

**REVIEW OF THE IMPLEMENTATION AND OPERATION OF THE POLICE  
ISSUED APPREHENDED DOMESTIC VIOLENCE ORDER (ADVO) REFORMS**

**Legal Aid NSW submission to the  
Department of Justice**

**July 2015**

**About Legal Aid NSW**

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 administers funding for 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Program (WDVCAP) services.

Legal Aid NSW provides criminal law services to defendants charged with personal violence offences, including children and young people under 18 who are assisted by the Children's Legal Service. Legal Aid NSW represents child respondents in ADVO applications and adult respondents where there are exceptional circumstances. Under the Domestic Violence Practitioner Scheme private practitioners assist women and children to obtain legal protection through ADVOs at 32 Local Courts across NSW.

Legal Aid NSW also administers funding for domestic violence-specific services, including:

- the WDVCAP which provides court advocacy services to women and children in need of protection orders in 108 Local Courts across NSW, and
- specialist community legal centres, such as Women's Legal Services NSW and the Wurringa Baiya Aboriginal Women's Legal Service.

Consistent with a multi-pronged approach to service delivery, Legal Aid NSW also provides family law (divorce, relationships with children and property issues) and care and protection services to victims, children and people who commit domestic violence offences, and civil law services to victims in matters such as visa applications, victims' compensation, relationship debt, social security and housing.

Legal Aid NSW welcomes the opportunity to respond to the Department of Justice review of the implementation and operation of the police issued ADVO reforms which commenced in May 2014. Should you require any further information, please contact Alex Curnick, Solicitor, Strategic Planning and Policy, Legal Aid NSW, 02 9219 5909 or [alex.curnick@legalaid.nsw.gov.au](mailto:alex.curnick@legalaid.nsw.gov.au).

## Response

### **1) Whether the police response to domestic violence has improved since the reforms took effect.**

Legal Aid NSW notes that the quality of ADVO applications by police appears to have improved since the introduction of the reforms in that the grounds for the application are now more comprehensive.

However, Legal Aid NSW continues to be concerned that ADVO applications made by police often seek conditions which are excessive in the circumstances of a particular case. Particularly in the Local Court, defendants may consent to unduly onerous or inappropriate orders which, if breached, can result in criminal sanctions for conduct that would not otherwise constitute a criminal offence.

The Children's Legal Service has specific concerns in respect of child ADVO defendants (see response to item 4 below).

### **2) Whether victim's safety (immediate and longer-term) has improved since the reforms took effect.**

Legal Aid NSW cannot comment whether victim's safety has improved since the introduction of the reforms. This would be an important issue for evaluation.

### **3) Whether any new issues for victims have arisen as a result of these reforms.**

Legal Aid NSW is unable to comment on whether any new issues for victims have arisen as a result of these reforms.

### **4) Whether any new issues for vulnerable defendants have arisen as a result of these reforms (e.g. defendants who are Aboriginal, juvenile, female, or have a cognitive impairment).**

## ***Alleged offender's contact with children***

Legal Aid NSW continues to be concerned about the fact that only a police officer can apply to vary or revoke an ADVO where one of the PINOPs is a child.<sup>1</sup> This issue has been exacerbated by the ADVO reforms, which effectively remove judicial oversight of the appropriateness of orders in provisional ADVOS.

The inclusion of a child as a PINOP can effectively deny an alleged offender contact with their children, and can further inflame a volatile situation.

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<sup>1</sup> See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 33A(2), 72(3); and definition of child in s 3.

In addition, Legal Aid NSW is aware of cases where a child has been included as a secondary PINOP although the child was not present during the domestic violence incident.

It is the experience of Legal Aid NSW that there are cases where an Order 7 has been made, which effectively prevents the alleged offender from having any contact with their children,<sup>2</sup> where it would have been more appropriate for an order 5 or 6 to have been made.<sup>3</sup> See also answer to question 5 below.

There should be mandatory training for police aimed at ensuring the appropriate use of discretion to include a child as a secondary PINOP only when it is necessary and, if necessary, to ensure the appropriate order is made.

### ***Child defendants and mandatory orders***

The fact that only a police officer can apply to vary or revoke an ADVO where one of the PINOPs is a child (under the age of 16)<sup>4</sup> is also relevant in the context where a child is the defendant to the ADVO. While the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (the Act) provides that provisional ADVOs against a child defendant should include mandatory orders only,<sup>5</sup> it is the experience of Legal Aid NSW that these ADVOs frequently also include additional standard orders. Again, an ADVO can only be varied by a police officer where a child is listed as a PINOP.<sup>6</sup>

Legal Aid NSW is of the view that where the defendant to an ADVO is aged 16 or 17, orders other than mandatory orders should only be made in exceptional cases.

In addition, child defendants to an ADVO aged 16 or 17 should have the opportunity to speak to the Youth Hotline to obtain legal advice before an order is made, regardless of whether associated charges are being considered. In the experience of Legal Aid NSW, the Youth Hotline rarely receives calls from young people when police are in the process of making a provisional ADVO. Use of the Youth Hotline appears to be limited to when the police are in the process of making provisional ADVOs in conjunction with charging, which may or may not be dealt with either under the *Young Offenders Act 1997*.

An obligation on senior police to contact the Youth Hotline for the young person to obtain legal advice before a provisional ADVO is made would be an appropriate mechanism to ensure the young person understood their rights and obligations and that the order made complied with the legislation.

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<sup>2</sup> Order 7 – The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant’s legal representative.

<sup>3</sup> Order 5 - The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant’s legal representative or as agreed in writing or as permitted by an order or directions under the Family Law Act 1975, for the purpose of counselling, conciliation or mediation.

Order 5 - The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant’s legal representative or as agreed in writing or as permitted by an order or as authorised by a parenting order under the Family Law Act 1975 unless the parenting order has been varied, suspended or discharged under section 68R of the Family Law Act 1975.

<sup>4</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 3.

<sup>5</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(3).

<sup>6</sup> See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 33A(2), 72(3).

### ***Further safeguards for vulnerable persons***

The Act provides that the police may detain a person for up to two hours for the purposes of applying for and/or serving an ADVO, including a provisional interim order,<sup>7</sup> and further provides that:

‘[a]s far as is reasonably practicable, a person who is detained [...] must be given an opportunity [...] to contact a friend, relative, guardian or independent person (other than a protected person)’<sup>8</sup>

This is in contrast with the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) which provides:

The custody manager for a detained person who is a vulnerable person must, as far as practicable, assist the person in exercising the person’s rights under Part 9 of the Act, including any right to make a telephone call to a legal practitioner, support person or other person.<sup>9</sup>

And further:

If a detained person is an Aboriginal person or Torres Strait Islander [...] the custody manager must [...] immediately inform the person that a representative of the Aboriginal Legal Service (NSW/ACT) Limited<sup>10</sup>

Legal Aid NSW considers that the Act should expressly provide that:

- a detained person has the ‘right to make a telephone call to a legal practitioner’, and
- the Aboriginal Legal Service (NSW/ACT) (ALS) be notified where the detained person is an Aboriginal or Torres Strait Islander person.

ALS notification is particularly important to ensure Aboriginal defendants are not disproportionately affected by the ADVO Reforms, particularly in the more remote parts of NSW where it may take up to four weeks for a police issued provisional ADVO to be listed before a court.

### ***Child victims and defendants***

Legal Aid NSW continues to be concerned about the number of children who are listed as the defendant in ADVO applications where the COPS records show, and the investigating police may be aware, that the PINOP the father/step-father, for example, has been a repeat perpetrator of domestic violence against members of the child’s household.

Additional training on the better use of police discretion concerning applications for orders may be the best way to address this issue.

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<sup>7</sup> See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 89, 89A, 90, 90A.

<sup>8</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 90B(2), 90B(3).

<sup>9</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* r 25.

<sup>10</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* r 33.

**5) Whether families who have a parenting order in place have been affected by these reforms.**

It is the experience of Legal Aid NSW that there are cases where an Order 7 has been made where it would have been more appropriate for an order 5 or 6 to have been made. See also answer to question 4 above.

The inclusion of a child as a PINOP and the making of order 7 can effectively negate the parenting order and deny an alleged offender contact with their children, for the time the order is in place.

As stated above, this can further inflame a volatile situation.

It is a matter of particular concern that only a police officer can apply to vary or revoke an ADVO where one of the PINOPs is a child.<sup>11</sup>

**6) Whether court processes for domestic violence matters have been affected by these reforms.**

Section 33A of Act, which was introduced by the reforms, enables the variation or revocation of provisional orders to be made on application by the defendant, and provides an important avenue for a defendant to seek review of the decision of a senior police officer to grant a provisional ADVO or orders within it. Before to its insertion, the variation or revocation of provisional orders were only able to be made on application by an authorised officer.

**7) Whether agency resources have been significantly impacted by these reforms.**

Legal Aid NSW has no comment to make in relation to whether agency resources have been significantly impacted by these reforms.

## **Conclusion**

Legal Aid NSW is concerned about the impact of the reforms on vulnerable defendants, in particular child ADVO defendants under the age of 16, and suggests that the reforms should continue to be monitored.

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<sup>11</sup> See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 33A(2), 72(3); and definition of child in s 3.