



THE LAW SOCIETY
OF NEW SOUTH WALES

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17 August 2016

The Hon Gabrielle Upton MP
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CC:
Mr Andrew Cappie-Wood
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Dear Attorney General,

Apprehended Domestic Violence Orders involving child defendants

The Law Society of NSW writes regarding the operation of section 27(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ("Act") as it relates to defendants who are children.¹

Section 27(1) of the Act provides that an application for a provisional apprehended domestic violence order ("ADVO") must be made where the police officer suspects that domestic violence has occurred. Section 27(4) provides that an application need not be made if the person for whose protection an order would be made is at least 16 years of age and the investigating police officer believes that there is good reason not to make the application. Section 27(6) provides that, for the purposes of s 27(4), the reluctance of the person (for whose protection an order would be made) to make an application for an interim ADVO does not, on its own, constitute a good reason for a police officer not to make an application if the police officer reasonably believes that the person has been the victim of violence or there is a significant threat of violence to the person, or the person has an intellectual disability and has no guardian.

¹ In this submission, "child" and "young person" are used interchangeably to refer to a person aged under 18 years.

The Law Society understands that there is no formal NSW Police Force (“NSWPF”) policy in relation to the exercise of discretion in matters involving child defendants in domestic violence matters. However, we understand that some discretionary factors are nevertheless applied by police officers on a case-by-case basis.

The Law Society considers that it may not always be appropriate to require police officers to automatically make an application for an interim ADVO in all domestic violence matters involving child defendants. This is particularly the case if the victim is the parent or guardian and is reluctant to make such an application against their child.

We consider that children and young people should be treated differently to adults, and that a wider discretion should be available to police officers where children or young people are potential ADVO defendants.

The Law Society acknowledges the 2010 report of the Australian Law Reform Commission and the NSW Law Reform Commission on family violence, in which the Commissions suggest that police have a duty to apply for a protection order in appropriate circumstances, however:

... the Commissions are not convinced that there should be a very broad, fixed set of circumstances in which police must always apply for a protection order. It does not seem appropriate to require police to apply routinely for an order whenever there has been an incident of family violence or whenever there is some likelihood of future family violence—*particularly if the victim, without apparent coercion or intimidation, has made it clear that he or she does not need protection in this way*. The Commissions therefore do not prescribe a list of particularly vulnerable victims for whom police must always apply for an order. Similarly, *the Commissions do not prescribe a set of circumstances in which police must always apply for an order*. However, police codes of practice, education and training should give police guidance on this matter.² [Emphasis added]

The 2016 recommendations of the Victorian Royal Commission into Family Violence provide that Victoria’s approach to addressing adolescent violence in the home should be guided by the principle that “[r]esponses should be flexible and tailored to the particular circumstances of each family.”³

Children differ from adults in their physical and psychological development and their emotional and educational needs. These differences are the reasons for a separate juvenile justice system and require different treatment for children.⁴ These principles underline the *Young Offenders Act 1997* (NSW), the object of which is to, amongst other things, establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences.⁵ The Law Society considers that these differences are also relevant to, and should be recognised in, the context of domestic violence matters where children are the defendants.

² Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, Final Report, ALRC Report No 114 (2010) vol 1, NSWLRC Report No 128 (2010) vol 1, 389 [9.89].

³ Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) vol IV, 166.

⁴ UN Committee on the Rights of the Child, *General Comment No. 10 (2007): Children’s rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), para. 10.

⁵ Section 3(a), *Young Offenders Act 1997* (NSW).

While the Law Society recognises the typical power imbalance in domestic violence matters and the need to ensure that victims are not pressured by violent partners into not proceeding with an ADVO, we believe that the power dynamic can be different between a child defendant and their parent or guardian. As recognised in the 2016 recommendations of the Victorian Royal Commission into Family Violence, “[a]dolescent violence in the home should be recognised by the family violence system as different from adult-perpetrated family violence.”⁶

The Royal Commission acknowledged these differences as follows:

... [p]arent victims tend to have greater control and freedom than victims of intimate partner violence; they are more easily able to maintain privacy and confidentiality and are likely to have greater economic and social resources than their child. The young person’s legal status as a child affects how the justice system responds, with an appropriate focus on rehabilitation... [m]ost parents view reconciliation as the ideal outcome in adolescent violence situations, whereas this is less often the case for victims of intimate partner violence.⁷

An application for an interim ADVO against a child may not be in the interests of the child’s parents or guardians, who have the primary responsibility for the upbringing and development of the child and whose basic concern is the best interests of the child. There is a risk that parents or guardians may not call the police if an application for an interim ADVO is required to be made in all the circumstances, which would be contrary to the aims of the Act. Furthermore, an interim ADVO may result in a child being separated from their parents or guardians, which may be contrary to the child’s best interests.

The Law Society considers that the Act should be amended to create a discretion in relation to children and young people under the age of 18 years who are the defendants in domestic violence matters. This will enable a police officer to consider all the circumstances in determining whether it is appropriate to make an application for an ADVO.

The Law Society notes that police discretion to apply for provisional orders exists in personal violence matters under the Act. Section 26(1)(b) provides that an application for a provisional order may be made if:

... a police officer has good reason to believe a provisional order needs to be made immediately to ensure the safety and protection of the person who would be protected by the provisional order or to prevent substantial damage to any property of that person.⁸

We consider that adopting a similar framework in domestic violence matters involving child defendants, as described above, would be within the scope of the Act.

⁶ Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) vol IV, 166.

⁷ *Ibid.*, 154.

⁸ Section 27(1)(a) of the Act only requires a police officer to make an application for a provisional order if the police officer suspects or believes that “a domestic violence offence... 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.” No such positive obligation exists for a personal violence offence.

Thank you for considering this letter. Should you have any questions or require further information, please contact Meagan Lee, Policy Lawyer on (02) 9926 0214 or email Meagan.Lee@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Gary Ulman', followed by a horizontal line and a period.

Gary Ulman
President