

**Response to the NSW Legislative Council's Standing Committee on Social Issues
inquiry into domestic violence trends and issues in NSW**

September 2011

Submission on behalf of

Legal Aid NSW

to the

NSW LEGISLATIVE COUNCIL'S STANDING COMMITTEE ON SOCIAL ISSUES

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Introduction

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation through in-house and private legal practitioners. Legal Aid NSW also funds services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Program (WDVCAP) services.

Domestic violence is behaviour that deprives or restricts another person from exercising their basic human rights. It is a complex form of violence which can include physical, sexual, psychological, social, economic, legal and cultural harm. It is violence that infringes another person's right to equality, security, liberty, integrity and dignity and to their physical safety and psychological health. To the extent that these rights are recognised in law, Legal Aid NSW play a key role in ensuring that these rights are protected.

In NSW, the primary response to domestic violence is through the criminal justice system – arrest, prosecution, punishment, and protection orders. In 2010 over 24,000 ADVOs were granted in NSW Local Courts.¹ However, domestic violence often precipitates a cluster of complex, interrelated and ongoing legal problems that are not only of a criminal nature but also include family and civil law matters, as well as social problems.

The most effective way to assist people in domestic violence situations, and to protect their rights, is to provide early, holistic, client-focused legal responses and appropriate referrals to other services to address social and welfare needs. Without such assistance, by its very nature, domestic violence contributes to the social exclusion of victims and defendants.

Consistent with a multi-pronged approach to service delivery, Legal Aid NSW provides an extensive range of legal services to people in domestic violence matters through its crime, family and civil law programs, and specifically:

- criminal law services to defendants charged with domestic violence related offences,
- family law (divorce, relationships with children and property issues) and care and protection services to alleged domestic violence perpetrators, victims and children, and
- civil law services to victims in domestic violence related matters such as visa applications, victims' compensation, relationship debt, social security and housing.

Within the program areas, Legal Aid NSW has specialist units that provide legal services to people in domestic and family violence matters, including the Children's Legal Service (CLS) and the Family Law Early Intervention Units (EIUs). Lawyers working with the CLS advise and represent children and young people under 18 involved in criminal cases in the Children's Court. The objective of the EIU is to help people resolve their family law issues as early as possible without the need for lengthy litigation, with a special focus on reaching disadvantaged communities who have difficulty accessing legal services, including people living in rural and remote areas, homeless people and Aboriginal communities.

Legal Aid NSW also funds domestic and family violence-specific services, as follows:

- the WDVCAP which provides court advocacy services to women and children in need of protection orders in 108 Local Courts across NSW,
- the Domestic Violence Practitioner Scheme (DVPS), a duty service which assists women and children to obtain legal protection through an Apprehended Domestic Violence Order (ADVO) at 32 Local Courts across NSW, and

¹ In 2010 there were 24,378 AVOs granted in NSW Local Courts. BOCSAR, NSW Local Courts 2010: Apprehended Violence Orders Granted: Statistical division of residence of person of interest (POI (a)).

- specialist community legal centres, such as Women’s Legal Services NSW and the Wirringa Baiya Aboriginal Women’s Legal Service.

Legal Aid NSW supports the focus of the Legislative Council Inquiry on analysing trends and issues in domestic violence in NSW, as it highlights the often fragmented and highly complex legal system in which domestic violence operates and stresses the need to consider the broader social and economic context in which domestic violence occurs.

The responses of Legal Aid NSW to the specific Terms of Reference of the Inquiry are set out in detail below, and reflect our unique experience in providing holistic client-focussed services to socially and economically disadvantaged people in domestic violence situations.

Legal Aid NSW would welcome the opportunity to elaborate further on the information or examples contained in our submission by telephone or in person. Should you require further information, please contact Annmarie Lumsden, Executive Director Strategic Planning Policy and Business Reporting at Legal Aid NSW on Annmarie.Lumsden@legalaid.nsw.gov.au or telephone (02) 9219 6324.

- 1. STRATEGIES TO REDUCE BREACHES AND IMPROVE COMPLIANCE WITH APPREHENDED DOMESTIC VIOLENCE ORDERS (ADVOS), INCLUDING:**
 - a. THE USE OF GPS BRACELETS**
 - b. WHETHER EXISTING PENALTIES FOR DOMESTIC VIOLENCE ARE ADEQUATE**

1. Introduction

Legal Aid NSW acknowledges and supports the NSW Government in its commitment to reduce domestic violence rates, with a specific focus on reducing rates of repeat offending and enhancing compliance with protection orders.

Legal Aid NSW supports NSW Government strategies that focus on strengthening the level of legal protection provided to victims of domestic violence, while enhancing the level of compliance with, and understanding of, protection orders by defendants. Early intervention initiatives that stress the coordination of victim access to legal protection and strengthen offender compliance and awareness would ultimately lead to enhanced safety for victims and defendant accountability.

However, Legal Aid NSW does not believe that the use of GPS bracelets is the most effective and appropriate means to achieve the aims of reducing domestic violence rates and enhancing victim protection.

In addition, Legal Aid NSW believes that existing penalties for domestic violence are adequate.

Legal Aid NSW is of the view that strategies to enhance compliance with protection orders should be directed at ensuring that sentences reflect the seriousness of the breach of an ADVO and the context of violence, improving defendant's understanding of ADVO conditions, and improving NSW Police Force (Police) responses to reported breaches.

2. The use of GPS bracelets

2.1 Outline of identified issues

Legal Aid NSW has identified the following concerns and issues in relation to the possible use of GPS bracelets in NSW:

- there is no evidence to suggest that GPS tagging of domestic violence offenders prevents re-offending,
- GPS tracking technology constitutes a serious invasion of civil liberty, not only for the offender but for the victim, and should only be used in serious domestic violence cases,
- if GPS bracelets were to be a sentencing option, there is a risk that this would lead to the net-widening to offenders who might not otherwise receive a sentence of this level of severity,
- victim safety may be put at risk where a victim does not have other forms of legal protection in addition to GPS bracelets, such as an ADVO,
- there is a risk that victims will have unrealistic expectations about the potential of GPS bracelets to protect them from further violence,
- GPS bracelets should not replace other penalties or sentences that address repeat offending and long-term behaviour change,
- the resourcing implications of GPS bracelets could be considerably high, and
- the impact of introducing GPS bracelets on victims and victim support services would be considerable.

2.2 No evidence to suggest GPS bracelets are effective

There are two types of GPS tagging programs, both of which have been used for offenders charged with or convicted of a domestic violence offence. Unilateral electronic monitoring (EM) programs involve using GPS technology for the surveillance and control of persons charged or convicted. They are designed to address public safety interests in general, or to prevent absconding while on bail.

Bilateral electronic monitoring (BEM) programs have existed since the 1980s, and have been used primarily in the context of domestic violence offences. BEM extends the mandate of EM by protecting specific individuals - victims. The victim's participation and cooperation are necessary to the functioning of BEM. The technology applicable to victims varies and can include a tracking device placed in the victim's home that could detect the offender's signal on his transmitter if he entered an exclusion zone around the home,² a pager to receive messages from a monitoring centre, a duress pendant, a cellular phone pre-programmed to notify authorities,³ or a GPS bracelet.

Although there have been significant improvements in technology since electronic monitoring programs were first introduced there is no conclusive evaluation of the benefits of EM or BEM in reducing breaches and enhancing compliance in domestic violence matters.

In particular, Legal Aid NSW notes that EM pilots conducted in the United Kingdom and New Zealand did not lead to countrywide schemes being introduced.

The New Zealand Department of Corrections introduced a trial of GPS technology on a limited basis in 2007-08, but found it unreliable.⁴ New Zealand authorities concluded that the technology should only be used in limited situations in conjunction with standard electronic monitoring equipment.⁵ In addition, electronic tracking was not shown to be effective in reducing recidivism and enhancing compliance with orders. Of the ten offenders who were subject to EM, four (40%) were convicted for a breach or convicted for another offence during the pilot period.⁶

Evaluations of EM GPS pilots in England and Wales found that 58% of the offenders were either recalled for breaching their licence/notice of supervision or had their community penalty revoked whilst being satellite tracked.⁷ In one study only 46% of offenders reported the satellite tracking had helped them to 'stay out of trouble', but that 26% were either reconvicted for an offence committed during their period of tracking or while unlawfully at large following their revocation.⁸

In NSW EM was been used in limited circumstances for high risk offenders in 2006-07, although Legal Aid NSW understands that an evaluation of the effectiveness of the technology has not been undertaken.⁹

² Ludo McFerran, *International strategies to protect women in their homes*, Australian Domestic and Family Violence Clearinghouse, Newsletter 34, 4.

³ Peter R. Ibarra and Edna Erez, *Victim-centric Diversion? The Electronic Monitoring of Domestic Violence Cases*, Behavioural Sciences and the Law, Behavioural Science Law 23: 259-276, 2005, 263.

⁴ Minister for Police and Corrective Services, *NZ Trials Prove Messenger Wrong on GPS Monitoring of Sex Offenders*, 1 January 2006.

⁵ McFerran, *International Strategies*, 4.

⁶ New Zealand Department of Corrections, Annual Report 2007-08, accessed at http://www.corrections.govt.nz/__data/assets/pdf_file/0005/295241/07-08-Annual-Report.pdf

⁷ Stephen Shute, *Satellite Tracking of Offenders: A Study of the Pilots In England and Wales*, Ministry of Justice, Research Summary 4, 2007, 1.

⁸ *ibid*, 11.

⁹ NSW Department of Corrective Services, Annual Report 2006-07, accessed at <http://www.correctiveservices.nsw.gov.au/about-us/publications/csnsw-annual-reports>

There is also no evidence to suggest that BEM is effective in reducing breaches and enhancing compliance with protection orders. Studies conducted in the USA of pilots where a tracking device placed in the victim's home have revealed that although there were low instances of offenders approaching victims' homes, violations were frequent in terms of unmonitored contact, with offenders encountering victims at court, on the street and over the phone.¹⁰ It is therefore unclear whether the devices had any impact on enhancing compliance with protection orders across a range of behaviours.

Legal Aid NSW also notes that the limited comparative evaluations of the effectiveness of EM have only compared the re-offending rates of tagged offenders with offenders given other reactionary sentences, such as community service, as opposed to comparison with offenders who have undertaken educational or behavioural change programs.

Legal Aid NSW recommends a thorough review of current and past trials involving tracking devices and GPS bracelets prior to the introduction of the technology in NSW.

2.3 Mandatory participation by victims where GPS bracelets are used

Legal Aid NSW is concerned about the potential impact of GPS bracelets on victims. If a victim is required to volunteer to be a part of a penalty of this nature, strict policies and procedures would need to be established and implemented addressing:

- how victims are required to give consent in order to participate, and
- whether victims are able to retract their consent during the sentence, and if so, how.

It would be contrary to the principle of finality in sentencing for resentencing of the offender to be contemplated in the event that the victim retracts consent after sentencing proceedings are finalised.

2.4 Flexibility to vary court orders where GPS bracelets are in use

The use of GPS bracelets as a penalty would not afford victims the flexibility they currently have to vary ADVOs and other court orders if they choose to reconcile with the offender. There is a real risk of criminalising victims who either choose, or are pressured by the offender, not to wear their GPS bracelet because they have reconciled, or are in the process of reconciling with an offender.

It is the view of Legal Aid NSW that, if introduced by the NSW Government, use of GPS bracelets should be restricted to serious offenders released on parole where there is no ongoing relationship between the victim and the offender.

2.5 GPS technology and potential 'black-spots'

Legal Aid NSW is concerned that if GPS bracelets were implemented in NSW as a penalty, victims may not seek other forms of legal protection, including ADVOs. This risk to victims is heightened by the fact that GPS bracelets and GPS technology are subject to effective satellite coverage and would presumably require the victim to wear a battery pack connected to the GPS device at all times. Should either of these requirements fall short, the victim is placed at risk of harm and, without an ADVO in place, will have no avenue of redress regarding the offender's breach. A Ministry of Justice research summary of satellite tracking pilots that took place across 2004-2006 in England and Wales reveals that 51% of the satellite-tracked offenders noted their tracking equipment had broken down at some point, largely due to their dropping and damaging the GPS equipment.¹¹

¹⁰ Ibarra and Erez, *Victim-centric Diversion?*, 263.

¹¹ Stephen Shute, *Satellite Tracking of Offenders*, 1.

The specific demographics of each NSW region and Local Government Area need to be borne in mind in determining appropriate locations in which GPS bracelets could be used. Identified locations will need to be covered by GPS technology and consideration will need to be given to potential service unavailability or black holes. Victims will need to be cautioned against having unrealistic expectations about the potential of tagging to protect them from further violence, particularly in high-risk areas where GPS coverage is likely to drop out (under bridges, parking garages, train stations).

There is also a high likelihood that offenders and victims will accidentally bump into each other if GPS bracelets are used in a small regional or rural area. Putting aside the ongoing resource implications of multiple automatic breaches, there is a risk that the Police will become complacent if their central communications system is frequently being contacted to respond to what amount to unintended breaches. If GPS tracking is to be introduced in NSW, it may be appropriate to limit GPS bracelets to a target group of serious offenders who are to be released on parole to reside in metropolitan areas.

Given that victims of domestic violence often flee the domestic violence situation and move interstate, any cross-jurisdictional issues that may arise in relation to GPS bracelets would also need to be determined prior to the introduction of the technology.

2.6 *Focus on criminal justice system response to domestic violence*

NSW Government initiatives directed at reducing domestic violence are often reactionary, targeting offending behaviour at the tail-end of the criminal process. Given the resourcing implications, there is a risk that introducing GPS bracelets as a penalty for domestic violence offenders will lead to a reduction in the investigation of new sentencing options, such as perpetrator programs and legal education that aim to address long-term criminality and the cycle of violence.

The invasive nature of GPS technology also limits the instances in which GPS bracelets would be an appropriate sentence and proportionate to the domestic violence offence.

There is a risk the use of GPS bracelets in sentencing will lead to the net-widening of offenders, including offenders who might not otherwise be eligible for a sentence of this level of severity. This could lead to an increase in the number of breaches by offenders who would not have otherwise been subject to the tagging device and ultimately an increased prison population in NSW. In this regard, Legal Aid NSW notes a recent NSW Bureau of Crime Statistics and Research (BOCSAR) report titled *The profile of offenders receiving suspended sentences* (August 2011) has found that suspended sentences are being imposed on offenders who, prior to the introduction of suspended sentences, would never have received a prison sentence.¹²

2.7 *Resource implications*

Thorough wrap around support services for victims and offenders required to wear GPS bracelets will be necessary to properly address the cause of the offending behaviour and prevent its reoccurrence. Legal Aid NSW notes that this would have resource implications for the NSW Government.

Stringent screening processes for both victims and offenders need to be put in place to ensure appropriate candidates are identified for the technology. This may require a pre-sentence report to be completed by Corrective Services NSW. Where both the victim and offender have to wear a GPS bracelet or tracking device, Corrective Services NSW may also need to explain the technology and the impact it will have on their lifestyle and undertake an assessment of the likelihood of the offender and victim coming into contact with each other.

¹² NSW Bureau of Crime Statistics and Research, *The profile of offenders receiving suspended sentences*, August 2011.

Corrective Services NSW would therefore need to interview both the offender and victim, which would again require additional resources.

Tagging does not protect victims from further abuse and as such other forms of risk management and support will continue to be essential. Support services for victims will need to be supplied by existing NSW Government services as part of their core business, and the additional impact on these services of supporting victims who are affected by GPS tracking penalties will be significant. Case management of victims will include assessing whether GSP tagging is appropriate in the circumstances (taking into consideration victim lifestyles, geographical viability for the technology, community ties, cultural issues, children, social stigma), providing information and support through the consent process, and counselling about any ongoing concerns with the technology and their safety. A thorough review and analysis of current services would need to be undertaken, including extensive consultation to determine what services are working effectively, where interagency collaboration is effective and what improvements need to be made. This would ensure there are adequate legal and support services in place to assist victims and defendants who may be subject to GPS tracking.

Legal Aid NSW is also concerned that funding for GPS tagging will be at the expense of other projects including behaviour change programs and other early intervention initiatives highlighted in the Australian Law Reform Commission (ALRC) Report 114 *Family Violence – A National Legal Response*.

In particular, Legal Aid NSW supports funding being made available for representation of defendants to ensure that domestic violence orders are appropriate in the circumstances, that defendants are aware of the conditions that they must comply with, and that advice is provided on related legal issues such as family law and care and protection issues. Representation of defendants in ADVO matters can promote greater understanding of the AVO process and its implications. It often means there is a greater chance of final orders being made at the first court mention of a matter, enhanced compliance with the orders, and a reduction in breaches of ADVOs and repeat offending.

2.8 *Impact on victims, children and young people*

The requirement of wearing GPS tracking devices would have a significant cultural impact on victims and offenders, and potentially a significant impact on people from Aboriginal and from culturally and linguistically diverse communities. Victims who do not want to be publicly stigmatised or identified as a domestic violence victim may be reluctant to wear a GPS device attached to the offenders GPS bracelet.

Legal Aid NSW is of the view participants in GPS tracking technology should not include a victim or offender who has children because of the potential psychological impact on a child or young person of their parent wearing the GPS tracking device, and is of the firm view that children and young people should be excluded. We note that section 38 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) requires a court when making an ADVO for an adult to include any children with whom the adult has a domestic relationship unless there are good reasons for not doing so, in which the court must state its reasons.

If it is contemplated that any of these groups will participate with the GPS bracelets, funding will need to be available to obtain expert reports from child psychologists on the potential impact on the child or the young person of inclusion in GPS tracking, and for counselling, where appropriate. Legal Aid NSW would be concerned with any proposal that children wear GPS bracelets when they are away from their home given the potential impact on their ongoing health and wellbeing.

In addition, as discussed at point 3, pro-arrest policing policies have led to an increased number of victims being charged with domestic violence related assault. Legal Aid NSW believes that it would be inappropriate for a defendant who is not the primary aggressor in the relationship to be required to wear a GPS as a form of punishment.

2.9 *Risks associated with an enhanced sense of safety amongst victims*

In NSW there have been two studies by the NSW Bureau of Crime Statistics and Research which show that ADVOs increase a victim's sense of safety: *An Evaluation of the NSW Apprehended Violence Order Scheme* (1997) and the *Evaluation of the Domestic Violence Court Intervention Model pilot (DVICM)* (2007). An argument can be made that GPS bracelets will also potentially increase a victim's sense of safety, particularly where the victim is aware that the GPS device is pre-programmed to alert authorities to a breach of an ADVO exclusion order.

Although our experience suggests that victim safety is enhanced when offenders are held accountable for their behaviour through sensible targeted penalties which address offending behaviour, we are not averse to victims being provided with an additional layer of safety such as through a duress pendant that they can activate to notify authorities of a breach of an ADVO. Where an ADVO is in place, a victim must rely on defendant compliance for their protection and it is necessary for the victim to have access to a telephone to seek assistance in the event of a breach.

If the rationale of introducing GPS bracelets is that offender knowledge of centralised monitoring of their behaviour and automatic alerts to the Police or Corrective Services NSW will limit breaches, it could be argued a pre-programmed duress button kept with the victim may also serve to enhance compliance. A duress device worn or carried by victims would also afford them the right to make their own decisions about their safety and protection.

Although we acknowledge there are some benefits to victims of GPS bracelets being introduced in NSW as a penalty for domestic violence offences, Legal Aid NSW considers the risks and intrusive nature of the technology, as well as the high costs of implementation and maintenance, far outweigh the benefits of the technology. Ultimately we do not believe GPS bracelets will address offending behaviour and lead to reduced re-offending in the long-term.

3. Adequacy of existing penalties for domestic violence offences

3.1 *Current penalties for domestic violence offences*

Legal Aid NSW is of the view that existing penalties for domestic violence offences are adequate.

3.2 *Sentencing for breach ADVOs*

The concern of Legal Aid NSW is that where commission of a criminal offence constitutes a breach of an ADVO, sentencing outcomes do not reflect the seriousness of the breach. Magistrates will often impose a more severe sentence for the criminal offence which constitutes the breach (for example, assault) rather than for the offence of breach ADVO. This is despite the fact that section 14(4) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) creates a presumption in favour of imprisonment if an act constituting a breach of an ADVO was an act of violence against a person.¹³

¹³ Section 14(4) *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

That being said, in NSW the most common penalty imposed for domestic violence related assaults is a good behaviour bond. This is also true for more serious domestic violence offences, including breaching an ADVO, assault occasioning actual bodily harm and stalking/intimidation.¹⁴ Between January 2008 and June 2009, 21.4% of all offenders charged with breach AVO received a bond without supervision. Fines were imposed on 17.1% and a prison sentence on 16.9%.¹⁵ The factors which influence sentencing of offenders for breaching an ADVO also vary considerably and are often not directly related to the history of violent behaviour in the relationship.

In addition, there have been cases where Local Court Magistrates do not appear to have regard to the context of violence when sentencing offenders for breach of an ADVO, as the case study below illustrates.

Case study: Sentencing for breach ADVO

The Women's Domestic Violence Court Advocacy Service, funded by Legal Aid NSW, supported the applicant in obtaining an ADVO against the defendant after the defendant threatened the applicant and assaulted her. On sentence for the assault charge, the defendant received a 12-month good behaviour bond and a \$100 fine. The ADVO was granted with conditions 1 and 10 (*Condition 10: The defendant must not approach the protected person(s) or any such premises or place at which the protected person(s) from time to time reside or work within twelve (12) hours of consuming intoxicating liquor or illicit drugs*).

The applicant subsequently contacted the WDVCS advising that the defendant was at her house, that he was extremely intoxicated and had threatened her. Police attended and the defendant was charged with breach ADVO.

The defendant was convicted and fined \$200 for breaching the ADVO. This was notwithstanding the ADVO had been granted as a result of an assault for which the defendant had been sentenced to a bond and received a fine.

3.2 Perpetrator programs as a sentencing option

Legal Aid NSW supports the use of evidence based perpetrator programs that strengthen the focus on reducing reoffending and address the long-term behaviour of domestic violence perpetrators.

However, Legal Aid NSW notes that few evaluations have been undertaken of the effectiveness of perpetrator programs that focus on long-term behavior change.¹⁶ Current academic research distinguishes between situational domestic violence in the context of a strained relationship and the more long-term violence suffered at the hands of a perpetrator who seeks to control a domestic relationship.¹⁷ The responses to these forms of violence in terms of perpetrator programs need to be different.

Legal Aid NSW understands that an evaluation recently conducted of perpetrator programs offered by Corrective Services NSW has found extremely positive outcomes.

¹⁴ Clare Ringland and Jacqueline Fitzgerald, *Factors which influence the sentencing of domestic violence offenders*, NSW Bureau of Crime Statistics and Research, Crime and Justice Statistics, Bureau Brief, Issue paper no. 48, July 2010, 7.

¹⁵ *ibid*, 10.

¹⁶ Dr Lesley Laing, *Responding to men who perpetuate domestic violence: controversies, interventions and challenges*, Australian Domestic and Family Violence Clearinghouse, Issues Paper 7, 2002, 9.

¹⁷ Dr Michael Flood, *Why violence against women and girls and happens, and how to prevent it*, Redress, August 2007, 13-18.

4. Additional strategies to reduce breaches and enhance compliance with orders

Legal Aid NSW is of the view that, in addition to ensuring that sentences reflect the seriousness of the breach of an ADVO and the context of violence, strategies to enhance compliance with protection orders should be directed at improving defendant's understanding of ADVO conditions, and improving Police responses to reported breaches.

Strategies directed at improving defendant's understanding of ADVO conditions are discussed in the context of term of reference 2 – Early intervention strategies to prevent domestic violence.

4.1 Improving Police response to reported breaches of ADVOs

Anecdotal evidence from Coordinators of the 28 WDV CAP services operating across NSW indicates that a significant number of women do not report breaches of ADVOs to Police as in their experience Police do not respond to their reports nor inform them of the outcomes of Police investigations. This is highlighted by the case study below.

Case study: Police investigations of breaches

The WDV CAS assisted the female victim of domestic violence to obtain an ADVO.

On 20 May 2011 the victim contacted the WDV CAP service advising that the defendant had attempted to strangle her in breach of the ADVO. She had contacted the Police immediately and was told her report would be sent to a second police station in the area where the defendant lived.

On 21 May 2011 the WDV CAP service called the second police station. Police advised that there was no record of the breach in the COPS system and stated that the victim 'still had the protection of the ADVO' in any case. The WDV CAP service then contacted the original police station and were informed that it could take up to one week for the incident to be transferred to the second police station. At the insistence of the WDV CAP service, the victim's report was found and faxed to the second police station.

Two days later, on 23 May 2011, the WDV CAS learnt Police had still not taken any action to investigate the breach. Police at the second police station advised the WDV CAS that they were sending the report to a third police station that may have more capacity to investigate the matter. The victim had stayed with her friend for 3 days waiting for Police to contact her to let her know the defendant had been arrested and it was safe for her to return home.

The defendant was eventually arrested and charged on 24 May 2011.

Reports of breaches of ADVOs to Police need to be investigated with the same veracity as other alleged criminal conduct.

Legal Aid NSW suggests that consideration be given to review of Police Standard Operating Procedures in relation to investigation of Reports of breaches of ADVOs. Specifically, SOPs should regulate Police response to breaches, including timeframes for investigation, and contact with victims in relation to the progress and outcomes of the investigation.

In addition, Legal Aid NSW suggests that consideration be given to requiring Police records of their reasons for not charging for an alleged breach. These reasons would then be available for use in future investigations that may lead to applications for subsequent ADVOs or criminal conduct involving the original victim.

2. EARLY INTERVENTION STRATEGIES TO PREVENT DOMESTIC VIOLENCE

1. Introduction

Legal Aid NSW has recently introduced a number of early intervention strategies to prevent domestic violence. This is the fundamental aim of the criminal law early intervention ADVO pilot project, which will provide minor assistance and duty representation services to ADVO defendants at two NSW Local Courts, and rationale for the recent expansion of the DVPS. Prevention of domestic violence is also a key aim of the Family Law Early Intervention Units (EIUs).

Domestic violence does not operate in isolation of other legal and social welfare issues, and is often the result of a multitude of factors impacting upon a person's relationship, including financial stress, health issues, housing concerns and mental illness. It is the view of Legal aid NSW that domestic violence is less likely to re-occur where victims and defendants are provided with appropriate, holistic legal advice and timely referrals to support services.

2. Legal Aid NSW ADVO defendant pilot

In ADVO proceedings in NSW Local Courts, duty solicitors with the DVPS and WDVCAP workers help to ensure that conditions of protection orders are tailored to meet the individual needs and circumstances of the victim.

It is imperative that defendants, as well as victims, are provided with comprehensive legal advice in order to clearly understand the conditions of their ADVO, their responsibilities under the order, and the consequences of breaching the order. ADVOs have a number of legal consequences for defendants that impact on housing, child-related employment and the use of firearms.¹⁸ It is important that the defendant is aware of these consequences when the order is made. Indeed, it is generally acknowledged that when defendants have the benefit of legal advice, court outcomes are more likely to be positive and the incidence of breaches may be reduced.¹⁹

Legal Aid NSW has recently developed and will shortly pilot a duty solicitor service for defendants in ADVO proceedings in two NSW Local Courts. It is intended that ADVO Early Intervention solicitors will work alongside DVPS and WDVCAP workers and negotiate workable agreements for ADVO defendants. These solicitors will also provide defendants with appropriate referral pathways for any other legal or social welfare issues, as well as limited follow up in the period after an order is made to ascertain whether the order is working for the defendant or if a variation is required.

Solicitors can provide on the spot assistance to defendants requiring crisis accommodation and facilitate their access to men's behaviour change programs. They can also explain the consequences of breaching an ADVO and reinforce the fact that offenders found guilty of domestic violence-related assault will be more likely to receive a prison sentence where they have breached an ADVO in the previous two years.²⁰ In providing an active, holistic legal response to defendants, Legal Aid NSW anticipates this service will assist in limiting any future movement of these offenders into the justice system.

¹⁸ See Part 7 of the *Commission for Children and Young People Act 1998*; s. 24 *Firearms Act 1996*.

¹⁹ Legal Aid NSW, *Report on Legal Aid NSW Services to People in Domestic Violence Situations*, November 2008, 32.

²⁰ Ringland & Fitzgerald, *Factors which influence the sentencing*.

3. Domestic Violence Practitioner Scheme (DVPS)

Domestic Violence Practitioner Scheme (DVPS) practitioners provide legal representation to private applicants in ADVO matters in metropolitan and regional NSW Local Courts. DVPSs operate as an adjunct to WDVCSs, using solicitors from the private profession who are rostered to attend court on AVO list days to represent private ADVO applicants. As at September 2011 the DVPS operates at 32 NSW Local Courts across NSW.

The objective of the DVPS is to assist women and children to obtain effective protection orders and to provide early intervention to address their other legal needs related to the domestic violence. Women experiencing domestic violence experience many barriers in enforcing their rights relating to victim's compensation; family law parenting plans; housing; financial entitlements; and general credit and debt and social security liabilities arising from financial abuse. The DVPS provides a single avenue in which these issues can be addressed.

The initial pilot of the DPVS revealed the service led to increased court outcomes for clients, as well as improved access to legal advice on related legal matters.²¹ The service has also led to a reduction in the rate of withdrawals of ADVOs in NSW. Since 1999 the withdrawal and dismissal rate of ADVO applications has slowly been decreasing, from nearly 48% in 1999 to around 40% in 2007.²² Since the expansion of the WDVCS in 2009 and the DVPS in 2010, both services have been instrumental in working together to reduce the total number of withdrawals of ADVO applications in NSW. Across 2008-09, 2.42% of all service events recorded by WDVCSs resulted in an ADVO application being withdrawn. Across 2010-11 this percentage has reduced to 1.83%.²³

4. Family Law Early Intervention Units

The Legal Aid NSW Family Law Early Intervention Unit (EIU) is a state-wide specialist service of Legal Aid NSW. It provides free family law services in courts and community organisations in a number of locations around NSW. The objective of the service is to help people resolve their family law issues as early as possible without the need to go through lengthy litigation.

It is well documented that family court proceedings are often accompanied by allegations of domestic violence.²⁴ While the Federal and Family Court jurisdiction takes precedence over Local Courts, early intervention strategies can play a crucial role at a local court level to assist people to resolve their family law issues efficiently.

The EIUs provide a crucial role on AVO list days in assisting victims or defendants to resolve family law issues and to obtain conditions on ADVOs that meet their circumstances. It is imperative that protection orders provide the fullest protection necessary for victims, and include exclusion orders where there are strong allegations of domestic violence. However, it is the experience of Legal Aid NSW that ADVO conditions relating to children (conditions 4, 5 and 6) can provide necessary boundaries and protection for victims while facilitating the children having a relationship with the defendant.

The EIUs can provide legal advice; draw up workable parenting plans with the other parties' legal representative that have the interests of both the victim and defendant in mind, assist to have parenting plans annexed to ADVOs as an extra condition, and advise about the impact of breaches of ADVOs on family law and care proceedings.

²¹ Legal Aid NSW, *The Domestic Violence Solicitor Scheme Pilot*, 1999.

²² ADVO withdrawal rate statistics provided by Local Court Services, Department of Attorney General and Justice.

²³ Data obtained from the Legal Aid NSW WDVCS Database.

²⁴ Dr Michael Flood, *The myth of women's false accusations of domestic violence and misuse of protection orders*, Women Against Violence: Issue Sixteen, 2004-2005, 44.

This is a particularly important service given the recent trend in some areas of NSW of Magistrates ordering DVPS practitioners to draw up parenting plans for victims prior to granting a final ADVO.

It is also the experience of Legal Aid NSW that often matters going through the Children's Court involve allegations of domestic violence. In our experience robust care advice provided early on by the EIUs in ADVO and family law proceedings can play a critical role in assisting defendants to modify their offending behaviour and reduce the instances of protection orders being used to further harass and intimidate victims. It can assist to break the cycle of violence and limit the long-term impact of exposure to violence on children and young people. Early intervention in this area is critical given that there is clear evidence that children who experience or are exposed to domestic violence are far more likely to become perpetrators and victims in the future.²⁵

5. Additional early intervention strategies

5.1 School education programs

Legal Aid NSW believes that early intervention strategies to reduce domestic violence in NSW should include primary and high school health education programs. Education would be appropriately directed at highlighting what safe relationships are and reinforcing that violence is not appropriate in any context, including within the home. Legal theatre scenarios could be used so that children and adolescents can learn what healthy relationships are by observing the behaviour of actors on stage. Scenarios could be played out with students asked to identify behaviour that was safe and unsafe.

These education programs would alert children to the need to focus on healthy relationships while assisting them to identify issues within their own homes. They could be integrated with sexual health education and tailored to particular age groups, genders and geographical areas. It would be essential that school counsellors and support workers be involved in these programs to support children who may identify that they are a victim of domestic violence, or that their parents are perpetrators of domestic violence.

5.2 Community referral pathways

It the experience of Legal Aid NSW that traditional legal services are not utilised by victims and perpetrators of domestic violence as a first point of reference. The majority of people seek help from non-legal sources such as friends and family, medical, health, counselling and welfare services and other sources.²⁶

A significant number of domestic violence offences also go un-reported. Recent statistics suggest less than half of all domestic violence assaults are reported to Police.²⁷ Furthermore, of the 26,006 incidents of domestic violence recorded by NSW Police in 2010, 22,322 (85.8%) occurred in residential homes.²⁸ A significant portion of these incidents were reported to Police by neighbours who overheard disputes, which suggests a significant number of incidents that are not reported by other people are never brought to the attention of Police. For these victims, community-based support services are essential.

²⁵ Dr Lesley Laing, *Children, young people and domestic violence*, Australian Domestic and Family Violence Clearinghouse, Issues Paper 2, 2002, 1-28.

²⁶ Legal Aid NSW, *Report on Legal Aid NSW Services*, 39.

²⁷ Grech & Burgess, *Trends and patterns*, 8.

²⁸ BOCSAR NSW Recorded Crime Statistics 2010: Number of incidents of selected offences recorded by NSW Police by premises type.

Legal Aid NSW notes the important role that holistic community-based referral hubs can play in assisting victims of domestic violence to navigate what is at times a highly complex and increasingly fragmented social welfare system. It is our experience that domestic violence often co-occurs with a range of ongoing and interrelated legal events. Legal responses that deal with domestic violence in isolation and which do not address interconnected legal issues may in fact exacerbate a victim's situation.²⁹

Legal clinics and community centres can assist victims and defendants to deal with a number of interrelated legal issues that impact on domestic violence. There is a strong correlation between alcohol and drug abuse and domestic violence. In 2010 over 10,000 (41%) domestic violence related assaults were alcohol related.³⁰ The recent BOCSAR report *Trends and patterns in domestic violence assaults: 2011 to 2010* outlines that the percentage of domestic assaults that are alcohol related varies across geographical areas, with a low of 35% in the Sydney Statistical Division to a high of 62% in the Far West Statistical Division.³¹ This report also reveals that 19 out of the top 20 NSW Local Government Areas for domestic assault are in rural or regional NSW.³² For this reason it is crucial that early intervention strategies and support services are directed at regional and rural areas.

A one-stop referral outreach centre, possibly provided by community centres, could include access to regular legal clinics providing general family, civil and criminal law advice, as well as a range of other drop in services delivered by partner agencies. Integrated agency services provided at the outreach centre could include financial support services to assist families to avoid social security or relationship debt, counselling services to address offending behaviour, therapy programs to assist victims of abuse, community education programs to enhance skills and encourage community engagement and health services to address underlying health issues and drug and alcohol addiction. Program managers could be employed at community centres to coordinate services and programs and facilitate access for defendants and victims to the range of relevant services available.

²⁹ Legal Aid NSW, *Report on Legal Aid NSW Services*, 31.

³⁰ BOCSAR NSW Recorded Crime Statistics 2010: Number and proportion of selected offences flagged as alcohol related by NSW Police.

³¹ Grech & Burgess, *Trends and patterns*, 4.

³² Campbelltown was the only urban Local Government Area in the top 20 in 2010.

3. THE INCREASE IN WOMEN BEING PROCEEDED AGAINST BY POLICE FOR DOMESTIC VIOLENCE RELATED ASSAULT

1. Introduction

Legal Aid NSW acknowledges that there has been a steady increase in NSW of women being proceeded against by Police for domestic violence related assault.³³ In 2010 of the 16,239 offenders of domestic violence related assault proceeded against by Police, 2,917 (17.9%) were female compared to 13,322 (82%) who were male.³⁴

2. Increase of female defendants as a result of Police pro-arrest policies

Legal Aid NSW notes that Police officers must apply for an ADVO where the officer suspects that a domestic violence offence or a stalking offence has been, or is likely to be, committed. Sections 27 and 49 of the *Crimes (Domestic and Family Violence) Act 2007* (NSW) effectively limit discretion amongst the Police to arrest and prosecute a defendant, even when a victim is reluctant for an application to be made.

Anecdotal evidence suggests that the increase in the number of female defendants in NSW is a consequence of these provisions, together with proactive policing policies that result in dual arrests of both the primary aggressor and victim and cross applications for ADVOs.

Case study: Police pro-arrest policies and cross-applications

Legal Aid NSW represented the respondent in a family law matter in the Federal Magistrates Court. There was ongoing coercive and controlling family violence throughout the relationship. The father controlled the family finances and the mother's social activities, and was verbally and sexually abusive towards the mother.

In April 2011 the parties separated and the father called the Police to report a domestic violence incident after the mother had reached into his back pocket to retrieve his keys to drive the children to school. When Police attend the incident they charged the mother with assault and made an ADVO application on behalf of the father.

The mother applied for a cross ADVO. In response to the mother's cross-application, the father applied to the Federal Magistrates Court for an urgent recovery order for the children. Orders were made that the mother would have care of the children during the week and the father on weekends.

The father continues to harass the mother and Legal Aid NSW is seeking to vary the orders on the basis of the father's ongoing violent behaviour.

³³ BOCSAR, *Female offending: has there been an increase?*, Issues paper No 46, April 2010.

³⁴ BOCSAR, NSW Recorded Crime Statistics 2010: Age and gender of alleged offenders proceeded against by NSW Police for incidents of selected offences.

Case study: Dual arrests where primary aggressor cannot be identified

The WDVCS assisted a woman in an ongoing domestically violent relationship. She and her male partner had been married for nine years and had three children. The wife was born in Thailand and had no family in Australia.

The wife found out her husband had been having an affair with a family friend. She confronted him about the affair and stated she wanted a divorce. The confrontation escalated into a verbal argument. Later that day the wife cut up family photographs and damaged frames whilst removing photographs from them.

Upon seeing the damaged photographs the husband became verbally abusive and grabbed the wife by her arms, pushing her into the wall. The husband lifted a dining room chair over his head and slammed it into the floor, breaking the chair on the ground.

Police were called to the incident by a neighbour who had overheard the argument. Both the husband and the wife were charged. The husband was charged with assault and the wife charged with malicious damage of the photographs. ADVOs were also taken out against both.

Jane Wangmann, in her empirical work on cross applications in NSW ADVO proceedings in 2008-09, has found that the ADVO system appears to replicate some of the problems it was intended to ameliorate.³⁵ Wangmann found that women and men do not provide unbiased, reliable accounts of their own violent behaviour and that of their partner. Rather, men tend to deny, minimise and transfer blame for their violent acts; in comparison women appear to readily admit their own violence.³⁶

Where evidence is not being provided by victims that they have acted in self-defence, Police officers are responding to domestic violence related call-outs by arresting female defendants or making dual arrests. This has been the case even where men are unable to demonstrate they are fearful of their female partner or that their female partner's violence is characterised by control. Women subjected to cross applications in these circumstances have perceived this behaviour to be another form of abuse, harassment and even a breach of an ADVO.³⁷

Additional difficulties are that the criminal justice system does not operate in a manner that enables Police officers and Magistrates to easily identify who is the primary aggressor in a relationship. The limited nature of complaint narratives and the limited capacity of Magistrates to hear and reflect on information about domestic violence due to the constraints of their work environment mean that female defendants are often being charged for violent acts that are more appropriately characterised as self-defence.³⁸

Given that Police are the first point of assistance for many victims of domestic violence, it is crucial that Police officers are appropriately trained to recognise who is the primary aggressor in a violent relationship and to be able to contextualise a victim's use of violence in self-defence. Training could directly relate to the identification of injuries and behaviour consistent with claims of self-defence.

³⁵ Jane Wangmann, *'She said...' 'He said...': Cross Applications in NSW Apprehended Domestic Violence Order Proceedings*, Thesis submitted to fulfil the requirements for the award of Doctor of Philosophy, University of Sydney, 2009, 17.

³⁶ *ibid*, 34.

³⁷ *ibid*, 138.

³⁸ *ibid*, 58.

4. OTHER RELEVANT MATTERS

1. Training and development

Training is a fundamental starting point for effective responses to domestic violence. Legal Aid NSW supports effective training in domestic violence for all Police officers, the Judiciary, court staff, legal practitioners, Government agencies and front-line community workers.

1.1 *Training of Police and Prosecutors*

Specialist domestic violence training of Police officers needs to focus on identification of the primary aggressor in violent relationships, and appropriate investigation of domestic violence incidents.

Police Prosecutors also require specialist domestic violence training with a view to ensuring that conditions of ADVOs are tailored to meet the individual needs and circumstances of the victim, and where possible, the defendant as well. Anecdotal evidence suggests that inexperienced Police Prosecutors seek inappropriate and unworkable conditions for ADVOs without seeking input from the victim, DVLO or WDVCAS. Inappropriate and unworkable conditions for ADVOs, by definition, are susceptible to breach, and when breached, a reluctance on the part of Police officers to prosecute.

1.2 *Training for community workers and legal practitioners*

Training for community workers and the legal profession should focus on the fact that domestic violence often precipitates a cluster of complex, interrelated and ongoing legal problems that are not only of a criminal nature but also include family and civil law matters, as well as social problems; and that the most effective way to assist people in domestic violence situations, and to protect their rights, is to provide early, holistic, client-focused legal responses and appropriate referrals to other services to address social and welfare needs.

Training for community workers also needs concentrate on improving their in screening and risk assessment skills for the early identification of domestic violence and appropriate referral.

1.3 *Judicial education*

Judicial officers should undertake specialist domestic violence training on the complex nature of this violence and in particular, the impact on victims and children, as well as ensuring that sentences reflect the seriousness of the breach of an ADVO and the context of violence.

2. Employment issues for child defendants in AVO matters

Legal Aid NSW is concerned about the impact of ADVOs on young defendants who may be subject to a Working with Children Check (WWCC) when seeking future employment. Any person who is a defendant in an AVO matter in which a final order for the protection of a child is made under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) on the application of the Police or another public official, may be subjected to a WWCC when seeking future employment.³⁹

³⁹ Section 34(a) *Commission for Children and Young People Act 1998* (NSW).

The Commission for Children and Young People (CCYP) conducts background checks on all people seeking child-related employment. The purpose of these checks are to exclude from child-related employment people with convictions for serious sex and violent crimes against children (called 'prohibited persons') and to determine preferred applicants for primary child-related employment, foster care, and employment as a minister of religion. Where a check reveals a person is not a 'prohibited person', a 'risk estimate' is performed by a screening agency or the CCYP. A risk assessment currently involves a background check, which may then categorise an employee as being "of no greater risk than anyone else", "of some risk", or of "significant risk".

The background check includes ascertaining whether a person has had a final AVO made under the *Crimes (Domestic and Personal Violence) Act 2007*, or a final order made under Part 15A of the *Crimes Act 1900*. For the purposes of WWCCs, the *Commission for Children and Young People Act 1998* (NSW) (CCYP Act) does not distinguish between child and adult AVO defendants. This means that any final AVO made in relation to a person, regardless of whether it was made when the person was a juvenile, will be relevant to the 'risk estimate' applied to that person. While a person will be given an opportunity to respond to the 'risk estimate' and explain the circumstances that led to the AVO being made, it is the experience of Legal Aid NSW that, where there is a final AVO in a person's history, 'risk' is always found.

The circumstances in which final orders are made are various. In the case of a young person, protected persons can include siblings, classmates at school, neighbours, co-residents in a group home or refuge, and girlfriends or boyfriends. It is the exception rather than the rule that AVOs involving defendants who are young people are made as a result of sex offences. The majority are made as a result of conflict at home or school and related activities.

The inclusion of such orders in the WWCC is arguably contrary to the intention of the legislation, which was designed to protect children from adult perpetrators. It was not envisaged that it would apply in the situation where both the defendant and the protected person are children and certainly an ADVO in these circumstances is not a true indication of the young person's attitude towards children.

In order to avoid stigmatisation for the rest of the child's life, convictions for children under the age of 16 years are not recorded. Between the ages of 16 and 18 years, convictions are only recorded at the discretion of the Magistrate.⁴⁰ However, there is no equivalent discretionary power to exclude AVOs made against juvenile defendants from the WWCC background check process. While interim orders are not reportable, all final orders made when the person was a juvenile, including those made by consent and without admissions, are relevant to a person's 'risk estimate'.

Legal Aid NSW notes that the only remedy available to a defendant who wishes to avoid a final AVO being considered in the WWCC is to apply for a revocation of the AVO. However, a defendant has no right to apply for the revocation of a final order where the protected person was under the age of 16 years.⁴¹ This issue often arises where the defendant reaches an employable age and seeks employment in a child-related area, and is not uncommon, since 'child-related area' is broadly defined. It can include, for example, employment as a youth or child care worker, employment in a school in any context ranging from a teacher, administrative officer or carpenter, employment as a bus-driver and employment in a club or society with significant child membership or involvement.⁴²

⁴⁰ Section 14 *Children (Criminal Proceedings) Act 1987* (NSW).

⁴¹ Section 72(3) *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

⁴² Section 33 *Commission for Children and Young People Act 1998* (NSW).

As a consequence, where the protected person was under the age of 16 years, defendants seeking the revocation of a final order must approach Police and request that they make an application on their behalf. Many defendants are reluctant to approach Police with such a request. For these reasons, Legal Aid NSW recommends that the CCYP Act be amended to exclude from the definition of 'relevant AVO' final orders made against defendants under 18 years of age.

Legal Aid NSW notes that the *Report on the Review of the NSW Commission for Children and Young People Act 1998* has recommended some changes to the way that AVOs are covered by the WWCC. This report recognises that some offences need specialist consideration and proposes legislation be clarified so that only serious AVOs, supported by well documented investigations, are notified.⁴³ Furthermore, the report recommends that a new model for the WWCC be introduced where people whose barring records were juvenile offences will be subject to risk assessment rather than an automatic refusal.⁴⁴

3. Criminal justice system responses to young people

Legislative provisions that have been put in place to assist with the management of adult relationships do not necessarily translate well when applied to juveniles. Inappropriate AVO conditions are regularly imposed on juveniles not to ensure the safety of the community, but rather to control a young person's behaviour. Two possible reasons for this are the recent well-intentioned changes to the *Crimes (Domestic and Personal Violence) Act 2007* that limit the discretion available to Police when responding to domestic violence situations and the outsourcing of care work to non-government organisations.

It is the experience of Legal Aid NSW that the majority of protection order matters dealt with in the context of the Children's Court in NSW are not the typical power imbalance situations that protection order legislation is trying to address. Rather, an increasing number of protection order matters involve conflict between siblings, and between young people and their parents. In particular, parents of young people with cognitive or mental health impairments are using ADVOs to discipline children who they cannot control and for whom there are no supported housing options or health services that can offer adequate assistance. In addition, care workers are increasingly using ADVOs to control the behaviour of young people they are caring for, with orders often including conditions relating to alcohol and property. Often conditions are not explained properly to juveniles who invariably then breach the ADVO.

In any case, young people in general, and in particular, young people with cognitive and mental impairments, often lack the capacity to understand the conditions of ADVOs and the consequences of breach. The making of protection orders in such situations is not always the most effective way to deal with conflict involving young people who have not matured and lack conflict resolution skills.

Case study: Criminalisation of young people by parents seeking to control their problematic behaviour

Jonah is a teenager with a cognitive impairment. He has a mental age of four or five and is often violent towards his parents. He lives in supported housing, but regularly runs away and returns to his parents' home.

To stop him coming home, his parents were granted an AVO against him that included the condition that he could not come within five metres of their house. Every time he breaches that condition, he commonly spends a few days on remand.

⁴³ Commission for Children and Young People, *Report on the Review of the NSW Commission for Children and Young People Act 1998*, June 2011, 8.

⁴⁴ *ibid*, 11.

Breaching AVOs can lead to conviction and the possibility of incarceration.

Criminalisation of children's problematic behaviour is of particular concern to Legal aid NSW, given research that reveals a high proportion of juveniles making their first appearance before a court continue their offending into adulthood, particularly if their first court appearance occurred when they were young.⁴⁵

A recent study of juveniles who appeared for the first time in the NSW Children's Court in 1995 found an indigenous male who appears even once in the Children's Court is almost certain to appear in an adult court within eight years of his first appearance.⁴⁶

Juveniles who have received a custodial sentence from a Children's Court, or who have had multiple Children's Court appearances, are more likely to appear in an adult court and more likely receive a prison sentence following their appearance in an adult court.⁴⁷

It is the view of Legal Aid NSW that penalties for breach of ADVOs applicable to young people should be different to those available to adults, and should focus on the use of diversionary options including rehabilitation programs, community employment and drug treatment.

That said, pro-arrest policing policies have led to an increasing number of young people being charged with assault and subject to ADVOs. It is the experience of Legal Aid NSW that often these children are not the primary aggressors in a relationship but are responding to years of violence inflicted against them and their mother by their father. When juveniles reach an age in which they can fight back, they often respond violently to the primary aggressor. Police need to be mindful of identifying the primary aggressor and exercise some discretion in applying pro-arrest policies.

4. Privacy laws and information sharing

Legal Aid NSW notes recent research from the United Kingdom documenting the benefits of enhanced information sharing amongst agencies dealing with domestic violence victims and offenders and in particular the use of Multi-Agency Risk Assessment Conferences (MARACs).⁴⁸ MARACs are essentially multi-agency meetings, usually Police led, where statutory and voluntary agency representatives share information about high-risk victims of domestic abuse.

The role of the MARACs is to provide a forum for effective information sharing and partnerships working amongst a range of adult and child focussed services in order to enhance the safety of high-risk victims and their children. Research has revealed that MARACs are often the key to obtaining successful outcomes for victims and that a partnership based holistic approach to service delivery is essential to reduce risk and deal with perpetrators.⁴⁹

Legal Aid NSW suggests that consideration be given to investigating the establishment of a MARAC like model in NSW that facilitates information sharing between government agencies and NGOs providing support services to women and children experiencing domestic violence, including a review privacy and secrecy laws, with a view to improving outcomes for victims seeking protection orders in NSW.

⁴⁵ Shuling Chen, Tania Matruglio, Don Weatherburn and Jiuzhao Hua, *The transition from juvenile to adult criminal careers*, Crime and Justice Bulletin, Contemporary Issues in Crime and Justice, Number 86, May 2005, 1.

⁴⁶ *ibid*, 4.

⁴⁷ *ibid*, 6.

⁴⁸ Home Office Violent and Youth Crime Prevention Unit and Research and analysis Unit, *Research Into Multi-Agency Risk Assessment Conferences*, CordisBright Consulting, July 2011.

⁴⁹ *ibid*, 97.

5. Service duplication

Legal Aid NSW notes that there is a large degree of duplication of domestic violence services for victims and defendants across NSW, and suggests a thorough mapping exercise be undertaken.

There also needs to be a thorough review and analysis of current services to determine what services are working effectively, where inter-agency collaboration is effective and what improvements need to be made.

Given limited funding for these services, this will ensure that new services are not established unnecessarily, and that effective services that have the capacity to undertake additional work are approached first when new funding becomes available.

6. Specialist domestic violence courts

There has been much discussion in NSW about the role that specialist courts can play in reducing domestic violence and enhancing defendant compliance with ADVOs. Legal Aid NSW supports the integration of family law and domestic violence in state and territory courts but does not believe that this is best achieved through the introduction of specialist domestic violence courts. In NSW, Local Courts would have the resources and capacity to function as specialist domestic violence courts if there were appropriate protocols, and Magistrates, prosecutors and practitioners were given appropriate training to assist them with this role.

Legal Aid NSW notes the role that specialist domestic violence courts have played in addressing domestic and sexual violence in the United Kingdom. Specialist domestic violence courts were established in the United Kingdom to address the lack of public confidence in the criminal justice system when dealing with crimes of domestic violence and in response to frequent retraction by victims of domestic violence complaints.⁵⁰ These specialist courts play a role in linking services to support victims, statutory services (such as housing, health and education), and those working with perpetrators.⁵¹

While acknowledging that there is a role for NSW Local Courts to provide a similar referral service, Legal Aid NSW stress the importance of early intervention and targeted referrals prior to court proceedings commencing.

7. Services to people from Aboriginal and Torres Strait Islander backgrounds

Disadvantaged communities such as Indigenous and migrant communities typically do not access options under the *Family Law Act 1975* or seek assistance to address instances of domestic violence. As a result, where there is family violence and the non violent parent is cast as being unable to protect the children, there is a high risk of child protection intervention communities and children being placed in long term care.

The need for early intervention community legal education in Aboriginal communities is particularly important. Recent statistics reveal that the rate of domestic violence for Indigenous women is more than six times higher than for non-Indigenous women.⁵² Given the history of poor relationships between Police and Aboriginal women in Australia, many Aboriginal women may remain in violent relationships rather than seek Police assistance.

⁵⁰ Vera Baird QC MP, *Speaking Notes: Just Partners: Family Violence, Specialist Courts and the Idea of Integration*, A National conference 22-23 May, Canberra Australia, 10.

⁵¹ *ibid*, 6.

⁵² Katrina Grech and Melissa Burgess, *Trends and patters in domestic violence assaults: 2001 to 2010*, NSW Bureau of Crime Statistics and Research, Issues paper no. 61, May 2011.

Aboriginal-specific support services are essential to ensure Aboriginal victims of domestic violence feel appropriately protected throughout any criminal justice process, including any pre court process.

Legal Aid NSW is of the view that consideration should be given to funding Specialist Aboriginal Workers for advocacy and court services that provide assistance to Indigenous women experiencing domestic violence, such as the WDVCS.

8. Jurisdictional issues between the Family Law Court and NSW Local Courts

It is the experience of Legal Aid NSW that Local Courts are not using their power under s68R of the *Family Law Act 1975* to vary, revive, discharge or suspend a parenting order. Specifically, Magistrates are unwilling to engage in discussions on AVO list days regarding family law orders. Where applicants are seeking a condition on the ADVO relating to the children, Magistrates are often refusing to deal with an ADVO application until later in the day when the parties have agreed to a parenting plan.

As a result, in some courts victims are negotiating parenting plans without legal advice, and often relying on advice from police, so that they can obtain a protection order that day. This is highly inappropriate.

Conversely, where bail conditions imposed by a Local Court require an offender to comply with an ADVO, Federal Magistrates have been unwilling to make parenting orders that may be inconsistent with those bail conditions.

Case study: Confusion between NSW Local Courts and Family Courts

A Federal Court Magistrate refused to make a family law order that was inconsistent with bail conditions. The bail condition was that the defendant must comply with the ADVO, which in turn included a condition that the defendant could not contact the applicant or their children.

The matter was listed at the Local Court to vary the bail conditions so that the Federal Magistrate could make an order to allow the child to see the defendant. The Local Court Magistrate would not change the bail conditions, stating that the Federal Magistrate had power to make an order that was inconsistent with an order of the Local Court.

Cases such as this highlight the need for Magistrates, Police Prosecutors and legal practitioners to be appropriately trained in domestic and family violence legal issues so that family law matters can be dealt with on AVO list days more effectively.

Legal Aid NSW is of the view that there would be benefit in extending the jurisdiction of the Children's Court to issue AVOs during care proceedings, and the Office of Public Guardian's to make applications for ADVOs for people under guardianship. These amendments would mirror the cross-jurisdictional focus of recent reforms to the family law system, which will make it easier for state and territory child protection authorities to participate in family law proceedings.⁵³ At the very least in Australia there needs to be a more coordinated approach to domestic violence across all three jurisdictions, and even within each jurisdiction.

⁵³ *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*.