

# A Practitioner's Guide to Domestic Violence Law in NSW

Women's Legal Service NSW





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# Chapter 1: Introduction to domestic violence

## What is domestic violence?

Domestic violence occurs when one person tries to dominate and control another person in a family-like or domestic relationship. Domestic violence involves an abuse of power and can take the form of:

- ▶ physical violence;
- ▶ sexual abuse;
- ▶ emotional or psychological abuse;
- ▶ verbal abuse;
- ▶ stalking and intimidation;
- ▶ social and geographic isolation;
- ▶ financial abuse;
- ▶ cruelty to pets;
- ▶ damage to property; or
- ▶ threats to be violent in these ways.

Domestic violence usually features a repeating pattern of behaviour with the dominant purpose of controlling the other person. The major impact is fear.

Domestic violence is predominately perpetrated by men against women. However, women can be perpetrators of violence in both heterosexual and LGBTIQ relationships. In this publication we refer to victim-survivors as women, which reflects the social science evidence and statistics.

Forced marriage, when a person gets married without freely consenting because they have been coerced, threatened or deceived is another form of domestic violence, as is reproductive coercion where control or pressure is used to determine contraception or pregnancy outcomes (See **Chapter 9** for more detail).

## What is the difference between 'domestic violence' and 'family violence'?

The terms 'domestic violence' and 'family violence' are often interchanged. They both generally refer to

violence between two or more people who are in a domestic relationship.

The terms 'domestic violence' and violence in a 'domestic relationship' are used in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (CDPVA), the legislation that deals with apprehended violence orders (AVOs). The CDPVA defines 'domestic relationship' broadly. The *Family Law Act 1975* (Cth) (FLA) refers to 'family violence'. This definition of family violence in the FLA changed in 2012 and includes a wide range of types of abuse.

The term 'family violence' is preferred by many Aboriginal and Torres Strait Islander people, reflecting an understanding of family violence beyond that between intimate partners and conceptualising violence against women within extended families and the wider community. Some Indigenous women prefer the term domestic violence as it differentiates violence in intimate relationships from that in the wider community. For more about this distinction, see the ANROWS (Australia's National Research Organisation for Women's Safety) paper on 'Existing knowledge, practice and responses to violence against women in Australian Indigenous communities'.<sup>1</sup>

The Coalition of Australian Governments' National Plan to Reduce Violence against Women and their Children 2010–2022 (the National Plan) defines domestic violence as:

acts of violence that occur between people who have, or have had, an intimate relationship. While there is no single definition, the central element of domestic violence is an ongoing pattern of behaviour aimed at controlling a partner through fear, for example by using behaviour which is violent and threatening. In most cases, the violent behaviour is part of a range of tactics to exercise power and control over women and their children, and can be both criminal and non-criminal. Domestic violence includes physical, sexual, emotional and psychological abuse. (Council of Australian Governments, 2011, p 2)

The term domestic violence is used throughout this guide to refer generally to domestic or family violence, unless the legal context requires specific reference to either domestic or family law.

1 [http://media.aomx.com/anrows.org.au/s3fs-public/FINAL%202012.16\\_3.2%20AIATSIS%20Landscapes%20WEB.pdf](http://media.aomx.com/anrows.org.au/s3fs-public/FINAL%202012.16_3.2%20AIATSIS%20Landscapes%20WEB.pdf)

## Crimes (Domestic and Personal Violence) Act 2007 (NSW)

While not separately defined, refer to sections 9 and 11 of the CDPVA for the meaning of domestic violence.

### Section 9 Objects of Act in relation to domestic violence

(3) In enacting this Act, Parliament recognises:

- (a) that domestic violence, in all its forms, is unacceptable behaviour, and
- (b) that domestic violence is predominantly perpetrated by men against women and children, and
- (c) that domestic violence occurs in all sectors of the community, and
- (d) that domestic violence extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years, and
- (e) that domestic violence occurs in traditional and non-traditional settings, and
- (f) the particularly vulnerable position of children who are exposed to domestic violence as victims or witnesses, and the impact that such exposure can have on their current and future physical, psychological and emotional well-being, and
- (f1) the particular impact of domestic violence on Aboriginal persons and Torres Strait Islanders, persons from culturally and linguistically diverse backgrounds, persons from gay, lesbian, bisexual, transgender and intersex communities, older persons and persons with disabilities, and
- (g) that domestic violence is best addressed through a co-ordinated legal and social response of assistance and prevention of violence and, in certain cases, may be the subject of appropriate intervention by the court.

## Family Law Act 1975 (Cth)

### Section 4AB Definition of family violence

- (1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
  - (a) an assault; or
  - (b) a sexual assault or other sexually abusive behaviour; or
  - (c) stalking; or
  - (d) repeated derogatory taunts; or

(e) intentionally damaging or destroying property; or

(f) intentionally causing death or injury to an animal; or

(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or

(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or

(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(3) For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

## Prevalence of domestic violence

Australia's National Research Organisation for Women's Safety (ANROWS) examined the health outcomes of intimate partner violence against women in its *State of knowledge* paper (March 2016, page 4) and identified that:

- ▶ one in six women in Australia reported having experienced physical or sexual violence by a current or former cohabiting partner;

- ▶ the prevalence of domestic violence appears to be substantially higher among Aboriginal and Torres Strait Islander women;
- ▶ domestic violence has a range of health consequences for women, particularly mental and reproductive health problems;
- ▶ children exposed to domestic violence are more likely to have a range of health, development and social problems and are at higher risk of perpetrating or being victims of domestic violence, which is a significant contributor to intergenerational cycles of disadvantage;
- ▶ domestic violence is a contributor to poverty, housing insecurity, social isolation and education and employment difficulties;
- ▶ violence against women costs the nation \$13.6 billion each year and is expected to rise to \$15.6 billion by 2021.

## Context and causes

Many people believe alcohol, drugs, stress, or mental illness causes domestic violence. While these may be contributing factors, the National Survey on Community Attitudes to Violence Against Women 2009 found that:

the pervasiveness of violence against women across boundaries of culture, race, class and religion indicates that above all it has foundations in gender power imbalances and violence-supportive norms ... key determinants of violence that include the following factors: the unequal power relations between men and women; social norms and practices related to violence in general; and a lack of access to resources and systems of support ... At the individual level, the most consistent predictor of the use of violence among men is their agreement with sexist, patriarchal, and/or sexually hostile attitudes. (page 14).

For Aboriginal and Torres Strait Islander women, the intersection of gender and racial inequality creates conditions for high rates of violence against them. The continued impacts of colonisation, dispossession and the loss of family and culture through the stolen generations can mean that the trauma experienced is intergenerational and complex.

## Complexity of need

Women experiencing domestic violence very often have a range of other issues that they need assistance with, including physical and mental health, accommodation, employment, social security, their children's education, immigration and visa status,

state and federal police involvement, and child welfare involvement.

In addition, clients often have to deal with three or more different courts and different legal representation if there are AVO, criminal law, child protection or family law proceedings.

## Complexity of system responses

Clients who have experienced domestic violence can be caught between what appear to be conflicting values in different parts of the legal system, and these may send her conflicting messages about her decision to stay in an abusive relationship or go.

On the one hand, Family and Community Services (FACS) may be pressing the mother to leave because of domestic violence and child protection concerns. However, leaving the relationship opens up the potential for family court proceedings and the likelihood that the father will be ordered to spend some time, even if supervised with the children.

According to an Australian Institute of Family Studies (AIFS) report, over 50% of parenting matters in the family law courts involve serious allegations of family violence and/or child abuse.<sup>2</sup> It is often the case that women who don't qualify for legal aid, but who cannot afford a private lawyer, are left with the choice of negotiating directly with their former partners on the courthouse steps or agreeing to attend family dispute resolution (FDR), where their chances of getting a safe and just outcome can be compromised.

Protective practices such as lawyer-assisted mediation and strategies for developing safe outcomes in agreements reached at FDR are important responses to these realities.

Women who have experienced domestic violence may find it harder than others to negotiate a fair property settlement. In a study reported in 2000, women who experienced severe abuse were about three times more likely than women who reported no physical abuse to indicate that they had received less than 40% of the total property pool.<sup>3</sup>

2 L Moloney et al., *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study*, Research Report No. 15. Melbourne: Australian Institute of Family Studies, 2007

3 G Sheehan and B Smyth, 'Spousal Violence and Post-separation Financial Outcomes' (2000) 14 *Australian Journal of Family Law*, 102, 112

## Resources

It is important for you to develop a comprehensive understanding of domestic violence, its dynamics and impact. You can stay informed of current research and information about domestic violence through well-regarded publications and bodies such as the Australian Institute of Family Studies (AIFS) or ANROWS.

AVERT Family Violence is a free online training course that was developed with funding from the Australian government in 2010.<sup>4</sup>

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4 [www.avertfamilyviolence.com.au](http://www.avertfamilyviolence.com.au)

## Chapter 2: Working with clients experiencing domestic violence

Responding effectively to clients experiencing domestic violence requires knowledge of the physical and emotional consequences of the violence, an understanding of appropriate and inappropriate responses, and safety planning.

### Issues to be aware of working with clients

#### Trauma-informed lawyering

Sarah Katz and Deeya Haldar describe trauma-informed lawyering as the practice of putting the realities of the client's traumatic experiences at the forefront and adjusting your practice to reflect that experience.<sup>5</sup> It is important to acknowledge the prevalence and the impact of trauma and to attempt to create a sense of safety for your clients.

The practice also includes employing self-care to counterbalance the effect the client's trauma experience may have on the practitioner (vicarious trauma). Setting appropriate boundaries with your clients and creating a safe space in which practitioners can talk about the effects of working with clients who have trauma histories can help to protect against vicarious trauma.

#### Gender awareness

Domestic violence is predominately perpetrated by men against women. See **Chapter 1: Introduction to Domestic Violence** for more information.

#### Aboriginal and Torres Strait Islander clients

Aboriginal and Torres Strait Islander women are far more likely to experience violence, and to suffer more serious violence, than non-Indigenous women.<sup>6</sup>

5 'The Pedagogy of Trauma-Informed Lawyering', *Clinical Law Review* (2016) 22:359

6 M Willis, 'Non-disclosure of Violence in Indigenous Communities', *Trends and Issues in Crime and Criminal Justice* (2011) 405, Australian Institute of Criminology, Canberra, 1

ANROWS has identified that Aboriginal and Torres Strait Islander women are:

- ▶ two to five times more likely to experience violence than non-Indigenous people;
- ▶ five times more likely to be homicide victims than non-Indigenous people; and
- ▶ 35 times more likely to be hospitalised than non-Indigenous people.<sup>7</sup>

It is important to be culturally sensitive when responding to Aboriginal and Torres Strait Islander people who may have experienced domestic violence. Ask whether your client identifies as Aboriginal or Torres Strait Islander and, if they do, ask whether they would prefer to be referred to an Indigenous-specific service. Each woman will have her own preference, with some preferring to use a mainstream service and others preferring an Indigenous-run service.

For a more detailed understanding of the existing research on Indigenous family violence see the ANROWS research publications which are a developing body of research knowledge. For example, 'Existing Knowledge, Practice and Responses to Violence against Women in Australian Indigenous Communities: State of Knowledge Paper', *Landscapes* (2016) 2.<sup>8</sup>

#### Cross-cultural issues

Some of your clients may suggest to you that domestic violence is 'normal' in their culture or religion. This is often what perpetrators of violence say to justify their behaviour. Victims may come to believe them, especially if they have seen friends or family experience domestic violence. Sometimes victims use this line when they are trying to assist the perpetrator to avoid charges, or in an effort to have an AVO or charges withdrawn or dismissed. However, when you talk to religious scholars or community elders they do not accept the proposition that violence is promoted, accepted or condoned in their faith or culture.

A useful way to respond to this suggestion is that it is not acceptable to be violent to a stranger and it is no different for people in domestic relationships. It is the community that are saying this behaviour is unacceptable and that's why there are laws against

7 ANROWS, *Indigenous Family Violence: Fast Facts*, May 2014

8 [http://media.aomx.com/anrows.org.au/s3fs-public/FINAL%202016\\_3.2%20AIATSIS%20Landscapes%20WEB.pdf](http://media.aomx.com/anrows.org.au/s3fs-public/FINAL%202016_3.2%20AIATSIS%20Landscapes%20WEB.pdf)

it. You can remind them it is the police who decide whether or not to take any action. The police are tasked with enforcing the law and the community expect them to enforce the law to everyone equally.

### Minimisation

People who have experienced domestic violence often minimise their experience by saying things like 'he only threatened me' or 'he just gave me a little push'. This may be because they have experienced violence regularly and the behaviour has become normalised. In some instances, particular behaviour may pale in comparison to other instances of abuse your client has experienced. Your clients may minimise their experience because they believe there isn't any corroborating evidence and therefore it not worth telling you about it.

Despite the minimisation, it is important for you to name it for what it is and say that is a criminal offence. Asking your client how the perpetrator's behaviour made them feel will tell you about your client's level of fear.

### Taking instructions

Taking instructions from a client who has experienced domestic violence requires particular skill to elicit the relevant information.

### Preparing your client for their appointment

Make sure your client is in a safe, quiet and private place. It is important to try to prevent children from seeing their parent upset (which is almost inevitable when giving detailed instructions about domestic violence), so try to obtain instructions during school time or arrange someone to look after younger children so your client can focus on giving instructions instead of tending to their children.

Suggest that your client go out or meet friends or family and do something nice (even if it's just going for a walk) after the appointment, as it will be difficult for her to relive traumatic events in her life.

### Explaining confidentiality

Perpetrators of violence often threaten victims that Family and Community Service (FACS) will remove their children if they disclose what's been happening to them and therefore victims are often reluctant to tell their story.

Before taking initial instructions tell your clients that solicitors are not mandatory reporters in re-

lation to child protection, and everything they tell you will remain strictly confidential. However, it's also important to tell them that other organisations are mandatory reporters.

### Limiting traumatisation

It is important to take thorough instructions the first time you speak to your client and make thorough notes so you don't have to revisit your client's story multiple times.

You can also minimise the trauma of your client retelling her story by getting information from relevant documentation such as police statements or court documents so that your client does not have to retell every detail of their story.

Be conscious that it may take some time over many consultations for a client who is affected by trauma to relate their history to you. Some may never feel OK about telling everything that has happened, but if their legal case depends on as much disclosure as possible then creating the environment and opportunity to provide a full history is crucial.

### Screening, risk assessment and safety planning

Screening, risk assessment and safety planning are all essential aspects of identifying and responding to clients who have experienced domestic violence. The essentials are covered below, but there is also a range of resources available to draw upon to inform your practice such as:

- ▶ Detection of Overall Risk Screen (DOORS) is a resource developed by the Commonwealth for use by family law practitioners;<sup>9</sup>
- ▶ Domestic Violence Safety Assessment Tool (DVSAT) is a resource developed as part of the integrated domestic and family violence response in NSW.<sup>10</sup>
- ▶ Common Risk Assessment Framework (CRAF) is a resource developed as part of the integrated domestic and family violence response in Victoria.<sup>11</sup>

9 The Family Law DOORS, available at [www.familylawdoors.com.au](http://www.familylawdoors.com.au)

10 NSW Government, *Domestic Violence Safety Assessment Tool (DVSAT) Guide*, available at [www.domesticviolence.nsw.gov.au](http://www.domesticviolence.nsw.gov.au)

11 Common Risk Assessment Framework (CRAF), available at: [www.dvrcv.org.au/training/family-violence-risk-assessment-craf](http://www.dvrcv.org.au/training/family-violence-risk-assessment-craf)

## Screening for domestic violence

It is good practice to screen for domestic violence in all matters by asking direct questions. Research shows that clients appreciate being asked. As a minimum, ask about physical abuse, emotional abuse and fear. For example, you could start by saying, 'I've just got a few questions that we ask all our clients':

- ▶ *Has Alex ever hurt you or threatened to hurt you?*
- ▶ *Does Alex ever humiliate you or put you down?*
- ▶ *Have you ever felt afraid of Alex?*

Some examples of additional ways to explore her answers are:

- ▶ *I know these questions are very difficult to answer, but I do need to ask. Have you ever felt worried about your safety?*
- ▶ *Can you talk more about how things are at home?*
- ▶ *What happens when things don't get done at home?*
- ▶ *How do the finances work between you and Alex?*
- ▶ *How does Alex respond when you xxx?*
- ▶ *How do you respond when Alex does xxx?*

## Responding to a disclosure

Your immediate response and attitude when a client discloses domestic violence can make a difference. Don't ask:

- ▶ *Why don't you leave?*
- ▶ *What could you have done to avoid this situation?*
- ▶ *Why did he hit you?*

Just being listened to can be an empowering experience for a client who has been abused. Validate her experience and her decision to disclose, for example:

- ▶ *That must have been frightening for you.*
- ▶ *I understand it could be very difficult for you to talk about this.*

Emphasise the unacceptability of violence, for example, 'Violence is unacceptable. You do not deserve to be treated this way.' Be clear that your client is not to blame. Avoid suggesting that the client is responsible for the violence or that they are able to control the violence by changing their behaviour.

## Risk assessment

Once you have screened for domestic violence, you should undertake a risk assessment and do a safety plan.

Risk assessment involves assessing the likelihood of the occurrence of violence and the likely severity of that violence ie the level of risk to safety in the family.

Risk assessment and safety planning should be undertaken regularly with clients since risks will change and safety plans will vary depending on what else is happening in your client's matter and what their current needs are. It is important for both you and the client to know that as the balance of power changes in the relationship, the risk to the person who has experienced violence and their children (and pets) may increase.

Identifying risk has three broad aspects to it:

- ▶ *identifying your client's perception of fear;*
- ▶ *using evidence based risk indicators; and*
- ▶ *applying your professional judgment.*

### Client's perception of fear

The victim's perception is the strongest most reliable indicator. This perception of fear is taken from the information gathered during the screening process (direct and indirect questioning). It is important to be aware that a victim may minimise rather than overstate concerns.

### Evidence based risk indicators

Knowledge of evidence based risk indicators assists in knowing when to raise red flags. Evidence based risk factors include:

- ▶ Presence of guns
- ▶ Previous use of a weapon
- ▶ Threats with weapons
- ▶ Threats to kill
- ▶ Previous serious injury
- ▶ Sexual assault
- ▶ Strangulation
- ▶ Stalking
- ▶ Threats of suicide
- ▶ Obsessiveness / extreme jealousy or dominance
- ▶ Threats to kill or actual harms of pets
- ▶ Drug and alcohol use (particularly in combination with an untreated mental health issue)

- ▶ Less than 6 months separation
- ▶ Pregnancy

### Risk Assessment Tools

The Risk Indicators are generally contained in Risk Assessment Tools. These tools contain a list of indicators that, if present, show an increased likelihood that severe violent acts could occur. Often these tools are used as the leading source of risk assessment. However best practice suggests that risk assessment be carried out in a semi non-directive conversation (information about victim fear and to assist the formation of professional judgment), and the risk assessment tool be used to confirm/challenge the judgment of the professional.

However, risk assessment tools such as DOORS, DVSAT and CRAF (see above and below) can be used to guide your questions to your client after your initial screening questions and/or as a checklist to make sure you have covered the most important risk factors. The tools can be useful for people less experienced or confident in undertaking a risk assessment or to double check against professional judgment or that “gut feeling.”

DOORS is an online checklist for clients to complete on their own and was developed in 2012 by the Commonwealth for use by family law practitioners. It screens for safety and mental health risks, parenting stress, and developmental risk for children and is available for free from the Attorney General's Department (Family Law Division)

The DVSAT was developed by the NSW Government as part of their integrated domestic violence response. It includes a list of 25 questions that screen for current and past violence, particular risk factors such as financial difficulties, substance abuse, firearms, pregnancy and sexual assault:

1. Has your partner ever threatened to harm or kill you?
2. Has your partner ever used physical violence against you?
3. Has your partner ever choked, strangled or suffocated you or attempted to do any of these things?
4. Has your partner ever threatened or assaulted you with any weapon (including knives and/or other objects)?

5. Has your partner ever harmed or killed a family pet or threatened to do so?
6. Has your partner ever been charged with breaching an apprehended violence order?
7. Is your partner jealous towards you or controlling of you?
8. Is the violence or controlling behaviour becoming worse or more frequent?
9. Has your partner stalked, constantly harassed or texted/emailed you?
10. Does your partner control your access to money?
11. Has there been a recent separation (in the last 12 months) or is one imminent?
12. Does your partner or the relationship have financial difficulties?
13. Is your partner unemployed?
14. Does your partner have mental health problems (including undiagnosed conditions) and/or depression?
15. Does your partner have a problem with substance abuse such as alcohol or other drugs?
16. Has your partner ever threatened or attempted suicide?
17. Is your partner currently on bail or parole, or have they served a time of imprisonment or recently been released from custody in relation to offences of violence?
18. Does your partner have access to firearms or prohibited weapons?
19. Are you pregnant and/or do you have children who are less than 12 months apart in age?
20. Has your partner ever threatened or used physical violence toward you while you were pregnant?
21. Has your partner ever harmed or threatened to harm your children?
22. Is there any conflict between you and your partner regarding child contact or residency issues and/or Family Court proceedings?
23. Are there children from a previous relationship present in your household?

24. Has your partner ever done things to you, of a sexual nature, that made you feel bad or physically hurt you?
25. Has your partner ever been arrested for sexual assault?

In applying the DVSAT, assessment of risk is based on the number of 'yes' answers with 1-11 deeming a person 'at threat' and 12 + 'yes' answers deeming a person at 'serious threat.' It also includes a section for assessment based on professional judgment

If a client is deemed at 'serious threat', they are referred to a safety action meeting (SAM) which is a regular meeting of local service providers that aims to prevent or lessen a serious threat to a victim of domestic violence through targeted information sharing. SAMs are progressively being rolled out across the State. By the end of March 2018, SAMs will operate from 43 sites: Albury, Armidale, Ashfield/Burwood, Bankstown, Bathurst, Blacktown, Blue Mountains, Bourke, Broken Hill, Campbelltown, Coffs Harbour, Deniliquin, Dubbo, Far South Coast, Goulburn, Gosford, Griffith, Hunter Valley, Illawarra, Lismore, Liverpool, Moree, Mt Druitt, Newcastle, Newtown, Northern Beaches, Nowra, Orange, Parramatta, Penrith, Port Macquarie, Queanbeyan, St George, Sutherland, Tamworth, Taree, Toronto, Tweed Heads, Wagga Wagga, Walgett, Waverley, Wollongong and Wyong.

A version of the DVSAT is used by police. When Police respond to a domestic violence incident they are required to complete a DVSAT and where the victim answers yes to 12 or more questions they are deemed to be 'at serious threat' and should be referred to a SAM.

### Safety Action Meetings

A SAM is part of a broader integrated domestic violence strategy *Safer Pathways*. For further information go to [www.domesticviolence.nsw.gov.au](http://www.domesticviolence.nsw.gov.au) and the NSW Government publication *It Stops Here: Safer Pathway Overview* from which the service delivery map on the following page has been sourced.

A SAM is a regular meeting of local service providers that aims to prevent or lessen a serious threat to victims of domestic violence through targeted information sharing.

The legal framework for information sharing is contained within Part 13A of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (CDPVA),

which allows service providers to share information for the purpose of preventing or lessening a serious threat to a person's safety. In limited circumstances Part 13A allows service providers to share information about a victim without their consent where it is necessary to prevent or lessen a serious threat to their safety, or the safety of their children or other persons.

SAMs are chaired by a senior police officer and attended by key government and non-government service providers working with victims of domestic violence and perpetrators in the local area. Neither victims nor perpetrators attend the meetings, which are designed to allow service providers to commit to actions to support victims and reduce the threat to their safety. Members share information to develop a tailored safety action plan for victims at serious threat and their children. A safety action plan is a list of actions that service providers can take to reduce the threat to a victim's safety. The meetings do not result in a plan or a document with which the victim must comply. For more information refer to the *Safety Action Meeting Manual* at [domesticviolence.nsw.gov.au](http://domesticviolence.nsw.gov.au).

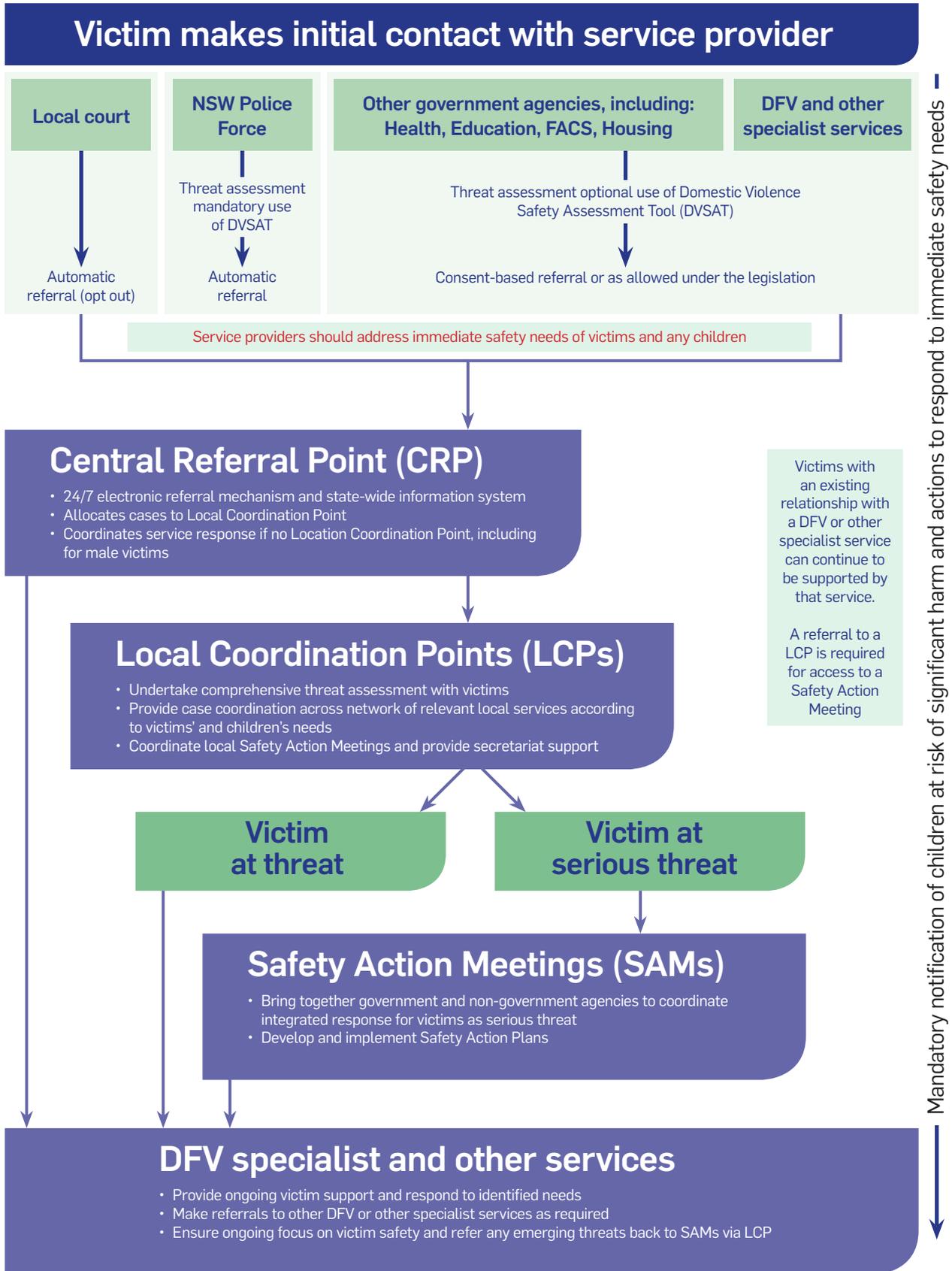
Before referring a client you should explain to her that once she is the subject of a SAM her information will be shared with other service providers such as police, Family and Community Services (FACS), NSW Health, the Department of Education, and Corrective Services.

### Practitioner tip

If FACS becomes aware that a child or young person is in need of care and protection it may take action it believes is necessary to protect the child or young person. Police may charge the perpetrator or the victim with an offence if they become aware a crime has been committed. Centrelink may take action against a victim or perpetrator if they become aware of previously undisclosed information.

If your client consents to being referred to a SAM you should refer them to their Local Coordination Point. There is a Safety Action Meeting Referral Form that can be filled in and given to your Local Coordination Point. Further information about SAMs and Local Coordination Points, including a copy of the referral form is available online.<sup>12</sup>

12 [www.crimeprevention.nsw.gov.au/domesticviolence/Documents/It%20stop/Safety\\_Action\\_Meeting\\_manual.pdf](http://www.crimeprevention.nsw.gov.au/domesticviolence/Documents/It%20stop/Safety_Action_Meeting_manual.pdf).



## Safety planning

Safety planning is intended to optimise your client's safety and may change depending on their changing circumstance. 1800RESPECT, the National Sexual Assault, Domestic Family Violence Counselling Service, developed the following safety planning checklist:

### Safety at home

- ▶ Responding is everyone's business. Let neighbours who you trust know to call the police on 000 if they hear fighting, shouting or noises. Some people who live in flats or apartments have coded stomps or tapping to alert their neighbours to get help.
- ▶ Have somewhere to go if you need to get out. In your wallet or mobile contact list keep phone numbers of family and friends.
- ▶ Have your own mobile phone and plan (preferably prepaid) so that you can stay in touch with people and calls can't be checked from the phone bill or call logs.
- ▶ Get an escape plan ready for when you feel that things might get out of control.

### Making an escape plan

- ▶ Plan and practise quick emergency exit routes from all the rooms in your house/flat.
- ▶ Have a small escape bag somewhere with spare keys, important papers, a special toy for the kids and some spare cash in case you need to leave in a hurry. If you need prescription medicines, keep a spare script in your escape bag.
- ▶ Leave spare copies of keys, important papers, photocopies of bank cards and credit cards etc. with a family member, friend or someone you trust.
- ▶ If you have any mobility issues or disabilities, arrange in advance for a friend to come straight away if you ring or text them. Some people use a code word, agreed on in advance. That way you can call even if the perpetrator can hear you.
- ▶ If it's safe, keep a diary of abusive or frightening incidents. These can help if you need to get a protection order.

## Collecting useful numbers

Consider gathering some useful addresses and numbers like:

- ▶ local taxi services (accessible taxi services, if you need them).
- ▶ the crisis phone line in your state or territory.
- ▶ the closest crisis contact centre.
- ▶ the address of the local police station.
- ▶ Remember you can always call 1800RESPECT on 1800 737 732.

## Safety after separation

- ▶ If you have separated from your partner, get outdoor lights, extra window or door locks, or gates if you can. Police will often do a 'security upgrade' check for you and give you ideas about increasing safety for your particular house or flat. Some domestic and family violence services or police services have funds available to help with costs.
- ▶ Change your mobile number and have it set on 'private'. Use a different SIM card if you need to communicate about children.
- ▶ Ask government agencies, utilities companies, law firms, doctors, schools etc. to keep your details private.
- ▶ Get a PO Box for important mail or keep your home address private.
- ▶ Talk to a domestic and family violence service, a community lawyer or the police about getting a protection order if you don't already have one. These can alert police to some of the dangers in advance. They can also be written to prohibit the abuser from coming to your workplace.

## Safety in public or at work

- ▶ Park your car in a busy public place. Avoid underground car parks, or if you have to use them, get someone to walk you to your car.
- ▶ If you see your partner or ex, get into a public or busy place as soon as possible.
- ▶ If you have separated from your partner, ask your boss if you can have calls and visitors screened through reception. If you work in a public space, such as a shopping centre, talk to the security staff and show them your ex's photo.

- ▶ If you have separated from your partner, try to change your routines regularly. Where possible, catch different trains or trams, leave home or work at different hours, shop in different places or online.
- ▶ Tell your boss or security staff of any protection orders that prevent the abuser from coming near your work. Keep a copy of your order at work or in your bag.

#### Safety on the Internet

- ▶ Use a public computer (library, community centre) or a friend's computer that your abuser can't access.
- ▶ Change or delete your Facebook account and your kids' accounts, or review your privacy settings to restrict access. People can accidentally give away details of where you are living or where you will be.
- ▶ Change your email account. Make it hard to trace – don't use your name and birth year in the account name.
- ▶ Have a computer technician check your computer for spyware or keystroke logging programs.

#### Helping kids

- ▶ Help your kids to know when there are warning signs of danger.
- ▶ Keep the conversation practical like other safety conversations you might have around natural disaster planning, fire safety, etc.
- ▶ Practise emergency escape routes – talk about these at the same time as you talk through a fire or hurricane drill.
- ▶ Teach your children that it is not their responsibility to stop the abuser when they are angry or violent.
- ▶ Teach your children who they can call or where they can go in an emergency. This includes how to call 000 and ask for the police, and how to give their address.
- ▶ Tell schools or childcare centres about the violence, along with school parents you can trust. They can keep a look out for signs of escalation and also help with caring for your child's emotional needs. A community of care helps

keep kids safe. Give the school or childcare centre a copy of your protection order, and a photo of the perpetrator so they know who to look out for.

#### Practitioner tip

Ask your client for safe numbers and times to call.

Check if it is safe to leave a message on these numbers.

Do not leave messages with family members or on voicemail until your client has instructed you that it is safe.

Be prepared not to say who you are if someone other than your client answers the phone. You can say, 'Sorry wrong number' or 'I'm calling to do a survey. I'll call back later,' for example.

Use a private number in case the perpetrator is checking her phone.

Only send letters by post and/or email when your client has instructed it is safe.

Time the sending of letters to the other party and prepare your client so they can prepare and take extra precautions in case the letter inflames the other party. For example avoid sending an email to the other party on a Friday afternoon.

If you lose contact with your client, take steps to check if she is safe. You can ask police to do a 'welfare check'.

#### Support services

It is important to connect your client with all relevant support services. See **Chapter 14: Referrals and Contacts** for referrals to financial, housing and other support services.

## Chapter 3: Apprehended violence orders (AVOs)

This chapter will provide a step-by-step guide about how to deal with clients who are an applicant or defendant in AVO proceedings.

### Practitioner tip

On 3 December 2016 changes were introduced to the Crimes (Domestic and Personal Violence) Act 2007 (NSW) (CDPVA) which included the introduction of “plain language” AVOs. The discussion about the wording of orders in this chapter reflect the wording used in AVOs made after 3 December 2016. AVOs made prior to 3 December 2016 will have orders which are worded and numbered differently to those made after 3 December 2016 but which still carry the same effect.

### Purpose

An AVO prohibits the defendant from engaging in certain behaviours. The objects of an AVO are set out in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (CDPVA).

In *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, Spigelman CJ (Mason P and Beazley JA agreeing):

The legislative scheme for apprehended violence orders serves a range of purposes which are quite distinct from the traditional criminal or quasi-criminal jurisdiction of the Local Court. The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking, intimidation and harassment. Apprehended violence orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law. [at 519]

In *Vukic v Edgerton* [2001] NSWCCA 2, Dowd J (Mason P and Austin J agreeing) observed that the underlying purpose of AVOs is to deter people from carrying out certain inappropriate conduct or

harming persons and to protect people from future harm. [at 47]

In *R v Hamid* (2006) 164 A Crim R 179; [2006] NSWCCA 302 Johnson J refers to the New South Wales Law Reform Commission Report 103 (2003), Apprehended Violence Orders, which states that the, “underlying rationale of the AVO scheme is to stop or prevent criminal behaviour, and to send a clear message that any form of violence, intimidation or harassment is a crime”.

### Types of AVOs

There are two types of AVOs, apprehended domestic violence orders (ADVOs) and apprehended personal violence orders (APVOs). An ADVO protects people from people with whom they have a domestic relationship. The CDPVA defines domestic relationship as:

### Meaning of ‘domestic relationship’

Section 5 sets out the definition of domestic relationship:

(1) For the purposes of this Act, a person has a “domestic relationship” with another person if the person:

- (a) is or has been married to the other person, or
- (b) is or has been a *de facto* partner of that other person, or
- (c) has or has had an intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature, or
- (d) is living or has lived in the same household as the other person, or
- (e) is living or has lived as a long-term resident in the same residential facility as the other person and at the same time as the other person (not being a facility that is a correctional centre within the meaning of the *Crimes (Administration of Sentences) Act 1999* or a detention centre within the meaning of the *Children (Detention Centres) Act 1987*), or
- (f) has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person, or
- (g) is or has been a relative of the other person, or
- (h) in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person’s culture.

Note: ‘De facto partner’ is defined in section 21C of the *Interpretation Act 1987*.

(2) Two persons also have a “domestic relationship” with each other for the purposes of this Act if they have both had a domestic relationship of a kind set out in subsection (1) (a), (b) or (c) with the same person.

*Note: A woman's ex-partner and current partner would therefore have a domestic relationship with each other for the purposes of this Act even if they had never met.*

APVOs protect people from people with whom they do not have a domestic relationship, for example, neighbours or work colleagues. This section will focus on ADVOs.

## Legal test

Section 16 of the CDPVA states:

(1) A court may, on application, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears:

(a) the commission by the other person of a domestic violence offence against the person, or

(b) the engagement of the other person in conduct in which the other person:

(i) intimidates the person or a person with whom the person has a domestic relationship, or

(ii) stalks the person,

being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

(2) Despite subsection (1), it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in, if:

(a) the person is a child, or

(b) the person is, in the opinion of the court, suffering from an appreciably below average general intelligence function, or

(c) in the opinion of the court:

(i) the person has been subjected at any time to conduct by the defendant amounting to a personal violence offence, and

(ii) there is a reasonable likelihood that the defendant may commit a personal violence offence against the person, and

(iii) the making of the order is necessary in the circumstances to protect the person from further violence, or

(d) the court is satisfied on the balance of probabilities that the person has reasonable grounds to fear the commission of a domestic violence offence against the person.

(2A) An apprehended domestic violence order that is made in reliance on subsection (2) (d) cannot impose prohibitions or restrictions on the behaviour of the defendant other than those prohibitions that are taken to be specified in the order by section 36.

(3) For the purposes of this section, conduct may amount to intimidation of a person even though:

(a) it does not involve actual or threatened violence to the person, or

(b) it consists only of actual or threatened damage to property belonging to, in the possession of or used by the person.

Section 11 of the CDPVA defines domestic violence offence as:

(1) In this Act “domestic violence offence” means an offence committed by a person against another person with whom the person who commits the offence has (or has had) a domestic relationship, being:

(a) a personal violence offence, or

(b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or

(c) an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).

(2) In this section, “offence” includes an offence under the Criminal Code Act 1995 of the Commonwealth.

Section 4 defines a personal violence offence as:

(a) an offence under, or mentioned in, section 19A, 24, 25, 26, 27, 28, 29, 30, 31, 33, 33A, 35, 35A, 37, 38, 39, 41, 44, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66EA, 80A, 80D, 86, 87, 93G, 93GA, 195, 196, 198, 199, 200, 562I (as in force before its substitution by the Crimes Amendment (Apprehended Violence) Act 2006) or 562ZG of the Crimes Act 1900, or

(b) an offence under section 13 or 14 of this Act, or

(b1) an offence under section 109, 111, 112, 113, 114, 115 or 308C of the Crimes Act 1900, but only if the serious indictable offence or indictable offence

*referred to in those sections is an offence referred to in paragraph (a) or (b), or*

*(c) an offence of attempting to commit an offence referred to in paragraph (a), (b) or (b1).*

Section 13 states:

*(1) A person who stalks or intimidates another person with the intention of causing the other person to fear physical or mental harm is guilty of an offence.*

*Maximum penalty: Imprisonment for 5 years or 50 penalty units, or both.*

*(2) For the purposes of this section, causing a person to fear physical or mental harm includes causing the person to fear physical or mental harm to another person with whom he or she has a domestic relationship.*

*(3) For the purposes of this section, a person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person.*

*(4) For the purposes of this section, the prosecution is not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm.*

*(5) A person who attempts to commit an offence against subsection (1) is guilty of an offence against that subsection and is punishable as if the offence attempted had been committed.*

Section 7 of the CDPVA defines intimidation as:

*(a) conduct amounting to harassment or molestation of the person, or*

*(b) an approach made to the person by any means (including by telephone, telephone text messaging, e-mailing and other technologically assisted means) that causes the person to fear for his or her safety, or*

*(c) any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property.*

*(2) For the purpose of determining whether a person's conduct amounts to intimidation, a court may have regard to any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour.*

*PE v MU* [2010] NSWDC 2 states “[h]arassment is not defined in the Act but in its legal sense it refers to ongoing behaviours which are found to be threatening or disturbing”.<sup>13</sup>

*Murdoch v Hadley* [2011] NSWLC 11 adopts the Macquarie Dictionary definition of harass:

**verb ( t )** 1. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid. 2. to disturb

<sup>13</sup> at [16].

persistently; torment. [French **harasser**, from Old French **harer** set a dog on] As a general proposition, there appears to be no reason why repeated verbal attacks upon a person could not amount to harassment as “repeated attacks” or as “torment”, and evidence of such attacks is by no means uncommon in the evidence relating to apprehended violence orders, although rarely of attacks so openly publicized. Such an interpretation is consistent with the dictionary definition given above, and, if accepted, seems to be as applicable to verbal attacks broadcast via electronic media as it would be to verbal attacks made orally in the presence of the victim, or, for example, broadcast via telephone or loudspeaker. Also it would seem to follow that repeated unwanted telephone calls to another person could fall within any broad interpretation of “harassment” even if, as here, those calls do not fall within s 7(1)(b) because they do cause any genuine fear regarding physical safety of persons or property.<sup>14</sup>

Section 8 of the CDPVA defines stalking as:

*the following of a person about or the watching or frequenting of the vicinity of, or an approach to, a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity.*

*(2) For the purpose of determining whether a person's conduct amounts to stalking, a court may have regard to any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour.*

Section 14 refers to contravening an AVO:

*(1) A person who knowingly contravenes a prohibition or restriction specified in an apprehended violence order made against the person is guilty of an offence.*

*Maximum penalty: Imprisonment for 2 years or 50 penalty units, or both.*

*Gianoutsos v Glykis* (2006) 65 NSWLR 539 found that the making of a final AVO “does not necessarily require a finding that any particular event has occurred (although such a finding could be made) and does not require a finding that a criminal act may have been committed”.<sup>15</sup>

## Consequences of AVOs

### Civil order but breach is a crime

An AVO is a civil order of the court. It is not a criminal charge and will not be listed on a defendant's criminal record, however a defendant can be charged with a criminal offence for contravening an AVO (commonly referred to as breach AVO) if they

<sup>14</sup> at [11]-[13]

<sup>15</sup> at [52]

continue to engage in the prohibited behaviour. See 'Contravening an AVO' below for more information.

### Firearms

Sections 23 and 24 of the *Firearms Act 1996* (NSW) (Firearms Act) automatically suspends a person's licence to possess or use a firearm on the making of an interim AVO and revokes it on the making of a final AVO. Sections 17 and 18 of the *Weapons Prohibition Act 1998* (NSW) duplicate these provisions.

Section 11(5)(c) of the Firearms Act provides that a person who is subject to a final AVO is prohibited from holding a firearm licence within ten years of the making of the final AVO. On the suspension or revocation of such licences or permits, the relevant firearms or weapons must be surrendered to the police or may be seized by the police.

### Working with children check

Having an AVO against you may or may not affect your ability to work with children. Section 8 of the *Child Protection (Working With Children) Act 2012* requires people applying for jobs working with children to undergo a 'working with children check'. A police-initiated final AVO made against a person for the protection of a child will be recorded on a defendant's working with children check and they may not be considered eligible for child-related employment. Section 15 of the CPWWCA requires the Children's Guardian to undertake a risk assessment of an applicant for a working with children check clearance. Section 15(4) lists the matters that the Children's Guardian may consider in undertaking the risk assessment. These include seriousness of the matters that caused the assessment; length of time that has passed; how old the applicant was at the time etc.

#### Practitioner Tip

For more information about the working with children check see the Office of the Children's Guardian website at [www.kidsguardian.nsw.gov.au/child-safe-organisations/working-with-children-check](http://www.kidsguardian.nsw.gov.au/child-safe-organisations/working-with-children-check). Also, watch out for possible changes to the law following a review of the Working with Children Check undertaken in 2017.

### Family law and AVOs

Section 60CC(3)(k) of the *Family Law Act 1975* (Cth) (FLA) requires the court, when considering

making a parenting order, to take into account the nature of an AVO (provisional, interim or final), the circumstances in which an AVO was made, any evidence admitted in proceedings for the order and any findings made by the court in, or in proceedings for, the AVO.

### Criminal records for domestic violence offences

Section 11 of the CDPVA defines a domestic violence offence as a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship.

According to section 12(2) of the CDPVA, if a person pleads guilty to an offence or is found guilty of an offence and the court is satisfied that the offence was a domestic violence offence, the court is to direct that the offence be recorded on the person's criminal record as a domestic violence offence.

Sections 27 and 49 of the CDPVA provide that if a person has committed a domestic violence offence, it will be relevant in determining:

- ▶ bail proceedings; and
- ▶ whether a person is guilty of stalking or intimidation, where previous behaviour constituting a domestic violence offence is taken into account for the purpose of determining whether a person's behaviour amounts to intimidation or stalking; and
- ▶ future ADVO applications, because police are required to make applications for ADVOS where a person in question has already committed a domestic violence offence; and
- ▶ an appropriate sentence for a future offence because previous convictions are considered to be an aggravating factor to be taken into account.

### AVO orders

In deciding whether or not to make an ADVO, section 17(1) of the CDPVA requires the court to consider the safety and protection of the protected person and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order.

Section 17(3) of the CDPVA states that when making an ADVO, the court is to ensure that the order imposes only those prohibitions and restrictions on the defendant that, in the opinion of the court, are

necessary for the safety and protection of the protected person, and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order, and the protected person's property.

There is a standard form AVO that lists mandatory orders and the additional orders listed in section 35 of the CDPVA.

### Mandatory orders

Section 36 of the CDVPA requires that every AVO include the following mandatory orders, which appear as Order 1 on an AVO, prohibiting the defendant from:

- (a) *You must not assault or threaten the protected person or any other person having a domestic relationship with the protected person.*
- (b) *You must not stalk, harass or intimidate the protected person or any other person having a domestic relationship with the protected person intentionally.*
- (c) *You must not recklessly destroy or damage any property that belongs to or is in the possession of the protected person or any other person having a domestic relationship with the protected person.*

These orders offer a minimum level of protection. They can be made even when the defendant and the protected person are still living together and/or still in a relationship, as they do not prevent contact or involve any exclusion from premises.

### Additional orders

A court can impose any prohibition or restriction on a defendant as appear 'necessary or desirable' to ensure the safety and protection of the person in need of protection and their child. Without limiting the prohibitions or restrictions a court can make, section 35 of the CDPVA sets out the additional orders that can be included on an AVO.

### Orders about contact

The additional orders can include orders about contact:

- (a) *You must not approach the protected person or contact them in any way, unless the contact is through a lawyer.*
- (b) *You must not approach:*
  - 5 *The school of any other place the protected person might go for study,*
  - 6 *Any place they might go for childcare, or*

7 *Any other place listed here \_\_\_\_\_.*

- (a) *You must not approach or be in the company of the protected person for at least 12 hours after drinking alcohol or taking illicit drugs.*
- (b) *You must not try to find the protected person except as ordered by a court.*

Order 2 is the strictest no contact order. It is usually only used where the parties do not have any children together or there is no need for them to have any contact in the future or it is not safe to have any contact between the defendant and the protected person.

### Orders about family law and parenting

Additional orders can include orders about family law and parenting.

- (a) *You must not approach the protected person or contact them in any way, unless the contact is:*

- 6 *through a lawyer, or*
- 7 *to attend accredited or court-approved counselling, mediation and/or conciliation, or*
- 8 *as ordered by this or another court about contact with child/ren, or*
- 9 *as agreed in writing between you and the parent(s) about contact with child/ren.*

Order 6 is appropriate where the protected person and the defendant have children and do not have parenting orders. They may have no parenting arrangements or a parenting plan (i.e. written agreement).

If order 6(d) is made the defendant will not be able to contact the protected person until such time as an agreement in writing is reached. Some magistrates will not make order 6(d) unless an agreement is reached in relation to the defendant's contact and will encourage the protected person and the defendant to do this on the AVO list day. If your client wants to enter into a parenting plan, refer to the sample plan below for suggested wording and change as relevant to your client's circumstances.

However, victims of domestic violence are often at their most vulnerable and may not be in a position to consider parenting arrangements. Victims of domestic violence should be given the opportunity to get legal advice from a family lawyer before agreeing to anything in writing in relation to children. A written agreement that sets out arrangements for children, signed and dated by the parties, is a parenting plan under the Family Law Act (see ss 63C, 64D, 65DA and 70NBB).

A written agreement does not become a court order or part of the AVO, but it may be handed up to the magistrate and sit on the court file. Although not binding like a court order, if the written agreement is signed and dated (i.e. is a parenting plan) it may be considered in family law proceedings as the parties' intentions in relation to the children and may have

child support implications. A parenting plan also overrides an existing court order about children.

If, after advice, a written agreement in the form of a parenting plan is agreed to as part of Order 6 the sample format below can be adapted to the client's instructions.

### Agreement in Writing / Parenting Plan

BETWEEN

[INSERT NAME] (Mother)

AND

[INSERT NAME] (Father)

This agreement is made subsequent to the Apprehended Violence Order

made by \_\_\_\_\_ Local Court on \_\_\_\_\_

for the protection of \_\_\_\_\_ (Protected Person)

This agreement is not a court order under the Family Law Act 1975 (Cth). It is an agreement about parenting arrangements until such time as another Parenting Plan or Court Orders are made between the parents.

The following arrangements are agreed in relation to the child/ren:

\_\_\_\_\_ DOB: \_\_\_\_\_

\_\_\_\_\_ DOB: \_\_\_\_\_

\_\_\_\_\_ DOB: \_\_\_\_\_

The child/ children lives with Mother / Father / other person

The Mother / Father spends time with the children as follows:

Each (name day) from .....am/pm to .....am/pm

Every alternate weekend beginning [date]:

For the purpose of spending time with the Father, the Father will pick up [Name] from school 3pm Friday and drop them at school 9am the following Monday.

The Father can call [name] between 7pm and 7.30pm on Wednesday evenings.

[Add any additional agreements]

We agree to be bound by the above terms until such time as a new Parenting Plan or Orders under the Family Law Act 1975 (Cth) are made.

Dated: \_\_\_\_\_

\_\_\_\_\_

Mother [Name]

[Signature]

\_\_\_\_\_

Father [Name]

[Signature]

Order 6(c) is appropriate where there are parenting orders in place. See **Chapter 5: DV and Family Law** for more information about parenting plans and parenting orders.

### Orders about where a defendant cannot go

Additional orders can include an order about where a defendant cannot go.

(f) *You must not live at:*

(a) *The same address as the protected person, or*

(b) *Any place listed here*

\_\_\_\_\_.

(g) *You must not go into:*

- *Any place where the protected person lives, or*
- *Any place where they work, or*
- *Any place listed here*

\_\_\_\_\_.

(h) *You must not go within \_\_\_\_\_ metres of:*

- *Any place where the protected person lives, or*
- *Any place where they work or*
- *Any place listed here*

\_\_\_\_\_.

When making an order that would prohibit or restrict access to the defendant's residence, section 17(2) of the CDPVA requires the court consider:

- ▶ the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made; and
- ▶ any hardship that may be caused by making or not making the order, particularly to the protected person and any children; and
- ▶ the accommodation needs of all relevant parties, in particular the protected person and any children; and
- ▶ any other relevant matter.

In *Farthing v Phipps* [2010] NSWDC 317, when the court is deciding whether to make an AVO, 'any other relevant matter' can include a person's ability to understand an AVO.

Section 17(4) of the CDPVA states that if an application is made for an ADVO that prohibits or restricts access by the defendant to any premises or place and the court hearing proceedings in respect

of the application decides to make an order without the prohibition or restriction sought, the court is to give reasons for that decision.

Section 35(2) of the CDPVA states that the defendant can be prohibited or restricted access to premises 'whether or not the defendant has a legal or equitable interest in the premises or place'. This is very important, as many victims feel that they have no rights to remain in the family home if the title is not in their name.

Order 7 only restricts the defendant from living at the premises. It does not restrict them entering the premises (upon invitation) to visit children for example.

Order 8 restricts the defendant from entering a particular place. Unfortunately, the word 'place' is not defined in the CDPVA and its meaning causes some confusion. Some people interpret the place as the house, whereas others interpret place as the front gate, fence or boundary line. The example provided in the pro forma orders is: You are not allowed to go within the boundary of those places. Advising clients to use caution and to take a liberal interpretation of the concept of place, such as the fence line, may be best.

In some cases where pick-up or drop-off of children is involved it may be prudent to redraft the order and specify an exact boundary. For example, the defendant must not go past the letterbox at the top of the driveway, so all parties are clear where the 'place' begins.

Order 9 is the most restrictive of the exclusion orders. It usually specifies an exclusion range of 50 or 100 metres from the place. If the protected person lives on a highway, or on a street the defendant needs to frequent to get to work or to visit family, a magistrate will be unlikely to make order 9. Therefore it is best to get instructions about the potential need for the defendant to go within 100 metres of the protected persons' place.

#### Practitioner tip

It is important that an AVO application seek appropriate and reasonable additional orders in each case. Some orders will cancel each other out and the wrong combination of orders may result in confusion for the defendant and the protected person, which can lead to breaches of the order. Some orders are broader than others and make lesser orders unnecessary. For example, by seeking exclusion order 9 you do not need order 7 or 8.

## Orders about weapons

The additional orders include orders about weapons:

- (a) *You must not possess any firearms or prohibited weapons.*

A court will make this order if the defendant has firearms or weapons. Even though it is not strictly necessary to make this order since a licence is suspended on the making of an interim AVO or revoked on the making of a final AVO, the inclusion of this order makes it clear on the face of the order that such items cannot be possessed. See 'Consequences of AVOs' above.

## Additional orders

Section 35(1) of the CDPVA allows courts to make orders that appear 'necessary or desirable' to ensure the safety and protection of the protected person, meaning the applicant can ask for additional orders not included on the standard form.

If your client is experiencing technology-facilitated stalking or abuse (see **Chapter 4: DV and Technology** for more information), you could seek the following orders.

If the perpetrator has been using surveillance devices, spyware, GPS tracking, online stalking or monitoring a person's accounts or devices, in addition to Order 5 you could ask the court to order: *'The defendant must not attempt to locate, ask someone else to locate, follow or keep the protected person under surveillance.'*

If a defendant has threatened to share an intimate image without consent, or has already shared the image and refused to remove the image, you could ask the court to make the following order: *'The defendant is prohibited from directly or indirectly publishing, sharing and threatening to publish or share images or videos of the protected person of an intimate nature.'*

## Duration of an AVO

An interim order will remain in effect until the AVO is made final or it is revoked, dismissed or withdrawn (s 24).

A final order will remain in effect for the period of time specified in the AVO and in the absence of a time period being specified, for 12 months (s 79), subject to s 73 which addresses variations or revocations of interim and final AVOs.

It is usual for Courts to make orders for a period of 12 months or 2 years. On occasion and in the most serious of cases, a court might make an order for a period of 5 years.

## Ancillary property recovery orders

A victim or defendant can seek a property recovery order as a means of recovering personal belongings from the house such as their personal clothes, children's clothes and personal effects.

They are not designed to be used as a quasi-property settlement and should not contain disputed major household goods or furniture or anything of significant value, which should be the subject of a family law property settlement. Clients need to bear in mind that the police do not have time to accompany someone to fill a whole truck or trailer.

An application for a property recovery order made by a protected person or a defendant must provide details of any relevant family law property order or pending application for a family law property order, which will then be taken into consideration (See s 37(1C) CDPVA).

Sections 37(1) and 37(1B) of the CDPVA provide that a property recovery order may be made by:

- ▶ a senior police officer;
- ▶ when making an interim AVO;
- ▶ on the making of a final AVO on the motion of a court or authorised officer; or
- ▶ on application of a police officer, the protected person or the defendant.

Section 37(1A) states that a court or authorised officer may make an ancillary property order only if satisfied that the protected person has left personal property at the premises, which the defendant occupies, or the defendant has left personal property at the premises which the protected person occupies. Section 37(5) requires a defendant be present if they want an order to recover their property.

*Section 37(2) Crimes (Domestic and Personal Violence) Act 2007 (NSW)*

*A property recovery order may do any or all of the following:*

- ▶ *direct the occupier to allow access to the premises to enable the removal of property,*
- ▶ *provide access at a time arranged between a occupier and a police officer,*

- ▶ require the person who has left the personal property at the premises to be accompanied by a police officer when removing the property from the premises,
- ▶ provide the person who has left the personal property be accompanied by another specified person,
- ▶ specify the type of property to which the order relates.

Sections 37(3) and 37(4) state that a property recovery order does not authorise entry to any premises by means of force or confer any right on a person to take property that the person does not own or have a legal right to possess, even if the type of property is specified in the order.

The maximum penalty for contravening a property recovery order or obstructing a person who is attempting to comply with a property recovery order, without reasonable excuse, is 50 penalty units (s 37(6)). Section 37(7) states that the accused bears the onus of proving reasonable excuse.

### Children as additional protected persons

Section 38(2) requires that where a protected person who is 18 years old or older has a child, a court or issuing officer must list their child as an additional protected person unless they are satisfied there are good reasons for not doing so. The court or issuing officer must give reasons for not listing the child (s 38(3)). An AVO may be made for the protection of a child even though an application was not made by a police officer (s 38(5)).

### Provisional orders – Part 7 CDPVA

Provisional AVOs are interim AVOs applied for by police to protect a person until the court has had the opportunity to hear the application. Like all AVOs, they are only enforceable if the defendant has been served with the application. Section 25 empowers a police officer to apply for a provisional AVO ‘on the spot’ eg by applying to a senior police officer by phone for an interim AVO (called a provisional AVO when made under Part 7 of the CDPVA).

Police may apply for a provisional order under section 26 of the CDPVA:

*(1) An application may be made by telephone, facsimile or other communication device if:*

- a) *an incident occurs involving the person against whom the provisional order is sought to be made and the person who would be protected by the provisional order, and*

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

*(2) An application may be made at any time and whether or not the court is sitting.*

Section 28A allows a senior police officer to make a provisional order where there are reasonable grounds to do so but not where he or she is the applicant officer, in which case an ‘authorised officer’ must make the order.

Sections 89, 89A and 90 allow police to detain a defendant or order them to remain in a place for the purpose of serving them with a provisional AVO.

Provisional orders remain in place for 28 days or until revoked, varied or replaced by an interim or final order (s 32). Sections 33 and 33A allow provisional orders to be varied or revoked by a police officer or defendant under certain conditions.

### Interim orders – Part 6 CDPVA

At the first court date or any court date after that, the court may, on application, make an interim AVO if it appears to the court that it is necessary or appropriate to do so in the circumstances (s 22(1)).

Section 40 requires an interim AVO to be made against a defendant if they have been charged with a serious offence against the protected person, whether or not an application for an order has been made. A serious offence includes a domestic violence offence (s 40(5)).

Section 22(3) allows an interim AVO to be made even when a defendant is not present at or aware of the proceedings. However, for the interim order to be enforceable it must be served on the defendant.

An interim court order remains in force until it is revoked, or a final AVO is made, or the application for a final AVO is withdrawn or dismissed, whichever first occurs (s 40).

An interim order, once served, has the same effect as a final AVO (s 22(6)).

See page 35 for further information on interim hearings.

### Capacity

In *Farthing v Phipps* [2010] NSWDC 317, the court considered the question of a person’s ability

to understand an AVO, with Lakatos SC DCJ holding that:

Section 17, as I have said, allows a court, including this Court, to take into account any other relevant matter in determining whether or not to make an order. As I have said, the object of the Act is the protection of persons from domestic violence, intimidation and stalking. The Act proceeds on the basis that an order by the Court directed to the defendant would be understood by that defendant and acted upon, and I refer to my earlier references to the various sections of the Act. As a matter of principle it follows that if the Court concludes that the making of an order will not have the desired primary effect, then that will be a substantial reason in accordance with s 17 not to make the order. Furthermore, if the Court concludes that a person against whom the order is made cannot properly comprehend the terms of its order, so that the effect might be that he or she unwittingly breaches the order and therefore exposes him or herself to imprisonment, that in my view would also be a sufficient other reason why an order should not be made.<sup>16</sup>

In that case, Ms Phipps and Mr Farthing were placed in shared accommodation, and Mr Farthing sought an ADVO against Ms Phipps. It was successfully argued that Ms Phipps' conduct was attributable to her 'psychological makeup' and she did not have the capacity to understand the terms of an AVO should it be taken against her. On this basis, the court declined to make an AVO for the protection of Mr Farthing.

## Applications for AVOs

Section 48(2) states that an application for an AVO may be made by:

- ▶ a person for whose protection the order would be made; or
- ▶ the guardian of the person for whose protection the order would be made; or
- ▶ a police officer.

Regardless of the manner in which the AVO application is initiated, they hold the same weight at law.

A defendant in an AVO application can also make an AVO application against the protected person. This is called a cross application.

## Police applications

Police are obliged to take out an application for an AVO in certain circumstances. Section 27(1) of the

CDPVA states that police must apply for a provisional AVO if:

- ▶ *A police officer investigating the incident concerned suspects or believes that:*
- ▶ *A domestic violence offence, or an offence against section 13 (stalking or intimidation) has recently been or is being committed, or is imminent or is likely to be committed against the person for whose protection an order would be made, or*
- ▶ *An offence under s227 (child and young person abuse) of the Child and Young Person (Care and Protection) Act 1998 (but only in relation to a child) has recently been or is being committed, or is imminent, or is likely to be committed against the person for whose protection an order would be made, or*
- ▶ *Proceedings have been commenced against a person for an offence referred to in subparagraph (i) and (ii) committed against the person for whose protection an order would be made, and*
- ▶ *The police officer has good reason to believe that an order needs to be made immediately to ensure the safety and protection of the person.*

Section 49(1) requires police to apply for an interim or final AVO in the same circumstances as above. Section 48(3) states that police must also make applications for children under 16 years of age.

### Practitioner tip

Practical tips to assist your client to get the police to apply for an AVO on their behalf:

Ask police if she or he can give a written statement. If there is a typed formal statement, police must investigate. If no statement is taken, make sure your client asks for an event or 'E' number;

Ask for the specific AVO orders they want, including listing their children as protected persons;

Your client should use the words that were used during the incident, she or he should not censor themselves. They should tell the police that the perpetrator said 'I'm going to fucking kill the lot of you if you ever leave', not 'He said he was going to kill me';

Your client should describe past incidents of domestic violence as well as recent incidents to contextualise their current fears;

<sup>16</sup> at [33].

You could type up their instructions in their words for them to hand to the police;

If police refuse to apply for an AVO for your client, you can write to the police reiterating their instructions and refer them to the Code of Practice for the NSW Police Force Response to Domestic and Family Violence (Police Code of Practice) and ask for a written explanation as to why they did not apply for an AVO.

### Private applications

Section 52 of the CDPVA allows a protected person to make an application for an AVO, by filing an application signed by a Registrar of a Local Court. A person can approach a local court registry for assistance with making a private AVO application. Some courts book the client in to see the Registrar in person to describe the grounds of the AVO and the orders that are being sought. Other courts may organise a telephone appointment with the Registrar to discuss the matter before a face-to-face appointment.

Registrars may encourage people to seek an ADVO through the police if they think it is a serious matter and the police should be acting. However, there are several reasons why victims may prefer, or have to, take out a private AVO instead of a police AVO:

- ▶ If the police currently have an AVO application against the person seeking protection for the same incident they cannot act for and against the same party at a hearing (see '**Cross applications**' below);
- ▶ If the victim has not had a good experience reporting the abuse to the police previously they may prefer to make a private application;
- ▶ Some groups in the community, such as Aboriginal and Torres Islander people and newly arrived migrants, may fear or distrust the police and may prefer to make a private application;
- ▶ If making a private application, the victim can opt out of an automatic referral to the Local Coordination Point for information and support by making a specific request to not share confidential details (whereas this referral is automatic in police applications).
- ▶ If a person makes a statement to police the perpetrator may be charged with a criminal offence, so if they do not want the perpetrator to be charged, they may prefer to make a private AVO application; or

- ▶ If the perpetrator is a police officer (note though the fact that the defendant is a police officer does not preclude police from taking out an AVO in circumstances where the defendant is a police officer. Where the defendant is a serving police officer, it is usual practice for the Crown Solicitors Office to appear on behalf of the police as complainant rather than the police prosecutor).

A child over 16 years of age but less than 18 years old has full capacity to make an application (s 48(6)).

### Practitioner tip

Practical tips to assist your client make a private AVO application:

Your client should ask for the specific AVO orders they want, including listing their children as protected persons.;

Your client should use the words that were used (first person speech) and not censor themselves. Tell the Registrar what the perpetrator said: 'I'm going to fucking kill the lot of you if you ever leave', not 'He said he was going to kill me';

Your client should describe past incidents of domestic violence as well as recent incidents to contextualise their current fears;

If your client needs urgent protection, they should ask for the AVO application to be listed urgently or on the next available date;

Your client should know the perpetrator's last known address so they can be served with the application;

Your client should know that the Registrar cannot refuse to initiate an ADVO application;

Refer your client to the Women's Domestic Violence Court Advocacy Services (WDVCAS) for information, support and referrals. See **Chapter 14: Referrals and Contacts** for more information about the WDVCAS;

Refer your client to the Domestic Violence Duty Scheme (DVDS) for advice and representation (on a grant of legal aid) in their AVO application. See **Chapter 14: Referrals and Contacts** for more information about the DVDS;

Refer your client to Women's Legal Service NSW for legal advice.

The Registrar cannot refuse to take an application for an AVO. However, section 53 states that a Registrar can refuse to sign and file an application for an APVO if they are satisfied that the application is frivolous, vexatious, without substance or has no reasonable prospect of success or could be dealt with more appropriately by mediation or other alternative dispute resolution. If a Registrar refuses to accept an application notice for filing, the applicant can apply to have a Magistrate decide whether their application should be filed (s 53(8)).

### Cross applications

If a defendant in an AVO application fears that the protected person will commit a personal violence offence against them, they can apply for an AVO to protect them from the protected person, which is known as a cross application.

Cross applications are usually dealt with together, however the court must determine each application separately, that is, each party must satisfy the court they have met the legal test set out in section 16 of the CDPVA. See 'Legal test' above for more information.

### Representing a client in an ADVO matter

If you are assisting a client in an ADVO matter, below is a list of instructions to seek from your client:

- ▶ name, including any other names they have been known by;
- ▶ date of birth;
- ▶ address, including whether it is safe to send post to that address and whether the defendant knows the address (if the defendant does not know the victim's address, it can be noted that the address is only to be known to the court);
- ▶ phone number, including whether it is safe to call that number and leave a message;
- ▶ an alternative way of contacting them;
- ▶ relationship to the other party, for example, married or de facto, and the length of their relationship, including when they separated and divorced, if appropriate;
- ▶ whether your client is the protected person or defendant;
- ▶ whether they want to make a cross application;
- ▶ whether there are any provisional or interim orders in place;
- ▶ other party or parties' name(s), including any other names they have been known by;
- ▶ other party or parties' date(s) of birth;
- ▶ other party or parties' address(es);
- ▶ alternative address(es) for the other party for service, for example, their workplace or their parents' house;
- ▶ any children's names;
- ▶ children's date(s) of birth;
- ▶ are there any parenting arrangements, parenting plans or parenting orders in place for the children;
- ▶ will the current parenting arrangements change with the proposed AVO;
- ▶ pending family dispute resolution (FDR) or family court dates;
- ▶ whether your client owns or rents their home;
- ▶ if they have a mortgage, whose name is on the title;
- ▶ if they rent, whose name is on the residential tenancy agreement (lease) (see **Chapter 11** for information on options regarding tenancy);
- ▶ whether there have been any previous AVOs;
- ▶ whether there have been any previous charges;
- ▶ details about any domestic violence during their relationship;
- ▶ details about the most recent domestic violence;
- ▶ whether anyone witnessed the domestic violence;
- ▶ whether there are any children listed on the AVO;
- ▶ if not, whether they want children listed on the AVO;
- ▶ what orders they want;
- ▶ if your client is seeking an order excluding the other party from their property, does the other party have any other accommodation options;
- ▶ are there any special reasons your client should remain in the house;
- ▶ whether your client seeks orders excluding the defendant from attending a school or child care place and addresses;
- ▶ whether they want to vary the AVO application or interim orders.

## Service

### Service of application notices

Section 55(1) of the CDPVA states that an application notice issued by a police officer must be served by a police officer in accordance with the rule 5.7 of the *Local Court Rules 2009* (NSW) (LCR). Section 55(2) states that an application notice issued by a protected person must be served by a police officer or a person nominated by the court or a Registrar in accordance with rule 5.7 of the LCR.

### Service of provisional AVOs

Section 31(1) of the CDPVA requires a provisional AVO to be served personally on the defendant by a police officer as soon as practicable after it is made. Section 89A of the CDPVA states:

*(1) A police officer who is making or is about to make an application for a provisional order that is an interim apprehended domestic violence order may give any of the following directions to the person against whom the order is sought:*

*(a) that the person remain at the scene where the incident occurred that was the reason for making the application,*

*(b) in a case where the person has left the scene of that incident – that the person remain at another place where the police officer locates the person,*

*(c) that the person go to and remain at another place that has been agreed to by the person,*

*(d) that the person go to and remain at a specified police station,*

*(e) that the person accompany a police officer to a police station and remain at the police station,*

*(f) that the person accompany a police officer to another place that has been agreed to by the person, or to another place (whether or not agreed to by the person) for the purpose of receiving medical attention, and remain at that other place.*

*(2) If a person refuses or fails to comply with a direction under this section, the police officer who gave the direction or another police officer may detain the person at the scene of the incident or other place, or detain the person and take the person to a police station.*

*(3) If a direction is given under subsection (1) (e) or (f), the police officer may detain the person in the vehicle in which the person accompanies the police officer to the police station or other place for so long as is necessary to transport the person to the police station or other place.*

*(4) In considering whether to detain a person under subsection (3), a police officer may have regard to the following matters:*

*(a) the need to ensure the safety of the person for whose protection the interim apprehended domestic violence order is sought, including the need to:*

*(i) ensure the service of the order, and*

*(ii) remove the defendant from the scene of the incident, and*

*(iii) prevent substantial damage to property,*

*(b) the circumstances of the defendant,*

*(c) any other relevant matter.*

### Service of interim, final, varied and revoked AVOs

According to section 90 of the CDPVA:

*(1) A police officer who reasonably suspects that a person is the defendant in relation to an apprehended violence order may direct the person to remain where the person is for the purpose only of serving on the person a copy of the order, or a variation of the order, that is required to be served personally under this Act.*

*(2) If a person refuses or fails to comply with a direction under this section, the police officer who gave the direction or another police officer may detain the person at the place where the person is, or detain the person and take the person to a police station, for the purpose only of serving the order or variation on the person.*

The Registrar of the court is required under subsection 77(3) of the CDPVA to serve a copy of the order or the record of the variation or revocation of the order personally on the defendant if the defendant is present at court.

If the defendant is not present at the time the order is made, the Registrar is to arrange for a copy of the order or of the record of variation or revocation to be served personally on the defendant by a police officer or such other person as the Registrar thinks fit (s 77(4)).

If the defendant is present at the time the order is made but the Registrar is unable to serve a copy of the order or the written record of the variation or revocation personally on the defendant, section 77(5) requires the Registrar to arrange for a copy of the order or record to be sent by post to the defendant or to such other person as the Registrar thinks fit.

## Substituted service

Section 77(6) states that service on the defendant of a copy of the order or record concerned may be effected in such other manner as the court directs. The applicant can make an application to the court under this section to substitute service generally to the postal address of the defendant's home or work, or service on another person. Submissions need to be made about what attempts have been made to serve the defendant personally. It is preferable to have this evidence in the form of an affidavit by the police.

If seeking substituted service to another person, the Magistrate will want to hear why you are suggesting this person. The protected person is the best person to give this evidence through either sworn affidavit or under oath in the witness box. The protected person usually suggests a family member or friend they know the defendant has contact with on a regular basis.

## Withdrawing an AVO application

A victim of domestic violence may want their AVO application withdrawn. This is a difficult situation as a victim of domestic violence is the expert in their own life and often has better knowledge of what will keep themselves and their family safe than anyone else. However, there is always a risk that the perpetrator may be pressuring them to withdraw the application.

The protected person cannot withdraw a police AVO application. They can ask the police to withdraw their application, however it is ultimately up to the police to decide how to proceed. Police are guided by section 27 and 49 of the CDPVA and their policies.

A protected person can apply to vary or revoke the AVO once made. See **Varying or revoking an AVO** on page 41.

The Police Code of Practice states:

If a person who initially made a complaint of criminal behaviour in the context of domestic violence, against another person and thereafter makes admissions to fabricating the initial complaint, police will investigate this matter. In investigating the alleged fabricated complaint, police will be cognisant of the dynamic of domestic violence and the possibility that the admission of fabrication is based upon fear, intimidation or other pressures being brought to bear upon the person. Before any decision is made to initiate a prosecution of such persons, police shall seek approval to do so from a senior officer.

If the protected person wants the charges laid against the perpetrator withdrawn, the prosecutor should turn their mind to the Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales, particularly as currently outlined in Guideline 19 and Appendix E.

## Public mischief charge

Victims have been charged with the offence of public mischief where they make a report to police and then later say that they made it up and retract their statement. Police tend not to charge victims of domestic violence with this offence, however there is no guarantee and clients need to be warned of the potential of such a charge.

*Crimes Act 1900 (NSW) section 547B*

*(1) Any person who, by any means, knowingly makes to a police officer any false representation that an act has been, or will be, done or that any event has occurred, or will occur, which act or event as so represented is such as calls for an investigation by a police officer, shall be liable on conviction before the Local Court to imprisonment for 12 months, or to a fine of 50 penalty units, or both.*

*(2) For the purposes of subsection (1), a person shall be deemed to make a representation to a police officer if the person makes the representation to any other person and the nature of the representation reasonably requires that other person to communicate it to a police officer and that person does so communicate it.*

## Offence of perjury

Some victims believe that if the AVO application is going ahead despite their wishes they can just lie in court to say it didn't happen or they cannot remember.

*Crimes Act NSW 1900 (NSW) section 327*

*(1) Any person who in or in connection with any judicial proceeding makes any false statement on oath concerning any matter which is material to the proceeding, knowing the statement to be false or not believing it to be true, is guilty of perjury and liable to imprisonment for 10 years.*

*(2) A statement can be considered to have been made in connection with a judicial proceeding whether or not a judicial proceeding has commenced, or ever commences, in connection with it.*

*(3) The determination of whether a statement is material to a judicial proceeding that has not commenced is to be made on the basis of any judicial proceeding likely to arise in connection with the statement.*

*(4) The question of whether any matter is material to a proceeding is a question of law.*

### Failure to comply with a subpoena to attend court

Police often subpoena victims to attend court if they suspect they may not attend the hearing. A subpoena to attend court is an order made by a judicial officer and must be complied with unless there is a lawful excuse. The Magistrate may issue a warrant to arrest the victim for failure to comply with a court order. According to section 24 of the *Local Court Act 2007* (NSW) and section 199 of the *District Court Act 1973* (NSW) a person may be found guilty of contempt of court, which is punishable by a fine of up to 20 penalty units or 28 days imprisonment.

The Police Code of Practice states that:

if a victim does not attend court when required to give evidence police will consult with the domestic violence liaison officer and relevant victim/client advocates if present at court. Police will only seek a warrant for the arrest of an alleged domestic violence victim in exceptional circumstances.

### Differences in court procedures

The Local Court deals with AVO applications involving defendants over 18 years old. The *Local Court Practice Note No. 2 of 2012 Domestic Violence Proceedings* sets out how AVO proceedings are managed.

The Children’s Court deals with AVO applications involving defendants under 18 years old. The *Children’s Court of New South Wales Practice Note No. 8 Apprehended Domestic and Personal Violence Proceedings in the Children’s Court* sets out how AVO matters are managed.

The District Court deals with appeals against the making, varying or revoking of AVOs and the refusal to make, vary or revoke an AVO.

If an AVO is sought or proposed to be made for the protection of a child, section 41(2) of the CDPVA requires that the proceedings are to be heard in the absence of the public unless the court otherwise directs.

### AVO court process

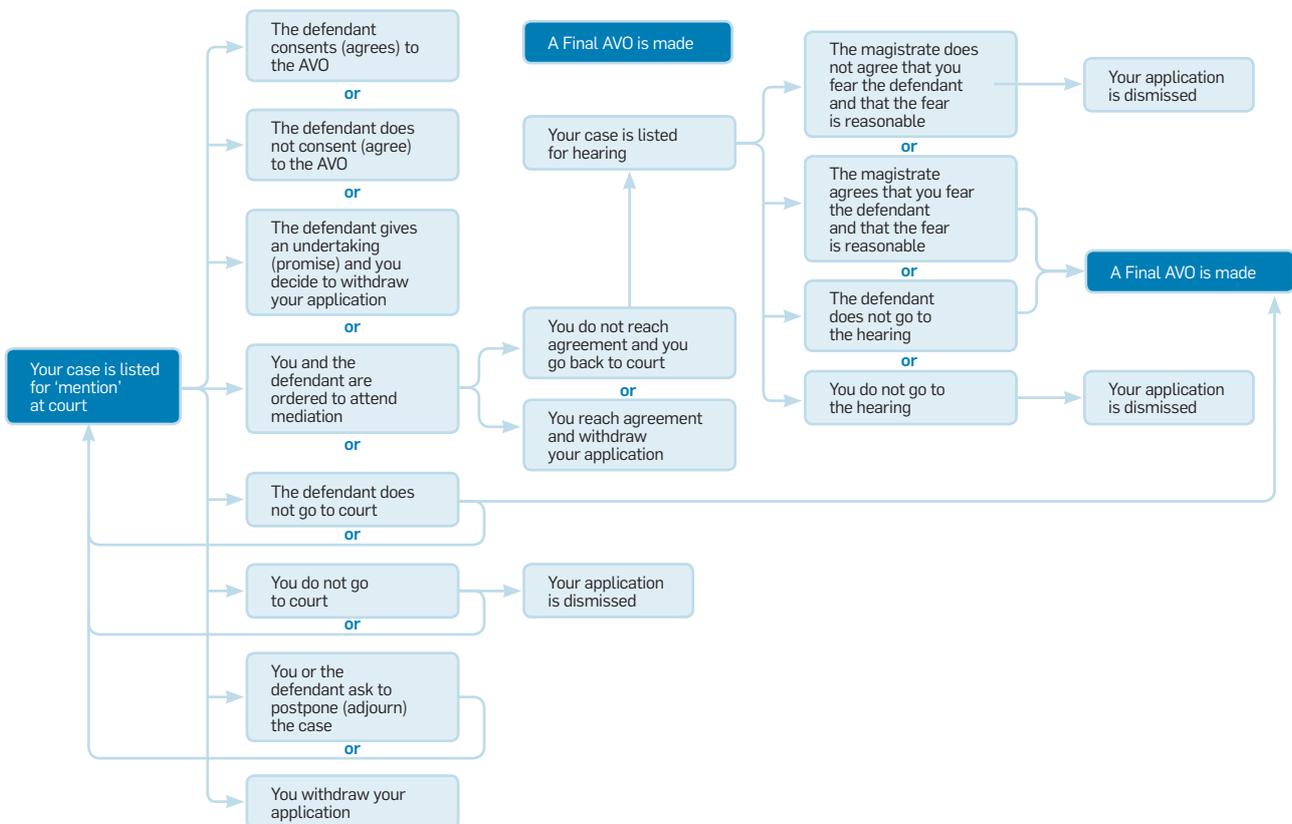


Image from Law Access<sup>17</sup>

17 [www.lawaccess.nsw.gov.au/Pages/representing/lawassist\\_avo/lawassist\\_flowcharts\\_avo/lawassist\\_goingtocourt\\_applicant\\_flowchart\\_avos.aspx](http://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_avo/lawassist_flowcharts_avo/lawassist_goingtocourt_applicant_flowchart_avos.aspx)

## When there are criminal charges

When a perpetrator has been charged with a criminal offence defined as a serious offence under section 40 CDPVA, the court must make an interim order against the defendant. Section 40 defines serious offence to include a domestic violence offence and an offence under section 13 CDPVA. The AVO follows the criminal proceedings and a final decision about the AVO application is not made until the criminal matter has been finalised.

## Where the defendant is a police officer

The Police Code of Practice states that the Crown Solicitor is ordinarily instructed to appear in ADVO proceedings involving defendants who are police officers.

## First mention

The first mention is usually within a month of making the AVO application. The victim should attend the first mention unless otherwise excused by the police. It is good for the victim to attend court even if they have been excused so that they can instruct the police prosecutor, their solicitor or the court (if they are self-represented) about any new incidents since the AVO was applied for, whether the orders need to be changed and whether an application for an interim AVO is contested (see 'Interim hearings' below for more information).

While it is preferable for the victim to attend, if they do not attend and are represented by the Police Prosecutor *Underhill v Murden* [2007] NSWSC 761 at [14] makes clear that the court should deal with the AVO application in accordance with Part 6 of the *Local Courts Act 1982* (NSW). Section 46 provides:

### *Time for hearing*

(1) *On the first return date for an application notice in any civil proceedings, or at such later time as the Local Court determines, the Court must set the date, time and place for hearing and determining the matter.*

(2) *The Local Court must notify the respondent of the date, time and place, if the respondent is not present.*

(3) *However, if the respondent is not present at the first return date, the Local Court may proceed to hear and determine the matter on that day at its discretion.*

*Note. The powers of the Local Court to adjourn proceedings are set out in section 54.*

## Practitioner tip

Most Local Courts have safe rooms managed by the local WDVCAS. Women are able to sit in safe rooms during the court proceedings so they don't need to see the perpetrator. It is common practice for the WDVCAS staff to liaise with the police prosecutor and/or the domestic violence liaison officer (DVLO) about the victim's wishes. See **Chapter 14: Referrals and Contacts** for more information about the WDVCAS.

The defendant has the following options at the first mention:

- ▶ offer undertakings; or
- ▶ seek an adjournment for legal advice;
- ▶ consent to the AVO (without admissions); or
- ▶ contest the AVO.

## Undertakings

A defendant may offer undertakings in place of consenting to the AVO. An undertaking is a promise to the court usually in the same terms as the AVO. It is not a court order and as such is not enforceable. Police do not accept undertakings because their Code of Practice aims to ensure strong and consistent responses directed at ensuring the safety and wellbeing of victims and holding perpetrators to account. However, it may be appropriate in certain circumstances, such as a one off non-violent incident between two people who have a very short relationship and no children together.

If acting for the defendant in a private application, particularly a female defendant who is a victim of domestic violence, you could approach the applicant and ask if they are willing to accept an undertaking. If the undertaking is breached this can be used as evidence for a future AVO application and generally adds weight to the need for such an application.

## Seek an adjournment

A defendant can seek an adjournment for legal advice. It is usual for the case to be adjourned for a week and sometimes more.

The police or applicant can ask the court to make an interim AVO to protect the victim until the next court date. The defendant can consent to the making of the AVO on an interim basis. If the defendant contests the making of an interim AVO the

court may hold an interim hearing either on the first mention date or at a later date.

### Consent without admissions

The defendant can consent to the AVO, usually without making any admissions about the truth of the contents of the application. If the defendant consents, a final AVO can be made on the first mention. Issues to take into account when advising a client whether to consent to the AVO without admissions include whether there may be family law proceedings either on foot or likely in the future. The transcript of a defended hearing can be admitted into evidence in family law proceedings. The court dealing with the family law proceedings will attribute greater weight to an AVO made following a defended hearing than an AVO consented to without admissions because there was a finding of fact following a defended hearing.

### Contest the AVO

If the defendant contests the AVO, directions will be made for the exchange of written statements and another mention date is set for the purpose of checking that the statements have been exchanged and to set a date for the final hearing, if necessary. The parties will need to tell the court how many witnesses they intend on bringing to the hearing.

The police or applicant can ask the court to make an interim AVO to protect the victim until the next court date. If the defendant contests the making of an interim AVO the court may hold an interim hearing either on the first mention date or at a later date.

### Interim hearing

A court can make an interim AVO if it appears it is “necessary or appropriate” to do so (s 22(1)). A court has a positive obligation to make an interim order when a person has been charged with a serious offence (s 40).

If the parties do not consent to an interim order, before making the order the court must be satisfied in applying the test under section 22 of the matters set out in section 17.

Where both the protected person and the defendant are present, the hearing can be conducted by one or more of the following: written grounds supporting the application; a written statement from any witness intended to be called at the in-

terim hearing; evidence given orally (including in cross-examination) at the interim hearing; and/or any submissions made by the parties or their legal representatives.

Section 22(3) enables the court to make an interim order whether or not the defendant is present or has been given notice of the proceedings and section 22(4) and Part 5.5 of the Local Court Rules set out the circumstances where a court may make an interim order in the absence of the PINOP. An interim order may not be made unless the PINOP is present, unless according to section 22, the court is satisfied that the person is unable for good reason to be present and the matter requires urgent consideration by the court.

An application for an AVO where police are not involved may be short listed where the applicant is seeking an urgent ex parte interim order. This occurs prior to any service of the AVO if the registrar is satisfied there are urgent circumstances.

Part 5 of the *Local Court Practice Note No. 2 of 2012* sets out how interim hearings are to be conducted.

## Evidence

### Written statements

Part 6 of the *Local Court Practice Note No. 2 of 2012* requires that courts direct applicants and defendants to serve on the other party a written statement of the oral evidence that the party intends to adduce in evidence in chief on any question of fact to be decided at a hearing. The court may, if satisfied it is in the interests of justice to do so, dispense with compliance with any or all of this Part.

A person’s written statement is to stand as the whole of his or her evidence in chief, so long as the person testifies to the truth of the written statement. A party may not adduce from that person any further evidence in chief, except by leave of the court.

Nothing in the Practice Note operates to make admissible any evidence that would otherwise be inadmissible or privileged.

There is no set form for a witness statement, however, statements should be set out in numbered paragraphs, include a statement of truth, and be signed and dated by the deponent.

An applicant’s witness statement should include:

- ▶ information about the nature of their relationship with the defendant to prove they are in a

domestic relationship as defined by section 5 of the CDPVA;

- ▶ the names and dates of birth of any children they have with the defendant;
- ▶ whether any AVOs or other orders have been made in the past against the defendant;
- ▶ whether the defendant has ever been charged or convicted of any domestic violence offences;
- ▶ whether there are any parenting arrangements or parenting orders or family law court proceedings on foot regarding their children;
- ▶ whether Family and Community Services (FACS) is or has been involved;
- ▶ whether there has been any violence or threats towards them or their children by the defendant in the past;
- ▶ any recent incidents of domestic violence by the defendant, including places, dates, and what the party saw, heard, said and did;
- ▶ details of any reports or statements made to the police, including any event numbers;
- ▶ details of any doctors reports or treatment by a doctor or hospital relating to any injuries caused;
- ▶ evidence of any damage to property;
- ▶ the other party's alcohol or drug use;
- ▶ the other party's access to firearms or other weapons;
- ▶ whether there are any mental health issues;
- ▶ as fear is essential, you need to outline their fear and what they fear;
- ▶ any account of a conversation should include the actual words the parties used.

A defendant's witness statement should include the same details as the applicant's statement (with reference to the applicant) and should identify any paragraphs in the applicant's statement that the defendant disagrees with.

A person who witnessed domestic violence between an applicant and the defendant can provide a witness statement, which sets out what they saw and heard occur between the parties.

#### Practitioner tip

People making statements should be careful not to admit to committing any criminal offences in their statements.

In police-initiated applications a victim's police statement is provided to the defendant as the witness statement. Applicants in private applications and defendants who are primarily the victim in the relationship can get assistance with drafting their statements from a solicitor on a grant of legal aid or a solicitor volunteering as part of the DVDS.

#### Subpoenas

The rules regarding the issuing of subpoenas in AVO proceedings derive from section 70 of the CDPVA and are set out in Part 3 of Chapter 4 of the *Criminal Procedure Act 1986* (NSW) (CPA) and Part 6 of the LCR.

Applicants and defendants in AVO proceedings can issue subpoenas to require a person to give evidence. If a person has signed a written witness statement but there is a risk they won't attend the hearing, the applicant or defendant can complete a Subpoena to Witness to Give Evidence, file it at the Local or Children's Court and serve it on the relevant person.

Applicants and defendants in AVO proceedings can also issue subpoenas to require a person to produce documents. An applicant or defendant may want to subpoena the other party's police or FACS records. The applicant or defendant can complete a Subpoena to Witness for Production, file it at the Local or Children's Court and serve it on the relevant person or agency.

Under section 229 of the CPA, an arrest warrant can be issued for failure to comply with a subpoena to give evidence under Part 4 of the CPA.

A person may not be required to give evidence or produce evidence if it relates to 'a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence' (s 296(1) of the CPA). This is known as the sexual assault communications privilege (SACP). See **Chapter 8: DV and Sexual Assault** for more information.

#### Domestic Violence Evidence in Chief (DVEC)

On 1 June 2015, the *Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014* (NSW) inserted Part 4B into the CPA allowing police to take a domestic violence victim's statement by video or audio recording, and use this recording as all or part of the victim's evidence in chief (s 289C and 289F(1)). Section 289H states that DVEC will only be used for defended hearings relating to criminal

charge matters and ADVO applications connected to these charge matters.

Victims will not have to give written statements, unless the police become aware of new evidence, in which case the victim will need to give a written statement about the additional evidence. The recording must be made as soon as practicable after the commission of the offence, with the victim's informed consent, which means usually at the scene of the incident or when the incident is reported to police (s 289D of the CPA).

A victim can make a request to police to give a further statement (written or oral) in circumstances where they feel they did not provide all relevant information to police when giving their DVEC statement. High levels of distress or injury at the time of the domestic violence incident may have impacted on the victim's capacity to give a clear and full account of the events. It is important to be aware that the defence may challenge this later evidence arguing it is an attempt to make the victim's case stronger and should therefore not be relied upon.

A solicitor representing the defendant will be given a copy of the recording, however they cannot give the defendant a copy of the recording (s 289L). According to section 289M, unrepresented defendants are not given a copy of the recording, however they must be served with the audio extract of the recording and police must, as far as is reasonably practicable, provide the unrepresented defendant with an opportunity to view the DVEC video recording at a police station.

The victim's consent is not required to play the recording at court (s 289G of the CPA). While the recorded statement will form their evidence in chief, victims must still attend court for cross-examination (s 289F(5) and s 289G).

## Final hearing

### Representation

In police-initiated applications the police prosecutor will represent the protected person and run the AVO hearing. People who have made a private application will have to represent themselves, pay a private solicitor, or apply for a grant of legal aid.

### Legal aid for AVO hearings

Where your client is likely to be eligible for legal aid, it is important to apply as soon as possible

because applications can take between two to five weeks to be determined. If your client's court date is fast approaching and the application is still to be determined, they can apply to the court to adjourn the proceedings under section 57 of LACA.

### Legal Aid for private applicants

Legal aid is available to private applicants in ADVO matters where they meet the means and merit test (Legal Aid NSW policy 4.4.1).

### Legal Aid for defendants

Legal aid is generally not available to defendants in ADVO hearings unless the defendant meets the means and merit test and there are exceptional circumstances (Legal Aid NSW policy 4.4.2)

#### Practitioner tip

If your client is a defendant to an application for an ADVO but is the primary victim in the relationship, she is still entitled to apply for legal aid under their 'exceptional circumstances' policy.

Legal Aid NSW policy 1.7.3 provides that exceptional circumstances include where the defendant in the ADVO proceedings is a victim of domestic violence. Legal Aid NSW will be satisfied that a defendant is a victim of domestic violence if any of the following criteria are satisfied:

- ▶ the application for legal aid is supported by a DVDS solicitor or a WDVCAS co-ordinator;
- ▶ the applicant for legal aid has previously been an applicant in an ADVO matter;
- ▶ the applicant for legal aid is currently living in a women's refuge or in alternative accommodation due to a domestic violence situation;
- ▶ the applicant provides evidence to support their application; or
- ▶ Legal Aid NSW is satisfied the applicant for legal aid is 'at special disadvantage', that is, accruing to Legal Aid NSW policy 1.7.2:
  - the applicant is a child or is acting on behalf of a child; or
  - the applicant is a person who has substantial difficulty in dealing with the legal system by reason of a psychiatric condition or developmental disability or intellectual impairment or physical disability.

Legal Aid NSW policy 11.4 states that an applicant or a defendant who is the primary victim of domestic violence in an ADVO matter is not required to pay an initial contribution to Legal Aid NSW. However section 46 of the *Legal Aid Commission Act 1979* (NSW) (LACA) requires Legal Aid NSW to make a determination at the conclusion of the proceedings, or if the legal aid grant is terminated, as to whether a final contribution is required.

#### Reviewing a refused application for legal aid

Your client can seek a review by the Legal Aid Review Committee (LARC) of a decision to refuse an application for a grant of aid. The review must be lodged within 28 days of receiving the decision and set out the reasons why your client disagrees with the decision (s 56(2)(a) of LACA). Your client can ask for more time to lodge a review under section 56(2)(b) by outlining the special circumstances that warrant the delay. Review applications can take between six and ten weeks to be determined so if your client's court date is soon they can apply to the court to adjourn the proceedings under section 57 of LACA.

#### Giving evidence in a hearing

Victims of domestic violence can find giving evidence in AVO proceedings very distressing, particularly being cross-examined. The experience can result in re-traumatisation, can compromise the quality of evidence given to the court, which can affect the court's ability to make safe and effective orders, and can allow the perpetrator to use court proceedings to control and dominate the victim. There are some options available to them about giving evidence, drawn from the provisions outlined below.

Section 67 of the CDPVA gives the court power to dispense with any rules, except mandatory rules, if it is in the interest of justice to do so.

Section 46(2) of the CDPVA entitles a protected person and a defendant to have a support person near them when giving evidence. The court can permit more than one support person if it is in the interest of justice to do so under section 46(5). Witnesses with a cognitive impairment are entitled to a support person when giving evidence (s 306ZK of the CPA). You can ask the court to make whatever direction is appropriate to give effect to your client's decision to have a support person present near them or within their sight.

Where a child is due to appear as a witness, section 41(2) of the CDPVA requires the proceedings be heard in the absence of the public unless the court otherwise directs. A child should not be required to give evidence in any manner about a matter unless the court believes that it is in the interests of justice for the child to do so (s 41(4)).

There is a ban on the direct cross-examination of children by unrepresented defendants in ADVO proceedings (s 41A CDPVA).

## Dismissal

If an application does not meet the test set out in section 16 of the CDPVA then the application will be dismissed.

## Costs

Only professional costs can be awarded in AVO proceedings (s 99(2)). Section 99(1) sets out professional costs as being 'costs relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a court (but not court fees payable to a court)'. Section 99A(1) of the CDPVA prohibits the award of professional costs against an applicant who is the protected person in an ADVO application, unless their application was frivolous or vexatious.

Justice Button in *Cunningham v Cunningham* [2012] NSWSC 849 referring to the phrase 'frivolous or vexatious' held at [63] that:

Those words are well known to the law and import a high degree of inappropriateness in a cause of action, approaching an abuse of process. I am content to proceed on the basis of definitions derived from *Bullen & Leake & Jacob's Precedents of Pleadings*<sup>18</sup> and provided in Peter Taylor et al, *Ritchie's Uniform Civil Procedure NSW* (2005) LexisNexis Butterworths at [4.15.10] – [4.15.15]: "A matter is frivolous when it is without substance or groundless or fanciful ... A matter is vexatious when it lacks bona fides and is hopeless and tends to cause the opponent unnecessary anxiety, trouble and expense".

A court cannot make an award of professional costs against an applicant who is a police officer seeking an AVO on behalf of a PINOP unless satisfied that the applicant made the application knowing it contained matters that are false or misleading in a material particular or the applicant deviated from the

18 12th ed (1975) Sweet and Maxwell at p 145

reasonable case management of the proceedings so significantly as to be inexcusable (s 99A(2)). These provisions in the CDPVA were introduced following the case of *Constable Redman v Willcocks* [2010] NSWSC 1268 in which professional costs were awarded against the police.

## Appeals

Section 84 of the CDPVA provides that:

(2) *An appeal may be made to the District Court*

(a) *by the defendant against the making of an apprehended violence order by the Local Court or the Children’s Court, or*

(a1) *by the applicant for an apprehended violence order (or, if the applicant was a police officer, either the applicant or the person for whose protection the order would have been made) against the dismissal of the application by the Local Court or the Children’s Court, or*

(b) *by the applicant for an order or a defendant against the awarding of costs under section 99 of this Act, or*

(c) *by a party to an apprehended violence order against the variation or revocation of the order by the Local Court or the Children’s Court, or*

(d) *by a party to an apprehended violence order against a refusal by the Local Court or the Children’s Court to vary or revoke the order.*

(3) *An appeal under subsection (2):*

(a) *may be made under Part 3 of the Crimes (Appeal and Review) Act 2001 in the same way as an application may be made under that Part by a defendant against a conviction arising from a court attendance notice dealt with under Part 2 of Chapter 4 of the Criminal Procedure Act 1986, and*

(b) *may be made only by leave of the District Court in the case of an appeal against the making of an apprehended violence order that was made with the consent of the defendant.*

(4) *The Crimes (Appeal and Review) Act 2001 applies to an application or appeal arising under this section with such modifications as are made by or in accordance with the regulations under that Act.*

(5) *For the purposes of this section and the Crimes (Appeal and Review) Act 2001, an order made by a Registrar of a court is taken to have been made by the court.*

(5A) *Part 6 (Interim court orders) applies to proceedings with respect to an appeal to the District Court under subsection (2) in the same way as it applies to an application*

*to the Local Court or the Children’s Court under Part 4 or 5.*

(5B) *If the District Court allows an appeal made under this section against the refusal to annul an apprehended violence order and remits the matter to the Local Court or the Children’s Court, the District Court must, unless the District Court is satisfied that it is not necessary to do so, make an interim court order under Part 6 as if an application for such an order had been duly made.*

A person has 28 days to appeal the decision of a court to make, vary or revoke an AVO (s 11(2) of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA)). An appeal can be lodged at any Local Court by completing and filing a Notice of Appeal and paying a fee, currently \$115. The fee may be waived or postponed if the applicant has evidence they are suffering financial hardship.

Sections 85(1) and 85(2) of the CDPVA state that lodging an appeal does not stay the AVO, however the court can stay the AVO if satisfied that it is safe to do so, having regard to the need to ensure the safety and protection of the protected person or any other person.

Section 18 of the CARA provides:

(1) *An appeal against conviction is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings, except as provided by section 19.*

(2) *Fresh evidence may be given, but only by leave of the District Court which may be granted only if the Court is satisfied that it is in the interests of justice that the fresh evidence be given.*

(3) *The parties to an appeal are each entitled to be provided with one free copy of the transcripts of evidence relevant to the appeal and, if fresh evidence is given, one free copy of the transcript of the fresh evidence.*

In *Mahmoud v Sutherland* [2012] NSWCA 306 Barrett JA held at [32] that:

the appeal court is not required to proceed as if the decision of that court had never been made. The focus must be on the question whether there was “some legal, factual or discretionary error”: *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 at [23].

In *Charara v The Queen* [2006] NSWCCA 244 Mason P held:

The appeal is to be by way of rehearing on the Local Court transcripts (s18(1)), obviously supplemented by reference to any exhibits tendered in the Local Court. Fresh evidence may be given by leave, subject to the District Court being satisfied that it is in the interests of justice that this should occur (s18(2)).

The District Court is then required to apply the principles governing appeals from a judge sitting without a jury. The Judge is to form his or her own judgment of the facts so far as able to do so, i.e. recognising the advantage enjoyed by the magistrate who saw and heard the witnesses called in the lower court (*Bell v Stewart* (1920) 28 CLR 419 at 424-5, *Paterson v Paterson* (1953) 89 CLR 212, *Fox v Percy* (2003) 214 CLR 118)... The procedure to be adopted, powers to be exercised and function to be performed must first be sought in the language of the particular statute. One thing, however, is clear. “The ‘rehearing’ does not involve a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits” (*Fox* at 118[22] per Gleeson CJ, Gummow and Kirby JJ). Referring to the “requirements, and limitations, of such an appeal”, their Honours continued (at [23], footnotes omitted):

On the one hand, the appellate court is obliged to “give the judgment which in its opinion ought to have been given in the first instance”. On the other, it must, of necessity, observe the “natural limitations” that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses’ credibility and of the “feeling” of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.<sup>19</sup>

Section 19 of the CARA provides:

*(1) The District Court may direct a person to attend and give evidence in proceedings on an appeal against conviction if it is satisfied:*

*(a) in the case of an appeal that relates to an offence involving violence against that person, that there are special reasons why, in the interests of justice, the person should attend and give evidence, or*

*(b) in any other case, that there are substantial reasons why, in the interests of justice, the person should attend and give evidence.*

If the appellant wants to give evidence or call a witness to give evidence they need to file a Notice of Motion and an Affidavit explaining why the wit-

ness did not attend and give evidence in the Local Court.

All the documents the appellant intends to rely upon in the appeal need to be served on the solicitor for the Department of Public Prosecution (DPP), who acts in conviction appeals, before the court date if possible.

The District Court will usually make a decision based on the transcript and submissions made by the appellant and the DPP solicitor.

### When a defendant appeals a criminal conviction and the AVO

Where a defendant appeals a conviction and the AVO to the district court and on appeal the conviction is over-turned, the district court should then consider the question of whether an AVO should be made, applying the test and standard of proof in the CDPVA. It is important that the DPP either asks the district court to deal with the appeal of the AVO or, if the court’s intention is to remit it back to the local court, that the DPP requests an interim AVO to protect the victim until a final determination on the AVO is made.

#### Practitioner tip

Ensure your client is aware that the District Court may not consider the AVO in the event a conviction is overturned. Your client should speak with the DPP solicitor to ask them to ensure that the court considers the AVO or makes an interim order before remitting it back to the Local Court.

### Annulments

Section 84 of the CDPVA states:

*(1) An application may be made under Part 2 of the Crimes (Appeal and Review) Act 2001 by the defendant for the annulment of an apprehended violence order made by the Local Court or the Children’s Court in the same way as an application may be made under that Part by a defendant for the annulment of a conviction arising from a court attendance notice dealt with under Part 2 of Chapter 4 of the Criminal Procedure Act 1986.*

*(1A) A person who applied to the Local Court or the Children’s Court for an apprehended violence order may apply to the Court for the annulment of the dismissal of the application for the order by the Court, but only if the person was not in attendance before the Court when the application was dismissed.*

<sup>19</sup> at [17] – [19]

*(1B) The Local Court or the Children's Court may grant an application for an annulment made under subsection (1A) if it is satisfied that, having regard to the circumstances of the case, there is just cause for doing so. If such an application is granted, the Court may deal with the application for the apprehended violence order as if the application for the order had not been dismissed.*

In *Miller v Director of Public Prosecutions* [2004] NSWCA 90 Sheller JA, Beazley JA and Young CJ in EQ agreeing held at [6] that the “wide vague words” chosen by the legislature pertaining to annulment applications warrants a wide construction.

An annulment application must be made within two years after the relevant conviction or sentence is made or imposed (s 4(2) of the CARA).

## Contravening an AVO

Section 14(1) of the CDPVA states that it is a criminal offence to knowingly contravene a prohibition or restriction specified in an AVO and is punishable by a maximum of 50 penalty units or imprisonment for 2 years or both.

Section 14(7) provides that a person is not guilty of an offence of aiding, abetting, counselling or procuring the commission of a contravention if the person is the protected person.

A person is not guilty of contravening an AVO if they were not served with a copy of the AVO or were not present in court when the AVO was made (s 14(2)), or the contravention of the prohibition or restriction concerned was necessary in order to attend mediation under section 21 (relevant in APVO matters) (s 14(3)(a)), or if the contravention of the prohibition or restriction concerned was done in compliance with the terms of a property recovery order (s 14(3)(b)).

A person who is convicted of contravening an AVO by an act of violence against a person must, in accordance with section 14(4), be sentenced to a term of imprisonment unless the court otherwise orders.

Where a police officer decides not to initiate criminal proceedings or not to proceed with criminal proceedings against a person for an alleged contravention they must make a written record of the reasons under section 14(8).

## Varying or revoking an AVO

### Who can make an application?

Sections 72A(1) and (2) of the CDPVA allows an application to vary or revoke an interim or final AVO to be made at any time by a police officer or an interested party in relation to the order. Section 72 defines an interested party as a protected person or a defendant under the order, a guardian of a protected person or if the protected person is a child, a parent of a protected person or the Secretary of the Department of Family and Community Services (FACS).

Section 72C requires a court to refuse to hear an application to vary or revoke a police-initiated AVO unless the application is made by a police officer or the court is satisfied that notice of the application have been served on the Commissioner of Police.

Section 72B(1) requires an interested person to seek leave of a court to vary or revoke a final or interim AVO which lists a child as a protected person. A court may grant leave if satisfied there are been a significant change in circumstances since the order was made or FACS is proposing a care plan that is inconsistent with the existing AVO or it is otherwise in the interest of justice to do so (s 72B of the CDPVA). According to section 48(6), a child who is over 16 years of age has full capacity to apply for a variation or revocation.

### What are the requirements for an application?

Section 72A(3) requires an application to set out the grounds and nature of the variation sought. If there is more than one protected person, an application can be made to vary or revoke the AVO in relation to all of the protected persons or in relation to any one or more of the protected persons (s 74(2)).

According to sections 73(4) and 73(5), an AVO cannot be varied or revoked unless notice of the application has been served on each of the protected persons to whom it relates and on the defendant. Section 73(6) requires a notice of an application to be served personally or in such other manner as the court hearing the application directs.

### When can an order to vary or revoke an AVO be made?

A court may vary or revoke a final or interim order if satisfied in all the circumstances it is proper to do so (s 73(1)).

The court can decline to hear an application for variation or revocation of final or interim AVO if there has not been a change in circumstances on which the making of the order was based and the application is in the nature of an appeal against the order under section 73(3).

Section 73(7) provides that the court may make an order extending the period that the final or interim AVO is in force without notice of the relevant application having been served on the defendant if the application was lodged before the day on which the AVO or interim order is due to expire. The AVO will be extended until the next mention but will not be enforceable until it is served on the defendant.

A party to the AVO can appeal the variation or revocation of the AVO under section 84(2)(c).

## National domestic violence order recognition scheme

On 25 November 2017, amendments to the CDP-VA came into force which allow NSW Police to enforce Domestic Violence Orders (DVOs) made on or after this date in other Australian states and territories (Part 13B). Other states and territories will also be able to enforce NSW ADVOs made from this date. These changes are known as the National Domestic Violence Order Recognition Scheme (the Scheme).

Any AVO (provisional, interim or final) made on or after 25 November 2017 will automatically be registered and therefore enforceable under the Scheme. For orders made prior to that date, the same process to register an interstate order applies as applied prior to the Scheme (see below).

### Breaches of interstate DVOs

If the defendant breaches the DVO the Police will contact the state or territory that issued the order and obtain a copy before they can charge the offender and check that the DVO is current, has been served, has a condition that relates to the report of the breach and there is a 'geographical nexus' with the offence. This means that either one or both of the parties was in NSW at the time of the alleged breach. If the defendant was not in NSW at the time of the breach, Police will refer the matter back to the jurisdiction where the defendant was at the time of the breach for further investigation.

## Varying or revoking interstate AVOs

The protected person or NSW Police can apply to vary or revoke an interstate DVO (Part 13B, Division 3). However, because the jurisdiction that made an interstate order is likely to hold the most information about the matter, if NSW Police are approached to make an application to vary an interstate DVO they will advise the parties to make such an application in the original jurisdiction. The only exception would be if the circumstances amounted to significant hardship for a protected person.

If police agree to assist with an application, they will need to consider three factors:

- is it more practical for both the NSW Police and the protected person to make a fresh application for a NSW ADVO? It may be easier for the protected person and police to simply make a fresh application instead of trying to source all of the background information from the original court where the order was made;
- can all interstate DVOs be varied or revoked? Some states have prohibitions on the variance or revocation of their orders;
- what is the effect of the variation being sought? Police will consider the effect of the potential variation on the level of protection given by the DVO to protected persons and affected children.

Section 98ZO requires a NSW court to consider the following when deciding whether to vary or revoke an interstate DVO:

- where the defendant and protected persons normally live;
- any difficulty the respondent to the proceedings may have in attending the court proceedings;
- whether there is sufficient information available to the court in relation to the making of the original DVO;
- whether any proceedings are being taken in respect of an alleged breach of the DVO and where those proceedings are being heard;
- the practicality of the applicant (if not the defendant under the DVO) applying for and obtaining a local DVO against the defendant with similar prohibitions or restrictions;
- the impact of the application on children who are protected persons under the DVO;
- any other matters the court considers relevant.

The amendments will allow other states and territories to vary or revoke orders made in NSW, and make new orders for the same parties. This means that an AVO made in NSW may be superseded by a new order or a variation/revocation made in another state or territory (section 98ZB).

### Registering interstate ADVOs made before 25 November 2017.

Domestic violence protection orders from other states and territories in Australia and New Zealand (external protection orders) are enforceable in NSW, if registered.

An external protection order can, under section 95, be registered in NSW by applying to the Registrar of a Local or Children's Court for registration by completing a form and attaching the external protection order and evidence of service on the defendant. The external protection order must be registered or referred to a Magistrate for adaptation, modification or to vary the period it is effective in NSW (s 96(1) and s 96(2)).

On registering an external protection order the Registrar must provide the Commissioner of Police with a copy of the registered protection order under section 96(4). Section 96(5) requires that the notice of registration of an external protection order is not to be served on the defendant unless the protected person consents to that service.

A registered external protection order may be varied or revoked under section 98(2). Notice of an application to vary or revoke must be served on the other party in accordance with sections 98(4) and (5).

## Chapter 4: Domestic violence and technology

Advances in information and communication technology, together with increased access to such technology, have led to a rapid rise in technology-facilitated domestic violence (also known as technology-facilitated stalking and abuse). This chapter provides guidance for practitioners wanting to advise clients about technology-facilitated domestic violence.

### WATCH THIS SPACE

The Commonwealth Attorney General is currently considering the introduction of law which will provide civil remedies for victims of non-consensual sharing of intimate images. So please ensure that you are up to date with any changes that may have been introduced following the writing of this chapter.

### What is technology-facilitated stalking?

Technology-facilitated stalking and abuse is the use of technology, such as the internet, social media, mobile phones, computers, and surveillance devices, to stalk, harass, intimidate or humiliate a person.

Technology-assisted domestic violence has been reported to have unique impacts, some more and some less harmful than in-person behaviours. For example, victims can feel tethered to their abusive partners by technology, unable to escape.

### Sharing intimate images without consent

Recent research has found that one in ten Australian adults have had a nude or semi-nude image of themselves sent to others or posted online without their consent.<sup>20</sup>

Sharing intimate images without consent is sometimes colloquially referred to as 'revenge porn'. This expression has been rejected as a preferred term-

nology because it belies diverse perpetrator tactics (not usually out of revenge) and it treats the images themselves as a form of pornography regardless of whether they would be regarded as such by ordinary community standards and may not be created for sexual gratification purposes. The term 'revenge porn' ignores the key issue – that it is abuse. 'Image based abuse' is the preferred terminology.

### Image-based abuse offences

If your client has had images shared without their consent or if somebody has threatened to do so, since 25 August 2017 the *Crimes Act 1900* (NSW) has been amended to create four new Table 2 offences to address the non-consensual sharing of intimate images:

- ▶ Recording an intimate image without consent (s 91P)
- ▶ Distributing an intimate image without consent (s 91Q)
- ▶ Threatening to record an intimate image without consent (s 91R(1))
- ▶ Threatening to distribute an intimate image without consent (s 91R(2))

A summary offence of contravening an order, such as failing to take reasonable steps to take down or destroy an intimate image recorded or distributed without consent has also been created, with a maximum penalty of 50 penalty units or imprisonment for 2 years, or both. (section 91S).

### Requisite mental element

For the recording and distributing offences in sections 91P and 91Q, the prosecution must prove that the act of recording or distributing is intentional, and that the person either knew that, or was reckless as to whether, the victim did not consent to the recording or distributing.

For the threat offences in section 91R, the prosecution must prove that the person who made the threat intended to cause the other person to fear that the threat would be carried out. It is irrelevant whether the image actually existed or not. These offences are particularly directed to the domestic violence context, where threats to distribute images may be used to control a person's behaviour.

### Consent

Section 91O provides that a person consents to a recording or distribution of the image if the person

20 See A Powell and N Henry, 'Digital Harassment and Abuse of Adult Australians: A Summary Report', RMIT University, 2015.

‘freely and voluntarily agrees’ to the recording or distribution. Agreeing to the recording or distribution of an image on one occasion, or to a particular person, or in a particular way, does not mean that a person will be taken to have agreed to recording or distribution of another image, or on another occasion, or to another person, or in another way. Distributing an image of oneself does not mean that a person consents to another person distributing the same image.

People under 16 or who do not have the capacity to consent (because of, for example, cognitive incapacity) are taken not to have consented to the recording or distribution of intimate images.

### Exceptions

There is an exception for the recording or distributing offences where ‘a reasonable person would consider the conduct of the accused person acceptable’ (s 91T). This exception is intended to ensure that the new offences do not criminalise ‘socially acceptable activities’.<sup>21</sup>

There are no exceptions for the offences of threaten to record or distribute an intimate image.

### Overlap with unlawful filming offences

There will be times when the same acts could be prosecuted under either the new recording offence in section 91P, or the existing unlawful filming (or ‘upskirting’ offences in section 91K and 91L of the Crimes Act 1900 (NSW)). However, the unlawful filming offences require proof that the offender had the purpose of sexual arousal or sexual gratification, while the new offence does not require proof of any particular motivation.

### Offence of publishing an indecent article

It is also an offence under section 578C of the *Crimes Act 1900* (NSW) to publish an indecent article. In *Police v Ravshan USMANOV* [2011] NSWLC 40 Mr Usmanov was sentenced to six years’ home detention for publishing nude photographs of his ex-girlfriend on Facebook.

### Sexting, and young people as offenders and victims

The image-based abuse offences do not apply to ‘sexting’, that is, sending a nude picture of oneself to someone else. However, they will apply if that

image is subsequently distributed without the person’s consent. The approval of the NSW Director of Public Prosecutions will be required for prosecutions of children under 16 years old.

Creating, possessing or distributing sexual images of children can still be prosecuted under section 91H of the Crimes Act 1900 (NSW) and Part 10.6 of the Criminal Code Act 1995 (Cth). Section 91H concerns sexual images of a person under 16 years, and children can be prosecuted without the consent of the DPP. The Commonwealth offences concern sexual images of a person under 18 years, and the consent of the Cth Attorney-General is required to commence proceedings where a defendant is under 18 at the time of the alleged offence.

### Accessing Victims Support

The three new indictable offences will also be included as “personal violence offences” in the *Crimes (Domestic and Personal Violence) Act*. This means eligibility under the NSW Victims Support scheme will be enlivened.

### Working with Children Check

The working with children check (WWCC) will be triggered if an adult commits one of the offences set out below against a child. For further information on the WWCC see page 22.

### Table of common behaviours and corresponding criminal offences

Perpetrators of technology-facilitated domestic violence employ many tactics. Due to perceived difficulties of evidence gathering, the impunity and anonymity technology can bring, and minimisation of the harm caused, police advocacy is often required to have matters investigated and perpetrators held to account.

In advocating for clients who have been victims of such behaviour, it can be useful to keep in mind the criminal nature of this behaviour and to push for the enforcement of existing laws. Listed below are examples of common behaviours and criminal offences that may be relevant.

See also a guide to relevant criminal offences involving domestic violence and technology at [www.smartsafe.org.au/legal-guides](http://www.smartsafe.org.au/legal-guides).

21 NSW Attorney General, The Hon Mark Speakman, Second Reading Speech, 24 May 2017.

Type of behaviour	Possible criminal offences
Keeping a person under video surveillance	<ul style="list-style-type: none"> <li>▶ Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13)</li> <li>▶ Voyeurism (<i>Crimes Act 1900</i> (NSW) s 91J)</li> <li>▶ Installing device to facilitate observation or filming (<i>Crimes Act 1900</i> (NSW) s 91M)</li> <li>▶ Installation, use and maintenance of optical surveillance devices without consent (<i>Surveillance Devices Act 2007</i> (NSW) s 8)</li> <li>▶ Possession of record of private conversation or activity (<i>Surveillance Devices Act 2007</i> (NSW) s 12)</li> <li>▶ Manufacture, supply and possession of listening and other devices for unlawful use (<i>Surveillance Devices Act 2007</i> (NSW) s 13)</li> </ul>
Listening to or recording private conversations without consent (may be facilitated by spyware apps or software)	<ul style="list-style-type: none"> <li>▶ Prohibition on installation, use and maintenance of listening devices (<i>Surveillance Devices Act 2007</i> (NSW) s 7)</li> <li>▶ Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13)</li> <li>▶ Possession of record of private conversation or activity (<i>Surveillance Devices Act 2007</i> (NSW) s 12)</li> <li>▶ Manufacture, supply and possession of listening and other devices for unlawful use (<i>Surveillance Devices Act 2007</i> (NSW) s 13)</li> <li>▶ Interception devices (<i>Criminal Code 1995</i> (Cth) s 474.4)</li> <li>▶ Telecommunication not to be intercepted (<i>Telecommunications (Interception and Access) Act 1979</i> (Cth) s 7)</li> </ul>
Tracking a person's location through GPS without consent	<ul style="list-style-type: none"> <li>▶ Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13)</li> <li>▶ Prohibition on installation, use and maintenance of tracking devices (<i>Surveillance Devices Act 2007</i> (NSW) s 9)</li> <li>▶ Manufacture, supply and possession of listening and other devices for unlawful use (<i>Surveillance Devices Act 2007</i> (NSW) s 13)</li> </ul>
Taking intimate images or recordings without consent	<ul style="list-style-type: none"> <li>▶ Recording an intimate image without consent (<i>Crimes Act 1900</i> (NSW) s 91P)</li> <li>▶ Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13)</li> <li>▶ Filming a person engaged in a private act (<i>Crimes Act 1900</i> (NSW), s 91K)</li> <li>▶ Filming a person's private parts (<i>Crimes Act 1900</i> (NSW) s 91L)</li> <li>▶ Installation, use and maintenance of optical surveillance devices without consent (<i>Surveillance Devices Act 2007</i> (NSW) s 8)</li> <li>▶ Possession of record of private conversation or activity (<i>Surveillance Devices Act 2007</i> (NSW) s 12)</li> </ul>
Sharing intimate images or recordings without consent	<ul style="list-style-type: none"> <li>▶ Distributing an intimate image without consent (<i>Crimes Act 1900</i> (NSW) s 91Q)</li> <li>▶ Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13)</li> <li>▶ Publishing indecent articles (<i>Crimes Act 1900</i> (NSW) s 578C)</li> <li>▶ Using a carriage service to menace, harass or cause offence (<i>Criminal Code 1995</i> (Cth) s 474.17)</li> <li>▶ Prohibition on communication or publication of private conversations or recordings of activities (<i>Surveillance Devices Act 2007</i> (NSW) s 11)</li> </ul>

Type of behaviour	Possible criminal offences
Threatening to record an intimate image without consent	<ul style="list-style-type: none"> <li>Threatening to record an intimate image without consent (<i>Crimes Act 1900 (NSW) s 91R</i>)</li> </ul>
Threatening to share intimate images or recordings without consent	<ul style="list-style-type: none"> <li>Threatening to distribute an intimate image without consent (<i>Crimes Act 1900 (NSW) s 91R(2)</i>)</li> <li>Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13</i>)</li> <li>Documents containing threats (<i>Crimes Act 1900 (NSW) s 31</i>)</li> <li>Using a carriage service to make a threat (<i>Criminal Code 1995 (Cth) s 474.150</i>)</li> <li>Using a carriage service to menace, harass or cause offence (<i>Criminal Code 1995 (Cth) s 474.17</i>)</li> </ul>
Checking call logs, messages or accounts without permission	<ul style="list-style-type: none"> <li>Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13</i>)</li> <li>Unauthorised access to or modification of restricted data held in computer (<i>Crimes Act 1900 (NSW) s 308H</i>)</li> </ul>
Making false online accounts or impersonating victims	<ul style="list-style-type: none"> <li>Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13</i>)</li> <li>Using a carriage service to menace, harass or cause offence (<i>Criminal Code 1995 (Cth) s 474.17</i>)</li> <li>Dealing in identification information (<i>Criminal Code 1995 (Cth) s 372.1</i>)</li> </ul>
'Doxing': releasing a person's details online such as their address, phone number, email address or personal details	<ul style="list-style-type: none"> <li>Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13</i>)</li> <li>Using a carriage service to menace, harass or cause offence (<i>Criminal Code 1995 (Cth) s 474.17</i>)</li> <li>Dealing in identification information (<i>Criminal Code 1995 (Cth) s 372.1</i>)</li> </ul>
Sending large volumes of electronic communications to threaten, intimidate or harass	<ul style="list-style-type: none"> <li>Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13</i>)</li> <li>Using a carriage service to menace, harass or cause offence (<i>Criminal Code 1995 (Cth) s 474.17</i>)</li> </ul>
Changing or demanding passwords	<ul style="list-style-type: none"> <li>Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13</i>)</li> <li>Unauthorised access to or modification of restricted data held in computer (<i>Crimes Act 1900 (NSW) s 308H</i>)</li> </ul>
Making threats via electronic communications	<ul style="list-style-type: none"> <li>Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13</i>)</li> <li>Documents containing threats (<i>Crimes Act 1900 (NSW) s 31</i>)</li> <li>Using a carriage service to make a threat (<i>Criminal Code 1995 (Cth) s 474.15</i>)</li> <li>Using a carriage service to menace, harass or cause offence (<i>Criminal Code 1995 (Cth) s 474.17</i>)</li> </ul>

Type of behaviour	Possible criminal offences
Blackmailing via electronic communications	<ul style="list-style-type: none"> <li>▶ Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13)</li> <li>▶ Using a carriage service to menace, harass or cause offence (<i>Criminal Code 1995</i> (Cth) s 474.17)</li> </ul>
Monitoring or unauthorised access of a person's social media accounts, email accounts, internet dating accounts or other accounts	<ul style="list-style-type: none"> <li>▶ Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13)</li> <li>▶ Unauthorised access to or modification of restricted data held in computer (<i>Crimes Act 1900</i> (NSW) s 308H)</li> </ul>
Accessing a person's computer, phone or other device without their knowledge or consent	<ul style="list-style-type: none"> <li>▶ Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13)</li> <li>▶ Unauthorised access to or modification of restricted data held in computer (<i>Crimes Act 1900</i> (NSW) s 308H)</li> </ul>
Installing spyware on electronic devices. Different spyware applications and software have varying capabilities. For example, some spyware allows you to access a person's messages, emails, photos and call logs; some allows you to intercept calls; others act as a remote listening device or tracking device, or activate an internal device camera	<ul style="list-style-type: none"> <li>▶ Stalking or intimidation with intent to cause fear of physical or mental harm (<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13)</li> <li>▶ Using a carriage service to menace, harass or cause offence (<i>Criminal Code 1995</i> (Cth) s 474.17)</li> </ul>

## Evidence

There is a common misconception that it is too onerous to prove who was the person at the other end of the text, email, surveillance device or other means of electronic communication. However, in cases involving technology, there is often more evidence than an in-person matter. What is difficult is knowing how to obtain the evidence and how to have it admitted into evidence. Below are some tips about how to do this.

### Email

Useful evidence can be obtained from the header of the email communication including the sender's IP address. Extracting this data is a simple process, but is different for each email service. To find out how to do this you can visit [www.whatismyipaddress.com/find-headers](http://www.whatismyipaddress.com/find-headers).

### Facebook

Some useful evidence may be obtained by downloading a copy of your client's Facebook data via the Facebook settings page. Facebook downloads the data into a PDF file including the IP addresses used to log in and out of Facebook, chat histories, posts, personal details, searches and photos including their metadata. Deleted content is not available and some old data may not be available if it has been deleted according to the retention schedule.

Police may also be able to obtain Facebook records if investigating a criminal matter. Investigating officers can visit [www.facebook.com/records](http://www.facebook.com/records) for identification information such as the user's IP address and contact details. For more formal investigations, police can use subpoenas or preservation orders from Facebook via internal mechanisms.

### Google

If the client has a copy of the intimate image, they can use Google image search to see if it has been published anywhere on the internet. They can do this at [images.google.com](http://images.google.com) by clicking on the camera button next to the search bar and uploading their photo to see whether the image is on the internet.

If a client is concerned the image will be posted online with their personal details, they can set up a Google alert ([www.google.com/alerts](http://www.google.com/alerts)) to notify them of any information that is posted. For example, they could set up alerts for their name, address, email and telephone number. They will then receive

email alerts with any search results that include those details.

Your client can also contact search engines such as Google to ask them to remove the content from their search results.

### Phone

There are a number of apps and programs that can be used to download text messages, voicemails or online chat histories to be tendered as evidence. Alternatively, you could ask to have a device handed up and its contents produced as evidence in court.

Most deleted emails, messages, photos and documents can be recovered with the right tools.

Carriage service providers may be able to reveal information about the true source of harassing or intimidating calls or messages. Your client should contact their service provider. Carriage service providers can also be subpoenaed for records. Your clients should also be aware they have a right to complain about unwelcome or life threatening messages under the Communications Alliance *C525:2010 Handling of Life Threatening and Unwelcome Communications Industry Code*.

Many photos have metadata or EXIF data sitting behind the file, which can provide valuable evidence. This can include geotagging information (such as the longitude and latitude of where the photo was taken or uploaded) or information about the device on which it was taken. A number of websites, apps and programs allow you to scan for this information, for example [www.exifdata.com](http://www.exifdata.com).

There are many phone apps that allow clients to record incoming calls. However, clients should be warned about the provisions prohibiting the use of listening devices to record private conversations without consent and the relevant exceptions, such as protecting their lawful interest under section 7 of the *Surveillance Devices Act 2007* (NSW) (see below).

#### Practitioner tip

Encourage clients to screenshot evidence, including website URLs where applicable. Copies should be saved on a USB or secure cloud-based account.

## Client recordings and the *Surveillance Devices Act 2007* (NSW)

Clients may come to you with audio or video recordings taken of a domestic violence incident. While the *Surveillance Devices Act* prohibits the use of listening devices, s 7(3)(b) allows recording where it is reasonably necessary for the protection of a lawful interest. A recording of a domestic violence incident would likely be considered reasonably necessary for the protection of a lawful interest, being the client's safety and would be admissible evidence. In addition, section 138 of the *Evidence Act 1995* (NSW) provides grounds for the admissibility of improperly obtained evidence, taking account of its probative value and importance of the evidence to the proceedings. In our experience such evidence has been admissible.

## Taking action

### Report to Police

Take the screen shots of the webpage where the image has been posted, showing the image and the URL and other evidence gathered as outlined above if possible and report it to the police.

Your client can also make an online report to the Australian Cybercrime Online Reporting Network (ACORN) by visiting [www.acorn.gov.au](http://www.acorn.gov.au) and the Office of the e-Safety Commissioner by visiting [www.esafety.gov.au](http://www.esafety.gov.au).

### Take-down request

Your client is very likely to want to have intimate images taken down.

The Crimes Act provisions empower courts to order a person convicted of the offence of recording or distributing an intimate image to take reasonable actions to remove, delete or destroy any image recorded or distributed by the person (s 91S).

In addition, practical, informal action can be taken by contacting the website administrator, host or webmaster to request they take the image down. This can be done using the 'contact us' or 'report a problem' function or by doing a 'whois' search using [whois.domaintools.com](http://whois.domaintools.com) for international websites or

[whois.auregistry.net.au](http://whois.auregistry.net.au) for Australian sites. If the webmaster does not delete the picture, they may be civilly liable for the continued publication of the image. See *Trkulja v Google* (No 5) [2012] VSC 533.

In any take-down request, it is a good idea to include the following:

- ▶ sufficient information for the image or video to be identified;
- ▶ your contact details;
- ▶ your relationship to the material, for example, the pictured person, the complainant, the copyright owner, their legal representative or their support person;
- ▶ a timeframe for the image/video to be removed;
- ▶ an indication of what law (including country) is being breached, for example, copyright, defamation, criminal laws.

Your client can also contact search engines such as Google to ask them to remove the content from their search results.

### WATCH THIS SPACE

The Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018 is currently before the Commonwealth Parliament. It would create a range of civil penalties for the non-consensual recording and sharing of intimate images, and give new powers to the eSafety Commissioner to compel the removal of intimate images from online locations, issue warnings and infringement notices and seek penalty orders in court.

The office of the eSafety Commissioner is currently taking reports of image-based abuse from victims. It is able to offer the following assistance:

- ▶ Referring victims to appropriate services (police, counselling, legal assistance);
- ▶ Requesting removal of the intimate image if it has been made available online (provided such a request would not interfere with police investigations);
- ▶ Keeping the victim updated on the action taken and the outcome achieved.

Despite having no powers to compel the removal of intimate images, the Office reports significant levels of compliance with its removal requests. You can find more information online at [www.esafety.gov.au/image-based-abuse/action](http://www.esafety.gov.au/image-based-abuse/action).

### Copyright

Sections 32, 86, 10 and 98 of the *Copyright Act 1968* (Cth) provide that where a photo or video has been created by the victim, such as a 'selfie', the ma-

material may be protected by copyright as the person who takes the photo is the author of that work, and the director of a film is usually the owner.

Where a couple makes the material consensually during their relationship, they may be classified as joint authors/makers who are tenants in common of copyright, presumably in equal shares. The test of joint authorship is the extent to which two or more people collaborate in the creation of a work and the amount of skill and labour each contributes. See *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] EWHC 7 (Ch).

Where this is the case, any publication or reproduction must be authorised by any authors/makers and a joint owner may sue for infringement without the participation of the other joint owner even if the infringer is the co-owner of the copyright. See *Prior v Sheldon* [2000] FCA 438, Wilcox J.

## Chapter 5: Domestic violence and family law

This chapter provides guidance to practitioners who are advising victims of domestic violence about parenting arrangements, property division and divorce. It is not a complete guide to family law but focuses on aspects where family violence is relevant.

### WATCH THIS SPACE

In 2017, the Commonwealth Attorney General announced Parent Management Hearings (PMH) to provide self-represented litigants with an alternative for resolving parenting disputes to the family court process. The PMH is described as “a fast, informal, non- adversarial dispute resolution mechanism” which will be “given powers to make binding determinations on less complex family law matters, which would otherwise require consideration by the family law courts.”

Subject to the passage of the Bill, the PMH will operate from Parramatta and another site still to be announced, commencing late 2018.

### Parenting arrangements

#### Definition of family violence

A broad definition of family violence was introduced into the *Family Law Act 1975* (Cth) (FLA) in 2012 and applies in all cases filed after 7 June 2012. See **Chapter 1: Introduction to Domestic Violence** for the legislative definition of family violence. The definition removed the requirement that the victim's fear be ‘reasonable’, in recognition of the subjective experience of fear and the psychological impact of violence.

#### Recent cases on family violence

In *Carra & Shultz* [2012] FMCAfam 930 the father alleged that the mother, by withholding the child from him, was committing family violence by ‘preventing the family member from making or keeping connections with his or her family, friends or culture’. The court held that the withholding of time or communication with a child, by itself, does not constitute family violence. The essence of the

definition of family violence is behaviour which ‘coerces or controls’ a family member ‘or causes [them] to be fearful’ (para 7).

The court went on to say:

It is possible to envisage a different context within which the withholding of a child may amount to family violence. One can imagine, for example, a scenario in which a parent flees from violence and does not take a child with him or her through lack of opportunity or because they have no immediate arrangements for appropriate alternative accommodation. If the other parent prevents the fleeing parent from spending time or communicating with the child as a means to coerce or control the fleeing parent or to cause them to be fearful about their own or the child's safety, it may well amount to family violence [para 8].

### Practitioner tip

Take care not to mask the presence of family violence by using the expression ‘high conflict relationship’ in family violence matters. ‘High conflict’ is a subjective term with no common meaning or definition. There can be a tendency to conflate ‘high conflict’ with family violence or to not acknowledge that ‘high conflict’ cases may involve a history of family violence. See **Chapter 1: Introduction to Domestic Violence** for more information about domestic and family violence.

In *Maluka & Maluka* [2009] FamCA 647 the court found that as there was a significant history of family violence which the father had no insight into, the mother and children were at an unacceptable risk of physical and emotional abuse and violence now [at 131] and into the future [at 384], which warranted making an order that the children spend no time with their father.

In *Willmont & Halliday* [2012] FamCA 918 Cleary J at [128] – [129] said:

I am unable to make a positive finding that the father has abused the children. However, I consider that there is, on balance, sufficient evidence of inappropriate conduct, which cannot be explained by exposure to anyone else other than the father. I consider that the father's lack of empathy for the children and his use of them to convey quite hateful messages arising from his own anger, represents a risk to their health and safety that is not outweighed by the benefits that may come from those times when the father enjoys the company of the children and they are cooperating with him. Accordingly, I make orders that place the children in the exclusive care of their mother, with no provision for communication with their father.

## Presumption of equal shared parental responsibility (ESPR)

Both parents have parental responsibility for a child until that child turns 18. Parental responsibility is defined in section 61B of the FLA to mean 'all the duties, powers, responsibilities and authority that, by law, parents have in relation to children'.

Section 61DA provides a presumption that it is in the best interests of a child to make an order that provides for the parents to have ESPR. This order places an obligation on the parents to consult with each other and make a genuine effort to agree on major long-term decisions about the child including:

- ▶ education;
- ▶ religious and cultural upbringing;
- ▶ health;
- ▶ name change; and
- ▶ changes to the child's living arrangements which make it significantly more difficult for the child to spend time with a parent (such as moving to a new area).

Section 61DA(2) provides that the presumption does not apply in cases of child abuse or family violence. In these circumstances, the court must consider whether sole parental responsibility or equal shared parental responsibility is appropriate. In *Hutley & Hutley* [2012] FamCA 679, while the mother adduced evidence that the father had been aggressive and intimidating during their relationship and was found guilty of assault, the court still ordered ESPR on the basis that the parties had managed to make joint decisions about the children.

Section 61DA(4) provides that the presumption is rebuttable where there is evidence to show it is not in the best interests of the child for the parents to have ESPR. In *Halston & Halston* [2013] FMCA-fam 606 despite the mother adducing evidence of family violence, the court largely discounted this evidence and made orders for sole parental responsibility to the father on the basis that the mother lacked insight into the importance of the children having a relationship with their father and they were unwilling and unable to work together for the children's best interests.

ESPR does not correlate to a child spending equal time with each parent. The decision about ESPR is made separately to any consideration of how much time a child spends with each parent. However,

once an order for ESPR has been made, the court must consider whether an order should be made for a child to spend equal time with a parent and if not, whether an order for substantial and significant time should be made, or what other arrangements are in the best interests of the child.

Section 60CG(1)(b) provides that when considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order does not expose a person to an unacceptable risk of family violence.

## Primary considerations

Section 60CA of the FLA provides that the best interests of the child are the paramount consideration in deciding whether to make a particular parenting order.

Section 60CC sets out how a court will determine what is in a child's best interests. The best interests of the child are made up of primary and additional considerations. The primary considerations are contained in section 60CC(2):

- ▶ the benefit to the child of having a meaningful relationship with both parents; and
- ▶ the need to protect the child from physical or psychological harm, and from being subjected to, or exposed to, abuse, neglect or family violence.

The need to protect children from harm is given greater weight in cases where there is family violence, child abuse or risk of exposure to either (s 60CC(2A)).

*A & A and the Child Representative* [1998] FamCA 25 sets out how a court is to assess the level of risk to a child spending time with a parent. In that case the mother alleged that the father seriously assaulted her in what appeared to be an attempted murder. The mother had no recollection of the events but had a genuine belief that the father was her assailant. She considered that there was a risk to the safety of the children if the father continued to have contact. The Full Court held that:

The first enquiry is whether there is objectively an unacceptable risk. If there is the Court must take steps proportionate to the degree of risk. If there is not, the Court may then need to consider whether the residence parent has a genuinely held belief that such a risk exists and whether that will have a significant impact on that party's capacity as the resident parent and so impinge on the best interests of the children.

The Court then needs to take steps proportionate to that circumstance.

Section 60D requires solicitors to advise people seeking advice about children about sections 60CA, 60CC(2) and (2A).

### Additional considerations

The additional considerations are set out in section 60CC(3) and include:

- a) any views expressed by the child;
- b) the nature of the child's relationship with parents and others, including grandparents;
- c) the extent to which each parent has taken, or failed to take, the opportunity;
- d) to participate in making decisions about major long-term issues in relation to the child;
- e) to spend time with the child;
- f) to communicate with the child;
- g) the extent to which each parent has fulfilled his or her obligations to maintain the child;
- h) the effect on the child of any changes in the child's circumstances;
- i) the practical difficulties and expense involved in spending time with and communicating with a parent, and the impact on the child of maintaining personal relationships and direct contact regularly with both parents;
- j) the capacity of each parent and others to provide for the child's needs;
- k) the maturity, sex, lifestyle and background of the child and parents;
- l) the child's right to enjoy Aboriginal or Torres Strait Islander culture, where relevant;
- m) each parent's attitude to the child and to parenting;
- n) any family violence involving the child or a member of the child's family;
- o) any family violence order;
- p) the desirability of making the order that is least likely to lead to further proceedings; and
- q) any other fact or circumstance the court thinks relevant.

## Family Dispute Resolution

Family Dispute Resolution (FDR) is the term used in the FLA to refer to mediation or conciliation that is facilitated by an FDR practitioner (FDRP).

Section 10F of the FLA defines FDR as a process (other than a judicial process):

- ▶ in which an FDRP helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- ▶ in which the practitioner is independent of all of the parties involved in the process.

Engagement in FDR in relation to disputes about children's issues is mandatory prior to filing, subject to some exceptions (discussed below). This means that a person can only file an application for parenting orders if:

- ▶ they have a section 60I certificate; or
- ▶ they fall within one of the exceptions.

Parties must demonstrate a genuine effort to resolve the dispute before filing an application in court. The pre-action procedures are set out at sections 60I(7)–(12) of the FLA.

### FDR where there is a history of risk of violence

Mediation is predicated on an equal bargaining power between the parties, which is not usually present in relationships of violence, power and control. However some people who have experienced violence would prefer to try FDR rather than rely on the exemptions.

#### Practitioner tip

Where your client has been a victim of violence and elects to go to FDR, it is important your client is encouraged to give a full disclosure of family violence to the FRC or other FDR service, particularly the FDR practitioner (mediator). This is important to ensure that the FDRP is aware of the safety issues in the case and to ensure that your client is not pressured into agreeing to arrangements that are unsafe or not in the best interests of their children.

Strategies for negotiation that might assist in ensuring safe and just outcomes include:

- ▶ staggered arrivals and departures;
- ▶ risk assessments immediately prior to, during, and after the FDR session;

- ▶ frequently checking in with the victim to see whether they feel able to continue mediation and that they are not feeling intimidated by the other party and/or the process;
- ▶ FDR with one or both parties attending by telephone;
- ▶ ‘shuttle’ FDR, where the parties remain in separate rooms and the FDRP moves between the rooms;
  - lawyer-assisted FDR, where one or both parties are represented by lawyers;
  - allowing vulnerable parties to have a support person waiting in another room;
  - taking breaks during the session to privately talk to the victim and check whether they felt understood, respected and able to continue;
  - where agreements are reached, making them short-term in nature with a view to the parties returning for a further FDR session in the following two to three months; and
  - use of frequent case-management meetings, where all professionals involved in the case can come together to collectively analyse the suitability of the case continuing.

### Where can your client participate in FDR?

Family Relationship Centres (FRCs) commonly provide FDR services. FRCs are funded by the government to provide a range of services to families but focus on supporting separated parents to reach agreements regarding children without the need for recourse to courts. Services are provided free of charge or on a sliding scale. FDRPs can also assist parties to write parenting plans. See ‘**Parenting plans**’ below for more information.

Some FRCs have partnerships with community legal centres or Legal Aid NSW to provide lawyer-assisted FDR. Lawyers working within the FRC model tend not to take an active role during FDR joint sessions (where all parties are in the room together with the FDRPs) but are there to ensure that a victim of violence does not feel pressured or coerced to agree to unsafe or unworkable arrangements and to provide advice during private sessions.

Legal Aid NSW facilitates FDR (sometimes called a ‘family law conference’) on a grant of legal aid. If your client is eligible for a grant of aid, you can ask to have that grant allocated to you so that you can

represent your client in the conference. You can also act for your client in a conference even if your client is not eligible for a grant of aid.

Private FDRPs also provide FDR services. It is important to check that any practitioner is registered with the Attorney-General’s Department as accredited under the FLA to provide FDR services and issue a section 60I certificate.

### Confidentiality in FDR

Anything said in the company of a family counsellor or an FDRP when conducting FDR is inadmissible with the exception of an admission by an adult or child that indicates that a child under 18 has been abused or is at risk of abuse, unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources (s 10E and s 10J of the FLA).

### Section 60I certificates

A section 60I certificate is issued to a party (or parties) where the parties have attempted FDR but have been unable to reach an agreement, where one party failed to attend FDR, or where the FDRP has determined FDR is inappropriate in the circumstances. The section 60I certificate remains valid for 12 months from the date it is issued.

The section 60I certificate will note one of the following:

- ▶ one party did not attend;
- ▶ the parties attended and made a genuine effort to resolve the dispute;
- ▶ the parties attended but one or both did not make a genuine effort to resolve the dispute;
- ▶ the FDRP determined the case was not appropriate for FDR; or
- ▶ the FDRP determined it was not appropriate to continue partway through the FDR process.

The certificate needs to be attached to the application for parenting orders.

### Exceptions to FDR

Section 60I(9) of the FLA sets out the grounds upon which a party can be exempted from FDR. Relevantly, if the court is satisfied there are reasonable grounds to believe there has been or there is a risk of family violence or child abuse, there is no requirement for a party to participate in FDR or to file a section 60I certificate when making an application for parenting orders.

Evidence of violence or abuse or the risk of them is provided by way of completing an Affidavit – Non-filing of a Family Dispute Resolution Certificate form, or by way of the affidavit filed with the Notice of Risk or Form 4.

## Options if parents can agree about parenting arrangements

If parents are able to reach an agreement about parenting arrangements they can have:

- ▶ an informal agreement;
- ▶ a parenting plan; or
- ▶ apply for consent orders.

### Informal agreement

An informal agreement can be written or oral. The benefits of an informal agreement are that it gives parents the flexibility to change the parenting arrangements when needed. Both parents retain parental responsibility for the child/ren.

An informal agreement is not enforceable, however, and its flexibility can result in uncertainty. Victims of domestic violence often require stricter boundaries around when the perpetrator spends time with their children, to protect their and their children's safety.

### Parenting plan

Sections 63C(1) and (2) mandate that a parenting plan is a written agreement made, signed and dated by parents that deals with any of the following:

- ▶ the person or persons with whom a child is to live;
- ▶ the time a child is to spend with another person or other persons;
- ▶ the allocation of parental responsibility for a child;
- ▶ if two or more persons are to share parental responsibility for a child, the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
- ▶ the communication a child is to have with another person or other persons;
- ▶ maintenance of a child;
- ▶ the process to be used for resolving disputes about the terms or operation of the plan;
- ▶ the process to be used for changing the plan to take account of the changing needs or cir-

cumstances of the child or the parties to the plan; or

- ▶ any aspect of the care, welfare or development of a child or any other aspect of parental responsibility for a child.

Below are 2 examples of parenting plans. Guidance can also be obtained from the 2016 resource "Parenting Orders – what you need to know" produced by the Commonwealth Attorney-General's Department and is available online.<sup>22</sup>

22 [www.ag.gov.au/Publications/Pages/Parenting-orders-what-you-need-to-know.aspx](http://www.ag.gov.au/Publications/Pages/Parenting-orders-what-you-need-to-know.aspx)

## PARENTING PLAN

BETWEEN

[INSERT NAME]

(Mother)

AND

[INSERT NAME]

(Father)

The Mother and the Father agree:

1. The Mother and the Father have [equal shared] parental responsibility for the child [NAME] born [DATE].
2. Each parent is solely responsible for making decisions about the day to day care, welfare and development of [NAME] when she is in their care.
3. [NAME] lives with the [Mother/Father] at all times when she is not living with the Mother.
4. [NAME] [lives with/spends time with] the [Mother/Father] as follows:
  - a) During school terms, every weekend from after school on Friday until before school on Monday. On long weekends or pupil free days this time is extended to before school on the next school day.
  - b) During school holidays, for half of the public school holidays as agreed between the parents. If there is no agreement, for the first half in even numbered years and the second half in odd numbered years.
  - c) For the purpose of this Parenting Plan the school holidays start at the end of the school day on the last day of the school term and the holidays finish before school on the day the school term resumes. [NAME] will be picked up at 4 pm on the day in the middle of the school holiday period.
  - d) Other times as agreed between the parents.
5. On special occasions [NAME] will spend time as follows:
  - a) On the Mother's birthday and on Mothers Day [NAME] will spend time with the Mother from 10 am until 5 pm, or on school days from after school until 6 pm.
  - b) On the Father's birthday and on Fathers Day [NAME] will spend time with the Father from 10 am until 5 pm, or on school days from after school until 6 pm.
  - c) On [NAME]'s birthday she will remain living with the parent she is scheduled to be with until 2 pm and then with the other parent from 2 pm until 6 pm, or on school days from after school until 6 pm.
  - d) On Easter Sunday [NAME] will remain living with the parent she is scheduled to be with until 2 pm and then with the other parent from 2 pm until 6 pm.
  - e) On Christmas Day [NAME] will remain living with the parent she is scheduled to be with until 2 pm then with the other parent until 6 pm on Boxing Day.
  - f) Or at times as agreed between the parents.
6. For the purpose of spending time, the [Mother] will pick [NAME] up from school or the [Father's] address at the start of her time and the [Father] will pick [NAME] up from school or the [Mother's] address at the start of his time.
7. The parents will both be entitled to attend all events involving [NAME] including, but not limited to:
  - a) Sporting events;
  - b) Extra curricula activities that allow parents to attend;
  - c) School functions and events that allow parents to attend such as concerts, school assemblies, sports days, parent and teacher interviews, canteen duties and social functions; and

The parent who has [NAME] in their care on the day of the event will be responsible for her day to day care at the event and for transportation to and from the event.

8. The Mother can have reasonable telephone communication with [NAME] when she is with the Father and [NAME] is to be available to receive calls each night between 6 pm and 8 pm on her mobile or on the Father's landline telephone.
9. The Father can have reasonable telephone communication with [NAME] during extended periods with the Mother.
10. Both parents are to give [NAME] privacy during telephone conversations with the other parent.
11. Each parent is to advise the other parent within 7 days if their residential address or contact telephone number changes.
12. Each parent is to notify the other of any medical emergencies suffered by [NAME].
13. Each parent is to ensure that the other parent is kept informed of any social, school or religious functions that [NAME] is to attend.
14. Within 14 days of signing this Parenting Plan, and within 14 days of [NAME]'s subsequent enrolment at any new school, the Father will do everything needed so that:
  - a) The Mother's details are recorded by the school as [NAME]'s parent and emergency contact person; and
  - b) [NAME]'s school is authorised to send directly to the Mother copies of all school reports, notices and advices concerning [NAME] and any activities that she may be involved in.
15. Within 7 days of receiving order forms for school photographs of [NAME] the Father is to give copies of the forms to the Mother.
16. The parents are not to make rude or critical comments about the other parent to [NAME] or in her sight or hearing.

It is noted that:

- It is the Mother and Father's intention to have further family dispute resolution to review these arrangements in approximately [DATE].

Dated:

Mother [Name]

Father [Name]

## PARENTING PLAN

BETWEEN

[INSERT NAME]

(Mother)

AND

[INSERT NAME]

(Father)

The mother and the father agree that:

1. The child [NAME] born [DATE] lives with his mother.
2. [NAME] will spend time in the care of his father as follows:
  - 2.1 Each Tuesday and Thursday from 11.30am to 1.00pm commencing 13 July 2010 and each alternate Saturday from 11.30am to 1.30pm commencing 17 July 2010.
  - 2.2 [NAME]'s time with his father shall occur at one of a range of agreed public locations suitable to [NAME]'s developmental needs and comfort and convenient to the parents including: the local swimming centre, [SUB-URB] Library, Shopping Centre at [SUBURB] and, subject to the mother's agreement, the [NAME] Father's Centre at [SUBURB].
  - 2.3 On the Monday of each week, the parents will communicate with each other and agree on the locations for [NAME]'s time with the father for the remainder of the week.
  - 2.4 For a period of 3 hours on [NAME]'s birthday and Christmas Day [YEAR] at the father's home.
3. The parties will communicate with respect to [NAME]'s routine and matters concerning [NAME]'s welfare via a parent's communication book, which will be written in by the parent who has most recently had care of [NAME] before each changeover and move from parent to parent with [NAME].
4. In the event of emergencies or variations to plans parents shall communicate with each other using text messages.
5. For the purposes of ensuring that [NAME] is settled during time he spends with the father, the mother shall be able to approach the father and child if the child is unsettled.
6. In the event [NAME] is unsettled in the father's care and he is unable to settle the child that he will telephone the mother and seek her assistance.
7. If the child is unsettled and distressed the father shall abort his time with [NAME] and return [NAME] to the mother.

It is noted that:

8. The mother and the father consent in principle to the father's name being entered on [NAME]'s Birth Certificate.
9. The mother and the father agree in principle that a passport shall be issued for [NAME] to travel overseas but that [NAME] remain resident in the Commonwealth of Australia.
10. It is the mother and the father's intention that after a period of 6 months from [DATE] the father would be able to have [NAME] in his care at any location at his discretion.
11. It is the mother and father's intention to have further legally assisted family dispute resolution in the Family Relationship Centre in approximately [DATE].

Dated:

Father [NAME]

Mother [NAME]

Witness

Witness

Section 63C(1A) makes clear that an agreement is not a parenting plan unless it is made free from any threat, duress or coercion.

The benefits of a parenting plan are that, like informal arrangements, they are flexible and easily changed by writing a new parenting plan. They provide more certainty than an informal agreement and, while not enforceable, if the parents end up at court regarding their children, a parenting plan is taken into account by the court under section 70NBB of the FLA. The Child Support Agency can also do an assessment regarding parents' liability based on a parenting plan.

### Consent orders

If parents want legally enforceable orders they can ask the Family Court to make orders that reflect the agreement they've reached, which are called consent orders under rule 10.15 of the *Family Law Rules 2004* (Cth) (FLR). Parents seeking consent orders need to complete and file the following documents, which are available on the Family Court of Australia website:

- ▶ an Application for Consent Orders;
- ▶ the orders they are seeking (refer to Consent Orders Supplement Guide); and
- ▶ Annexure to Draft Consent Parenting Orders.

The Application for Consent Orders is relatively straight forward, however parents may benefit from a solicitor helping them draft the orders they want. Where there is family violence, parents or their representatives must set out in the Annexure to Draft Consent Parenting Orders how the proposed orders deal with the allegations of family violence.

Before making the orders, the court must be satisfied that the orders sought are in the child/ren's best interests.

#### Practitioner tip

A client seeking consent orders should be advised that consent orders will compel a parent to make a child available in accordance with the orders unless there is a reasonable excuse. A reasonable excuse may be that there was a need to protect a person's health, safety or well-being or there was a misunderstanding by the person that they were breaching the order. In the absence of a reasonable excuse, your client may be found to be contravening the orders and open to penalty such as make up time, being ordered to attend a parenting

program or, in serious cases, a fine or jail. It is possible that the court may change the orders in circumstances where the court considers the orders are unworkable and this may include changing orders in favour of the other parent. Sometimes, consent orders, and in particular the threat of contravention proceedings, are used by a perpetrator of violence to continue to coerce, control and threaten a victim of violence. It is also important to note that a court will not contravene a parent for failing to spend time with a child as per the orders.

Consent orders will remain in effect until one of the following takes place:

- ▶ the orders are changed by agreement, by either further consent orders or a by a parenting plan which over-turns all or part of the orders; or
- ▶ the orders are set aside or changed by the court, but before doing so, the court must be satisfied there has been a significant change in circumstances – see *Rice v Asplund* (1979) FLC 90-725.

### If parents can't agree about parenting arrangements

If parents can't reach an agreement, they can apply to the Federal Circuit Court for parenting orders by completing and filing:

- ▶ an Initiating Application;
- ▶ a Notice of Risk (*Federal Circuit Court Rules 2001* (Cth) (FCCR), Form 1 to Schedule 2 and rule 22A.02);
- ▶ an affidavit setting out the facts relied on (FCCR, rule 4.05); and
- ▶ attaching a section 60I certificate given by an FDRP or an Affidavit – Non-filing Dispute Resolution Certificate under 60I(9)(a), (b), (c), (d), (e) or (f) of the Act.

If parents are seeking financial orders they will have to file additional documents (FCCR, Part 24 (financial orders); FCCR, rule 25A.02). See 'Property division' below for more information.

Parents can only file an application for parenting orders in the Family Court of Australia if the issues in the case are of a complex nature, in which case they would need to file:

1. an Initiating Application;
2. a Notice of Child Abuse, Family Violence or Risk of Family Violence (FLR, Schedule 2);

3. an affidavit if they are seeking interim or procedural orders (FLR, rule 5.02); and
4. a certificate given to them by an FDRP under subsection 60I(9) or an Affidavit – Non-filing Dispute Resolution Certificate if 60I(9)(a), (b), (c), (d), (e) or (f) of the Act applies.

If parents are seeking financial and/or child support orders they will need to file additional documents (FLR, rules 2.02 and 2.05 (financial orders); FLR, rule 4.18). See ‘**Property division**’ below for further information.

## Notice of Risk / Notice of Child Abuse, Family Violence or Risk of Family Violence

Parties are required to file a notice in the prescribed form if they allege that:

- a) a child has been abused or is at risk of being abused (s 67Z FLA); or
- b) there has been family violence or there is a risk of family violence by a party (s 67ZBA FLA)

In the Federal Circuit Court this is a Notice of Risk and in the Family Court this is a Notice of Child Abuse, Family Violence or Risk of Family Violence. Completing the forms assists the court to fulfill its duty to ask the parties about child abuse and family violence, under subsection 69ZQ(aa) of the FLA.

### Notice of Risk in the Federal Circuit Court

Part 22A of the FCCR makes it mandatory to file a Notice of Risk when filing an Initiating Application or a Response seeking parenting orders. The Notice of Risk must be in accordance with the prescribed form and can be filed electronically through the Commonwealth Courts Portal ([www.comcourts.gov.au](http://www.comcourts.gov.au)).

Instructions for completing the Notice of Risk are included on the form. Essentially the risks must be particularised clearly in the form, as in a pleading, and the evidence in support must be outlined in the affidavit filed with the Application or Response or separately with the Notice of Risk, as applicable.

The Notice seeks information about child abuse and family violence. If family violence is alleged, then consideration needs to be given to whether the family violence constitutes abuse or risk of abuse within the meaning of section 4 of the FLA. In our

view the risk of harm to children needs to be a current risk and one that the orders being sought will respond to.

### For example

#### **Do you allege that there has been family violence or there is risk of family violence?**

Between <date> and <date> the child witnessed domestic abuse of his mother (Anne) by his father (John). Incidents occurred weekly including the father yelling at, threatening to assault and threatening to kill the mother. Incidents included physical violence perpetrated by the father including hitting, kicking, pushing, hair pulling and throwing objects. As a result of the domestic abuse the mother has sought medical attention for injuries on at least one occasion and police have attended the home on three occasions over the last 12 months.

Also see section below on Affidavits for more information about how to describe family violence.

Where Q2 on the Notice of Risk is ticked YES, the information is reported to Family and Community Services (FACS), as required by sections 67Z and 67ZBA of the FLA.

The Notice of Risk also seeks information about mental ill-health; drug and alcohol abuse; parental incapacity; or any other risk posed to the child. The information provided in response must relate to how they pose a risk to the child.

If new facts or circumstances arise after filing a Notice of Risk, a new Notice of Risk and affidavit must be filed in accordance with rule 22A.04 of the FCCR.

### Notice of Child Abuse in the Family Court

A Notice of Child Abuse is only required where there are allegations to be made, unlike the requirement to file a Notice of Risk in all matters in the Federal Circuit Court. The prescribed form must be used in accordance with rule 2.04D of the FLR.

The Notice of Child Abuse requires a concise summary of the allegations and details of each of them including dates they occurred, and any other particulars, which reflect the contents of the affidavit evidence. See ‘**Affidavits**’ below for more information about how to describe domestic violence.

Rule 2.05(1) of the FLR requires a copy of any family violence order affecting the child or a member of the child’s family to be filed when a case starts or as soon as practicable after the order is made. If a copy

of the family violence order is not available, rule 2.05(2) of the FLR require the party to file a written notice containing:

- ▶ an undertaking to file the order within a specified time;
- ▶ the date of the order;
- ▶ the court that made the order; and
- ▶ the details of the order.

The Notice of Child Abuse does not specifically seek additional information about the risk to a child from mental ill-health, drug and alcohol abuse or parental incapacity. In other respects, the substance of the information to be provided is the same as required for a Notice of Risk.

### Affidavits

A well-prepared affidavit is often the most useful contribution you can make as a legal practitioner to the preparation of your client's case. This is not a complete guide to drafting affidavits in family law proceedings. Practitioners need to also use their general skills in good affidavit drafting including understanding the rules of evidence, and the application of the *Evidence Act 1995* (Cth).

Section 69ZT of the FLA states that the rules in relation to hearsay, opinion, tendency and coincidence, and credibility and character do not apply, unless there are exceptional circumstances. Judicial discretion applies to determine the weight the evidence is given. Note, however that the relevance rule still applies in family law.

Keeping informed of reputable research on domestic and family violence and its impact on children will help you to understand the context in which to seek instructions for the preparation of affidavits in family law cases. Also refer to **Chapter 1: Introduction to Domestic Violence** and **Chapter 2: Domestic Violence Clients for further guidance**.

The civil standard of proof must be met, but it is important to remember that although useful, independent corroboration of allegations of family violence is not required. The Full Court in *Amador & Amador* [2009] 43 FamCAFC 196 provided:

Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage and possibly their children. We cannot accept that a Court could never make a positive finding that such violence occurred without their being corroborative evidence from a third party or a document or an

admission. The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.

Domestic violence is contextual. Although domestic violence is often described by incident, the experience of domestic violence is as a continuum of violence, usually including a high prevalence of low levels of everyday violence. Portraying the details of domestic violence, including the day to day lived experience of clients, is important, as good quality evidence is one of the objectives when drafting an affidavit on family violence.

### Sample Affidavit History of Family Violence

1. *When we first met, F was very protective of me, wanting to know what I had been doing, who I was seeing when we weren't together, and ringing me often. I found this endearing at first, since our relationship was new and I thought he was just very keen. However, after we moved in together and I was pregnant with C, his behaviour became more intense. F rang me dozens of times most days. He said words to the effect of:*

*'Hi, what are you up to?'*

*'Who are you meeting with today?'*

*'How come you're meeting with Greg again. Didn't you meet with him on Tuesday?'*

*'How come you're going out for coffee with your boss this afternoon?'*

2. *If I went out with friends, he would insist on knowing all the details of where we were going, who would be there and how long we were going to stay. During one lunch with friends he rang me four times to check up on how it was going. He said words to the effect of:*

*'Hi. How's it going? Who's there for lunch?'*

*'Hi. Haven't you finished lunch yet?'*

*'Are you on your way home soon?'*

*'How come you aren't home yet?'*

3. *On 14 April 2015 when I was out with friends he followed me to the café and stopped by our table. He said words to the effect of:*

*'Hey babe. How long you gonna be?'*

*'We've got stuff to do.'*

*We had no previous plans to do anything that date. I felt humiliated in front of my friends.*

4. *Soon after I became pregnant F elbowed me really hard in the belly. He said, 'I'm sorry, that was an accident', but it didn't feel like an accident to me.*
5. *About three weeks after that, we were in the kitchen and he was drunk and trying to make out with me. I said I didn't feel like sex and he got very angry. He pinned me against the kitchen wall and said, 'Well that's too bad.' He dragged me by the arm to the bedroom and had sex with me anyway.*
6. *I started to feel afraid of F and tried not to do anything that would upset him. I stopped seeing my friends.*
7. *F insisted on coming to all my antenatal visits at the hospital. I felt stifled as though I couldn't see anyone else alone.*
8. *After C was born, nothing I did was good enough for F. He criticised how I looked after C. He said words to the effect of:  
'You're just as useless as your mother.'  
'Stop pandering to him, he'll just end up a sissy like you.'  
'You've just become a whinging bitch.'*
9. *I gave up work when I was 32 weeks pregnant and after that I had no money to call my own. F gave me just enough cash for the groceries and he paid all the bills. When I needed a haircut I had to ask him for \$50 and he came with me and sat in the salon.*
10. *On 20 June 2015 we argued over the phone bill. F pulled the bill out of my hand and shouted words to the effect of, 'Give it here. How can you run up such a huge bill? You're just bloody useless.' He slapped me hard across the face while I was holding C. C started to cry. F ran out of the house, slamming the door and punching a hole in the fly screen. As he left the house he yelled, 'I fucking hate you, you bitch!'*
11. *I rang the police. There is an Apprehended Domestic Violence Order against F as a result. Annexed and marked 'A' is a copy of the Final Apprehended Domestic Violence Order dated 29 June 2015.*
12. *The AVO was just the mandatory orders and we kept living together. F promised to change. F was OK for a while after this but on 2 November 2015, C's first birthday, he flipped out. I had invited friends over for C's birthday party and F was furious. We had a huge fight. At about 11 am F grabbed C and left*

*the house and didn't come back until 6 pm. He didn't tell me where he was going and he didn't return any of my mobile phone calls. I was beside myself with worry.*

## Safety at court

### Family Violence Best Practice Principles

The Family Court's Family Violence Best Practice Principles (last updated in December 2015) are intended to guide decision makers, lawyers and parties in parenting disputes where family violence or abuse is alleged or where a risk of family violence is raised and are applicable to all proceedings before courts exercising jurisdiction under the FLA.

The Best Practice Principles recognise:

- i) the harmful effects of family violence and abuse on victims;
- ii) the place accorded to the issue of family violence in the FLA; and
- iii) the principles guiding the Magellan case management system for the disposition of cases involving allegations of sexual abuse or serious physical abuse of children.

### Safety plans

The *Family Violence Plan 2014–16: Family Court of Australia and Federal Circuit Court of Australia* gives high priority to safety at court and provides assistance to any client who has fears for their safety at court.

Safety plans for court can include, but are not limited to:

- a) staggered arrival times;
- b) separate entry and exit points;
- c) security guards; and
- d) safe rooms to wait in.

Let the court know your client has fears for their safety at court as early as possible before a court appointment or appearance. The registry prefers at least five days' notice, but urgent arrangements can also be made.

### Practitioner Tip

Contact the court about safety fears by:

- using Live Chat at [www.familycourt.gov.au](http://www.familycourt.gov.au) or [www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au)
- emailing [enquiries@familylawcourts.gov.au](mailto:enquiries@familylawcourts.gov.au)
- calling 1300 352 000
- contacting the case coordinator if the matter has been filed in the Family Court

### Division 12A Principles for conducting child-related proceedings

The principles for conducting child-related proceedings contained in Division 12A, Part VII of the FLA include that the court is to actively direct control and manage the conduct of proceedings, and to conduct them in a way that will safeguard parties to proceedings against family violence (s 69ZN(5)(b)).

Where a party to family law proceedings has experienced family violence and is affected by trauma, the prospect of facing direct cross-examination by the other party (and perpetrator of the alleged abuse) can be very daunting and stressful. In 2015, 330 women responded to a Women's Legal Services Australia (WLSA) survey of survivors of domestic and family violence to gather evidence about the extent and impact of the experience of being directly cross-examined in family law courts. High levels of violence were reported, including 64% of women reporting sexual violence. Thirty nine per cent (39%) of matters settled before judgment and 45% of these respondents said that the prospective fear of personal cross-examination by their abuser was a significant factor in their decision to settle.

One hundred and forty-four (144) respondents made comments about the effect the cross examination had on them:

I felt he had the privilege to continue his intimidation and threats yet in a confined legal space. It defeats the purpose of having a safety room at court – my support person and I sit there to avoid seeing him yet we are 'thrown to the wolves' when we enter the court room. It made me feel all the feelings over again, it made me sick to the core.

Couldn't speak very well, frozen.

Terrifying. I could not look at him. The judge later said in his submission that I hated the man cause I couldn't look at him. The man terrorised me for years

and to this day is still making me paranoid that he will carry out his death threat.

### WATCH THIS SPACE

In July 2017 the Commonwealth Attorney-General's Department consulted on the Family Law Amendment (Family Violence and Cross Examination of Parties) Bill 2017 however to date the bill has not been introduced in to Parliament.

Although there are no specific legislation provisions in the FLA to enable the prohibition of direct cross-examination (as there is in the *Criminal Procedure Act 1986* (NSW) for victims giving evidence in sexual assault trials), practitioners need to be aware of and use wherever appropriate the existing provisions to conduct child-related proceedings in a way that recognises and responds to the prospect of direct cross-examination of victims of family violence by their alleged perpetrators.

Section 69ZX outlines the court's general duties and powers relating to evidence and provides that the court can limit or not allow cross-examination of a particular witness (s 69 ZX(2)(i)). For example, an unrepresented perpetrator (or victim) may be required to submit questions they want to ask the victim (or perpetrator) in writing to the judge, who vets them before they are put to the relevant party either orally or in writing; or, the Independent Children's Lawyer may be allowed to cross-examine the victim first and then be given an opportunity to cross-examine the victim again after the unrepresented parties. See 'Independent Children's Lawyer' below for more information.

The court can also enable vulnerable persons to give testimony by video or in closed court (s 69 ZX(1)(c)).

In child-related proceedings, section 69ZX(3) allows the court to receive the transcript of evidence in other proceedings into evidence, to draw conclusions of fact from the transcripts that it thinks proper, and to adopt any of the recommendations, findings, decisions or judgments from those proceedings. Rule 15.75 of the FLR provides that a transcript of a hearing or trial may be received in evidence as a true record of the hearing or trial. This may include evidence from criminal or AVO proceedings.

Division 1 of Part XI of the FLA outlines general matters about procedure and evidence in family law

proceedings. Section 101(1) provides that the court shall forbid the asking of, or excuse a witness from answering, offensive, scandalous, insulting, abusive or humiliating questions unless it is essential in the interests of justice that the question be answered. This is a useful provision but it can be very difficult to notice whether a particular question is offensive or abusive – it may be that a certain look is what is devastating and brings back the immediacy of the family violence experienced. Further, it is the whole experience of direct cross-examination that is the problem, not just an individual question that may to the judge appear to be offensive, scandalous, insulting, abusive or humiliating.

Provisions relating to the use of video link, audio link or other means of giving evidence are found in Division 2 Part XI of the FLA. Section 102D provides that the court may for the purposes of any family law proceedings direct or allow a person to appear before the court by video or audio link or other appropriate means. This power may be exercised on application of a party to the proceedings or on the court's own initiative.

Also relevant is Division 3 of Part 2.1 of the *Evidence Act 1995* (Cth), which sets out the general rules about giving evidence (sections 26 to 36). Section 41 relates to improper questioning. It requires the court to disallow a question or inform the witness that the question need not be answered if the court is of the opinion the question is:

- ▶ misleading or confusing;
- ▶ is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
- ▶ is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- ▶ has no basis other than a stereotype.

Section 84 relates to the exclusion of admissions influenced by violence and certain other conduct. It states that the evidence of an admission is not admissible unless the court is satisfied that the admission and the making thereof were not influenced by:

- ▶ violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
- ▶ a threat of conduct of that kind.

Section 69ZQ(1)(aa) requires the court to actively enquire into whether there are any allegations or concerns by the parties about family violence or child abuse.

Section 69ZW empowers the court to make an order for a state or territory agency (such as police or FACS) to provide the court with documents or information that may assist the court with its consideration of allegations.

### Court to take prompt action in relation to allegations of child abuse or family violence

When a Notice of Child Abuse has been filed, section 67ZBB requires the court to:

1. consider making interim or procedural orders;
2. act expeditiously in relation to the allegations raised in the Notice of Child Abuse (ideally within eight weeks);
3. consider whether it is appropriate for the court to make a personal protection order or orders under section 68 and
4. consider whether it is appropriate for the court to obtain documents from welfare and law-enforcement agencies.

### Confidentiality and subpoenas

Victims of family violence may be concerned about their personal records being subpoenaed and used in family law proceedings and it is indeed common practice in disputes about parenting arrangements for subpoenas to be issued to a range of services and professionals, including counsellors and medical practitioners as well as police, child welfare services, health services and schools.

In many cases little consideration may be given to whether they are all required or if the information can be obtained from only one or two sources. For example, if the fact in issue is whether there has been family violence, police records may be sufficient without the need to also pursue therapeutic notes.

Objections to subpoenas are rarely made because the process of objecting to a subpoena can be very onerous and daunting for the service provider or the subject of the notes. Even in the limited cases where objections are raised, orders are generally made to produce the material with restrictions such as inspection by legal representatives only and not

parties, or on rare occasions an order may be made for the material to be viewed by the judge only, who will determine relevance and weight at a later stage in the proceedings.

Generally the decision about the inclusion of sensitive material into evidence and the weight to be given to it is one for judicial discretion. In the family law jurisdiction this can be an even more significant judicial role given the wide discretion that can be exercised, particularly in matters relating to children, where the rules of evidence do not apply unless the court decides they are required in the individual case (s 69ZT of the FLA).

However there are protections in place regarding the subpoenaed material.

The FCCR rule 15A.01 defines medical records as, 'for a person ... the histories, reports, diagnoses, prognoses, interpretations and other data or records, written or electronic, relating to the person's medical condition, that are maintained by a physician, hospital or other provider of services or facilities for medical treatment.' According to rule 15A.14 of the FCCR and rule 15.31 of the FLR the subject of medical records may give written notice before the production date that they wish to inspect the records to decide whether to object. If they wish to object they must then provide grounds in writing within seven days of the production date. Unless otherwise ordered the records cannot be inspected until seven days after the production date or the determination of the objection, whichever is later. Parties in the Federal Circuit Court can also seek a right of first inspection for medical records pursuant to FCCR rule 15A.14(2).

FCCR rule 15A.12 and rule 13.07A of the FLR state that documents produced must be used for the purpose of the case only and a person must 'not disclose the contents of the document or give a copy of it to any other person without the Court's permission'. Copies can be made of all subpoena material except child welfare records, criminal records, medical records and police records (FLR 15.30(2)(b); FCCR 15A.13(2)(b)).

Self-represented litigants in Family Court proceedings must obtain the registrar's permission before issue of subpoena according to FCR rule 15.18.

Further, anything said in the company of a family counsellor or an FDRP when conducting FDR is inadmissible with the exception of an admission by an adult or child that indicates that a child under

18 has been abused or is at risk of abuse, unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources (s 10E and s 10J of the FLA).

## Independent Children's Lawyer (ICL)

Section 68L of the FLA allows a court to order, of its own initiative or on application of the child, an organisation concerned with the welfare of the child, or any other person, that a child's interests in the proceedings be independently represented by a solicitor, if it appears to be in their interests to do so.

Section 68LA of the FLA sets out the role of an ICL:

(2) *The independent children's lawyer must:*

- (a) *form an independent view, based on the evidence available to the independent children's lawyer, of what is in the best interests of the child; and*
- (b) *act in relation to the proceedings in what the independent children's lawyer believes to be the best interests of the child.*

(3) *The independent children's lawyer must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.*

(4) *The independent children's lawyer:*

- (a) *is not the child's legal representative; and*
- (b) *is not obliged to act on the child's instructions in relation to the proceedings.*

(5) *The independent children's lawyer must:*

- (a) *act impartially in dealings with the parties to the proceedings; and*
- (b) *ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and*
- (c) *if a report or other document that relates to the child is to be used in the proceedings:*
  - (i) *analyse the report or other document to identify those matters in the report or other document that the independent children's lawyer considers to be the most significant ones for determining what is in the best interests of the child; and*
  - (ii) *ensure that those matters are properly drawn to the court's attention; and*

*(d) endeavour to minimise the trauma to the child associated with the proceedings; and*

*(e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.*

*(6) Subject to subsection (7), the independent children's lawyer:*

*(a) is not under an obligation to disclose to the court; and*

*(b) cannot be required to disclose to the court;*

*any information that the child communicates to the independent children's lawyer.*

*(7) The independent children's lawyer may disclose to the court any information that the child communicates to the independent children's lawyer if the independent children's lawyer considers the disclosure to be in the best interests of the child.*

*(8) Subsection (7) applies even if the disclosure is made against the wishes of the child.*

## Family consultants

Clients involved in family law proceedings can be ordered to attend an appointment with a family consultant under section 11E(1)(c). Section 11A sets out the functions of family consultants:

*(a) assisting and advising people involved in the proceedings; and*

*(b) assisting and advising courts, and giving evidence, in relation to the proceedings; and*

*(c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and*

*(d) reporting to the court under sections 55A and 62G; and*

*(e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.*

The Family Court and the Federal Circuit Court have family consultants who conduct assessments and provide advice to judges about separated families. The *Child Dispute Services Family Violence Policy* sets out how family consultants should respond to allegations of family violence. Your clients may be ordered to participate in a:

- ▶ Child Dispute Conference;
- ▶ Child Inclusive Conference;
- ▶ Child Responsive Program.

In each of the above, the family consultant will conduct separate interviews with each parent. Your client can bring a support person with them to the interview. The meeting is not confidential and all the information gathered by the family consultant is admissible and can be reported to the court.

Section 11G mandates that a failure to attend a meeting with a family consultant will be reported to the court and the court may make any orders it considers appropriate.

### Child Dispute Conference

In a Child Dispute Conference (CDC) each of the parents meet with a family consultant. The main purpose of the CDC is to conduct a brief assessment of the family situation and the issues in dispute. There is no cost to the parties.

### Child Inclusive Conference

In a Child Inclusive Conference (CIC) each of the parents and the children meet with a family consultant. CICs are intended to give the court an understanding of the family situation, particularly of the child/ren's experiences. There is no cost to the parties.

### Child Responsive Program

The Child Responsive Program involves a series of meetings between a family consultant, the parents (or other carers), and usually the child/ren. The program focuses on the child/ren's needs and the aim is to help parents and the court understand what the child/ren need and how the court can best deal with the matter. There is no cost to the parties.

### Single Expert Witness

In some circumstances, such as where an appropriately qualified expert is required to report on a particular issue in a case, parties will be seen by a single expert witness such as a psychiatrist or clinical psychologist agreed upon by the parties. The expert meets with the parties and the children and writes a detailed report which will include a set of recommendations to the court.

### The Magellan List

The Magellan program was developed to deal with Family Court cases involving serious allegations of physical and sexual child abuse. An individual judge closely manages each Magellan matter and the court aims to finalise the case quickly. The court can request relevant documentation from FACS, includ-

ing a Magellan Report, which outlines the involvement FACS have had in relation to the child and/or their family. Section 91B of the FLA allows the court to invite, but not compel, FACS to intervene in the proceedings. Also see *Secretary, Department of Health and Human Services v Ray and Others* (2010) 45 Fam LR 1.

#### Practitioner tip

An order for sole parental responsibility does not give a parent authority to change the name of a child through the NSW Registry of Births, Deaths and Marriages (BDM). So, check with your client about whether they want to change the name of their child and seek family court orders that authorise BDM to register a change of name at the same time as your client is seeking other parenting orders. If that is not practical, the District Court also has jurisdiction to deal with the change of a child's name under section 28 of the Births, Deaths and Marriages Registration Act 1995.

#### Overseas travel

If there are court proceedings underway or there are parenting orders already in place which do not provide for overseas travel, it is an offence under section 65Y of the FLA, to travel overseas with a child without the written consent of the other party or without court orders allowing overseas travel.

#### Obtaining a passport for a child

Section 11 of the *Australian Passports Act 2005 (Cth)* sets out the provisions relating to the issuing of a passport to a child. Section 11(1) states that a passport should not be issued for a child unless each person who has parental responsibility for a child consents or there is a court order which provides for the issuing of a passport. Section 11(5) sets out the definition of who has parental responsibility for the purposes of the section 11. Section 11(2) sets out the 'special circumstances' of the matter warrants the issuing of a passport notwithstanding the consent of all persons who have parental responsibility for a child.

#### Property division

Victims of domestic violence may need assistance negotiating with perpetrators about how to divide the property of their relationship.

#### Property of the relationship

Section 4 of the FLA defines property of a marriage or a de facto relationship as any assets or debts brought into the relationship, or acquired during the relationship, in either or both party's names including superannuation, gifts, inheritances, assets and goodwill that a party has built up in a business, compensation awards, redundancies, lottery winnings and prospective inheritances, if there is a level of certainty that the party will receive the inheritance.

#### Alteration of property interests

Sections 79(1) and 79(2) and 90SM(1) and 90SM(3) of the FLA allow the court to alter the parties' interests in the property of the marriage or de facto relationship, only if the court is satisfied that, in all the circumstances, it is just and equitable to make the order.

Section 79(4) states that when considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:

- a) financial contributions made by both parties;
- b) non-financial contributions made by both parties; and
- c) the parties' current and future needs.

Section 90SM(4) requires the court to consider the above when considering altering the property interests of parties in a de facto relationship.

#### Property settlement adjustment and family violence

The leading case of *Kennon and Kennon* established that an adjustment in a property settlement case can be made on the basis of family violence. *Kennon* and subsequent cases indicate that a small adjustment will be made but only in exceptional circumstances.

*Kennon and Kennon* [1997] FamCA 27; (1997) 22 Fam LR 1

In *Kennon*, the Full Court of the Family Court recognised family violence as a relevant issue in assessing the adjustment that should be made in a property settlement case. In that case there was a 4-year marriage and no children and a history of domestic violence assaults.

The Full Court held:

Our view is that where there is a course of violent conduct by one party toward the other during the marriage which is demonstrated to have had a significant adverse impact on that parties contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties respective contributions.

*Devon & Devon [2014] FCCA 1566*

In *Devon*, the parties were married for 31 years and had 4 adult children, including one with an intellectual disability. There were no significant assets at the start of the marriage and it was accepted that the husband ran the family business and the wife was the homemaker and main carer of the children.

The Court accepted that the wife had experienced family violence over their entire relationship. Her Kennon argument reflected a loading in terms of contribution but also in terms of her health and future employability. She successfully proved that the domestic violence made her homemaker and parenting role even more difficult and evidence was before the Court of the wife's major depression and high levels of anxiety and stress making her unable to obtain employment.

Judge Burchardt held:

In view of the very lengthy relationship between the parties, and the relatively workaday nature of their contributions while they lived together, it would ordinarily have been appropriate to assess the parties' contributions as equal. I would be prepared to give the wife, as she seeks, a five per cent loading (a modest one, as it should be) for the *Kennon* factors.

There was an additional loading in the wife's favour of a further 15 per cent based on future needs. Ultimately the wife received 70% of the asset pool and retained her superannuation (as did the husband), a percentage which included her claim for spousal maintenance.

*Scott & Scott [2015] FCCA 2394*

In *Scott* the parties had 3 children aged 16,17 and 20 years. The wife argued family violence by the husband and for an adjustment of the property in her favour between 65% and 80% which included a Kennon adjustment.

The wife gave evidence of family violence. She was isolated from her family and friends and the husband did not allow her to return home to spend time with her dying mother. The husband had physically assaulted her and there was verbal and physical abuse throughout the marriage witnessed by the children. The husband unsuccessfully argued that the wife's evidence of family violence was not corroborated.

Judge Harland stated that corroboration of family violence is not required. At paragraphs 46 and 47:

It is also necessary to point out corroboration is not necessary in order for the court to make findings about family violence. Family violence tends to take place behind closed doors. Often there are not witnesses apart from those directly involved.

In this regard I refer to the Family Violence Best Practice Principles, Third Edition, October 2012, page 6:

Importantly, the FLA does not require independent verification of allegations of family violence (such as police or medical reports) for a court to be satisfied that it has occurred. As the Full Court of the Family Court said in *Amador & Amador [2009] FamCAFC 196; (2009) 43 Fam LR 268*:

Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission.

The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.

Although Judge Harland was willing to apply the Kennon principle, she had difficulty doing so, because the wife did not prove how the domestic violence made her contributions more arduous. An adjustment of 15% was made in favour of the wife for other reasons but not an adjustment based on the Kennon claim. From paragraphs 94 – 97 Judge Harland gave the following reasons:

94. The wife seeks an adjustment in her favour taking into account the family violence and relies on the Full Court decision of *Kennon and Kennon (1997) FLC 92 – 757*. The Full Court said:

our view is that where there is a course of violent conduct by one party toward the other during the marriage which is demonstrated to

have had a significant adverse impact on that parties contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties respective contributions within s79.

95. I am satisfied that during the relationship the husband was violent towards the wife. However as the extract from *Kennon* makes clear more than this must be established. The wife did not lead evidence as to how the violence made her contributions significantly more arduous. The Court is not entitled to assume that the husband's violence has made her contributions more arduous. The comments of the Full Court in the unreported decision of *S & S* [2003] FamCA 905 are also applicable here:

There is no doubt that domestic violence may be a relevant factor in assessing contribution. The difficulty as presented in this case and many others is that inadequate evidence makes a proper assessment by the trial Judge either very difficult or impossible.

An insufficiency of evidence in the present case leaves the Court with a limited ability to deal with allegations in the context of section 79 proceedings. As *Kennon* has established, it is necessary to provide evidence to establish:

- The incidence of domestic violence;
- The effect of domestic violence; and
- Evidence to enable the court to quantify the effect of that violence upon the parties' capacity to "contribute" as defined by section 79(4).

We do not agree that the evidence in this case could properly have led to an adjustment pursuant to section 79. There was no suggestion by counsel of the wife that his Honour did not correctly summarise the evidence in relation to this topic. The particular deficiency apart from those referred to by the trial Judge is the complete absence of evidence as to how the husband's conduct affected her ability to contribute.

96. In this case the wife's evidence did not address the issue of how her contributions were made more arduous because of the husband's violence. She gave very limited evidence about how the violence has impacted on her. I am unable to be satisfied that she lost her job and is unable to work as a child care worker because of it.

## Spousal maintenance

Section 75(2) refers to matters to be taken into consideration in relation to spousal maintenance. Section 72(1) states that a party to property proceedings may be liable to financially support the other party if they are reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:

1. by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
2. by reason of age or physical or mental incapacity for appropriate gainful employment; or
3. for any other adequate reason.

Section 90SF(4) requires the court to take account of the same circumstances when considering making a maintenance order in favour of a member of a de facto couple.

## Options if parties can agree about property division

If parties can agree about how to divide the property of their relationship, they can have:

- ▶ an informal agreement;
- ▶ a binding financial agreement (BFA); or
- ▶ consent orders made.

## Informal agreement

An informal agreement is appropriate when there is only limited property of the relationship, for example, only household items. A victim of domestic violence may still need a property recovery order if the perpetrator refuses to allow them to pick up their property. See **Chapter 3: AVOs** for more information about property recovery orders.

Victims of domestic violence who are renting with the perpetrator, particularly those who are co-tenants on a residential tenancy agreement, will also need advice about how to end their or the perpetrator's liability under the lease. See **Chapter 11: DV and Housing** for more information.

## Binding financial agreements

Under sections 90D and 90UD of the FLA, a BFA should sets out how all or any of the property or financial resources that either or both of the parties had or acquired during the relationship is to

be dealt with, and/or outlines the maintenance of either of the parties.

### Consent orders

If parties want legally enforceable orders they can ask the Family Court under rule 10.15 of the FLR to make orders that reflect the agreement they have reached, which are called consent orders. Parties seeking consent orders need to complete and file the following documents, which are available on the Family Court of Australia website:

- ▶ an Application for Consent Orders; and
- ▶ the orders they are seeking (refer to Consent Orders Supplement Guide); and
- ▶ complete the Superannuation Information Kit (if seeking superannuation splitting orders).

The Application for Consent Orders is relatively straightforward, however parties may benefit from a solicitor helping them draft the orders they want. Before making orders the court must be satisfied that the orders sought are just and equitable in the circumstances.

There are advantages to applying for consent orders rather than entering into a binding financial agreement:

- ▶ while it is recommended that parties applying for consent orders obtain independent legal advice before filing, it is not compulsory, whereas both parties need to employ a solicitor to draft and advise them on a BFA;
- ▶ there is also no judicial oversight of BFA, so they do not have to be just and equitable;
- ▶ consent orders can also deal with parenting arrangements, whereas BFAs can only deal with property division.

### When parties can't agree about property division

If parties cannot reach an agreement, they can apply to the Federal Circuit Court for financial orders by completing and filing:

- ▶ an Initiating Application;
- ▶ an affidavit setting out the facts relied on (FCCR, rule 4.05);
- ▶ a financial statement; and
- ▶ a Superannuation Information Kit (if they are seeking superannuation splitting orders).

Parties are required to make a full and frank disclosure of all their assets and liabilities. The court can draw conclusions that a party has not made a full disclosure. The court ultimately decides whether it is just and equitable to alter the financial positions of each of the parties.

Parties must seek financial orders and/or maintenance orders within 12 months of a divorce becoming effective or seek leave of the court (s 44(3A)). De facto couples must seek financial orders and/or maintenance orders or within two years of separating (s 44(5)).

### Divorce

The Federal Circuit Court will make a divorce order if:

- a) a marriage has broken down irretrievably (s 48(1) FLA); and
- b) the parties have separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order (s 48(2) FLA); and
- c) if there are children of the marriage, proper arrangements in all the circumstances have been made for the care, welfare and development of those children (s 55A FLA).

Both spouses do not need to consent (agree) to divorce. Under section 49(1), the court can make a divorce order on the basis that one spouse has told the other spouse they want to separate.

## Chapter 6: Domestic violence and care and protection

Victims of domestic violence who have children are at risk of statutory child protection intervention on the grounds that perpetrators may also abuse their children or children may be injured by exposure to domestic violence perpetrated between members of their family. Children are also at risk of harm when the impact of domestic violence prevents a parent or caregiver from appropriately responding to their needs.

This chapter aims to help practitioners advise their clients about how to avoid statutory child protection intervention and respond effectively to intervention when it occurs.

### WATCH THIS SPACE

There are potential changes coming to the child protection system so please ensure that you are up to date with any changes that may have been introduced following the writing of this chapter.

### Legislation

The main statutes are:

- ▶ Children and Young Persons (Care and Protection) Act 1998 (NSW) (CYPA);
- ▶ Children and Young Persons (Care and Protection) Regulation 2012 (NSW) (CYPR); and
- ▶ Family Law Act 1975 (Cth) (FLA).

### Objects and principles in the CYPA

The objects in section 8 of the CYPA include:

1. it is best for children and young people to have long-term, safe, nurturing, stable and secure environments, which are to be provided in accordance with the permanent placement principles;
2. those working with children and young people are to provide an environment for them that is free of violence and exploita-

tion and provide services that foster their health, developmental needs, spirituality, self-respect and dignity; and

3. appropriate assistance is to be given to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

The principles in section 9 of the CYPA include:

1. the safety, welfare and wellbeing of children and young people are paramount;
2. children and young people are to be given the opportunity to freely express their views to the best of their capacity and appropriate weight is to be given to those views;
3. the culture, disability, language, religion and sexuality of the child or young person and their carers must be taken into account;
4. the least intrusive intervention is to be preferred;
5. identity, language, cultural and religious ties should be preserved where possible;
6. decisions about children or young people in out of home care should be made as quickly as possible;
7. relationships with people significant to the child or young person are to be maintained where it is in their best interests to do so; and
8. the permanent placement principles apply to all children and young people in out of home care.

### The principle of participation

There is a separate principle in section 10 of the CYPA to ensure that children and young people are supported to participate to the best of their age and developmental capacity in making decisions that have a significant impact on their life, such as Children's Court applications, the development and review of care plans and contact with family or other relevant people.

### The permanent placement principles

Section 10A of the CYPA says that a permanent placement is a long term placement of children or

young people who have been removed from the care of their parents. There is a hierarchy of preferred placements, which depend on what is practicable and in the best interests of the child or young person being:

- ▶ restoration to the care of parents to preserve the family relationship;
- ▶ guardianship to a relative, kin or other suitable person;
- ▶ adoption, except for Aboriginal and Torres Strait Islander children, where adoption is the last preference;
- ▶ parental responsibility to the Minister.

### Aboriginal and Torres Strait Islander children and young person placement principles

Section 13 of the CYPA sets out the hierarchy for the placement of Aboriginal and Torres Strait Islander children and young people:

- ▶ their extended family or kinship group, as recognised by their community;
- ▶ a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs,
- ▶ a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of reside;
- ▶ a suitable person approved by the Secretary after consultation with:
  - members of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs; and
  - such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

### Definition of domestic violence

There is no definition of domestic violence or family violence in the CYPA. Domestic violence is identified in section 23 as a circumstance that may give rise to a finding that a child is at risk of significant harm.

The NSW Mandatory Reporter Guide (MRG) describes domestic violence in the context of being a carer and having concern about a child as 'observations of extreme power/control dynamics (eg

extreme isolation) or threats of harm to adults in household'. The MRG also provides detailed definitions for abuse and neglect to assist in determining whether there is a risk of significant harm. More information about the MRG is below.

### Risk of significant harm

Risk of significant harm (ROSH) is the statutory threshold as set out in section 23 of the CYPA:

*(1) ... a child or young person is at risk of significant harm if current concerns exist for the safety, welfare or well-being of the child or young person because of the presence, to a significant extent, of any one or more of the following circumstances:*

*(a) the child's or young person's basic physical or psychological needs are not being met or are at risk of not being met,*

*(b) the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical care,*

*(b1) in the case of a child or young person who is required to attend school in accordance with the Education Act 1990—the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive an education in accordance with that Act,*

*(c) the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated,*

*(d) the child or young person is living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm,*

*(e) a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm,*

*(f) the child was the subject of a pre-natal report under section 25 and the birth mother of the child did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.*

*Note. Physical or sexual abuse may include an assault and can exist despite the fact that consent has been given.*

*(2) Any such circumstances may relate to a single act or omission or to a series of acts or omissions.*

A child or young person can also be determined at risk of significant harm if an unauthorised person provides their out of home care (s 154(2)(a)), or they have exceeded the maximum length of time in

voluntary out of home care and this is determined to be a significant contravention (s 156(3)).

## Taking instructions

While your primary focus is likely to be assessing the level of risk to a child or young person, there are other factors that are important to take into account in order to reduce the need for statutory intervention and best support vulnerable children and young people and their families.

### Aboriginal and Torres Strait Islander children and young people

Aboriginal and Torres Strait Islander children are overrepresented in child protection services. Various legislative, policy and practical measures are now in place to address the disproportionate representation of Aboriginal and Torres Strait Islander children. For example, Part 2 of CYPA sets out Aboriginal and Torres Strait Islander Principles.

It is very important that Aboriginal and Torres Strait Islander children are identified as early as possible to ensure that they have the opportunity to access culturally appropriate pathways. Always check if any of the children are identified as Aboriginal and Torres Strait Islander by any parent or caregiver. The meaning of 'Aboriginal' and 'Torres Strait Islander' is outlined in section 5 CYPA.

### Previous contact with Family and Community Services (FACS) – 'known to DoCS'

It is very important to ask your client if they think they or their children are 'known to DoCS', as prior contact with FACS is likely to increase the chance of statutory intervention if risk factors are present.

### Carer options if parents are not appropriate caregivers

In our experience when FACS remove children they do not always ask parents who they would like to care for their children. If there is a risk that children may be removed and placed with alternative carers, immediately obtain detailed instructions from your client about their preferred caregiver. This is particularly important for Aboriginal and Torres Strait Islander children. This information should be provided to FACS as soon as possible and ask FACS to assess the nominated people before any decisions are made about out of home care placements.

## Family law pathway

Where FACS has not yet intervened, it may be prudent to advise your client to commence family law proceedings to seek appropriate orders. This demonstrates insight into the potential risk factors for children living in a violent household and a willingness to take responsibility for their care and welfare. It may also prevent FACS from seeking orders in the Children's Court, which is very important as parents typically have less control over outcomes once there is state intervention.

## Reporting children at risk

### Mandatory reporters

Mandatory reporting requirements are set out in section 27 CYPA and apply to people working in or managing organisations that provide health care, welfare, education, children's services, residential services or law enforcement to children. Such individuals must report any reasonable grounds for suspecting a child is at risk of significant harm (ROSH) to FACS as soon as practicable.

There is no definition of 'significant', however the Mandatory Reporter Guide (MRG) provides structured decision-making tools to determine whether a matter meets the ROSH threshold and needs to be reported to FACS. An online version of the MRG is available at [reporter.childstory.nsw.gov.au/s](http://reporter.childstory.nsw.gov.au/s).

Section 29 CYPA provides protection to people notifying child protection concerns. Their identity can only be disclosed in very limited circumstances, primarily when law enforcement agencies are investigating a serious offence against a child or young person. Reports made in good faith do not constitute a breach of professional ethics or expose the reporter to liability for defamation.

Legal professionals are not mandatory reporters, but in very rare circumstances may be required to assess whether they need to make a voluntary ROSH report to FACS. The Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015 provide exceptions to the duty of confidentiality, which may permit disclosure of information about a risk of significant harm to a child, being:

*9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;*

9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person.

#### Practitioner tip

It is strongly recommended that any circumstances which may give rise to a breach of confidentiality be first discussed with the NSW Law Society's Ethics Solicitor if time permits.

### NSW Interagency Guidelines

The *Child Wellbeing and Child Protection – NSW Interagency Guidelines* (the Guidelines) provide information and guidance to agencies working in child wellbeing and child protection services. The Guidelines encourage collaborative practice characterised by streamlined service provision, effective referrals and sensitive exchange of information. They establish that reports to the Child Protection Helpline must meet the ROSH threshold.

### Child Wellbeing Units

In 2010 Child Wellbeing Units (CWUs) were established in the government agencies that make the majority of child protection reports, which are the police and the Departments of Education, Health and FACS. The primary function of CWUs is to assess the level of risk for children and young people and to determine if the matter meets the ROSH threshold, which requires a report to the Child Protection Helpline. CWUs also assist with case management options and referrals.

Mandatory reporters without a CWU in their agency use the MRG and for non-ROSH matters may follow their agency policies or use local contacts or the Family Referral Service.

### Responding to reports

The following agencies are responsible for identifying and responding to reports that children are at risk of harm:

- a) Family and Community Services (also known as FACS or DoCS or 'the welfare') and funded non-government organisations (NGOs);
- b) police;
- c) Joint Investigative Response Teams (JIRT).

### FACS

The key role of FACS is to keep children and young people safe from abuse and neglect and support vulnerable families. FACS is responsible for investigat-

ing notifications of children at risk of harm and neglect, primarily matters which have met the ROSH threshold.

FACS also funds a range of NGOs to provide prevention, early intervention, support and out of home care (OOHC) services to children, families and carers. NGOs must operate in accordance with their funding contract and any relevant legislation, policies and guidelines. There may also be additional obligations arising from accreditation requirements, such as those required by the Office of the Children's Guardian for statutory OOHC and adoption service providers.

FACS also has responsibility for the employment of children, care proceedings in the Children's Court, and matters where the state has parental responsibility for children and young people.

### Police

Police are mandatory reporters. The *Code of Practice for the NSW Police Force Response to Domestic and Family Violence* (NSW Police Force, 25 Nov 2013) sets out the child protection requirements when police respond to domestic and family violence and states that police can use professional judgment to determine when a child meets the ROSH threshold. Police can decide a child is at ROSH even if the child was not present at the time of the domestic violence incident.

### Joint Investigative Response Teams (JIRT)

JIRT is made up of FACS, police and NSW Health professionals who undertake joint investigation of child protection matters when there is a possibility that the abuse constitutes a criminal offence (JIRT Memorandum of Understanding August 2006). JIRT aims to conduct investigations in a child friendly and minimally intrusive manner.

There is also a *JIRT Aboriginal Consultation Protocol: Guidelines for utilising Aboriginal staff for JIRT Consultation*, which provides step-by-step guidelines about consulting with Aboriginal staff within the three JIRT agencies throughout the JIRT process and emphasises the importance of respectful inquiries to identify Aboriginal clients. Further information about the types of matters that may require a JIRT response can be found in the *NSW Joint Investigation Response Team (JIRT) Criteria*.

## Information sharing

### Exchange of information and co-ordination of services

Chapter 16A CYPA allows government agencies and NGOs who are prescribed bodies to exchange information. Prescribed bodies include:

- ▶ police;
- ▶ a public service agency or a public authority;
- ▶ schools and TAFEs;
- ▶ public and private health organisations;
- ▶ the Family Court of Australia and the Federal Circuit Court; and
- ▶ the Department of Immigration and Border Protection.

There is also a very broad prescribed category under regulation 8(j) of the CYPR, for 'any other organisation the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly to children' to exchange information.

Information can also be exchanged in relation to an unborn child who is the subject of a pre-natal report under section 25 CYPA and in relation to the family of such an unborn child.

Chapter 16A of the CYPA also requires prescribed bodies to take reasonable steps to coordinate decision making and the delivery of services regarding children and young people. FACS encourages prescribed bodies to obtain the consent of the client for the release of information, but information may be provided without consent. FACS provide a template letter for providing information under Chapter 16A and include a checklist for providing information or responding to a Chapter 16A information request in the NSW interagency Guidelines.

## Courts

The following courts deals with allegations that children are at risk of harm:

- ▶ NSW Children's Court;
- ▶ NSW Supreme Court;
- ▶ Federal Circuit Court and Family Court of Australia.

### NSW Children's Court

The Children's Court deals with a range of matters including criminal cases, care and protection of children, AVOs, and compulsory schooling orders for children and young people under 18 years of age.

The Children's Court has specialist children's magistrates and three designated courthouses located in Parramatta, Broadmeadow and Surry Hills. The Children's Court also sits on a permanent basis in Local Courts at Campbelltown, Woy Woy, Wyong and Port Kembla. In other locations specialist children's magistrates on circuit and Local Court magistrates conduct regular sittings of the Children's Court.

Courts sitting as a Children's Court are closed to the general public. Judges and magistrates wear black robes, but no wigs and are called 'your honour'. Most courts also require you to have security checking on entry and have safe rooms available. Remote witness facilities are available in some courts to allow vulnerable witnesses to give evidence in a room that is separate from the courtroom.

### NSW Supreme Court

The Supreme Court can intervene in Children's Court matters in exceptional circumstances under its protective jurisdiction, also known as the *parens patriae* or inherent or wardship jurisdiction of the court. Section 247 CYPA provides that '[nothing] in this Act limits the jurisdiction of the Supreme Court'. Also see *CAC v Secretary, Department of Family and FACS* [2014] NSWSC 1855; *Re Frieda and Geoffrey* [2009] NSWSC 133; 40 Fam LR 608; *Re Victoria* [2002] NSWSC 647; 29 Fam LR 157 at [37]-[40]; *Re Baby S* [2014] NSWSC 871 at [16] and [19]-[23]).

### Federal Circuit Court and Family Court of Australia

Under the *Family Law Act 1975* (FLA) courts have jurisdiction to make orders for the welfare of children under section 67ZC. However, according to section 69ZK, they cannot make orders in relation to children under the care of a person under a child welfare law unless they commence after the child ceases to be in that care arrangement or where the child welfare agency provides written consent.

FACS has entered into memorandums of understanding and protocols with both the Family Court of Australia and the Federal Circuit Court (com-

menced when it was the Federal Magistrates Court) (*Memorandum of Understanding between the Family Court of Australia and the NSW Department of FACS, Memorandum of Understanding between Department of FACS and the Federal Magistrates Court of Australia, Protocol between DoCS and the Family Court, Protocol between Department of FACS and Federal Magistrates Court of Australia*). These documents set out a range of procedures including for case management, intervention, disclosure and information sharing, location orders and recovery orders.

FACS can elect to intervene in any family law proceedings if they have concerns for the safety and wellbeing of a child.

## Steps after a report is made

If FACS forms the opinion that a child or a young person is in need of care and protection, they are required under section 34 of CYPA to take whatever action is necessary to safeguard or promote the safety, welfare and wellbeing of the child or young person, including:

- ▶ refer the child and their family to a support service;
- ▶ develop a care plan;
- ▶ develop a parent responsibility contract (PRC);
- ▶ exercise their emergency protection powers;
- ▶ seek orders from the Children's Court.

FACS is required under section 37 to consider alternative dispute resolution (ADR) as a way to resolve problems at an early stage.

## Referral to support services

If it is deemed that a child does not meet the ROSH threshold, their family may be referred to a support service such as a Family Referral Service, which will refer the family to appropriate services such as Brighter Futures which provide a range of tailored services including case management, casework focused on parent vulnerabilities, structured home visiting, quality children's services, parenting programs and brokerage funds.

## Care plans

A care plan is a plan developed through agreement with the parents of the child or young person including an agreement reached in the course of alternative dispute resolution (ADR) (s 3 CYPA). It can be registered with the Children's Court and used as

evidence of an attempt to resolve the matter without bringing a care application (s 38(1)).

A care plan can also be a set of proposals for consideration by the Children's Court (S.3 CYPA) and forms the basis of orders made.

See below for more information about 'care applications'.

## Parental responsibility contracts

A PRC is an agreement between FACS and one or more primary caregivers for a child or young person that contains provisions aimed at improving the parenting skills of the primary caregivers and encouraging them to accept greater responsibility for the child or young person (s 38A(1)(a)).

A PRC, or a refusal to enter into a PRC, may be used as evidence of an attempt to resolve a matter concerning a child or young person's need for care and protection (s 38D(1) and (2)).

Section 38A(2) provides that a PRC must:

- (a) be in writing, and
- (b) be signed by the Secretary and each primary care-giver or each expectant parent who is to be a party to the contract, and
- (c) be in the form (if any) prescribed by the regulations, and
- (d) be registered with the Children's Court, and
- (e) specify the period (not exceeding 12 months) during which the contract will (unless varied under section 38B) be in force, commencing on the date on which the agreement is registered with the Children's Court, and
- (f) specify the circumstances in which a breach of a term of the contract by a party to the contract will authorise the Secretary to file a contract breach notice with the Children's Court.

Subsection 38A(3) mandates that no more than one PRC may be entered into within any period of 18 months between FACS and any of the same primary caregivers for a child or young person.

Before entering into a PRC, section 38A(4) requires FACS to give the other proposed parties to the contract a reasonable opportunity to obtain independent advice concerning the provisions of the contract.

Section 38A(5) provides that a PRC may make provision for or with respect to any or all of the following:

- (a) attendance of a party to the contract for treatment for alcohol, drug or other substance abuse during the term of the contract,*
- (b) attendance of a party to the contract for counselling,*
- (c) requirements relating to alcohol or drug testing that a party to the contract must undergo during the term of the contract,*
- (d) permitting information about the contract (including compliance with the contract) to be shared between persons and agencies involved in the implementation of the provisions of the contract,*
- (e) participation in courses aimed at improving the parenting skills of any party to the contract (including, for example, courses relating to behavioural management and financial management),*
- (f) monitoring of compliance with the terms of the contract.*

A PRC cannot make provision for or with respect to the allocation of parental responsibility for a child or young person or the placement of a child or young person in OOHC (s 38A(6)).

A PRC takes effect only if (and when) it is registered with the Children's Court under section 38A(8). If a party to a PRC breaches the PRC, FACS may under section 38E, file a contract breach notice in the Children's Court and seek care orders. See '**Care orders**' below for more information.

### Emergency protection powers

If FACS or a police officer is satisfied, on reasonable grounds, that a child or young person is at immediate risk of serious harm, and that the making of an AVO would not be sufficient to protect the child or young person from that risk, they can remove the child or young person from the place of risk under section 43(1).

According to section 45, if a child or young person is removed without a warrant FACS must make a care application to the Children's Court within three working days after the removal and must satisfy the court why the removal of the child or young person without a warrant was considered to be necessary.

Under section 46(1), the Children's Court may make an order for the emergency care and protection of a child or young person if it is satisfied that the child or young person is at risk of serious harm. The order, while in force, places the child or young person in the care of the Secretary or the person

specified in the order under section 46(2). According to 46(3) and (4), the order has effect for a maximum period of 14 days, however it can be extended once for a further maximum period of 14 days.

### Children's court orders

FACS and other relevant parties can apply to the Children's Court for the following types of orders:

- ▶ care orders;
- ▶ guardianship orders;
- ▶ parent capacity orders; and
- ▶ contact orders.

Proceedings before the Children's Court are not to be conducted in an adversarial manner and should proceed with as little formality and legal technicality as possible (s 93(1) and (2)). The Children's Court is not bound by the rules of evidence and the standard of proof is proof on the balance of probabilities (s 93(3) and 93(4)).

### Care orders

Section 71 of the CYPA sets out the grounds on which an application for care orders can be made:

*(1) The Children's Court may make a care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection for any reason including, without limitation, any of the following:*

- (a) there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason,*
- (b) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,*
- (c) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated,*
- (d) subject to subsection (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers,*
- (e) the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living,*
- (f) in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service,*

*(g) the child or young person is subject to a care and protection order of another State or Territory that is not being complied with,*

*(h) section 171 (1) applies in respect of the child or young person.*

*(1A) If the Children's Court makes a care order in relation to a reason not listed in subsection (1), the Court may only do so if the Secretary pleads the reason in the care application.*

*(2) The Children's Court cannot conclude that the basic needs of a child or young person are likely not to be met only because of:*

*(a) a parent's or primary care-giver's disability, or*

*(b) poverty.*

When FACS is seeking care orders sections 78(1) and 78(2) require that it include a care plan, which addresses the following:

*(a) the allocation of parental responsibility between the Minister and the parents of the child or young person for the duration of any period for which the child or young person is removed from the care of his or her parents,*

*(b) the kind of placement proposed to be sought for the child or young person, including:*

*(i) how it relates in general terms to permanency planning for the child or young person, and*

*(ii) any interim arrangements that are proposed for the child or young person pending permanent placement and the timetable proposed for achieving a permanent placement,*

*(c) the arrangements for contact between the child or young person and his or her parents, relatives, friends and other persons connected with the child or young person,*

*(d) the agency designated to supervise the placement in out-of-home care,*

*(e) the services that need to be provided to the child or young person.*

Section 63(1) provides that FACS must:

- ▶ advise the court about the support and assistance provided for the safety, welfare and well-being of the child or young person; and
- ▶ the alternatives to a care order that were considered before the application was made; and the reasons why those alternatives were rejected.

A court cannot dismiss a care application on the basis that appropriate alternative action that could

have been taken in relation to the young person was not considered or taken (s 63(2)).

A care order may be made only if the Children's Court is satisfied that the child or young person is in need of care and protection. If the court is not satisfied, it may make an order dismissing the application (s 72).

### Guardianship orders

A guardianship order is the allocation by the Children's Court of all aspects of parental responsibility for a child or young person who is in statutory OOHHC or supported OOHHC or who it finds is in need of care and protection until the child or young person reaches 18 years of age to a suitable person (s 79(2)).

The following people can seek a guardianship order:

- ▶ FACS;
- ▶ an agency responsible for supervising the placement of the child or young person (with the written consent of FACS); or
- ▶ a person who is seeking to be allocated all aspects of parental responsibility for the child or young person (s 79B(1)).

Each parent must be given a reasonable opportunity to obtain independent legal advice about the application and is entitled to be heard at the hearing of the matter (s 79B(4)).

The Children's Court must not make a guardianship order unless, according to section 79(3), it is satisfied that:

*(a) there is no realistic possibility of restoration of the child or young person to his or her parents, and*

*(b) that the prospective guardian will provide a safe, nurturing, stable and secure environment for the child or young person and will continue to do so in the future, and*

*(c) if the child or young person is an Aboriginal or Torres Strait Islander child or young person – permanent placement of the child or young person under the guardianship order is in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles that apply to placement of such a child or young person in statutory out-of-home care under section 13, and*

*(d) if the child or young person is 12 or more years of age and capable of giving consent – the consent of the child or young person is given in the form and manner prescribed by the regulations.*

## Parent capacity orders

Section 91A states that a parent capacity order (PCO) can require a parent or primary caregiver of a child or young person to attend or participate in a program, service or course or engage in therapy or treatment aimed at building or enhancing his or her parenting skills.

Section 91E(1) empowers the Children's Court to make a PCO in relation to a parent or primary caregiver of a child or young person if it is satisfied that:

*(a) there is an identified deficiency in the parenting capacity of the parent or primary care-giver that has the potential to place the child or young person at risk of significant harm and it is reasonable and practicable to require the parent or primary care-giver to comply with the order, and*

*(b) the parent or primary care-giver is unlikely to attend or participate in the program, service or course or engage in the therapy or treatment required by the order unless the order is made.*

## Contact orders

Under section 86(1), the Children's Court can make any of the following orders about contact:

*(a) stipulating minimum requirements concerning the frequency and duration of contact between a child or young person and his or her parents, relatives or other persons of significance to the child or young person,*

*(b) requiring contact with a specified person to be supervised,*

*(c) denying contact with a specified person if contact with that person is not in the best interests of the child or young person.*

## Varying Children's Court orders

Your client may be able to apply to the Children's Court to vary orders that were made in relation to their children.

If they want to vary (or seek) contact orders, they need to seek leave of the court under sections 86(1A) and 86(1B) by satisfying the court there has been a significant change in any relevant circumstances since a final order was made.

Before granting leave, section 86(1D) requires the Children's Court to also consider whether they have attempted to reach an agreement about contact arrangements by participating in ADR, and may order them to attend ADR. Legal Aid NSW facilitates

mediations in relation to contact disputes in care and protection matters.

Your client can seek leave of the Children's Court to vary or revoke care orders if they can satisfy the court under section 90(1) and (2) that there has been a significant change in any relevant circumstances since the care order was made or last varied.

# Chapter 7: Domestic violence and immigration law

Perpetrators of domestic violence often threaten to send their partners who are on temporary visas home to their country of origin. This chapter will help you to advise your clients who are newly arrived migrants experiencing domestic violence.

## Family violence provisions

Schedule 2 of the *Migration Regulations 1994* (Cth) (Migration Regulations) provides that the following temporary visa holders can apply for permanent residency if they have experienced family violence, before they would have otherwise been entitled to apply for it, being two years after being with their sponsor:

- a) partner subclasses 309, 100, 820, 801;
- b) prospective marriage (fiancé) subclass 300 (in limited circumstances);
- c) dependent child subclass 445; and
- d) distinguished talent subclass 858.

Regulation 1.12 of the Migration Regulations defines family violence as:

*conduct, whether actual or threatened, towards:*

- (a) *the alleged victim; or*
- (b) *a member of the family unit of the alleged victim; or*
- (c) *a member of the family unit of the alleged perpetrator; or*
- (d) *the property of the alleged victim; or*
- (e) *the property of a member of the family unit of the alleged victim; or*
- (f) *the property of a member of the family unit of the alleged perpetrator;*

*that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.*

The sponsoring partner or the primary applicant (distinguished talent visas) must have committed family violence while the relationship existed

according to regulation 1.23. If the victim holds a subclass visa 300 (a fiancé visa), they must have been married to the sponsor (Migration Regulations, Schedule 2, clause 820.211(8)(b)). The relationship must have been 'genuine and continuing' and the victim must have formed the view that the family violence occurred.

## Procedure where there is family violence

If your client has experienced family violence and their relationship with the perpetrator has ended they should advise the Department of Immigration and Border Protection (DIBP) of their change of address by submitting Form 929, and change of circumstances, that is, their relationship breakdown due to family violence by submitting form 1022.

If your client fails to advise DIBP of their change in circumstances, DIBP could refuse their permanent visa application without seeking further information.

### Practitioner tip

Your client should always get legal advice before advising the DIBP about their change in circumstances.

## Proving family violence

Your client can prove family violence by providing:

- ▶ judicial evidence (DIBP must accept that family violence has occurred);
- ▶ non-judicial evidence (DIBP may accept that that family violence has occurred);
- ▶ independent expert evidence (DIBP must accept their findings).

### Judicial evidence

Judicial evidence is:

- ▶ an injunction made under sections 114(1)(a), (b) or (c) of the *Family Law Act 1975* (Cth) (Migration Regulations 1.23(2)); or
- ▶ an apprehended domestic violence order made after the court had given the alleged perpetrator an opportunity to be heard, or to make submissions to the court, in relation to the matter (Migration Regulations 1.23(4)); or
- ▶ the perpetrator has been convicted or found guilty of a violence offence against the victim (Migration Regulations 1.23(6)).

## Non-judicial evidence

Non-judicial evidence is defined as:

- a) a joint undertaking; or
  - b) a statutory declaration by the visa applicant; and
- at least two items from the following list:
- a medical report, hospital report, discharge summary or statutory declaration by a registered medical practitioner;
  - a report or record of assault, a witness statement or a statutory declaration made by a federal or state police officer, or a witness statement made by someone other than the alleged victim during the course of a police investigation;
  - a report or statutory declaration made by an officer of a child welfare or child protection authority;
  - a letter or assessment report made by a women's refuge or family/domestic violence crisis centre on the organisation's letterhead;
  - a statutory declaration made by a social worker who has provided counselling or assistance to the alleged victim while performing the duties of a social worker;
  - a statutory declaration made by a registered psychologist who has treated the alleged victim while performing the duties of a psychologist;
  - a statutory declaration made by a family consultant appointed under the *Family Law Act 1975*; and
  - a statutory declaration or a letter on the school's letterhead made by a school counsellor or school principal acting in their professional capacity.

The list of evidence is available online.<sup>23</sup>

Your client needs to use a Form 1410 for their statutory declaration. Their statutory declaration must:

- ▶ set out the allegation of family violence, including the effect on them; and
- ▶ name the alleged perpetrator;
- ▶ if your client is not the alleged victim, it must also:

- name the person to whom the conduct was directed;
- identify the relationship between the alleged victim and the visa applicant; and
- set out the evidence on which the allegation of family violence is based.

Professionals can use a standard Commonwealth statutory declaration and must set out:

- ▶ that it is their opinion that the alleged victim has experienced family violence;
- ▶ the basis for their opinion;
- ▶ the name of the victim;
- ▶ the name of the perpetrator;
- ▶ if the conduct of the alleged perpetrator was not specifically directed towards the alleged victim:
  - the name of the person to whom the conduct was directed; and
  - the relationship between the alleged victim and that person.

Your client must submit statutory declarations from professionals from at least two different categories. With regard to evidence from a women's refuge, there is no requirement that the manager sign the letter or the assessment report.

## Independent expert advice

If DIBC is not satisfied, on the basis of non-judicial evidence, that your client has suffered family violence, the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence (regulation 1.23(10)(c)(i), Migration Regulations).

Your client will be notified if their application has been referred to an independent expert. All information provided to DIBC is forwarded to the independent expert. The independent expert can contact your client for any further information. An assessment is made by independent expert only in relation to the question of whether family violence has occurred. Regulation 1.23(10)(c)(ii) states that the independent expert finding is final and binding on DIBP.

## Appeals

If DIBC refuses to grant your client's application, your client can appeal to the Administrative Appeals Tribunal (AAT). The application fees apply and fee reductions can be given if the AAT is satis-

23 [www.comlaw.gov.au/Details/F2012L02237/Download](http://www.comlaw.gov.au/Details/F2012L02237/Download)

fied that paying the full fee has caused, or is likely to cause, severe financial hardship. There is a very strict time limit to apply, depending on where your client is located when the decision is made and how the decision was conveyed.

### Other options

If your client is not eligible for a permanent visa under the family violence provisions, there may be other permanent visa options to consider.

They may be eligible for a protection visa if they meet the 'refugee' criteria, that is, they have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, and are unable or unwilling to obtain protection from home country.

They may be eligible for a complementary protection visa if they have substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to a receiving country, there is a real risk they will suffer significant harm.

Alternatively, they may be eligible for a witness protection (trafficking) visa, a skilled visa or a student visa. Contact the Immigration Advice and Rights Centre for further information about these options.

## Chapter 8: Domestic violence and sexual assault

Victims of domestic violence may have also experienced sexual assault. This chapter helps you to assist and advise your clients who have experienced sexual assault.

### Types of offences

The *Crimes Act 1900* (NSW) (Crimes Act) lists a range of sexual offences, including but not limited to:

- ▶ sexual assault;
- ▶ aggravated sexual assault;
- ▶ sexual assault by forced self-manipulation.

Police may charge a person with a sexual assault offence and apply for an AVO for the protection of the victim.

### Sexual assault

Section 61I of the Crimes Act states that sexual assault occurs when a person has sexual intercourse with another person without that person's consent, knowing that the other person is not consenting. The maximum penalty for this offence is 14 years' imprisonment.

Section 61H of the Crimes Act defines sexual intercourse as:

- ▶ penetration of a person's genitalia (including surgically constructed genitalia) or anus by any part of the body of another person, or by an object manipulated by another person;
- ▶ placing the penis into the mouth of another person; or
- ▶ cunnilingus.

Consent means the 'person freely and voluntarily agrees to the sexual intercourse', according to section 61HA(2). A sexual offence is committed if:

1. a person knows that the other person is not consenting;
2. is reckless as to whether the other person is consenting; or

3. has no reasonable grounds for believing that the other person consents to the sexual intercourse.

In determining whether the defendant committed an offence, the court is directed by section 61HA(3) to look at the circumstances of the case including what steps the defendant took to find out whether the other person was consenting.

According to section 61HA the grounds under which a person is taken to have not consented include:

- ▶ that they did not have the capacity to consent, including because of age or cognitive incapacity; or
- ▶ that they did not have the opportunity to consent because they were unconscious or asleep; or
- ▶ that they or another person were subject to threats of force or terror; or
- ▶ that consent was obtained because the person was unlawfully detained; or
- ▶ that consent was obtained through mistake as to identity, mistake as to marriage or mistake as to purpose (such as the purpose of medical examination).

The grounds on which it may be established that a person does not consent to sexual intercourse include:

- ▶ if the person has sexual intercourse while substantially intoxicated by alcohol or other drugs; or
- ▶ because of intimidatory or coercive conduct, or another threat that does not involve a threat of force, or because of an abuse of a position of authority or trust.

Section 61HA does not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

Consent cannot be inferred from the absence of physical resistance (s 61HA(7)).

Being married to the victim is not a defence to sexual assault (s 61T).

Consent to sexual intercourse can be given and then withdrawn. If sexual intercourse is continued after permission has been withdrawn, the offence of sexual assault is committed.

### Aggravated sexual assault

Section 61J states that aggravated sexual assault occurs when a person has sexual intercourse with another person in 'aggravating circumstances' and without the other person's consent. The maximum penalty is 20 years' imprisonment.

Circumstances of aggravation exist where:

- a) the offender, at the time of, or immediately before or after the offence, intentionally or recklessly inflicts actual bodily harm on the victim or someone else present;
- b) the offender, at the time of, or immediately before or after the offence, threatens to inflict actual bodily harm on the victim or another person who is present by means of an offensive instrument;
- c) the offender is in the company of another or others;
- d) the offender breaks into any house or building with the intent of committing the offence;
- e) the offender deprives the victim of his or her liberty before or after committing the offence;
- f) the victim is under 16;
- g) the victim is under the authority of the offender; or
- h) the victim has a serious physical disability or cognitive impairment.

### Sexual assault by forced self-manipulation

Section 80A states this offence occurs when someone forces another person (by threats) to engage in self-manipulation, that is the penetration of a vagina or anus by an object manipulated by that person. The maximum penalty is 14 years' imprisonment or 20 years' imprisonment in circumstances of aggravation, which are the same as above.

### Reporting sexual assault

There is no limitation period for reporting a sexual assault. Victims of sexual assault may find it very difficult to report the sexual assault to the police. You could refer them to one of the services listed in **Chapter 14: Referrals and Contacts** for support reporting.

A victim of sexual assault will be referred to as the 'complainant' by police and in any subsequent criminal proceedings.

### Medical and forensic examinations

Whether the victim wishes to make a formal complaint to police or not, they will be offered a general medical examination and a forensic examination at a sexual assault service. A medical examination is carried out to make sure that any physical injuries are treated and that other medical concerns arising from the assault, such as sexually transmitted infections or the possibility of pregnancy, can be addressed.

The standardised Sexual Assault Investigation Kit (SAIK) is used for the forensic examination. The examination involves taking a detailed history and laboratory specimens, including anal, oral, vaginal or penile swabs, sperm samples from the person's body or clothes, and a blood sample from the victim (where appropriate). The critical period in which to collect forensic evidence is up to 72 hours after the assault, and anyone who presents to a sexual assault service in this period is usually seen immediately, although there may be physical evidence up to seven days later. A forensic examination immediately after a sexual assault may provide important corroborative evidence for any subsequent trial.

If the person is unsure about reporting the assault to police, the SAIK specimens are generally stored for three months in case they change their mind. If the person has made a report to police, police will request the SAIK examination as a part of their investigation.

### Making a statement

A person who decides to report a sexual assault to police is asked to give a full and detailed statement. This statement forms the basis of the prosecution, and is relied on to settle the charges.

Your client should take care to ensure that the statement is comprehensive and accurate and should check it carefully before signing it. If an error or omission is discovered later on, the police should be contacted as soon as possible so that the statement can be rectified.

### Withdrawing a complaint

It is not uncommon for someone who has made a statement to police to decide, at any time up to the trial, that they do not wish to continue. This may occur for a variety of reasons, including fear of the legal process, threats by the accused, family pressures, shame and exhaustion.

If the complainant indicates that no sexual assault in fact took place and retracts the allegations, the investigation or prosecution may be terminated. The complainant may also be charged with a range of criminal offences, including making a false accusation under section 314 of the Crimes Act. While the decision is ultimately up to the police and the Director of Public Prosecutions (DPP), the views of the complainant are considered in making the decision in accordance with Guideline 19 of the DPP *Prosecution Guidelines*. See also page 32 in **Chapter 3** for further information about the offences of public mischief and perjury.

### Sexual Assault Reporting Option (SARO)

For victims who are reluctant to formally report to police, an option is to complete a SARO questionnaire developed by police. Information is confidential and is entered into a secure and restricted database with police. The questions can be answered anonymously or personal details can be provided.

Completing the questionnaire will not result in a police investigation. It is not taken as a formal complaint for investigation and prosecution purposes. The information is used by the police to gather information on sexual offences and offending. A formal complaint can be made at any time if the victim changes their mind about making a formal report.

If a victim completing the questionnaire has had a forensic examination, they can consent to the release of the SAIK and analysis of the samples, which may help the police to identify an offender.

## Prosecution

### Witness Assistance Service (WAS)

The DPP has a Witness Assistance Service (WAS) that is staffed by people who are experienced in assisting victims of crime, including dedicated Indigenous officers. The WAS is available to assist complainants and other witnesses with:

- ▶ information about the prosecution process;
- ▶ court preparation;
- ▶ referral to appropriate support and counselling services; and
- ▶ information about the progress of their matter and the court process in general.

There are WAS officers at all offices of the DPP.

### Cross-examination in committal hearings

Section 93 of the *Criminal Procedure Act 1986* (NSW) (CPA) provides that Magistrates can direct the attendance of a sexual assault complainant to give oral evidence only if the defendant has shown 'special reasons' why, in the interests of justice, the complainant should do so. The magistrate will consider submissions from both the defence and the prosecution before making a decision as to whether a complainant will be called to give evidence at committal. Some special reasons for which magistrates have allowed cross-examination of complainants are:

- ▶ issues with identification of the accused person;
- ▶ inconsistency about details of the offence on the part of the complainant; and
- ▶ a real possibility that, if the complainant were cross-examined, the accused person would not be committed for trial.

Once a complainant has been directed to attend to give oral evidence, cross-examination can also be limited to those issues that formed the basis of the application.

### Sexual Assault Communications Privilege (SACP)

Sexual Assault Communications Privilege (SACP) is a statutory right under Part 5, Division 2 of the CPA that recognises there is a public interest in preserving the confidentiality of counselling records and the integrity of the counselling relationship; protecting sexual assault victims from further harm that may be caused if their records are revealed and used by the defence; and promoting the reporting of sexual assault.

#### Practitioner tip

SACP does not apply in all areas of law.

The privilege applies in all criminal and AVO cases in NSW and in very limited circumstances, to civil cases such as personal injury or sexual harassment cases, but only where SACP has been upheld in a criminal proceeding and the civil case is about the same or similar acts. SACP does not apply in family law and it generally does not apply in child protection cases.

SACP is activated when a party to a criminal case (defence, prosecution or police) wants to access or use written or oral communications that have been

made in confidential, therapeutic settings (referred to as ‘protected confidences’). For example, the defence might seek to access the victim’s mental health records, or the prosecution seeks to rely on evidence that the victim told their GP about a sexual assault immediately after it happened, many years before it was reported to the police.

### Protected confidence

Section 296(1) of the CPA defines a ‘protected confidence’ as ‘a counselling communication that is made by, or about a victim or alleged victim of a sexual assault offence’. The privilege does not just apply to counselling records of the complainant in relation to the sexual assault, but to any counselling to a client that has been sexually assaulted, or counselling that may have occurred prior to the sexual assault.

#### Practitioner tip

The privilege relates to records even if they were made before the sexual assault and to records that do not refer to the sexual assault or are not, or do not appear to be, directly related to the assault.

### Counselling communication

Section 296(5) of the CPA defines a person who ‘counsels’ as someone who has ‘some skill, gained through training, study or experience, in treating a person who has suffered harm’. They may be either paid or unpaid for that role.

### The leave test

If a party seeks to subpoena a protected confidence they must be granted the court’s leave to do so. However, it is up to the person seeking to issue the subpoena (who has not seen the requested documents) to identify whether or not the requested documents will disclose protected confidences. Section 299D(1) of the CPA sets out the tests for the granting of leave to produce or adduce a protected confidence:

- ▶ the document or evidence will have substantial probative value; and
- ▶ other documents or evidence concerning the matters are not available; and
- ▶ the public interest in preserving the confidentiality of protected confidences and protecting the victim from harm is substantially outweighed by the public interest in admitting

into evidence information or the contents of a document of substantial probative value.

In deciding the public interest test, the court must take into account:

- ▶ the need to encourage victims of sexual offences to seek counselling;
- ▶ that the effectiveness of counselling is likely to be dependent on protecting the confidentiality of the counselling relationship;
- ▶ the public interest in ensuring that victims of sexual offences receive effective counselling;
- ▶ that the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person;
- ▶ whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias; and
- ▶ that the adducing of the evidence is likely to infringe a reasonable expectation of privacy (s 299D(2)).

### Claiming privilege / objecting to the issue of a subpoena

A victim of sexual assault who wants to claim the privilege can obtain advice and representation from the SACP Service at Legal Aid NSW. At the time of writing, no means or merits test is applied.

The service also provides free advice and information to workers and services in the health and welfare sector who have received a subpoena for client records.

### Measures to minimise harm

If the court makes an order to produce a protected confidence, section 302 of the CPA allows the court to make orders to minimise harm that may be caused by disclosure of a counselling communication or witness identity information at the production stage. The following ancillary orders may be made by the court:

- ▶ delete any information in the notes that would disclose the address or telephone number of the victim or counsellor;
- ▶ the parties are only allowed to read the notes instead of being provided with copies;
- ▶ if the other parties are allowed a copy, then only one copy of the notes be provided;

- ▶ only those sections of the notes the court considers to be relevant are to be made available;
- ▶ only the defence lawyer and not the defendant is to handle the documents;
- ▶ the contents of the documents are not to be revealed to the defendant except to obtain specific instructions;
- ▶ all copies of notes are to be returned within 7 days of the completion of the trial;
- ▶ if oral evidence is to be given by a counsellor in court, all or any of the evidence is heard in camera (in a closed court); and
- ▶ the suppression of publication of any of the information in the notes if this is necessary to protect the safety of either the complainant or the counsellor.

If records are not covered by the privilege but may still be considered 'sensitive' in nature the court may also make orders like those listed above for the protection of documents.

#### Practitioner tip

Check that the subpoena has been validly issued. If it is invalid, an objection can be filed.

More information about SACP, including the Subpoena Survival Guide, can be found on the Legal Aid website.<sup>24</sup>

### Consent to release information

A victim of sexual assault can consent to the release of protected confidences ('waive privilege') during a court case. The consent must be in writing, make specific reference to the information being released and state that the victim understands their SACP rights.

### Measures to assist complainants giving evidence at trial

When a complainant gives evidence, the proceedings are to be held in camera (s 291 CPA). A complainant is also entitled to give evidence from a private room using closed circuit television facilities if they choose to (s 291(2) CPA).

Section 294B of the CPA allows alternative arrangements to be made for victims of prescribed sexual offences to give evidence. If the defendant has been charged with committing a prescribed sexual of-

fence against the protected person, section 294B(3) provides for the protected person to elect:

*(a) to give that evidence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom, or*

*(b) to give that evidence by use of alternative arrangements made to restrict contact (including visual contact) between the complainant and the accused person or any other person or persons in the courtroom, including the following:*

*(i) use of screens,*

*(ii) planned seating arrangements for people who have an interest in the proceedings (including the level at which they are seated and the people in the complainant's line of vision).*

Section 294C CPA allows the complainant to request to have a support person present and near them while giving their evidence, provided that person is not a witness in the case.

Section 294A CPA prohibits the direct examining or cross examining of the complainant by the accused person (charged with a prescribed sexual offence) where the accused is not represented by a legal practitioner.

24 [www.legalaid.nsw.gov.au/publications/factsheets-and-resources/subpoena-survival-guide/sexual-assault-communications-privilege-sacp](http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/subpoena-survival-guide/sexual-assault-communications-privilege-sacp)

# Chapter 9: Forced marriage and reproductive coercion

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## Forced marriage

A forced marriage is when a person gets married without freely and fully consenting, because they have been coerced, threatened or deceived, or because they are incapable of understanding the nature and effect of a marriage ceremony, for reasons such as lack of capacity or age.

Forced marriage is a criminal offence under section 270.7A of the *Criminal Code Act 1995* (Cth) and a human rights abuse. It is also domestic violence as forced marriage typically involves sexual assault, geographic and social isolation, financial control, psychological abuse and forced labour, and a high risk of experiencing other forms of domestic violence, such as verbal and physical abuse.

The crime of forced marriage can apply to:

1. legally recognised marriages, as well as cultural or religious ceremonies and registered relationships;
2. marriages that occur in Australia (including where a person was brought to Australia to get married), as well as where a person is taken overseas to get married; and
3. the conduct of any person involved in bringing about the forced marriage, including family members, friends, wedding planners and marriage celebrants.

The offences apply regardless of the age, gender, or sexual orientation of the victim.

### Practitioner tip

If you believe that your client is in a forced marriage or at risk of being forcibly married you can contact the Australian Federal Police for assistance.

If the person is under eighteen years and at risk of being taken outside Australia you can also obtain an urgent family law order in the Federal Circuit Court to place the person's name on the Airport Watch List or, in exceptional circumstances, an order to stop an aircraft.

More information, including a range of fact sheets and referral options, is available at the Attorney-General's website<sup>25</sup>.

## Reproductive coercion

Reproductive coercion is behaviour used to control or pressure contraceptive and pregnancy outcomes. Common scenarios include perpetrators intentionally causing pregnancy to make women more vulnerable and dependent on them or taking actions to terminate a pregnancy wanted by the woman.

Reproductive coercion can take many forms including:

- ▶ sexual assault;
- ▶ harming or threatening to harm a woman if birth control is used or not used;
- ▶ harming or threatening to harm a woman if she continues a pregnancy or has an abortion;
- ▶ birth control sabotage, such as controlling finances or freedom of movement so women cannot obtain birth control, hiding or destroying birth control pills, breaking or removing a condom during sex, forcibly removing other contraceptive devices, such as IUDs or vaginal rings or not withdrawing as agreed; and
- ▶ physically assaulting a woman to cause a miscarriage.

If women experience reproductive coercion in addition to other forms of domestic violence an unwanted pregnancy can significantly inhibit their ability to end the relationship and sever ties to the perpetrator. Access to safe and affordable contraception options and termination procedures are essential to ensure that women experiencing domestic violence can elect to avoid having a child with a perpetrator.

25 [www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/ForcedMarriage.aspx](http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/ForcedMarriage.aspx)

## Chapter 10: Domestic violence and victims support

Victims of crimes that occurred in NSW may be eligible for financial support and counselling through the NSW Victims Support Scheme. This scheme replaced the previous Victims Compensation Scheme in 2013.

This chapter will guide you through the new scheme and will focus on the support available to your client as a primary victim of an act of violence. Victims support is also available for family members and secondary victims and further information on the support available can be found by visiting Victims Services at [www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

### WATCH THIS SPACE

There are potential changes coming to the victims support scheme so please ensure that you are up to date with any changes that may have been introduced following the writing of this chapter.

### Legislation

The *Victims Rights and Support Act 2013* (NSW) (VRSA), supplemented by the *Victims Rights and Support Regulation 2013* (VRSR) established the Victims Support Scheme.

### Role of lawyers

The VRSA does not provide for solicitors' professional fees or disbursements to be paid. Victims Services staff are available to provide assistance with the preparation of the claim and to obtain evidence.

Despite this, if a lawyer lodges an application for a victim or notifies Victims Services that the victim is represented, they will direct all correspondence to the lawyer rather than the client. Victims Services will also expect the lawyer to provide evidence other than police records unless they are notified otherwise.

### Act of violence

To be eligible for victims support, a person must have been the victim of an act of violence in NSW. Section 19 of the VRSA defines an act of violence as:

*an act or series of related acts, whether committed by one or more persons:*

- a) that has apparently occurred in the course of the commission of an offence, and*
- b) that has involved violent conduct against one or more persons, and*
- c) that has resulted in injury or death to one or more of those persons.*

Section 19(3) states that this specifically includes sexual assault and domestic violence.

### Primary victim of an act of violence

A primary victim of an [act of violence](#) is a person who is injured, or dies, as a direct result of that act (s 20(1)). It also extends to a person who is injured, or dies, as a direct result of trying to prevent another person from committing that act, or trying to help or rescue another person against whom that act is being committed or has just been committed, or trying to arrest another person who is committing, or who has just committed, that act (s 20(2)).

### Composition of support for a primary victim

A victim of an act of violence may be eligible for a range of different types of support:

- ▶ information, support and referral;
- ▶ counselling;
- ▶ financial assistance for immediate needs;
- ▶ financial assistance for economic loss; and/or
- ▶ recognition payment.

### Counselling

A victim of violence can apply for free counselling under the scheme. Applicants can apply for an initial ten hours of counselling, which can be extended for up to a further twelve hours if recommended by the counsellor. Counselling is capped at twenty-two hours unless there are exceptional reasons. There is no cap for victims of child sexual assault.

The application form requires that the applicant provide personal details and a brief description of

the act of violence. Documentary evidence is not required.

#### Practitioner tip

The contents of the counselling session may be used in the preparation of a report to Victims Services for the purposes of subsequent counselling, financial assistance and/or recognition payment applications.

There is no time limit for applications for counselling.

#### Financial assistance for immediate needs

A victim of violence may be eligible for up to \$5000 in financial assistance for immediate needs to cover expenses for treatment or other measures that need to be taken urgently to secure their safety, health or wellbeing (s 26(1)(b)). An application must be lodged within two years of the act of violence or two years from turning 18 for children (s 40(1)). There are no out of time provisions for filing an application for financial assistance for immediate needs.

Financial assistance may cover urgent expenses such as:

- ▶ safety measures including changing locks, fitting alarms and screens;
- ▶ expenses associated with relocating to a safer location, which may include a rental bond, removal services and accommodation costs;
- ▶ emergency medical and dental expenses.

The expenses must have arisen as a direct result of the act of violence. A victim may apply for reimbursement of an expense already outlaid or direct payment to a service provider.

The applicant needs to provide documentary evidence that they reported an act of violence to police or a medical professional in accordance with section 39 and copies of receipts or invoices.

#### Financial assistance for economic loss

Section 26(1)(c) and regulation 8(2) provide that a victim of violence may be eligible for up to \$30,000 in financial assistance for economic loss for the following economic losses:

- ▶ up to \$20,000 for loss of earnings;
- ▶ if the victim cannot demonstrate loss of earnings, up to \$5000 for out-of-pocket expenses,

which may include rent, furniture, childcare and household bills;

- ▶ medical and dental expenses;
- ▶ up to \$5000 for justice-related expenses, being expenses associated with criminal or coronial proceedings related to the act of violence, which may include expenses associated with making statements to police, preparing victim impact statements, or travel to court proceedings. The fees of a legal practitioner cannot be reimbursed as a 'justice-related expense'; or
- ▶ up to \$1500 for loss of, or damage to, clothing or personal effects worn or carried by the primary victim at the time of the act of violence.

Section 39(2)(b) of the VRSA states that the following documentary evidence must support an economic loss application:

- ▶ a police report or report of a government agency detailing the act of violence; and
- ▶ a medical, dental or counselling report verifying that the applicant has actually been injured as a result of the act of violence.

The applicant must also provide details and evidence of the financial losses claimed in accordance with section 39(4).

Applications for financial support must be lodged within two years of the act of violence, or two years from turning 18 for children (s 40(1)). There are no out of time provisions for filing an application for economic loss.

Section 40(7) states that there is no time limit for applications by child sexual abuse victims for claims for out-of-pocket expenses or justice-related expenses.

#### Recognition payments

A victim of violence may be eligible for a lump-sum payment in recognition of the trauma they have suffered. There are four categories of recognition payments set out in section 35:

##### Category A

- ▶ \$15,000 payment to a family member who was financially dependent upon a homicide victim;
- ▶ \$7,500 to each parent, step-parent or guardian of a homicide victim.

### Category B

A \$10,000 payment to a victim of:

- ▶ sexual assault resulting in serious bodily injury or which involved an offensive weapon or was carried out by two or more persons;
- ▶ sexual assault, indecent assault or attempted sexual assault which was one of a series of related acts.

### Category C

A \$5,000 payment to a victim of:

- ▶ sexual assault other than one which falls within those in Category B;
- ▶ attempted sexual assault resulting in serious bodily injury;
- ▶ assault resulting in grievous bodily harm;
- ▶ physical assault of a child that is one of a series of related acts.

### Category D

A \$1,500 payment to a victim of:

- ▶ an indecent assault;
- ▶ an attempted sexual assault involving violence other than in Category B and C;
- ▶ a robbery involving violence;
- ▶ an assault (not involving grievous bodily harm).

#### Practitioner tip

Serious bodily injury has been found to include both physical and psychological injury see *CRT v Commissioner of Victims Rights [2017] NSWCATAD 174*.

Grievous bodily harm has been found to include a serious psychological injury see *BMF v Commissioner of Victims Rights [2016] NSWCATAD 144* and *BWQ v Commissioner of Victims Rights [2015] NSWCATAD 197*.

There are no out of time provisions for filing an application for a recognition payment so it is important to determine the relevant time frame within which an application should be filed:

- ▶ applications relating to domestic violence, child abuse or sexual assault must be lodged within ten years after the act of violence or ten years from turning 18 for children (s 40(5));
- ▶ for all other types of acts of violence, an application for a recognition payment must be

lodged within two years from the date of the act of violence, or two years from turning 18 for children (s40(4));

- ▶ there is no time limit for an application for a recognition payment by a victim of child sexual abuse (s40(7)).

Section 39(2)(b) requires an application to be supported by the following documentary evidence:

- ▶ a police report or report of a government agency detailing the act of violence; and
- ▶ a medical, dental or counselling report verifying that the applicant has actually been injured as a result of the act of violence.

### Further claims

Section 40(6) allows a victim to continue to make applications for financial assistance for five years from the date of the initial application or, in relation to applications for financial support, until a cap has been reached.

### Internal reviews

Where an applicant is aggrieved by a decision made in relation to their application for victims support they can request an internal review under section 49.

An Internal Review Request Form is sent with the Notice of Decision, or can be downloaded from the Victims Services website, however, it is not a requirement that the form be used. There is no fee. The application must set out grounds of review and full particulars should be provided to substantiate each ground.

A senior assessor will determine the review by making a new decision, as if the original decision had not been made. New or additional evidence or submissions can be filed and considered on review. As with the first determination, internal reviews are decided on the papers.

An application for an internal review must be lodged within 28 days from the date on which the applicant is given notice of the decision (s 49).

Section 49 of the VRSA makes clear there is no further right of review following an internal review of a decision regarding counselling or financial support.

## Review by NCAT

An applicant who is aggrieved by the decision of a Victims Services Senior Assessor regarding a recognition payment has a right under section 51 of review to the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal (NCAT).

An application to NCAT for administrative review must be lodged within 28 days from the date the applicant is notified of the internal review decision in accordance with rule 24 of the *Civil and Administrative Tribunal Rules 2014* (NSW). Section 41 of the *Civil and Administrative Tribunal Act 2013* allows the Tribunal to grant leave to accept an application filed out of time.

Reviews at NCAT can be decided on the papers or the applicant can give oral evidence in support of their claim. New or additional evidence or submissions can be filed and considered on review.

Schedule 3, clause 15 of the *Civil and Administrative Tribunal Act 2013* (NSW), states there is no further right to review from a decision of NCAT.

## Restitution

Under section 59 of the VRSA, Victims Services can recover money paid to victims from the perpetrator of violence if they were convicted of an offence arising from substantially the same facts as those constituting the act of violence, by issuing the perpetrator with a provisional order for restitution. A 'conviction' includes an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Victims Services has discretion not to pursue a perpetrator for restitution in cases where, for example, pursuing restitution may place the victim at further risk. An applicant (or the applicant's solicitor) can write submissions to the Commissioner asking for the exercise of discretion.

# Chapter 11: Domestic violence and housing

It's well known that domestic violence is a leading cause of women's homelessness. Therefore, it's important that you seek instructions from your client about their housing situation. This chapter will focus on options available to clients who are renting and experiencing domestic violence.

## WATCH THIS SPACE

There are potential changes coming to tenancy laws, including the provisions that relate to tenancy and victims of violence so please ensure that you are up to date with any changes that may have been introduced following the writing of this chapter.

## Legislation

The *Residential Tenancies Act 2010* (NSW) (RTA) sets out the rights and responsibilities of tenants and landlords in NSW (including social housing providers).

## NCAT

The NSW Civil and Administrative Tribunal Commercial and Consumer Division (NCAT) resolves disputes between tenants, landlords and co-tenants. It is informal, low cost and user friendly. However it strongly advocates for resolution through conciliation and does not have safe rooms or other procedures to protect victims of domestic violence. Solicitors will need to seek leave under section 45 of the *Civil and Administrative Tribunal Act 2013* (NSW) to represent their clients in NCAT.

## Residential tenancy agreements

Section 13 of the RTA states that a residential tenancy agreement is an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence. It may be express or implied and may be oral or in writing, or partly oral and partly in writing.

## Types of tenants

Section 3 of the RTA defines a tenant as a person who has the right to occupy a residential premises under a residential tenancy agreement, including sub-tenants.

A co-tenant is a tenant who is one of two or more tenants listed on a residential tenancy agreement, who are jointly and severally liable for the rent and any damage to the property.

A sole tenant is a person who is the only person listed on a residential tenancy agreement.

A sub-tenant is a person who has a written residential tenancy agreement with a tenant who is listed as a tenant on a residential tenancy agreement with a landlord.

A person who resides in a rental property but is not named on a residential tenancy agreement is an occupant.

## Types of residential tenancy agreements

A fixed term residential tenancy agreement is for a particular period of time, for example six months.

A periodic residential tenancy agreement is not for a particular period of time. If a tenant continues to live in a rental property beyond the time period specified in a fixed term agreement and does not enter into a new fixed term agreement, they will be on a periodic agreement.

## Taking instructions:

You should get the following instructions from your client:

1. What type of tenant are they; co-tenant, sole tenant or occupant?
2. What type of residential tenancy agreement do they have, for example fixed term, periodic, or no residential tenancy agreement? You should ask to look at a copy of their residential tenancy agreement to confirm what type of residential tenancy agreement they have. Consider whether you need an authority from your client to speak to their real estate agent or social housing provider.
3. Do they want to stay in the property or go?
4. If they want to stay, can they afford to rent the property on their own?

5. Do they have an apprehended violence order (AVO)? If so, is it interim or final? What are the conditions on the AVO?
6. Are there any debts associated with the tenancy, for example, rent arrears or damage to the property?
7. Is the property sufficiently secure? Do locks need to be changed?
8. Are they likely to owe their landlord more than their rental bond?
9. Has NCAT terminated their tenancy?
10. Who paid the bond?

## Options for tenants and occupants wanting to stay

### Co-tenants in a fixed term residential tenancy agreement

If your client is a co-tenant with the defendant in AVO proceedings, if there is a final AVO that prohibits the defendant from having access to the rental property, your client can continue to live safely in the property. The AVO will end the defendant's tenancy, which means your client will be solely liable for the rent.

An interim AVO prohibiting the defendant co-tenant from having access to the rental property will mean that your client can continue to live safely in the property while the interim AVO is in place. An interim AVO won't end the defendant's tenancy.

If your client does not have a final AVO excluding the defendant co-tenant from accessing the property, your client could apply under section 102 of the RTA for an order from NCAT ending the other co-tenant's tenancy due to the special circumstances of their case. Your client could argue that the domestic violence warrants NCAT making an order ending the co-tenant's tenancy. NCAT has been known to list these applications urgently if requested to do so in writing. Your client could use a statutory declaration, police records, letters from support services and/or an interim AVO to support their application. Your client would benefit from having an advocate represent them as the other co-tenant may be permitted to cross-examine them.

### Co-tenants in a periodic residential tenancy agreement

Your client has the same options available to them as co-tenants in fixed term residential tenancy agreement wanting to stay. Please see above for these options.

### Sole tenants in a fixed term or periodic residential tenancy agreement

If your client wants to stay living in the property they do not need to do anything. However you may want to refer them to their local Staying Home Leaving Violence (SHLV) service if they would like to upgrade the security of their home. See '**Locks and Security**' below for more information about SHLV.

### Occupants

If your client doesn't have a residential tenancy agreement they do not have any legal right to stay in the property. However, if they have a final AVO that prevents a tenant from accessing the property, they can apply to NCAT under section 79 for an order that they be recognised as a tenant.

## Options for tenants and occupants wanting to leave

### Co-tenants in a fixed term residential tenancy agreement

It is not recommended that your client just vacate their rental property because they will remain liable for the rent and any damage caused by the remaining co-tenant(s) who stay living in the property. If they can't pay any outstanding debts owing they could be listed on a 'bad tenants' database, which can make it very difficult for them to rent another property. This is why it's very important to advise your client about their other options if they want to leave the property.

Your client can end their residential tenancy agreement without having to compensate their landlord if both the landlord and other co-tenant(s) agree to end it. If they are able to reach an agreement they should put their agreement in writing and everyone should sign it. The agreement should state that they do not owe their landlord any money.

If your client has a final AVO prohibiting the defendant co-tenant from accessing the rental property, your client can give their landlord a 14-day written termination notice and a copy of their AVO.

You can refer your client to [www.tenants.org.au](http://www.tenants.org.au) for sample termination notices. They will not owe their landlord any money for ending their tenancy early.

If your client does not have a final AVO prohibiting the defendant co-tenant from accessing the rental property they could apply under section 102 for an order from NCAT to end their tenancy due to the special circumstances of their case. Your client could argue that the domestic violence warrants NCAT making an order ending their tenancy. NCAT has been known to list these applications urgently if requested to do so in writing. Your client could use a statutory declaration, police records and/or an interim AVO to support their application. Your client would benefit from having an advocate represent them as the other co-tenant may be permitted to cross-examine them. NCAT has the power to order your client to compensate the landlord for ending the tenancy early, however this is still a much better option than abandoning the rental property.

### Co-tenants in a periodic residential tenancy agreement

Your client can just leave the rental property, however they will remain liable for the rent and any damage caused by the remaining co-tenant(s) who stay living in the property. If they can't pay any outstanding debts owing they could be listed on a 'bad tenants' database, which can make it very difficult for them to rent another property. This is why it's very important to advise your client about their other options if they want to leave the property.

Your client can end their residential tenancy agreement without having to compensate their landlord if both the landlord and other co-tenant(s) agree to end it. If they are able to reach an agreement they should put their agreement in writing and everyone should sign it. The agreement should state that they do not owe their landlord any money.

If they can't reach an agreement, your client can give their landlord and all the other co-tenants a 21-day written termination notice and leave the property. You can refer your client to [www.tenants.org.au](http://www.tenants.org.au) for sample termination notices. They will be jointly and severally responsible for the rent until the end of the 21-day period.

### Sole tenants in a fixed term residential tenancy agreement

Your client has the same options available to them as co-tenants in a fixed term RTA wanting to leave. Please see above for these options.

Additionally, if your client is near the end of their fixed term residential tenancy agreement they can give their landlord a 14-day written termination notice. You can refer your client to [www.tenants.org.au](http://www.tenants.org.au) for sample termination notices.

### Sole tenants in a periodic residential tenancy agreement

Your client has the same options available to them as co-tenants in a periodic residential tenancy agreement wanting to leave. Please see above for these options.

### Occupants

Your client can just leave, however, if they have any other type of agreement with the homeowner or the people they are living with, they should give a written termination notice in accordance with that agreement.

### Locks and security

Landlords are responsible for ensuring that their rental properties are reasonably secure (s 70). However, if your client would like to upgrade the security of their rental property beyond what would normally be reasonably secure, they will need to pay for it, unless they are eligible for support through a Staying Home Leaving Violence (SHLV) Service.

#### Practitioner tip

SHLV is a specialised domestic and family violence program aimed at promoting victims' housing stability and preventing homelessness and the program can pay to upgrade the security of victims' homes. A list of SHLV services is available at [www.community.nsw.gov.au/parents-carers-and-families/domestic-and-family-violence/staying-home-leaving-violence](http://www.community.nsw.gov.au/parents-carers-and-families/domestic-and-family-violence/staying-home-leaving-violence) and see also **Chapter 14**, page 101 for further information.

Your client will need to seek their landlord's permission if they want to add or remove a lock or security device unless they have a 'reasonable excuse', which section 71(2) defines as:

- a) *in an emergency;*
- b) *in accordance with an NCAT order;*
- c) *after the tenancy of a co-tenant is terminated; or*

*d) after a tenant or occupant is prohibited from having access to the property by an AVO.*

Sections 73 and 72 require tenants to give a copy of the key or other opening device to the landlord and any other tenants within seven days, unless NCAT authorises a copy not be given or a person is prohibited from having access to the property by an AVO.

See also 'Victims Support: Financial assistance for information on financial assistance to cover security upgrades to a property' on page 91.

## Tenant databases

Many victims of violence who flee rental properties may be listed on tenant databases without knowing it. Landlords and agents are unlikely to rent your client a property if they are listed on a tenant database.

Tenant databases contain personal information about people who have lived in rental properties, which landlords and agents can access to determine whether to enter into a residential tenancy agreement with a person.

Section 212 states that your client can be listed on a tenant database if they were named as a tenant on a residential tenancy agreement and their tenancy was terminated because they breached their residential tenancy agreement and because of that breach they owed their landlord an amount more than their rental bond, or if NCAT made a termination order.

Section 213 states that a landlord or agent must not list personal information about your client in a tenant database unless:

- ▶ they have given your client a copy of the personal information or taken other reasonable steps to disclose the personal information to them;
- ▶ they have given them at least 14 days to review the personal information and make submissions objecting to its entry into the database or about its accuracy, completeness and clarity; and
- ▶ they have considered any submissions made.

However, this section does not apply if the landlord or agent cannot locate the person after making reasonable inquiries.

Section 211 requires landlords and agents to notify former tenants that they have been listed on a

tenant database. However, if your client did not provide their previous landlord or agent their new address they may not know if they are listed on a tenant database.

Section 216 allows your client to find out whether a former landlord or agent has listed them on a database by making a written request. The information must be provided to them for free within 14 days of making the request. Your client can also request this information from a database operator, however they may need to pay a fee, which should not be excessive.

Your client can seek an order from NCAT under section 217 prohibiting them from being listed on a tenant database or removing or amending their personal information on the tenant database if:

- ▶ the tenant database includes personal information about them that is inaccurate, incomplete, ambiguous or out of date, or that has been listed on the database for longer than three years; or
- ▶ it is unjust in the circumstances, having regard to the following:
  - the reason for the listing;
  - the tenant's involvement in any acts or omissions giving rise to the listing;
  - any adverse consequences suffered, or likely to be suffered, by the tenant because of the listing;
  - any other relevant matter.

## Rental bonds

If your client stays living in a rental property and their perpetrator was a co-tenant and moves out, your client will be obliged under section 174 to repay them any money they paid towards the bond within 14 days of receiving written request from the perpetrator, unless the perpetrator is prohibited from accessing the property by a final AVO.

If your client moves out of the property and the remaining co-tenant does not repay the money your client paid towards the bond within 14 days of making a written request, your client can apply to NCAT to resolve the matter. Section 175(3) of the RTA and regulation 22(8) of the *Residential Tenancies Regulation 2010* (NSW) requires tenants to apply within six months of the bond being paid out, which would occur after the remaining tenants move out.

## Chapter 12: Domestic violence and employment

People experiencing domestic violence often need time off work to attend appointments with their solicitor or court. This chapter sets out rights your client may have in the workplace.

### Flexible working arrangements

Your client may have the right to request flexible working arrangements under sections 65(1) and 65(1A)(e) of the *Fair Work Act 2009* (Cth) (FWA), if they are experiencing domestic and family violence. Examples of flexible working arrangements include:

- ▶ changes to location of work;
- ▶ changes to work hours;
- ▶ time off work to attend court dates or medical appointments; or
- ▶ arrangements to work from home.

Section 65(1) and 65(1A)(f) of the FWA states that employees who are supporting a member of their household or an immediate family member who is experiencing domestic or family violence may also have a right to request flexible working arrangements.

#### Who is eligible to apply?

Employees will be eligible to apply for flexible working arrangements if they are a National System Employee, which is defined by sections 59, 13 and 14 of the FWA. Most employees in NSW are National System Employees with the exception of state government employees and employees of local councils.

Section 65(2)(a) requires employees to have completed at least 12 months of continuous service immediately before making the request.

Section 65(2)(b) allows casual employees who are long-term casual employees and have a reasonable expectation of continuing employment with the employer on a regular and systematic basis to apply for flexible working conditions.

### Making a request for flexible working arrangements

Section 65 of the FWA sets out the requirements for making a request for flexible working conditions. The request must be in writing and set out details of the changes sought and the reasons for the change (s 65(3)). It is important to note that section 65 is only a right to request flexible working conditions, rather than a right to flexible working conditions.

An employer must provide the employee with a written response to their request within 21 days of the employee making the request (s 65(4)). The employer must tell the employee whether the request has been granted or if it has been refused. The employer may only refuse the request on reasonable business grounds (s 65(5)). Section 65(5A) sets out reasonable business grounds to include the following:

- ▶ the new working arrangements requested by the employee would be too costly for the employer;
- ▶ there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- ▶ it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- ▶ the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
- ▶ the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

If the employer refuses the request, the written response must include details of the reasons for the refusal (s 65(6)).

### Practitioner tip

The FWA does not include a provision for an employee to take a refusal to grant flexible working conditions to the Fair Work Commission for determination. The FWA does however, protect an employee from an employer taking 'adverse action' against them for asserting a workplace right, in this case, the right to request flexible working conditions. These protections are set out in sections 340, 341 and 342 of the FWA.

### Other entitlements

Your client may have additional entitlements. For example, many employees have access to special domestic violence leave under enterprise agreements. Your client should obtain legal advice about other possible employment entitlements.

## Chapter 13: Other issues and resources

Victims of domestic violence experience a range of other non-legal issues that they need to deal with. This chapter discusses how to address these issues.

### Financial issues

#### Centrelink crisis payments

Your client may be eligible for a Centrelink crisis payment. This is a one-off payment equivalent to one week of the income support payment they are currently receiving. If your client is not already receiving an income support payment, they can claim this at the same time they claim a crisis payment. The number of times a person can receive a crisis payment is usually limited to four times within any 12-month period.

#### Practitioner tip

There are tight timeframes to apply for a crisis payment. Your client needs to make the application to Centrelink within seven days of the event that led your client to make the application. In this case, it is likely to be within seven days of the domestic violence incident.

In cases of domestic violence, in order to be eligible, your client must:

- ▶ be in receipt of or eligible for a Centrelink income support payment;
- ▶ be in severe financial hardship;
- ▶ meet the residence requirements of the income support payment;
- ▶ be in Australia at the time of crisis and when the claim is submitted; and
- ▶ have left their home, be unable to return, and have set up or intend to set up a new home, or have remained in their home after experiencing domestic violence while the perpetrator has left or been removed from the home.

If your client has children with the perpetrator of violence they are usually required to seek child support from them. However, they may be eligible for an exemption if there is a documented history of violence or they are at risk of future violence from the other parent.

More information is available in the Women's Legal Service NSW publication *Women and Family Law*.

### Getting a new or safe phone and staying connected

Your client may have had her phone damaged or taken or is at risk of technology facilitated stalking or harassment. A new phone and number may be part of keeping her safe and connected to services and supports.

#### Telstra Safe Connections Program

The Women's Services Network (WESNET) partners with Telstra to help women impacted by domestic violence to maintain a safe mobile phone. Telstra provides smartphones, pre-paid credit and information on the safe use of technology to WESNET for distribution through its partner agencies to support women impacted by domestic violence. Contact WESNET on **1800 937 638**.

#### The Telstra Pre-Paid Recharge Program

The Telstra Pre-Paid Recharge Program provides \$30 pre-paid mobile recharge cards, at no cost, to support community agencies helping survivors of domestic violence who depend on a Telstra Pre-Paid Mobile for their communications.

### Managing debt

If your client is having difficulty paying credit cards and loans they can write to their lender and apply for a hardship variation under section 72 of the National Credit Code (Schedule 1 of the *National Consumer Credit Protection Act*) asking to make smaller repayments.

A financial counsellor may also be able to assist your client develop a budget and help them negotiate with lenders. For more information refer to **Chapter 14: Referrals and Contact** and call the Financial Rights Legal Centre.

If your client banks with the Commonwealth Bank, it has a domestic and family violence emergency assistance policy which can assist clients who have home loans or need housing assistance, and those who have personal loans or credit card debts. Further information is available at [www.commbank.com.au/support/dv-assistance.html](http://www.commbank.com.au/support/dv-assistance.html)

## Risk of Homelessness

### Refuges

Referrals to refuges are made via the Domestic Violence Line (**1800 656 463**).

### Staying Home Leaving Violence

The Staying Home Leaving Violence (SHLV) program is a specialised domestic and family violence program aimed at promoting housing stability and preventing homelessness for women experiencing domestic violence. The program helps women aged over 18 (and their children) who have separated from a violent partner or family member to remain safely in their own home or another home of their choice with the perpetrator removed.

The service is funded by Family and Community Services (FACS) and works closely with police, Local Courts, women's domestic violence court advocacy services (WDVCAS), health services, NSW Housing and non-government organisations to provide assistance to clients of the service. Assistance ranges from installation of security measures in homes to safety and risk assessment, development of safety plans, advocacy with police, referrals to legal advice and counselling, and help with tenancy, financial and other issues.

Your client can self-refer, or government or non-government agencies can refer her. At the time of writing, Staying Home Leaving Violence operates from 27 services across NSW; Bega, Blacktown, Broken Hill, Campbelltown, Clarence Valley, Coffs Harbour, Dubbo, Eastern Sydney, Fairfield/Liverpool, Inverell, Kempsey, Lake Macquarie, Maitland/Cessnock, Moree, Newcastle, Nowra, Orange, Parramatta/Holroyd, Penrith, Redfern, Tamworth, Wollongong, and Wyong/Gosford.

### Start Safely

The Start Safely program, funded by Housing NSW, involves the payment of a rental subsidy to provide short to medium term financial assistance to victims of domestic violence so they can secure private rental accommodation.

To be eligible, your client must:

- ▶ be escaping domestic violence;
- ▶ be homeless or at risk of being homeless;
- ▶ be eligible for social housing;

- ▶ be able to demonstrate that she can afford the private market rent after the subsidy period ends; and
- ▶ be willing to receive support services, where relevant.

Your client may be eligible for the subsidy in circumstances where she has assets but cannot access them in the short to medium term because of circumstances beyond her control. This may include where she has an interest in the family home but the Family Court has ordered that the property cannot be sold pending court proceedings.

The Start Safely subsidy is calculated according to income. An applicant receiving the subsidy pays all of their Commonwealth Rent Assistance entitlement and 25% of the rest of their income as rent. FACS pays the balance as a subsidy directly to the real estate agent or landlord.

The Start Safely subsidy will only be approved for a private rental property that is considered affordable. An affordable property means not paying more than 50% of your income on top of Commonwealth Rent Assistance.

Rent subsidies are available for an initial period of three months and can be provided for up to a total of 36 months.

### Housing NSW

Housing NSW can assist victims of domestic violence with emergency housing. This may include short stays in hotel accommodation or refuges.

Victims of domestic violence may be eligible for priority housing with Housing NSW. Eligibility for priority housing moves applicants ahead of others on the list for housing who do not fall on the priority list.

If your client is currently living in public housing and experiencing domestic violence, they can apply to Housing NSW for a transfer to another property, temporary accommodation, or assistance in taking over the tenancy if their name is not already on the lease.

## Counselling

### Medicare Rebate

This scheme provides rebates of between \$80 and \$120 for psychological treatment/counselling by registered psychologists. Eligible people can receive up to ten individual counselling sessions in a calendar year and ten group therapy sessions in a calendar year.

To access the Medicare Rebate, your client needs a general practitioner to complete a mental health assessment, prepare a mental health treatment plan and provide a referral to a psychologist.

### Victims Services

Your client may be eligible for free counselling through Victims Services. See **Chapter 10: DV and Victims Support** for information on counselling provided through NSW Victims Services.

### Domestic Violence Line

The Domestic Violence Line provides 24-hour, seven days a week telephone counselling, information and referrals for people experiencing or who have experienced domestic violence.

### 1800 Respect

1800 Respect operates a 24-hour, seven days a week telephone and online counselling service.

## Pets

If your client is concerned about the safety of pets, the RSPCA Safe Beds for Pets program provides temporary housing for pets of people who are escaping domestic violence. Your client may also be able to claim the cost for boarding pets from Victims Services under the financial assistance category.

# Chapter 14: Referrals and contacts

Below are services that may be able to provide additional advice and support to your clients.

## Crisis support

### NSW Police

- ▶ **000** or **106 (TTY)** (For urgent assistance or to report a crime)
- ▶ **131 444** or **(02) 9211 3776 (TTY)** (General enquiries)
- ▶ **1800 333 000** (Crime Stoppers)
- ▶ **1800 622 571** (Complaints)
- ▶ [www.police.nsw.gov.au](http://www.police.nsw.gov.au)

### Domestic Violence Line

It makes referrals to women's refuges, family support services, counselling, the police and courts, lawyers and hospitals. It helps with transport, emergency accommodation and other relevant support. Available 24 hours a day.

- ▶ **1800 656 463**
- ▶ **1800 671 442 (TTY)**
- ▶ [www.community.nsw.gov.au/parents,-carers-and-families/domestic-and-family-violence/domestic-violence-line](http://www.community.nsw.gov.au/parents,-carers-and-families/domestic-and-family-violence/domestic-violence-line)

### 1800 RESPECT

Provides counselling over the phone and online for sexual assault and domestic violence. Available 24 hours a day.

- ▶ **1800 737 732**
- ▶ [www.1800respect.org.au](http://www.1800respect.org.au)

### NSW Rape Crisis Centre

Provides support and counselling for rape victims. Available 24 hours a day.

- ▶ **1800 424 017**
- ▶ [www.nswrapecrisis.com.au](http://www.nswrapecrisis.com.au)

### Lifeline

Provides crisis counselling. Available 24 hours a day.

- ▶ **13 11 14**
- ▶ [www.lifeline.org.au](http://www.lifeline.org.au)

### Link2Home

Provides referrals to accommodation for people in immediate need. Available 24 hours a day.

- ▶ **1800 152 152**
- ▶ [www.cityofsydney.nsw.gov.au/community/community-support/homelessness](http://www.cityofsydney.nsw.gov.au/community/community-support/homelessness)

### Centrelink

Your client may be eligible for a Centrelink crisis payment. This is a one-off payment equivalent to one week of the current income support payment they are already receiving. Your client needs to make the application to Centrelink within seven days of the domestic violence incident that led your client to make the application.

- ▶ **132 850**
- ▶ [www.humanservices.gov.au/customer/enablers/claiming-crisis-payment](http://www.humanservices.gov.au/customer/enablers/claiming-crisis-payment)

### Kids Help Line

Provides counselling (by phone, online and by email) for young people aged between five and 25 years. Available 24 hours a day.

- ▶ **1800 551 800**
- ▶ [www.kidshelp.com.au](http://www.kidshelp.com.au)

## Legal advice and information

### Women's Legal Service NSW

The **Domestic Violence Legal Advice Line** provides free confidential legal information, advice and referrals for women in NSW with a focus on domestic violence and Apprehended Domestic Violence Orders.

Available Monday 1.30 pm to 4.30 pm, Tuesday 9.30 am to 12.30 pm, Thursday 1.30 pm to 4.30 pm.

- ▶ **(02) 8745 6999**
- ▶ **1800 810 784 (rural freecall)**

The **Women's Legal Contact Line** provides free confidential legal information, advice and referrals for women in NSW with a focus on family law, domestic violence and sexual assault.

Available Monday Tuesday 1.30 pm to 4.30 pm and Thursday 9.30 am to 12.30 pm.

- ▶ **(02) 8745 6988** or
- ▶ **1800 801 501 (rural freecall)**

The **Indigenous Women's Legal Contact Line** provides free confidential legal information, ad-

vice and referrals for Aboriginal and Torres Strait Islander women in NSW with a focus on domestic violence, sexual assault, parenting issues, family law, discrimination and victim's support. Available Monday, Tuesday and Thursday 10 am to 12.30 pm.

- ▶ (02) 8745 6977
- ▶ 1800 639 784 (rural freecall)

The **Working Women's Legal Service** provide free legal advice for women who have experienced sexual harassment, pregnancy discrimination or discrimination because of family responsibilities. Leave a voicemail message and they will call you back.

- ▶ (02) 8745 6954

The **Care and Protection Legal Advice Line** provides free legal advice for mothers and other female relatives who are dealing with the Family and Community Services (FACS). Leave a voicemail message and they will call you back.

- ▶ (02) 8745 6908

**Evening telephone advice service** provides free legal advice by telephone about family law and discrimination at work. Telephone appointments are available on Tuesday evenings from 6 pm to 8 pm. You can request an appointment with a lawyer using an online booking form.

- ▶ [www.wlsnsw.org.au/contact-us](http://www.wlsnsw.org.au/contact-us)

### LawAccess

Free legal information, advice and referrals. Available Monday to Friday 9am to 5pm.

- ▶ 1300 888 529
- ▶ [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)

### Legal Aid NSW

They provide advice and representation on a range of areas. There are Legal Aid offices throughout NSW; call LawAccess or visit the Legal Aid website to find the nearest one.

- ▶ 1300 888 529
- ▶ [www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

### Community Legal Centres

Community Legal Centres (CLCs) are independent community organisations providing equitable and accessible legal services. There are specialist and generalist CLCs throughout NSW. Call LawAccess or visit the CLCNSW website to find the appropriate one.

- ▶ 1300 888 529
- ▶ [www.clcnsw.org.au](http://www.clcnsw.org.au)

### Wirringa Baiya Aboriginal Women's Legal Centre

- ▶ 1800 686 587 (NSW only)
- ▶ Email: [wirringa\\_baiya@clc.net.au](mailto:wirringa_baiya@clc.net.au)

### Aboriginal Legal Service

Assists Aboriginal and Torres Strait Islander men, women and children through representation in court, advice and information, and referral to further support services.

- ▶ Crime matters: 1800 765 767
- ▶ Care and protection matters: 1800 733 233
- ▶ [www.alsnswact.org.au](http://www.alsnswact.org.au)

### Family Violence Prevention Legal Services

Thiyama-li Family Violence Service (Moree, Bourke, Walgett)

- ▶ 6751 1400

Warra-Warra Family Violence Prevention Legal Service (Broken Hill)

- ▶ 8087 6766

Many Rivers Family Violence Prevention Legal Service (Kempsey)

- ▶ 6562 5856
- ▶ 6562 4856

Binaal Billa Family Violence Prevention Legal Service (Forbes)

- ▶ 1800 700 218

### Victims of domestic violence and sexual assault

#### NSW Health Sexual Assault Services

Free services including information, crisis counselling, medical care and forensic examination and ongoing counselling and support groups. For your local service visit the website or the local hospital.

- ▶ [www.kidsfamilies.health.nsw.gov.au/current-work/programs/programs-and-initiatives/sexual-assault-services](http://www.kidsfamilies.health.nsw.gov.au/current-work/programs/programs-and-initiatives/sexual-assault-services)

### Child and Adolescent Sexual Assault Counselling Inc.

Peak body for community based services providing child sexual assault counselling and support services to children, young people and adults, and their non-offending family members.

- ▶ **(02) 9750 0500**
- ▶ [www.casac.org.au](http://www.casac.org.au)

### Adults Surviving Child Abuse

Services for adults who have experienced child abuse and trauma including a support line, information and resources.

- ▶ **1300 657 380**
- ▶ [www.asca.org.au](http://www.asca.org.au)

### Women's Domestic Violence Court Advocacy Services

Women's Domestic Violence Court Advocacy Services (WDVCAS) provide safe rooms at Local Courts on ADVO list days. They can help victims to obtain legal protection from domestic violence and help with other needs including accessing support services (for example financial assistance and advice, housing, counselling and family law issues). Some WDVCAS have specialist workers to help Aboriginal women, or women from culturally and linguistically diverse backgrounds. There are WDVCAS throughout NSW. Contact LawAccess for a referral to your local service.

- ▶ **1300 888 529**
- ▶ [www.wdvcasnw.org.au](http://www.wdvcasnw.org.au)

### Domestic Violence Duty Scheme

The Domestic Violence Duty Scheme (DVDS) is a panel of private lawyers who assist women and children experiencing domestic violence in Apprehended Violence Order (AVO) court proceedings. They can give free independent legal advice to clients including police clients on ADVOs, family law, care and protection and Victims Services. They can also advise and represent women who have made a private application for an ADVO in mentions, and hearings through a grant of legal aid.

They can also advise and represent women who are defendants to an AVO or cross application where it can be established that they are actually the victims in the relationship. DVDS solicitors attend court on AVO list days in most metropolitan and many regional local courts.

The best way to find out if the court your client is attending has a DVDS is to contact the local Women's Domestic Violence Court Advocacy Service.

- ▶ **1300 888 529**
- ▶ [www.legalaid.nsw.gov.au/what-we-do/services](http://www.legalaid.nsw.gov.au/what-we-do/services)

### Staying Home Leaving Violence

The Staying Home Leaving Violence (SHLV) program is a specialised domestic and family violence program aimed at promoting housing stability and preventing homelessness for women experiencing domestic violence. Assistance ranges from installation of security measures in homes, safety and risk assessment, development of safety plans, advocacy with police, referrals to legal advice and counselling and help with tenancy, financial and other issues.

Your client can self-refer or government or non-government agencies can refer her. At the time of writing, Staying Home Leaving Violence operates from 27 services across NSW; Bega, Blacktown, Broken Hill, Campbelltown, Clarence Valley, Coffs Harbour, Dubbo, Eastern Sydney, Fairfield/Liverpool, Inverell, Kempsey, Lake Macquarie, Maitland/Cessnock, Moree, Newcastle, Nowra, Orange, Parramatta/Holroyd, Penrith, Redfern, Tamworth, Wollongong, and Wyong/Gosford.

The best way to find your local SHLV service is to call LawAccess or visit their website.

- ▶ **1300 888 529**
- ▶ [www.community.nsw.gov.au/parents.-carers-and-families/domestic-and-family-violence/staying-home-leaving-violence](http://www.community.nsw.gov.au/parents.-carers-and-families/domestic-and-family-violence/staying-home-leaving-violence)

### Start Safely program

The Start Safely program, funded by Housing NSW, involves the payment of a rental subsidy to provide short- to medium-term financial assistance to victims of domestic violence so they can secure private rental accommodation.

- ▶ **1300 468 746**
- ▶ [www.housing.nsw.gov.au/help-with-housing/homelessness/domestic-violence-and-homelessness](http://www.housing.nsw.gov.au/help-with-housing/homelessness/domestic-violence-and-homelessness)

### Witness Assistance Services (Director of Public Prosecutions)

Assistance and support for victims of crime and vulnerable prosecution witnesses going to court. Priority is given to victims of sexual assault and domestic violence.

- ▶ **1800 814 534**
- ▶ [www.odpp.nsw.gov.au/witness-assistance-service](http://www.odpp.nsw.gov.au/witness-assistance-service)

### Victims Services NSW

Victims of sexual assault, domestic violence and other violent crimes can make claims for financial assistance and get free counselling.

- ▶ **1800 633 063**
- ▶ **(02) 8688 5511**
- ▶ **1800 019 123 (Aboriginal Contact Line)**
- ▶ [www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

### Medicare rebate for counselling

Medicare rebates are available for up to ten individual and ten group allied mental health services per calendar year to patients with an assessed mental disorder who are referred by a GP managing the patient under a mental health treatment plan or under a referred psychiatrist assessment and management plan, or by a psychiatrist or paediatrician.

- ▶ [www.health.gov.au/internet/main/publishing.nsf/content/mental-ba-fact-pat](http://www.health.gov.au/internet/main/publishing.nsf/content/mental-ba-fact-pat)

### Financial Rights Legal Centre

A specialist CLC that provides free telephone legal advice and financial counselling to NSW consumers on credit, debt and banking matters. Available Monday to Friday, 9.30am to 4.30pm.

- ▶ **1800 007 007**
- ▶ [www.financialrights.org.au](http://www.financialrights.org.au)

### Welfare Rights Centre

This specialist CLC can advise people about their social security rights, entitlements and obligations and assist people through the social security review and appeals system.

- ▶ **(02) 9211 5300**
- ▶ [www.welfarerights.org.au/organisations/nsw/sydney](http://www.welfarerights.org.au/organisations/nsw/sydney)

### Women's Health Centres

Women's Health Centres are non-government, community based, feminist services that provide choices for women to determine their individual health needs. Visit Women's Health NSW for information about local Women's Health Centres.

- ▶ [www.whnsw.asn.au/centres.htm](http://www.whnsw.asn.au/centres.htm)

### Family Planning NSW

Family Planning NSW provides reproductive and sexual health services.

- ▶ [www.fpnsw.org.au](http://www.fpnsw.org.au)

### Safe Beds for Pets

Offers temporary housing for pets of people who are seeking refuge from domestic violence.

- ▶ **(02) 9782 4408**
- ▶ [www.rspcansw.org.au/our-work/programs-community-services/safe-beds-for-pets](http://www.rspcansw.org.au/our-work/programs-community-services/safe-beds-for-pets)

## Clients from non-English speaking backgrounds

### Translating and Interpreting Service (TIS)

Interpreting for people whose first language is not English. Phone interpreting service available 24 hours a day.

- ▶ **131 450**
- ▶ [www.tisnational.gov.au](http://www.tisnational.gov.au)

### Immigrant Women's Speakout

Offers a range of services to women of non-English speaking background including information, advocacy and referral services.

- ▶ **(02) 9635 8022**
- ▶ [www.speakout.org.au](http://www.speakout.org.au)

## Forced Marriage and Migration

### Australian Federal Police

The AFP can help people who are at risk of a forced marriage or who are in a forced marriage, including where a person may be taken overseas to marry.

- ▶ **131 AFP (131 237)** or **000** in an emergency

### My Blue Sky

Information and advice for people in a forced marriage or who are worried they will be forced to marry.

- ▶ **(02) 9514 8115** or **0481 070 844**
- ▶ [mybluesky.org.au](http://mybluesky.org.au)

## Immigration Advice & Rights Centre

Specialist CLC that gives legal advice about immigration and refugee law.

- ▶ **(02) 8234 0799 (advice)** Tuesday and Thursday 2pm to 4pm
- ▶ **(02) 8234 0700 (appointments and enquiries)**
- ▶ [www.iarc.asn.au](http://www.iarc.asn.au)

## Clients with disabilities

### Intellectual Disability Rights Service

The Intellectual Disability Rights Service (IDRS) is a specialist legal advocacy service for people with intellectual disability in NSW.

- ▶ **(02) 9318 0144**
- ▶ **1800 666 611**
- ▶ [www.idrs.org.au](http://www.idrs.org.au)

### National Relay Service

Provides an Australia-wide phone service for people who are deaf or have a hearing or speech impairment. Available 24 hours a day.

- ▶ **133 677** or **1800 555 677** to call a 1800 number (TTY users)
- ▶ **1300 555 727** or **1800 555 727** to call a 1800 number (speak and listen)
- ▶ **0423 677 767** or if calling an SMS relay user: **133 677 (SMS relay)**
- ▶ [relayservice.gov.au/contact](http://relayservice.gov.au/contact) (internet relay)

## Prisoners

### Women's Legal Service

- ▶ Prisoners can dial **21#** on the gaol CADL phone system (free call)

### Prisoners Legal Service (PLS)

PLS is a statewide specialist service of Legal Aid NSW. PLS provides advice, minor assistance and representation to prisoners.

- ▶ Prisoners can dial **11#** on the gaol CADL phone system and ask for PLS (free call)

## LGBTI clients

### Inner City Legal Centre

Specialist legal advice for lesbian, gay, bisexual, transgender, intersex and queer people and sex workers.

- ▶ **(02) 9332 1966** or
- ▶ **1800 244 481**
- ▶ [www.iclc.org.au](http://www.iclc.org.au)

### ACON

Provides support for LGBTI people experiencing violence.

- ▶ **(02) 9206 2000** (Sydney)
- ▶ **(02) 6622 1555** (Northern Rivers)
- ▶ **(02) 4962 7700** (Hunter)
- ▶ **(02) 6584 0943** (Port Macquarie)
- ▶ **(02) 6651 6017** (Coffs Harbour)
- ▶ **(02) 9206 2500** (Wollongong)

## Children and young people

### National Children's and Youth Law Centre

An independent, non-profit organisation working for and in support of children and young people, their rights and access to justice. Legal advice provided by email.

- ▶ **(02) 9385 9588**
- ▶ [www.ncylc.org.au](http://www.ncylc.org.au)

### Lawstuff

Legal information on topics relevant to children and young people in an easy to read format.

- ▶ **(02) 9385 9588**
- ▶ [www.lawstuff.org.au](http://www.lawstuff.org.au)



**A Practitioner's  
Guide to Domestic  
Violence Law in NSW**

Women's Legal Service NSW