

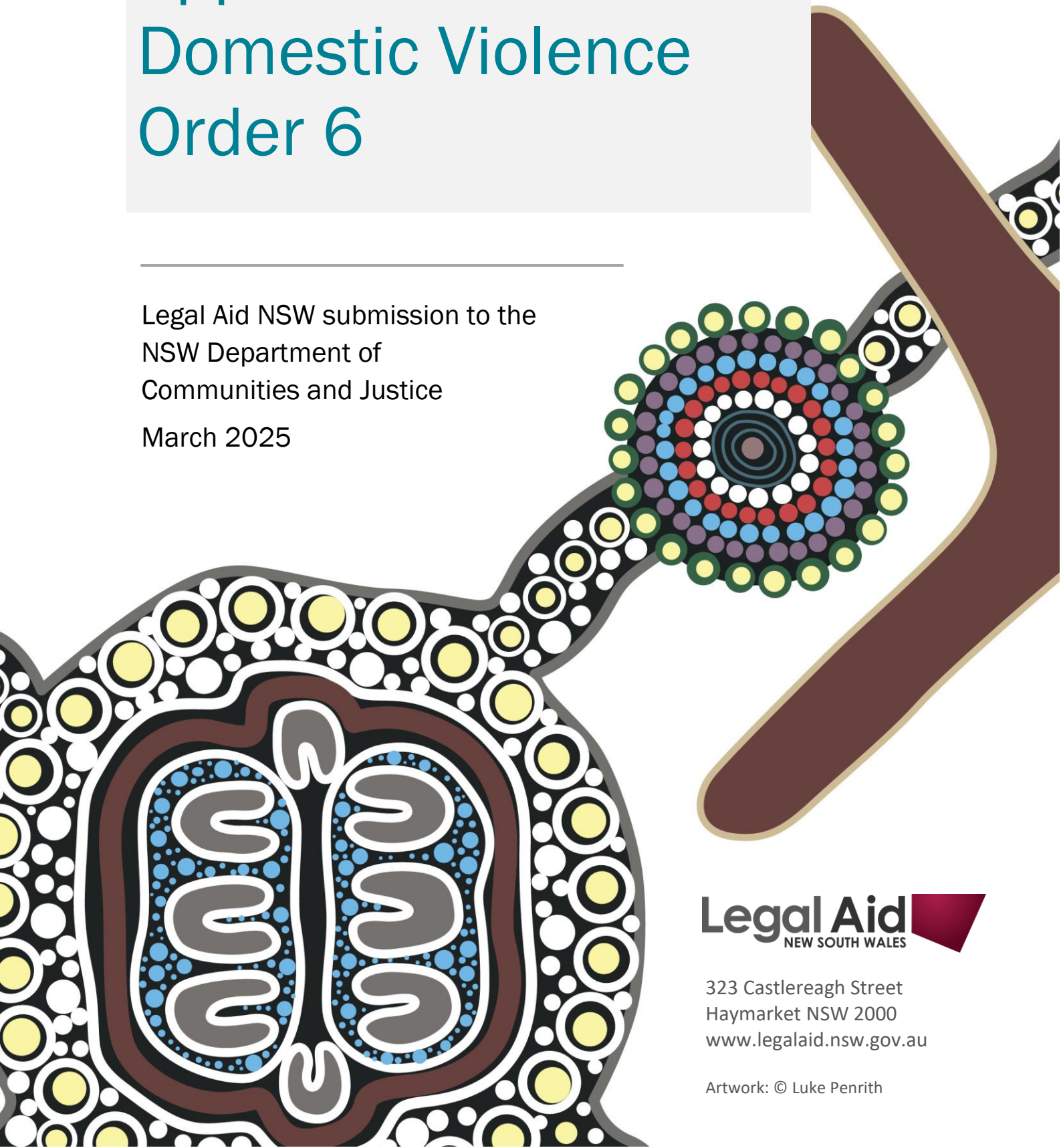
# Review of Apprehended Domestic Violence Order 6

Legal Aid NSW submission to the  
NSW Department of  
Communities and Justice  
March 2025

**Legal Aid**  
NEW SOUTH WALES

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## Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community. We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people. Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

# 1. 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). We provide legal services across New South Wales through a state-wide network of 25 offices. We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Services, all six specialist Children's Courts, and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid

NSW also provides specialist representation for children in both the family law and care and protection jurisdiction.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

## 2. Executive summary

Legal Aid NSW welcomes the opportunity to provide a submission to the NSW Department of Communities and Justice (DCJ's) review of Apprehended Domestic Violence Order (ADVO) standard Order 6.

Legal Aid NSW provides specialist advice, representation and support to persons in need of protection (PINOPs) and defendants in ADVOs across our Criminal, Family and Civil Law Divisions.

Our submission draws on the experience of our staff in assisting perpetrators of domestic and family violence (DFV) through our Criminal Law Division and supporting victims<sup>1</sup> and PINOPs through our Family Law Division,<sup>2</sup> our Domestic Violence Unit (DVU)<sup>3</sup> and our Women's Domestic Violence Court Advocacy Program (WDVCAP).<sup>4</sup> We hope this broad expertise will assist DCJ in its review.

Legal Aid NSW has observed a general lack of clarity around the practical operation of Order 6(d), including what constitutes an agreement under Order 6(d) and the extent to which it permits contact between a PINOP and a defendant. This ambiguity leads to inconsistent advice, application, and potential breaches of ADVOs.

Despite these issues, Order 6(d) serves a crucial function, offering PINOPs agency, flexibility, and an effective means of managing decisions about the care of their children and their own safety. Therefore in our view Order 6 should be retained in its entirety, but clarified to ensure its application is clear, consistent, and workable. This should include introducing a new category of communication that is allowed under Order 6, prior to an 'agreement in writing' being developed, that permits written communication for the sole purpose of reaching agreements on child contact arrangements. We also advocate for:

- free and easily accessible legal advice for ADVO PINOPs and defendants
- legislative reform to require courts to explain the nature and effect of their obligations pursuant to Order 6 to relevant ADVO defendants
- the development of a resource that provides PINOPs and defendants with information about how Order 6 is designed to work in practice, and provides guidance on drafting 'agreements in writing'
- training on how Order 6 is designed to operate for all criminal justice system stakeholders, and
- regular mandatory DFV training for NSW Police.

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<sup>1</sup> 'Victim' is used in this submission to denote a person who is the victim or complainant or alleged victim of violence. Some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission, the term 'victim' is intended to be inclusive of both victims and survivors.

<sup>2</sup> Our Family Law Division represents victims and perpetrators of DFV and their children in matters in the family law and care and protection systems.

<sup>3</sup> The DVU is a trauma informed multidisciplinary service made up of lawyers, caseworkers, mental health workers and financial counsellors who work together to assist victims of DFV to address their legal and non-legal needs.

<sup>4</sup> WDVCAP administers NSW Government funding to 27 non-government organisations to provide WDVCS, the main frontline, specialist support service for female victims of DFV in NSW.

## Recommendations

### Recommendation 1

- Order 6 should be retained, but clarified and rewritten in plain English and should clearly distinguish between:
  - contact between the PINOP and defendant regarding the children, and
  - contact between the defendant and children.
- Order 6 should be amended to introduce a new category of allowable communication, prior to the PINOP and defendant entering into a formal 'agreement in writing' pursuant to Order 6(d), permitting written communication (including text messages and email) for the sole purpose of reaching agreements on child contact arrangements.
- Order 6(d) and (e) should be clarified to:
  - explicitly state that contact between the PINOP and defendant must be regarding the children, and
  - explicitly state that any contact agreed must not contradict other ADVO conditions.
- A number of guidance notes should be added to Order 6, including:
  - A note encouraging PINOPs and defendants to seek independent legal advice before entering into an 'agreement in writing' about contact with the children under 6(d) and (e).
  - A note stating that a PINOP can withdraw from an 'agreement in writing' under 6(d) and (e) by notifying the defendant in writing.
  - A note stating that when making or varying an ADVO with Order 6 in cases involving children subject to parenting orders, courts can consider section 68R of the *Family Law Act 1975* (Cth) (with an equivalent notation for care orders).
  - A note clarifying that the ADVO imposes restrictions only on the defendant and that the PINOP is not obligated to respond to a defendant's request to establish a written agreement.
  - A note confirming that Orders 6(a)-(d) and/or (e) are designed to be used together.

### Recommendation 2

- The NSW Government should fund the provision of free and easily accessible legal advice services to PINOPs and defendants in ADVO matters which contain Order 6, to ensure they understand the nature and effect of Order 6 and are provided with assistance to draft appropriate written parenting agreements.

### Recommendation 3

- *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should be amended to require the court to explain to the defendant the nature and effect of their obligations pursuant to Order 6 where the ADVO contains that Order.

#### Recommendation 4

- The NSW Government should develop a brochure (or similar) document which provides PINOPs and defendants with information about how Order 6 is designed to work in practice, and guidance on drafting 'agreements in writing'.

#### Recommendation 5

- The NSW Government should ensure that any changes aimed at clarifying Order 6 are accompanied by comprehensive training for NSW Police, courts, frontline criminal justice professionals, and family violence support workers. This training should promote a consistent approach and cover:

- specific training on any rewording of Order 6(d) and how this order should work in practice
- the intersection of ADVOs and the family law system
- section 68R of the *Family Law Act 1975*
- the importance of providing agency to PINOPs

Training materials, such as an information sheet or video, should also be developed to address common questions and practical scenarios regarding Order 6.

#### Recommendation 6

- NSW Police should develop a framework to guide police training in DFV policing that identifies intervals for refresher training, modes for course delivery, and protocols for integrating course evaluations and workforce capability assessments into the training design.
- NSW Police domestic and family violence training should expressly cover:
  - the intersection of family law and ADVOs, and the heightened risk of DFV in the context of contentious family law proceedings
  - the importance of providing agency to PINOPs wherever possible
  - guidance on when children should be listed as PINOPs on ADVOs involving their parents
  - strategies to prevent perpetrator misidentification.



## 3. Legal Aid NSW's overall position

### 3.1 Order 6 should be retained but clarified

#### *The importance of Order 6(d)*

In NSW, when a PINOP and defendant have children together ADVO Order 2 (which prevents any contact unless through a lawyer) is often replaced with Order 6. Order 6 is crucial because, while DFV can pose risks to parents and children, these risks do not always outweigh a child's right to a relationship with both parents.<sup>5</sup> In some situations where an ADVO protects one parent from another, it may remain appropriate for children to continue to spend time with the defendant parent.

Repealing or limiting Order 6(d) would reduce court options in cases where the PINOP or NSW Police seek to restrict contact between the defendant and PINOP, but the grounds do not justify restricting the child's contact with the defendant parent for an extended period. Order 6(d) strikes a necessary balance by enabling appropriate child-parent contact, while safeguarding PINOPs.

We strongly support retaining Order 6(d) and (e), particularly given the delays, costs, and complexities of obtaining parenting orders through the Federal Circuit and Family Court of Australia (FCFCoA). However, we recommend clarification to ensure their consistent application. When properly applied—ideally after both parties receive independent legal advice—Order 6(d):

- enables parents to make flexible agreements that can be facilitated quickly, where appropriate
- enables PINOPs to make decisions about both parenting arrangements and their personal safety (this is particularly important given that ADVO applications are often initiated by NSW Police, sometimes against the PINOPs' wishes, limiting their autonomy), and
- ensures appropriate communication about the care of children is not criminalised.

Coparenting requires communication and adaptability. Removing Order 6(d) may result in parties struggling to comply with ADVO conditions or hesitating to report breaches for fear of consequences. This could undermine ADVO protections while increasing the risk of prosecution for defendants. Legal Aid NSW supports a framework that allows PINOPs to make parenting arrangements with defendants when appropriate.

#### *The need to clarify Order 6(d)*

We agree that the current ambiguity in Order 6(d) creates risks for both PINOPs and defendants, and risks undermining the effectiveness of ADVOS. For example, it could be used by defendants to facilitate the type of contact with the PINOP that is not in fact permissible

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<sup>5</sup> The United Nations Convention on the Rights of the Child affirms a child's right to know and be cared for by both parents (United Nations Convention of the Rights of the Child, Article 7.1.) The Convention also guarantees regular contact with a separated parent unless contrary to the child's best interests. As a signatory, Australia has incorporated these principles into domestic law (including section s 60CC(2)(e) the *Family Law Act 1975 (Cth)*).



under the ADVO, exposing them to a risk of harm. On the other hand, we have observed a lack of clarity regarding Order 6(d) exposes defendants to a risk of arrest and incarceration. Legal Aid NSW has represented many defendants who were arrested and refused bail after contacting a PINOP under the belief that Order 6 allowed it. These cases increase the workload of the Local Court of NSW, with inconsistent judicial interpretations resulting in some defendants being released quickly while others remain in custody until their final hearing— further straining overcrowded prisons.

A clearer and more consistent interpretation of Order 6(d) would reduce court strain and ensure PINOPs and defendants receive reliable guidance and advice from government agencies, service providers, and frontline workers. This would enhance compliance, improve ADVO effectiveness, and maintain necessary flexibility in coparenting arrangements.

We support retaining Order 6(d) but recommend revising it for greater clarity by:

- rewriting Order 6 in plain English
- rewriting Order 6(d) to ensure all parties understand what it does and does not permit
- introducing a new category of allowable communication, prior to the PINOP and defendant entering into an 'agreement in writing' pursuant to Order 6(d), permitting written communication (including text messages and email) for the sole purpose of reaching agreements on child contact arrangements, and
- adding guidance notes to clarify Order 6's operation and prevent misinterpretation.

We look forward to contributing to the appropriate wording of any proposed changes and note that poor drafting of a new Order 6(d) could unjustly impact both PINOPs and defendants.

### *Recommendation 1*

- Order 6 should be retained, but clarified and rewritten in plain English and should clearly distinguish between:
  - contact between the PINOP and defendant regarding the children, and
  - contact between the defendant and children.
- Order 6 should be amended to introduce a new category of allowable communication, prior to the PINOP and defendant entering into a formal 'agreement in writing' pursuant to Order 6(d), permitting written communication (including text messages and email) for the sole purpose of reaching agreements on child contact arrangements.
- Order 6(d) and (e) should be clarified to:
  - explicitly state that contact between the PINOP and defendant must be regarding the children, and
  - explicitly state that any contact agreed must not contradict other ADVO conditions.
- A number of guidance notes should be added to Order 6, including:

- A note encouraging PINOPs and defendants to seek independent legal advice before entering into an 'agreement in writing' about contact with the children under 6(d) and (e).
- A note stating that a PINOP can withdraw from an 'agreement in writing' under 6(d) and (e) by notifying the defendant in writing.
- A note stating that when making or varying an ADVO with Order 6 in cases involving children subject to parenting orders, courts can consider section 68R of the *Family Law Act 1975* (Cth) (with an equivalent notation for care orders).
- A note clarifying that the ADVO imposes restrictions only on the defendant and that the PINOP is not obligated to respond to a defendant's request to establish a written agreement.
- A note confirming that Orders 6(a)-(d) and/or (e) are designed to be used together.

### *The risks associated with Order 6(d)*

We acknowledge that allowing 'agreements in writing' under Order 6 does carry inherent risks for some PINOPs and their children. Some defendants may exploit any form of permitted contact to intimidate or harass the PINOP. Additionally, contact that appears to comply with an ADVO may, in reality, be controlling or threatening. These risks should be recognised and mitigated where possible.

While a formal requirement for oversight would significantly reduce the flexibility Order 6 currently provides, we believe an effective mitigation strategy is to enable access to timely and free legal advice and assistance in drafting written parenting agreements for PINOPs and defendants across NSW.

Currently, many individuals do not receive legal advice before drafting an 'agreement in writing.' Legal Aid NSW's DVU, which provides advice to ADVO PINOPs, is only available in certain locations, and lacks the capacity to oversee Order 6 agreements without significant additional funding. While criminal law duty lawyers offer brief advice to defendants at some Local Courts, this service is not available in many areas of NSW.

We have observed various breaches of Order 6 where vague and ambiguous 'agreements in writing' were made without either party receiving legal advice. To ensure both PINOPs and defendants understand the ADVO terms and to reduce the risk of breaches, it is crucial that permitted forms of contact are clearly specified in any written agreement.

Drafting parenting agreements is specialised work. 'Agreements in writing' pursuant to Order 6(d) should be detailed to enhance clarity, promote compliance, and reduce the risk of Order 6 being misused. The best way to achieve this is through the provision of legal assistance.

### *Recommendation 2*

- The NSW Government should fund the provision of free and easily accessible legal advice services to PINOPs and defendants in ADVO matters which contain Order 6, to ensure they understand the nature and effect of Order 6 and are provided with assistance to draft appropriate written parenting agreements.

### 3.2 Steps should be taken to ensure PINOPs and defendants understand Order 6

We also recommend legislative reform to require courts to explain to defendants the nature and effect of their obligations pursuant Order 6. This would include:

- that any agreement cannot conflict with other ADVO conditions, and that an existing parenting plan between the PINOP and defendant may continue, provided it does not conflict with other ADVO conditions (i.e. place restrictions)
- that written agreements can allow contact for care arrangements (i.e. changeover) but not for other purposes
- that any agreed contact between the PINOP and defendant must be strictly about the children and cannot be used to discuss unrelated matters, and
- that the ADVO imposes restrictions only on the defendant and that the PINOP is not obligated to enter into or comply with a written agreement, nor are they required to respond to a defendant's request to establish such an agreement. Further, that persistent harassment of the PINOP may be prosecuted as breach of ADVO Order 1.

Given the complexity of these explanations, courts should receive training to ensure they understand the issues and can communicate them effectively (see recommendation 5).

ADVO defendants with cognitive impairments may require additional support to understand and comply with Order 6(d). These individuals often struggle to understand or follow the ADVO conditions, leading to a higher risk of breaches. Order 6 is specifically confusing for this cohort.

We recommend that courts making ADVOs that include an Order 6 should be required to explain the nature and effect of their obligations pursuant to Order 6.

#### Recommendation 3

- *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should be amended to require the court to explain to the defendant the nature and effect of their obligations pursuant to Order 6 where the ADVO contains that Order.

We also recommend the development of a brochure (or similar) document designed to be provided to PINOPs and defendants at the time an ADVO with Order 6 is made. This document should provide information on how Order 6 is designed to work in practice (providing examples of permitted contact) and, provide guidance on drafting 'agreements in writing'.

#### Recommendation 4

- The NSW Government should develop a brochure (or similar) document which provides PINOPs and defendants with information about how Order 6 is designed to work in practice, and guidance on drafting 'agreements in writing'.

### 3.3 Training on Order 6 should be rolled out for criminal justice system stakeholders

We recommend any changes to clarify Order 6 should be accompanied by the rollout of training materials for NSW Police, NSW magistrates and court staff, all frontline criminal justice professionals and family violence support workers. This will assist to ensure decisions

are made consistently and NSW Police are equipped with the correct information to enable them to enforce breaches of ADVOs.

The training should include specific content that highlights the importance of a consistent approach and provides guidance on how Order 6 is designed to operate in practice. The training should also cover:

- intersection of ADVOs and the family law system
- information about section 68R of the *Family Law Act 1975*
- the fact that there is no obligation for PINOPs to immediately enter into a parenting agreement when an ADVO with an Order 6 has been made, and
- the fact that abusive behaviour perpetrated in the course of contact that is otherwise permissible by Order 6 is a breach of Order 1 (at the least) and should be prosecuted as such where appropriate.

Training could also include an information sheet or video that sets out “common questions” and scenarios regarding Order 6.

#### Recommendation 5

- The NSW Government should ensure that any changes aimed at clarifying Order 6 are accompanied by comprehensive training for NSW Police, courts, frontline criminal justice professionals, and family violence support workers. This training should promote a consistent approach and cover:
  - specific training on any rewording of Order 6(d) and how this order should work in practice
  - the intersection of ADVOs and the family law system
  - section 68R of the *Family Law Act 1975*
  - the importance of providing agency to PINOPs

Training materials, such as an information sheet or video, should also be developed to address common questions and practical scenarios regarding Order 6.

### 3.4 Frontline NSW Police officers should receive regular compulsory domestic and family violence training

We have observed that some of the challenges with the operation of Order 6 stem from issues in NSW Police practice. An inquiry by the Audit Office of NSW identified various deficiencies in police training regarding DFV, which may contribute to these problems.<sup>6</sup> Their report found that NSW Police does not require ongoing DFV training beyond the probationary year, and that although they have developed a Domestic Violence Fundamentals course to enhance officers' skills, attendance at this course is voluntary.<sup>7</sup>

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<sup>6</sup> Audit Office of NSW, *Police responses to domestic and family violence* (Report, April 2022) 6.

<sup>7</sup> Ibid.

This raises a risk that some local area commands could have capability gaps in their DFV skills and knowledge. Given that DFV is a significant component of frontline police work, there is scope for NSWPF to enhance its monitoring and understanding of the levels of workforce capability in this complex area of policing.

Specific issues we have observed with Order 6 that appear to stem from gaps in police training include:

- Police being reluctant to prosecute clear breaches of other ADVO conditions in circumstances where contact is agreed in writing- see case study at page 18 for an example of this.
- Insufficient PINOP consultation about which orders to seek- PINOPs' views can sometimes be overlooked when police are deciding whether to apply for a provisional ADVO and what orders to request. This can result in the imposition of inappropriate ADVO conditions by the court, which may not reflect the wishes or safety concerns of the PINOP.
- Inconsistency around when children are listed as PINOPs in ADVOs<sup>8</sup>- This results in children being left off ADVOs in situations where it may be appropriate to include them. We consider NSW Police would benefit from more detailed guidance on when it is appropriate to include a child as a PINOP on an ADVO.
- Perpetrator misidentification- this is a form of systems abuse where police or courts incorrectly identify the DFV victim as the offender, leading to wrongful criminal charges or ADVO proceedings. Contributing factors include:
  - Perpetrators providing false information to police
  - Incident-based policing lacking a nuanced approach
  - Failure to consider all available evidence
  - Not speaking to the woman independently
  - Police making snap judgments without the full picture
  - Readily believing men's DFV allegations without recognizing they may be part of the abuse
  - Assuming allegations in family law proceedings are strategic
  - Insufficient training for frontline officers in identifying the primary aggressor

Misidentification has serious consequences, affecting parenting arrangements, employment, and personal liberty while leaving the true victim unprotected and at greater risk.

This issue is directly relevant to the Order 6 review, as perpetrator misidentification undermines victim safety and makes it harder for them to establish safe, flexible parenting arrangements. Addressing misidentification is crucial to ensuring Order 6 remains an effective protection for those at genuine risk. We argue this is best achieved through increased training for police.

To improve the effectiveness of ADVOs and the NSWPF's response to DFV more generally, we recommend regular DFV refresher training that includes:

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<sup>8</sup> See also Women's Safety NSW, *Apprehended Domestic Violence Orders and Order 6* (Report, 21 May 2021), 18.

1. training outlining what ADVO order 6 does and does not allow
2. training on the intersection of family law and ADVOs, and the heightened risk of DFV in the context of contentious family law proceedings
3. the importance of providing agency to PINOPs wherever possible
4. guidance on when children should be listed as PINOPs on an ADVO, and
5. training on perpetrator misidentification, and how it can be avoided.

We consider additional training would strengthen the effectiveness of ADVOs, support PINOPs' agency, and improve their protection in DFV cases.

#### *Recommendation 6*

- NSW Police should develop a framework to guide police training in DFV policing that identifies intervals for refresher training, modes for course delivery, and protocols for integrating course evaluations and workforce capability assessments into the training design.
- NSW Police domestic and family violence training should expressly cover:
  - the intersection of family law and ADVOs, and the heightened risk of DFV in the context of contentious family law proceedings
  - the importance of providing agency to PINOPs wherever possible
  - guidance on when children should be listed as PINOPs on ADVOs involving their parents
  - strategies to prevent perpetrator misidentification.

## 4. Additional information on the questions posed by the review

### 4.1 Do you agree with some or all of the problems affecting Order 6 identified in Section 2 of the Discussion Paper?

#### 4.1.1 Problem 1: Orders 6 doesn't define 'contact'

Legal Aid NSW acknowledges the concerns outlined in the Discussion Paper about the undefined use of the term "contact". We have observed that its dual meaning—referring to both communication between parties and spend-time arrangements with children—can be confusing for PINOPs, defendants and other stakeholders.

#### 4.1.2 Problem 2: There is confusion about the interaction of Order 6(c) with family law

It is our experience that defendants, PINOPS and even NSW Police can be confused by the intersection of the state-based ADVO scheme and the federal family law system, particularly where there are inconsistent orders between the two schemes. Existing parenting orders can also be overlooked or not raised in the Local Court of NSW (**Local Court**) during ADVO applications, contributing to further confusion.

The NSW ADVO scheme and the federal family law system have differing functions and purposes. When determining parenting matters, the FCFCoA is guided by the child's best interests. To determine the child's best interests, the court must consider factors such as the safety of the child and parents, any history of DFV, abuse, or neglect, and any past or current ADVOs, and the benefit to the child of having a meaningful relationship with both parents.<sup>9</sup> The court must also ensure that any order made does not expose a person to an unacceptable risk of family violence or conflict with current ADVOs.<sup>10</sup>

In contrast, the NSW ADVO scheme is preventative and solely focuses simply on safety risks.<sup>11</sup> A court can issue an ADVO if it is satisfied, on the balance of probabilities, that the PINOP has reasonable grounds to fear, and in fact fears the commission of a domestic violence offence, and that the conduct is sufficient to warrant the making of the order.<sup>12</sup> These differing legal frameworks and considerations can sometimes result in inconsistencies between the two systems.

#### *Section 68R of the Family Law Act 1975*

In our experience, the Local Court rarely exercises its power under section 68R of the *Family Law Act 1975* to vary, discharge, or suspend parenting orders to align with ADVOs. The Australian Law Reform Commission has identified several reasons for this, which Legal Aid NSW agrees with:

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<sup>9</sup> *Family Law Act 1975* (Cth), ss 60CC & 65D(1).

<sup>10</sup> *Ibid*, s 60CG.

<sup>11</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 16.

<sup>12</sup> *Ibid*.



- parenting orders are often viewed by the Local Court as a matter for the FCFCoA
- the Local Court questions its authority to vary a superior court's order, particularly when Local Courts primarily deal with criminal cases, not parenting disputes
- the Local Court has limited time and resources to assess parenting orders
- the Local Court often has insufficient evidence to determine parenting issues
- unlike in the FCFCoA, there are no child dispute services or child representatives in the Local Court, and
- ADVOs are often considered in the context of a single critical incident.<sup>13</sup>

The Local Court faces significant time and resource constraints. Magistrates manage extremely high workloads, with daily lists often exceeding 100 matters. As a result, they rarely have time to fully consider all relevant circumstances or arguments.

ADVO defendants frequently attend the first listing date with extensive material, and seek to make lengthy submissions to the court about why the ADVO should not be made. However, due to heavy caseloads, courts often continue provisional ADVOs in the same terms sought by NSW Police rather than thoroughly engaging with these issues. Similar challenges arise at ADVO final hearings, where multiple serious criminal cases may be listed for hearing on the same day, and ADVO hearings are often listed for just one hour. This means ADVO hearings can feel rushed, and that evidence or the surrounding circumstances or parenting arrangements are overlooked/deemed not relevant.

In addition to time constraints, Local Court Magistrates often lack access to the comprehensive materials available in family law proceedings. Unlike the Local Court and NSW Police, the FCFCoA has access to Family Reports, single expert reports, and other critical evidence, allowing for a more detailed understanding of the circumstances. The FCFCoA is also more attuned to the risks of DFV in acrimonious family law disputes. In light of this, we consider parenting orders should not be varied, discharged, or suspended lightly by the Local Court.

Rather than mandating that the Local Court *must* consider section 68R when making an ADVO, Legal Aid NSW supports adding a guidance note to Order 6 (see recommendation 1). This note would clarify that when making or varying an ADVO with Order 6 in cases involving existing parenting orders, the court *may* consider section 68R of the *Family Law Act 1975* (with a similar notation for contact orders made under the child protection system). This reference would help draw the court's attention to section 68R and encourage its consideration where appropriate.

#### 4.1.3 Problem 3: Order 6(a) essentially repeats Order 2

We acknowledge that some duplication exists between Orders 2 and 6(a), which can occasionally cause confusion. However, both orders serve distinct and important functions. We oppose the reform option to delete ADVO Order 2, detailed in the Discussion Paper.

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<sup>13</sup> Australian Law Reform Commission, *Family Violence- A National Legal Response: Section 68R of the Family Law Act* (ALRC Report 114, November 2020).

The Discussion Paper suggests that ADVOs containing both Orders 2 and 6(a) create confusion, but in our experience, courts rarely use them together. When both appear in provisional orders issued by NSW Police, courts typically recognise this as an error and amend the ADVO accordingly. Many courts interpret the inclusion of both orders as limiting contact to lawyers only, as Order 6's exceptions should not override other ADVO conditions.

The broad definition of 'domestic relationship' means many ADVOs protect PINOPs from defendants with whom they do not share children, making Order 2 appropriate in some cases. However, where parties share children and require communication for co-parenting, Order 6 facilitates this while still protecting the PINOP by restricting other forms of contact. While Order 6(a) mirrors Order 2 in limiting communication to lawyers, Orders 6(b)–(e) provide additional contact options that are often necessary for parents.

We consider that Orders 6(a)–(d) are designed to be applied together rather than selectively. For example, even when detailed FCFCoA orders are in place which suggests only Order 6(c) may be appropriate, Order 6(d) remains important for urgent communication beyond those orders. We note in cases of severe violence where no contact is appropriate, it is open to the court to replace Order 6 with Order 2.

#### 4.1.4 Problem 4: The wording of order 6 is confusing and not in plain English

Legal Aid NSW agrees that the current wording of Order 6 is confusing. We believe it would be clearer if rewritten in plain English with simpler phrasing (see recommendation 1). We look forward to being consulted on any specific rewording proposal.

#### 4.1.5 Problem 5: There are difficulties monitoring and enforcing Order 6

We acknowledge the challenges in prosecuting breaches of Order 6, as highlighted in the Discussion Paper. These difficulties include:

- there is no standard format for written agreements
- there is uncertainty over what qualifies as a written agreement (e.g., a signed document, email, text message, or variations made through digital communication)
- there is no requirement for defendants to provide a copy of the agreement to the court or NSW Police, and
- written agreements can be changed at any time without any oversight.

However, we have observed that some of the challenges prosecuting breaches of Order 6 also stem from NSW Police misunderstandings of Order 6. We have observed police can be reluctant to prosecute breaches of ADVOs in situations where they view the matter as a "family law issue" or believe contact is permitted under a parenting agreement. This issue arises even when the alleged breach involves harassing or intimidating behaviour. In our experience, such difficulties frequently occur in disputes over children, regardless of whether a formal parenting agreement exists. The following case studies illustrate this issue:

### Karen's story<sup>14</sup>

There is a current ADVO in place that lists Karen as the PINOP, and Kevin as the defendant. The ADVO has both Order 1 and Order 6.

In line with Order 6, Karen and Kevin have a written agreement allowing Kevin to attend Karen's residence to collect the children. However, each time Kevin arrives, he verbally abuses and threatens Karen, often in front of the children. He yells insults, makes intimidating remarks about her safety, and, on several occasions, has pounded on the door aggressively when she doesn't answer immediately.

Fearing for her safety, Karen reports these incidents to the police. However, the officers are reluctant to take action, citing the written agreement that permits Kevin to attend the residence. They argue that his presence alone does not constitute a breach.

This response overlooks a critical issue: Kevin's conduct is a criminal offence (intimidation) and also clearly breaches Order 1 of the ADVO, which prohibits harassment, intimidation, and threats. The existence of a written agreement under Order 6 does not override these protections. The police's failure to recognise this distinction leaves Karen without recourse and allows Kevin's abusive behaviour to continue unchecked.

We have observed NSW Police being sceptical of and/or dismissing DFV reports as a tactic to gain an advantage in family law disputes, particularly in high-conflict cases without physical violence but involving intimidation, harassment, stalking, and coercive control. We believe additional training for NSW Police would improve the prosecution of breaches of Order 6 (see recommendation 6).

#### 4.1.6 Problem 6: People in need of protection are forced into 'on-the-spot' parenting negotiations, leading to them agreeing to unsafe agreements

Legal Aid NSW acknowledge this issue and is concerned about its impact on the safety of PINOPs and their children. In our experience, pressure to enter into parenting agreements most commonly arises when a magistrate conditions the addition of Order 6 on a signed 'agreement in writing', effectively forcing an on-the-spot decision.

This is particularly problematic when negotiations are rushed and can be imbalanced. Some PINOPs report feeling pressured to sign agreements drafted by the defendant's solicitor at court, with little or no opportunity for them to first receive independent legal advice,<sup>15</sup> or meaningful negotiation. Other PINOPs report feeling pressured by NSW Police to "let Dad see the kids." Conversely, some criminal lawyers may feel inadequately equipped to provide advice and assistance on a duty day about the terms of an 'agreement in writing' regarding the care of children. Pressure to formulate an agreement on the spot may result in parties entering into incomplete or unworkable arrangements.

This is also problematic when the incident of violence is recent, and PINOPs may be especially vulnerable due to the emotional, financial, and practical instability that often follows DFV.

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<sup>14</sup> This case study has been de-identified.

<sup>15</sup> Due to limited resources, advice and duty services from Legal Aid NSW's DVU are not available at all local courts.

Importantly, there is no legal requirement for a PINOP to enter into a parenting agreement before or after an ADVO with Order 6 is made. If no agreement under 6(d) exists, defendants can still seek parenting agreements through legal representation, mediation, or FCFCoA orders.

In our view any pressure put on PINOPs to agree to enter into 'on-the-spot' parenting negotiations is misguided and recommend addressing this issue through:

1. education for criminal justice professionals and police (see recommendation 5), and
2. the insertion of a guidance note on Order 6 that encourages PINOPs and defendants to seek legal advice before entering into agreements under Order 6(d) (see recommendation 1).

#### 4.1.7 Problem 7: Order 6 may not be widely used

Legal Aid NSW disagrees that Order 6 is not widely used. Both our criminal lawyers (who advise ADVO defendants) and our DVU lawyers (who advise PINOPs) report that Order 6, including Order 6(d), is commonly included in ADVOS where the PINOP and defendant share children. While Order 6(e) is used less frequently, it serves an important function by allowing contact between a parent and a third party caring for the children.

This anecdotal experience is supported by statistics. According to data cited in the Discussion Paper, 11.8 percent of all final ADVOS issued between 1 July 2022 and 30 June 2023 included Order 6. Notably, more than a third of final ADVOS (36.8 percent) contained only Order 1.

This means that 63.2 percent of ADVOS (22,077 cases) included additional conditions, and of those, 18.73 percent (4,136 cases) contained Order 6. This is a significant proportion, especially considering the broad definition of 'domestic relationship' includes a variety of relationships, including parties who do not share children, making Order 6 inappropriate in those cases. These figures clearly demonstrate that Order 6 is widely used and plays a crucial role in parenting arrangements for parents with ADVOS.

#### 4.2 Do you think Order 6 should be amended to remove Order 6(d) and Order 6(e)? Why or why not?

As discussed at Part 3, Legal Aid NSW strongly opposes removing Order 6(d) and (e). These orders provide PINOPs with a vital mechanism for managing the care of their children and their own safety.

#### 4.3 Do you think Order 6 should be amended to remove reference to an 'agreement in writing' and refer instead to formal plans, including parenting and care plans

The family law process is long and drawn out and efforts should be made to help people to avoid it where possible. Legal Aid NSW therefore oppose limiting agreements under Order 6(d) and (e) to formal plans. Such approach would reduce the flexibility many PINOPs need when co-parenting with ADVO defendants and force them to engage with the family law process (whether that be by family dispute resolution (FDR) and a parenting plan, or through formal court orders).

#### 4.4 Do you think Order 6(d) and (e) should be revised to specify in greater detail both permissible forms of communications and permissible topics relating to the child/ren rather than a potentially ambiguous reference to an agreement in writing?

We are concerned that any attempt to specify in greater detail both permissible forms of communications and permissible topics in Order 6 risks applying an overly broad brush to very different situations, reducing PINOPs' agency, and creating unworkable conditions that may compromise their safety. It would also remove necessary flexibility and fail to account for the varied circumstances in which Order 6 applies. Parenting agreements are often nuanced, and appropriate forms of contact vary. Some PINOPs may only feel safe with written communication (e.g., email or text), while others may prefer phone calls or in-person contact. For these reasons we oppose any prescriptive definition of allowable contact.

While such detailed provisions exist in other states, their legislative frameworks differ significantly. For example, under the *Family Violence Protection Act 2008* (VIC) conditions restricting contact cannot be imposed without the PINOP's consent.<sup>16</sup> This is very different to NSW, where:

- ADVOs can be issued based on police concerns rather than the PINOPs own fears, and
- the NSW Police Domestic Violence Code of Practice prioritises safety fears over PINOPs' wishes and does not require police to consider the PINOPs views or convey those views to the court.<sup>17</sup>

Amendments to Order 6(d) to create a prescriptive list of allowable forms and topics of communication would therefore further reduce PINOP agency.

Additionally, in cases where the court deems it appropriate to limit PINOP agency and prevent forms of contact, or specify how contact should occur (e.g., only via phone), the court can replace Order 6 with an Order 2 or a non-standard order under Order 11.

#### 4.5 Do you agree or disagree with including guidance notes in the Regulation? Why or why not?

It is difficult to make Order 6 both sufficiently clear and flexible at the same time. We therefore consider the addition of guidance notes to be appropriate. See recommendation 1 for a full list of the notations we support.

#### 4.6 Do you agree or disagree with a requirement for oversight?

We are concerned that requiring formal oversight of agreements under Order 6 would result in unnecessary delays, costly FDR conferences, or court proceedings, and make it more

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<sup>16</sup> *Family Violence Protection Act 2008* (VIC), s 75.

<sup>17</sup> NSW Police Force, *Code of Practice of the NSW Police Force Response to Domestic and Family Violence* (NSW Police Code of Practice, 1 June 2018), 65.

difficult for PINOPs to amend or withdraw agreements. It would also reduce the flexibility of Order 6.

### *Court oversight*

Both the NSW Local Court and FCFCoA are under-resourced and would likely be unable to provide timely oversight. Additionally, many individuals prefer to avoid bureaucratic processes and do not seek or need family court intervention to manage care arrangements for their children. We are also concerned that requiring parents to obtain court oversight may not be culturally appropriate.

### *Mandating legal advice/formal parenting plans*

For the following reasons, Legal Aid NSW is concerned about requiring those entering 'agreements in writing' to first obtain independent legal advice, and for those agreements to be formal parenting plans:

- FDR conferences can take months to schedule, and private FDR services are cost-prohibitive
- Legal aid is only available to those with very low incomes, making oversight by way of legal advice unaffordable for those who do not qualify for aid but still face financial hardship.
- Legal Aid NSW lacks the capacity to oversee Order 6 agreements without substantial additional funding.
- Requiring lawyers to confirm a party was not coerced would require additional training and a review of duty guidelines, grants, and legal aid scope.

While legal advice and the drafting of effective parenting agreements are ideal, requiring it in all cases would undermine the flexibility that makes Order 6 effective.

Legal Aid NSW supports measures to ensure that parties are not coerced into parenting agreements but believes formal oversight is not the solution. Instead, we propose:

1. adding a guidance note to Order 6 encouraging parties to seek independent legal advice before signing an agreement under 6(d) or 6(e) (see recommendation 1), and
2. increasing the availability of free and accessible legal advice for ADVO PINOPs and defendants (see recommendation 2).

If formal oversight is introduced, it must be accompanied by additional resources to ensure PINOPs and defendants have access to free legal advice and FDR services within a reasonable timeframe, so that agreements are not stalled by unnecessary delays.



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