its position.

The Victorian Model is appropriate because of the following features:

- free assessment and mediation provided by experienced, accredited mediators who are subject to practice standards;
- pursuant to s 32, there are no sanctions for non-compliance (s 32); and
- pursuant to s 30, the mediation certificate preserves confidentiality (s 30).

The Committee notes that the s 34 guidelines contain a good faith requirement. Criticisms of a good faith standard are based on concerns that the court intrudes into the mediation process when evaluations about participation are made. However, the Victorian Model avoids good faith participation being an aggravating factor because a dispute resolution officer carries out the referral assessment and remains confidential under s 30. Regardless, the Committee does not support assessment criteria that raises the standard of participation, given that the NADRAC acknowledges that there is no evidence that bad faith participation is a barrier to legitimate, successful, mandatory mediation.

Vague language

Two terms are used with great frequency in AVO conditions. These are 'approach' and 'contact'; for example "do not approach within 50 metres of Person A", "do not contact Person B" and so on. Neither is a defined term, and each is interpreted in accordance with its ordinary English meaning.

The Committee's experience is that these terms can pose serious difficulties in construction and evidence. From a defence perspective, advocates must advise and argue on the interaction of these vague terms with everyday circumstances. Is the boarding of a train an 'approach'? If a defendant is confronted by the PINOP, is it 'contact'? From the police prosecutor perspective, there are evidentiary challenges where the 'approach' of one person depends on proving that the other person was indeed at the relevant location first.

The Committee recommends legislative guidance is provided on the construction of 'approach' and 'contact'.

Complex language

Complex AVO conditions are a related issue. For example, the standard condition in s 35(2)(c) "prohibiting or restricting the defendant from approaching the protected person, or any such premises or place, within 12 hours of consuming intoxicating liquor or illicit drugs" combines not only the vague words explained above, but unnecessarily legalistic descriptions of alcohol and drugs. Many persons subject to an AVO do not leave court with a firm grasp of the actual requirements of the order. This is clearly not an effective way to encourage compliance with the terms of the order or to protect PINOPs.

The Committee recommends consideration be given to plain English drafting of standard and additional AVO conditions.

The Action Plan

Item 29

See the Committee's response to issues relating to the definitions of 'personal violence offence' and 'domestic relationship'.

Item 30

Recognising the presumption that a victim of domestic violence has the right to remain in the family home

See comments in response to Item 32.

Focusing on perpetrators of domestic violence taking responsibility for their actions

The Committee is of the view that it would be useful to expressly recognise the need for perpetrators of domestic violence to take responsibility for their actions by incorporating an additional objective in s (9)(1) of the Act. The Committee proposes the following subsection:

(e) to ensure perpetrators of domestic violence take responsibility for their actions.

Using the verb "focusing" as suggested in the Action Plan is undesirable as the proposed subsection would be but one of five distinct objects of the Act relating to domestic violence. It could create the misleading impression that the object ought be the subject of greater consideration than the other objects, or least raise an ambiguity. Therefore the verb "ensure" is preferred and is consistent with subsections (a), (c) and (d).

The failure of a perpetrator to acknowledge wrongdoing in the context of domestic violence can be a catalyst for recidivism. This is particularly so in the case of domestic relationships involving marriage, de facto partnerships or intimate personal relationships. Whilst the majority of perpetrators are able to accept that any form of physical violence is enough to constitute domestic violence, many are either unaware or unwilling to accept that other forms of behaviour such as economic, emotional or psychological abuse, stalking, or exposing a child to the effects of such behaviour are also domestic violence. The proposed legislative amendment addressed in Item 31 below may assist in educating and rehabilitating perpetrators so that they are able to understand and take responsibility for their actions.

Item 31

The Committee endorses the insertion of a provision into the Act allowing for courts to make voluntary referral orders to a preventative / rehabilitative program in relation to ADVOs and other domestic violence related offences. This would accord with the Action Plan's strategies aimed at prevention, which point to research that shows that "repeated acts of domestic violence are prevented by early intervention, crisis and long-term management programs".

Whilst the Committee approves the Action Plan's use of terminology such as "stopping or preventing domestic violence on the defendant's part" and "promoting the protection of the protected person", voluntary referral orders also ought also have a rehabilitative focus for perpetrators. It might therefore be useful to recognise this in the drafting of the proposed provision. The protection afforded by an ADVO may be effective in preventing further domestic violence upon a particular PINOP, it may not of itself be an effective deterrent in relation to further domestic violence being inflicted by the defendant upon other persons. Educating a perpetrator about the prevalence of and harm caused by domestic violence through the relevant program would be a measure to reduce the

likelihood of recidivism and its effectiveness could be observed under the Action Plan's five-year monitoring proposal.

As is strongly emphasised throughout the Action Plan, intervention at the earliest practicable stage is a paramount consideration. However, a voluntary referral must also be made at an appropriate and effective time. The Committee submits that a referral should attach to the conditions of a final ADVO where appropriate. The certainty of a Final Order is an important first step in a defendant coming to terms with his or her harmful behaviour.

In relation to domestic violence offences, a referral ought be an option available to the court at the stage when an offender has entered a plea of guilty or been found guilty of the offence. The matter could then be stood over to allow the offender time to complete the relevant program before he or she is sentenced, similar to a referral to a Traffic Offenders Program for drink-driving offences. This may assist the offender in gaining insight into his or her offending behaviour and could become a relevant factor in sentencing.

Lastly, the Action Plan's suggestion of a referral having an objective of "assisting a child to deal with the effect of domestic violence" is, in the Committee's view, a matter for support and counselling services and not something that could be directly achieved through a perpetrator participating in such a program. This is therefore inappropriate terminology to include in the proposed provision, although it could safely be assumed that where children are the subjects of or are affected by domestic violence this will be addressed in the relevant program.

Item 32

The Committee submits that providing a rebuttable statutory presumption in favour of a protected person remaining in their place of residence would confer no additional protection than that which is presently available. That the court is to determine pursuant to s 35(1) whether such a prohibition is "necessary or desirable...to ensure the safety and protection of the person in need of protection and any children from domestic or personal violence" provides an important safeguard to defendants.

A restriction as significant as a defendant being prohibited from accessing his or her residential premises regardless of "whether or not the defendant has a legal or equitable interest in the premises or place" ought only be imposed after it is deemed necessary or desirable according to evidence. It is important that ADVOs are not sought vexatiously and a statutory presumption in favour of a protected person remaining in their place of residence could vitiate this consideration.

It should also be noted that the Action Plan identifies the issues that can arise in relation to accommodation with reference to the NSW Homelessness Action Plan 2009-2014, most relevantly the concern to "[provide] long-term accommodation and support for women and children escaping domestic violence". The Committee supports the constructive, practical approaches to this issue proposed in the Action Plan.

The Family Violence Report

Recommendation 7-2

Section 9(3) of the Act currently recognises a number of the natures, features and dynamics of family violence that are outlined in this recommendation. It would be desirable to include a provision stating that the incidence of domestic violence is underreported. Such a provision would highlight the difficulty in identifying domestic violence and would support a preventive approach to such violence, such as the Act already encourages through empowering the courts to make apprehended violence orders.

It does not seem necessary to incorporate the phrase “while anyone may be a victim of family violence, or may use family violence”, as this is implicit in the Act’s gender-neutral vocabulary and would have little impact on the operation of the Act. Although this may appear to create a gender-biased statement, the Act contains express objects to address domestic violence in terms of reducing violence against women and children. Reference to the predominant gendered nature of domestic violence appears consistent with the objects of the Act. Including a provision that states that domestic violence “has a detrimental impact on children” may be useful. However, s 9(3)(f) currently highlights the differential impact of domestic violence on children in terms of their vulnerability and well-being. Use of the word “detrimental” would not appear to have significant consequences on the operation of the Act, as potential detriment is implied through the recognition of children’s particular vulnerability. Nevertheless it may be desirable to include such a provision if the Act seeks to place further importance on the vulnerable position of children.

The Committee does not view reference in the Act to particular groups affected by domestic violence as necessary. Whilst these groups are often acknowledged as particularly vulnerable, an express reference to them in the Act may not be required to ensure that these groups are properly recognised. Proper recognition of these groups’ vulnerabilities may be better addressed through equity based policy approaches. If reference were to be made to these groups in the legislation, it would be necessary to consider whether the full scope of vulnerable groups has been included. This may require consultation with stakeholders.

Recommendation 7-4 (c)

Ensuring that people who use family violence are made accountable is not currently included as an object of the Act in relation to domestic and personal violence. However, to include this as a core purpose of the Act would be consistent with the Act’s current objects and provisions.

The objects of the Act look to the safety and protection of victims of violence, as well as the reduction and prevention of domestic violence. Given that domestic violence is often associated with repeat offenders, it appears consist to incorporate an object relevant to accountability. In seeking as a core purpose to hold users of domestic violence to account, the Act may be able to reduce repeat incidences of domestic violence. The Act achieves its objectives through empowering courts to make apprehended domestic and personal violence orders. The personal nature of these orders means that individual accountability is central to their effectiveness.

Any core purpose relevant to accountability must not interfere with a defendant’s right to a fair trial. In some provisions, such as s 17(3), the court is expressly required to consider the safety and protection of protected persons, and impose restrictions on the defendant only to the extent they are necessary in light of that consideration. In such cases, steps to ensure accountability of the perpetrator should not interfere with the defendant’s right to have only certain matters considered.

Recommendation 20-3

The Committee is of the opinion that state and territory family violence legislation should confer jurisdiction on children's courts to hear and determine applications for family violence protection orders. However, it must be emphasised that this power is restricted to situations where:

- the person affected by family violence, sought to be protected, or against whom the order is sought, is a child or young person;
- proceedings related to that child or young person are before the court; and
- the court is satisfied that the grounds for making the order are met.

It is already the case that some state and territory family violence laws currently confer jurisdiction on children's courts to make family violence protection orders. However, the restrictions and limits on this jurisdiction vary considerably. It is therefore clearly advantageous that this area of jurisdiction is clarified. The requirements on this power, namely that it should only be available where there are proceedings in the court involving the child or young person, or a member of that person's family, would seem to sufficiently limit the power to only the most relevant circumstances.

Jurisdiction to make family violence protection orders would likely increase the efficiency and effectiveness of the judicial system. Through expanding jurisdiction to the children's courts, a family which enters into the court process at the point of the children's court will not be further burdened through needing to commence additional proceedings, increasing that family's access to justice and not burdening the courts with unnecessary and resource-consuming proceedings.

An expansion of jurisdiction would also be consistent with the expertise of the children's court. Magistrates of the children's courts not only would be aware of many of the issues of domestic violence relevant to the granting of family violence protection orders, but would have a particularly unique experience in deciding matters in the best interests of the child. Their particular perspective formed through daily dealings with children's matters would therefore better inform and adhere to the objectives of the family court judicial process in protecting the "best interests of the child".

It may also be argued that these changes would provide better for the safety of children in all cases, providing a partial safety net when police fail to act appropriately. Currently, it is mandatory that police officers seek a family violence protection order in circumstances where they suspect that a child or young person has been harmed, or is at risk of being harmed through family violence. However, problems can be identified with this scheme. For example, reports by the Ombudsman suggest there may be some inappropriate attitudes held by some police officers that devalued the seriousness of the crime and minimized the experiences of the people, leading to a failure to act on what would otherwise be reasonable suspicions.⁴ Although this may not be ideal, it does mean that in the small amount of cases where police fail to appropriately act on a matter, the Children's Court would be able to fulfil this role, simply providing a further protection mechanism to keep children from harm.

Recommendation 20-4

The Committee supports the recommendation that where the Children's Court has jurisdiction to hear a family violence protection order application, the court should also be able to make a family violence protection order in favour of siblings of the child or young person applying, or other children or young people in the same household affected by the same or similar circumstances. This seems sensible and appropriate to avoid the unnecessary process of further applications, or the risk that other siblings may not (or cannot) come forward. This would provide more comprehensive protection for all children, and acknowledges the reality that domestic violence is not limited to relationships between individuals of the household but affects all members of the household.

⁴ NSW Ombudsman, *The Policing of Domestic Violence in NSW* (1999).

The Committee thanks you for the opportunity to comment.

If you have any questions in relation to the matters raised in this submission, please contact:

Thomas Spohr, Chair of the NSW Young Lawyers Criminal Law Committee
(crimlaw.chair@younglawyers.com.au)

or

Heidi Fairhall, President of NSW Young Lawyers
(president@younglawyers.com.au).

Yours faithfully,

A handwritten signature in blue ink, appearing to be 'T. Spohr', written over a horizontal line.

Thomas Spohr | Executive Councillor, NSW Young Lawyers | Chair, Criminal Law Committee

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