THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: rbg576322

15 November 2011

Ms Penny Musgrave
Director
Criminal Law Review Division
Department of Attorney General and Justice
DX 1227

Dear Ms Musgrave,

Statutory Review of the Crimes (Domestic and Personal Violence) Act 2007

The Law Society's Criminal Law Committee (Committee) welcomes the opportunity to make submissions to the statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*.

The Committee has reviewed and responded to the questions raised in the discussion paper in the attached submission.

Should you have any questions please contact the policy lawyer with responsibility for this matter, Rachel Geare, who can be contacted on 9926-0310 or by email at rachel.geare@lawsociety.com.au.

Yours sincerely,

Stuart Westgarth
President

1. Definition of 'personal violence offence'

The Committee submits that the definition of 'personal violence offence' should be expanded to cover all offences involving violence that occur in a domestic violence context. Federal offences committed in a family violence context should also be included in the definition.

2. Definition of 'domestic relationship'

If a 'personal violence offence' is committed by one person against the other, and the two people are in a 'domestic relationship', the offence will be a 'domestic violence offence' (section 11). There are significant consequences if an offence falls within the definition of a 'domestic violence offence', which, as outlined in the discussion paper, include:

- The police are given greater powers to deal with such offences (Part 6, *Law Enforcement (Powers and Responsibilities) Act 2002*), including the power to search for a greater range of weapons at the scene of domestic violence incidents (sections 86-87, *Law Enforcement (Powers and Responsibilities) Act 2002*).
- The offence is an exception from the presumption in favour of bail (section 9A *Bail Act 1978*).
- The sentence for such an offence cannot include home detention where it is likely the offender would reside, or resume a relationship with the victim/s (section 76(g) *Crimes (Sentencing Procedure) Act 1999*).
- Police are required to make an application for an order.
- In some cases it can be considered an aggravating factor in sentencing.

The Committee is of the view that the definition of 'domestic relationship' is too broad. The Committee submits that sections 5(d), (e) and (f) which cover flatmates; persons living long-term in the same residential facility; and carer type relationships, should be deleted.

Section 5(c) is also problematic, and encompasses anyone who has had an intimate personal relationship with another person. A one-night sexual encounter is categorised as an 'intimate personal relationship' and the Committee submits that this cannot be what was contemplated by the legislature when it enacted the definition of a 'domestic relationship'.

The Committee is not suggesting that orders should not be available for people in these relationships. These relationships can be more appropriately considered in the context of personal violence matters (violence outside a domestic relationship). Removing these relationships from the definition of 'domestic relationship' gives the police discretion to seek orders without an obligation to do so.

3. Variation applications where a child is the person in need of protection

Section 72(3) provides that an application for variation or revocation must be made by a police officer if the protected person or one of the protected persons is a child at the time of the application.

The Committee is of the view that the legislation should be amended to allow for a protected person or a defendant to apply for a variation or revocation of an order. The case study below illustrates the need for the legislative amendment. The Committee agrees with the considerations in support of the legislation set out in the discussion paper. If the legislation is amended, the Court would have the discretion to consider the application and refuse to amend the order if it is not in the best interests of the child.

Case study

Jason, aged 19, and his former partner Danielle have a 2-year-old daughter, Taylor. Taylor currently lives with Danielle's parents and has regular contact with both Jason and Danielle.

Last year, soon after Jason and Danielle broke up, Jason went back to Danielle's flat to pick up some of his belongings. Danielle refused to let him in and a fight ensued. Danielle called the police, who took out an AVO on her behalf.

At court, Jason consented to a final AVO containing the statutory orders and a condition that he not reside at, enter, or go within 100 metres of Danielle's residence. Taylor was not named as a protected person on the AVO. However, unbeknown to Jason and without mentioning it in court, pursuant to section 38(2) the court included a condition in the final order that had the effect of extending the operation of the AVO to Taylor. This meant that Jason was prohibited from going to visit Taylor. When Jason realised the problem, he sought to have the AVO varied. However, the court would not allow him to file a variation application because section 72(3) provides that if any of the protected persons is a child, an application for variation or revocation may only be made by a police officer.

Jason's solicitor contacted the local police Domestic Violence Liaison Officer, who was fortunately very co-operative and agreed to lodge a variation application. However, police DVLOs cannot always be expected to respond in this way; at the very least, many of them have a heavy workload and may not prioritise an application such as Jason's.

The Committee has considered the arguments against amending the legislation outlined in the discussion paper, and is of the view that these considerations can be addressed by the Court when it deals with the application.

4. Revocation of AVOs

The Committee is of the view that issues related to the impact of AVOs on defendants should be dealt with in the legislation that gives rise to the problem (i.e. the *Firearms Act 1996*, *Weapons Prohibition Act 1998* and the *Commission for Children and Young People Act 1988*).

The Committee's primary concern is about the impact on a person's future employment when the AVO was made against the person as a child.

The NSW Commission for Children and Young People collects and maintains a database of relevant AVOs against any person as part of its function in respect of background checking (section 36(1)(a) *Commission for Children and Young People Act 1988*). A 'relevant apprehended violence order' means a final apprehended violence order under the *Crimes (Domestic and Personal Violence) Act 2007* made on the

application of a police officer or other public official for the protection of a child (section 33 *Commission for Children and Young People Act 1988*).

The legislation has the seemingly unintended detrimental impact on children who are the defendants to an AVO if they ever wish to work in child related employment. The legislation makes no exemption for those AVO proceedings commenced while the defendant was a child. AVOs with child defendants are often taken out in response to school yard conflicts where the victim is often a child of a similar age, or incidences at the child's home or residence by the child's parent or carer. The legislation should not include AVOs which have no bearing on whether an individual will be suitable to work with children.

While an application can be made for an exemption from the ban from working with children, this only relates to offences and does not apply to AVOs. The Committee strongly supports an amendment to the *Commission for Children and Young People Act 1988* to exempt children who are the subject of an AVO under these circumstances from the Working with Children Check.

5. Costs in AVO matters

a) Assessment of liability – costs orders against the police

The Committee agrees with the Supreme Court that 'the test for the awarding of costs in s 99(4) is certainly not the same test as s 214(1)(b) [of the *Criminal Procedure Act 1986*] implies in relation to the initiation of proceedings'[1] and should be clarified. The Committee submits that the test should be an amalgamation of section 99(4) and section 214(1)(b).

b) Assessment of quantum – relationship between the *Criminal Procedure Act 1986* and the *Legal Profession Act 2004*

The Committee agrees with the Court of Appeal that the 'statutory scheme with respect to costs orders in relation to proceedings under the 2007 Act is undesirably complex'.[2] The Committee does not see any rationale for an assessment of costs under section 353(4) of the *Legal Profession Act 2004*. There is no reason why section 215 of the *Criminal Procedure Act 1986* should not apply in the few cases where quantum is an issue. The Committee submits that section 353(4) of the *Legal Profession Act 2004* should be repealed.

The Costs Committee has a different view, and while it would allow a Magistrate to specify quantum, it submits that in difficult or unusual cases the Magistrate should be able to direct the assessment of costs.

6. AVO applications involving 'serious offence' matters that are remitted to a higher court

The Committee supports Options 2 and 3 which would enable an AVO matter to be remitted to a higher court for finalisation. Alternatively the higher court may formally refer the matter back to the lower court to finalise, together with any material to assist the Local Court. This would enable the serious charge matter and the related AVO matter to travel through the system together. Provision would also be made for the transmission

[1] *Constable Redman v Willcocks* [2010] NSWSC 1268 at 40
[2] *Garde v Dowd* [2011] NSWCA 115 at 15.

of evidence given in the higher court to the lower court, and provide for the admissibility of that evidence in the AVO proceedings.

7. Apprehended Personal Violence Orders

The Committee supports the four proposals to address concerns about vexatious applications for APVOs.

Proposal A: enhancing the Registrar's discretion to refuse to issue an APVO application notice

The Committee supports the proposal to enhance the Registrar's discretion to refuse to issue an APVO application.

Options 1 and 2

The Committee supports the suggestions made by the Local Court referred to in the NSW Law Reform Commission's 2003 *Apprehended Violence Orders Report*, to amend the presumptions against a refusal to issues an application notice, being:

- harassment should require a continuing course of conduct, not 'one comment by a neighbour';
- Registrars should not have to consider the offences of stalking or intimidation because it is too difficult for a Registrar to determine whether the person knew that their conduct was likely to cause fear in the other person.

Option 3

An authorised officer or Registrar should have the discretion to refuse to issue an application notice where the application is brought by a police officer. If a Registrar refuses to accept an application, the police would have the same right that an applicant has under section 53(8) to apply to the court for the application to be accepted.

Option 4

If a Registrar refuses to accept an application notice, the applicant may apply to the court for the application to be accepted (section 53(8)). The Committee submits that section 53(8) should specify that the court is not expected to embark on a full hearing if it is clear that the matter is frivolous, vexatious, without substance or has no reasonable prospect of success. However, in the interest of open justice the Committee does not support the proposal that a Magistrate make the determination in chambers.

Proposal B: Ensuring the referral of appropriate APVOs to mediation

The Committee strongly supports mediation of APVO disputes as a means to limit the opportunity for abuse of the system. There should be a rebuttable presumption that APVO disputes should go to mediation.

Proposal C: Providing a means to prosecute the protected person for false or vexatious APVOs

The Committee submits that the legislation should require applicants to file a statutory declaration or affidavit upon making an application for an APVO. This requirement

would make it clear to the applicant that making an application is a solemn process and that there are serious consequences for making a false declaration.

The threat of criminal prosecution can assist with ensuring the integrity of the judicial process, as well as work as an incentive for an applicant to tell the truth. The making of an APVO has implications and may lead to criminal sanctions, including imprisonment, if breached.

Proposal D: Further legislative distinction between ADVOs and APVOs

If separate legislation for ADVOs and APVOs will help to address concerns about vexatious applicants, then the legislation should be separated.

Section 14: Offence of contravening an apprehended violence order

Consent as a defence

The Committee suggests that consideration should be given to creating a statutory defence of consent in relation to an offence under section 14(1).

For instance, where there is a prohibition on attending the protected person's premises, the parties (whether it be mother and child, or partners) reconcile, and the protected person invites the other person home, the child or former partner is in breach of the order. While it is preferable for the protected person to apply to the court to have the order varied, this does not often occur, and is not assisted by the cumbersome process involved in having an order varied. The protected person's consent should provide a defence to the breach of the order.

Offence of inciting a breach

Section 14(7) provides that a protected person cannot be charged with aiding, abetting, counselling or procuring the commission the offence of contravening an order.

The Committee is not suggesting that a mother who invites her child home, which results in a breach of the order, should be prosecuted or face criminal sanctions. However, the Committee is concerned about protected persons who incite a breach, e.g. by constantly communicating by text messages, or calling, and thereby placing a person at risk of a criminal conviction with no risk to themselves. The Committee suggests that section 14(7) should be deleted, so that criminal sanctions are available in extreme cases.

The Action Plan and Family Violence Report

Exclusion orders

The Committee is concerned about the proposed presumption in favour of the protected person remaining in their place of residence contained in Items 30 and 32 of the Action Plan and Recommendation 11-8 in the Family Violence Report

Whilst the Committee acknowledges that it will usually be the case that if anyone has to move out it should be the defendant that will not always be a fair result. The presumption may not always be the safest option for the alleged victim, or the fairest one for the alleged perpetrator.

The creation of a presumption might be taken to assume that the defendant, regardless of his/her legal or equitable rights, has an evidentiary burden to meet in the event that

the person in need of protection maintains she/he will not be safe unless the defendant is excluded. This appears to conflict with the intention set out in Recommendation 11-9 which is a fair proposal.

Recommendation 11-8 imposes an unnecessary additional burden on courts. Should the court need to look at the issue of an exclusion order, the parties can be expected to draw the need to its attention and determination of the issue could involve the principles described in Recommendation 11-9.