



Government of South Australia

Office of the Guardian
for Children and Young People

**Response to Discussion Paper, Attorney-
General's Department**

Review of Domestic Violence Laws

May 2007

To: Ms Maurine Pyke QC

From: Ms Pam Simmons
Guardian for Children and Young People

1. Introduction

- 1.1 Among other statutory functions the Guardian for Children and Young People acts as an advocate for the interests of children under the guardianship, or in the custody, of the Minister for Families and Communities. We have a major interest in preventing children from requiring statutory protection and protecting children from harm.
- 1.2 The State Government has asked Ms Maurine Pyke QC to review the domestic violence laws in South Australia. Ms Pyke issued a discussion paper in March 2007 and invited comment by 21 May 2007.
- 1.3 This response is prepared on the basis of the Office's experience in investigating individual matters and talking with experts in the area of children and domestic violence.¹ Responsibility for the comments rests solely with the Guardian. We have restricted our comments to the options for reform that have most application to children.

2. General

- 2.1 It is now well known and accepted that domestic violence has a highly damaging impact on children who directly experience the violence or are witness to it.
- 2.2 We welcome the review of the *Domestic Violence Act 1994* (and related Acts) and the opportunity to amend provisions to take account of progress in our knowledge and social mores. This includes the need to take better account of the circumstances of children who are affected by domestic violence.
- 2.3 As a starting point, amendments should be consistent with our obligations as a signatory to the *United Nations Convention on the Rights of the Child* and the *Declaration on the Elimination of Violence Against Women*. Particular account should be taken of provisions in the Convention that give primacy to the best interests of the child (Article 3), the right to have their views taken into account (Article 12), protection from abuse (Article 19), and to be treated with dignity where they have been accused of a breach of penal law (Article 40).
- 2.4 We ask that the final report from Ms Maurine Pyke be a public document and that there be minimal delay in releasing it. This supports the integrity of the consultation process that people have willingly engaged in.

3. Principles

- 3.1 Guiding principles should be inserted into the Act. They will aid in the interpretation of the provisions.
- 3.2 The inserted principles should include specific reference to the impact on children of exposure to domestic violence. This will underscore the gravity of the act to children's wellbeing now and in the future.

¹ Acknowledgment and thanks to: Ms Angela Andary, Office of the Guardian; Ms Jo Battersby, Office of the Health and Community Services Complaints Commissioner; Ms Jennifer Duncan, Youth Affairs Council of SA; Mr Steve Golding, Families SA; Mr David Kerr, Victim Support Services; Ms Eleanora Rubenis, Children and Law Committee Law Society of SA; Ms Kirsten Sandstrom, Children and Law Committee Law Society of SA; Ms Lea Spaven, The CREATE Foundation; Ms Laura Willows, Children and Law Committee Law Society of SA.

4. Definition of children – age

- 4.1 The current Act defines a child as being under the age of 18 years. This is consistent with the *Children's Protection Act 1993* and the *UN Convention on the Rights of the Child*. This age should be retained.

5. Capacity to make application

- 5.1 Children who *regularly or normally reside with the defendant or domestic partner or former domestic partner of the defendant* should be able to make application for a domestic violence restraining order.

The proposed reforms in Chapter 3 (27.1 and 27.2) of the discussion paper do not adequately cover the range of 'caring' arrangements for children because it refers to 'a relative' (27.1.3) and further defines a child as a child where a 'parenting order' or plan is in place under the *Family Law Act*. There are a significant number of formal and informal household arrangements for the care of children that would be excluded by this narrower definition.

The broader definition, to include children who regularly or normally reside in the household, would also cover circumstances where the violence is between children, either siblings or not, living in the same household.

- 5.2 In relation to who should be able to make application on behalf of a child, we believe that this should not be specified. Children will choose different significant adults to assist them and the Court can decide the legitimacy of the advocate's relationship. If the concern is about vexatious applications, these are possible regardless of restrictions made on who can make application, are few in number and will be decided by the Court.
- 5.3 In relation to the age at which a child should be able to make application the following needs to be taken into account. Children have the right to participate in the decisions that affect them. A child who is capable of forming his or her own views has the right to express those views freely. The views of the child should be given due weight according to the age and maturity of the child.

It may be preferable to not specify an age at which a child can make application because the Court must be satisfied that the child is fully aware of the nature and effect of the application and that he or she is not being coerced into making an application. The more important principle is that the views of the child are fully taken into account in any judicial proceedings that involves them.

6. Jurisdiction

- 6.1 Jurisdiction should vest in both the Magistrates Court and the Youth Court.
- 6.2 It is preferable that the matters commence in a specialist court, such as the Family Violence Court. However, the specialist court is not available to all people in all regions. Regardless of where the matter commences there should be ease of transfer to the Youth Court where a child is the applicant. If domestic violence matters are to be heard in the Youth Court the judiciary will benefit from expert knowledge about the dynamics of such violence and its impact on children.
- 6.3 Where a child is the respondent the matter should commence in the Youth Court.

7. Representation of children

- 7.1 The underlying principle is that a child and his/her interests should be represented separately to adult parties to a judicial matter as interests and views may differ. There continues to be discussion about what is *adequate* representation in other jurisdictions, such as the Family Court and the Youth Court. To strengthen the obligation for separate representation, a child or young person should be allocated a lawyer where they have not engaged their own. The young person can then choose to not be represented in court by their lawyer but they would do so following legal advice. This is stronger than the suggested option in the discussion paper.

8. Protection of children in proceedings

- 8.1 Special procedures are required to protect children from distressing exposure to the public and the defendant, and to protect them from forceful and distressing questioning. The Youth Court currently has such protections.
- 8.2 Any proceedings conducted in another Court where a child is an applicant or witness should be closed. A child who gives evidence is entitled to have support with Court approval for the presence of that person.
- 8.3 There should be a total prohibition on the publication of any details which may identify a child before, during or after proceedings, whether the child is an applicant, witness or respondent or otherwise named in the proceedings.
- 8.4 Children are particularly vulnerable during the giving of evidence. We have been involved in two matters recently in country Magistrates Courts where the protection for child witnesses was inadequate and the children would not proceed with giving evidence. Some courts have adopted video links and rules about communication with children such as questions put through a person approved by the Court. Other forms of evidence can be adopted to protect children. Such options should be more readily available in all Courts and for all proceedings requiring a child's participation. Judiciary and child representatives should also undertake specialist training in communicating with, and understanding, children.
- 8.5 Children who are not a party to the proceedings should not give evidence (in person or by affidavit) without special leave of the Court and should not be present or called as a witness during proceedings unless they are directly involved and the Court decides it is necessary.

9. Definition of domestic violence

- 9.1 The definition of the act of domestic violence should include "causing or allowing the child to see or hear the physical or psychological abuse of a person with whom the child has a domestic relationship and which puts the child or allows the child to be put a real risk of seeing or hearing that abuse occurring." This acknowledges the significant adverse impact on children of witnessing domestic violence.

10. Sentencing

- 10.1 The presence of a child whilst an act of domestic violence is committed should be an aggravating factor for the purpose of sentencing.

11. Court's initiative to act on behalf of children

11.1 The Court should have the capacity on its own initiative to make orders for the protection of children where the Court is satisfied the child has witnessed and is likely again to hear or witness domestic violence. This should be possible regardless of whether the person who is the subject of the violence makes a complaint.

12. Restraining orders

12.1 The existing Act does not deal with children as perpetrators of domestic violence. While this is a relatively small part of the issue it is important to formally recognise that children who have witnessed or experienced domestic violence may perpetuate it at an early age. The response must take into account their age-related reduced responsibility and developmental needs, while also clearly protecting the victims of violence.

12.2 No domestic violence restraining order should be imposed on a child under 10. This is consistent with the age of criminal responsibility. Further consistency could be introduced by applying the notion of *doli incapax* to children aged between 10 and 13 years in deciding whether an order is imposed. In Australia in criminal matters, *doli incapax* requires the Court to prove that the child was fully capable of understanding his/her actions. The issuing of a restraining order could serve to mask significant issues of abuse or neglect of a child by identifying the child as the cause of the problem. Their use on children should be carefully monitored. Orders should be time-limited and intervention for the child respondent could be a condition of the order.

12.3 Where the respondent to an order is under 18 and the protected person is a person responsible for their day to day care (or their parent or guardian) Families SA should be notified so that alternative arrangements are secured. The proposed reform suggests this would apply to respondents under 16 and we acknowledge that more intensive efforts would be required at a younger age. However, the statutory care and protection responsibilities do extend to all children under 18 and this Act should be consistent with international obligations and the *Children's Protection Act*.

12.4 A proposed option for reform would see the application served upon a parent or guardian where a respondent is aged under 16. In most cases this would be appropriate. However where the parent or guardian is the protected person alternative arrangements would be required.

13. Interim proceedings to an order

13.1 If an interim proceeding would result in an order which prohibits a child from being on premises where he/she normally receives care or education this should only be made if the Court is satisfied that adequate alternative arrangements have been made. However, experience in the care and protection system suggests that this must be balanced with the imperative to act where there is a real risk of harm to children.