

# domestic violence LEGAL SERVICE

24 May 2018

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Robert Bradshaw PSM  
Director, Policy Coordination  
Solicitor for the Northern Territory  
Department of the Attorney-General and Justice  
Level 8, 68 the Esplanade  
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GPO Box 1722, Darwin NT 0801

Dear Robert

## **Request for urgent legislative change to *Domestic and Family Violence Act* to support victim safety**

This letter is written on behalf of and with the endorsement of **Central Australian Womens Legal Service (CAWLS)**, **Central Australian Aboriginal Family Legal Unit (CAAFLU)**, **Katherine Women's Legal Information Service (KWILS)**, **Top End Women's Legal Service (TEWLS)**, **North Australian Aboriginal Family Legal Service (NAAFLS)** and **Domestic Violence Legal Service (DVLS)**.

This letter is put to your department as a summary of the above organisations' request for the Northern Territory Government (NTG) to move to make urgent changes to the *Domestic and Family Violence Act* (DFVA) to ensure and protect victim safety.

## **Background**

We refer to previous correspondence from DVLS dated 27 February 2018 outlining recent changes in the approach of the Darwin Local Court in making changes to Police section 41 Domestic Violence Orders (DVOs) which we see as putting victim safety at risk.

We refer to your subsequent attendance at meeting of our organisations, DV Legal Services, on 28 February 2018. We confirm that you suggested that DV Legal Services should provide more detail on the legislative changes requested and that we put forward those changes to the legislation with a view to a package of amendments being put to Parliament. The amendments sought would not supplement those which may be generated from the major review of the Act currently in progress. Rather, the changes would address the immediate problem around Part 2.9 of the Act and the absence of clear legislative power to make interim variations by consent to section 41 DVOs. Finally, we are mindful of later advice from your office (Laura Berta) that you do not require members to engage in the drafting of proposed amendments, but rather provide your office with a clear outline of the issues and the outcomes sought. To this end, please see our comments outlined below.

## **Issue: Court accepting oral applications under Part 2.9 – police orders being reduced or revoked without notice to protected person**

In recent months, a practice of oral applications at Court to vary section 41 Police DVOs prior to confirmation has been emerging. This was recently considered in a Local Court decision (21751889 *Police v Panwar*) in relation to revocation of an unconfirmed section 41.

Prior to *Police v Panwar*), common practice had been that unconfirmed s41 orders were varied on an interim basis only where all parties were present and consented to such a variation. This practice still

occurs today, however, there is now uncertainty as to when the Court will be content to make interim variations by consent.

In late 2017, the Solicitor for the Northern Territory made submissions that the Court may not make an interim variation with consent because there is no explicit legislative provision empowering the Court to make such a variation. Defendants' counsel have since applied to the Court to dispense with the procedural requirements at Part 2.9, sections 73 through 78, and to hear and act on oral applications to vary the section 41 on an interim basis and even to have a section 41 DVOs revoked.

In *Police v Panwar*, the court determined that any party to an order can make an oral application for review at Court under part 2.9 (including an oral review at court on the return of summons mention) and the court can confirm the order (in stronger or lesser terms) on an interim basis, subject to a summons to show cause. This is highly problematic from a victim-safety perspective, as well as perhaps questionable at law given that the decision dispenses with the mandatory requirements for review set out at sections 73 and 78.

Of greatest concern is that this decision and recent Court decisions have led to the making of unilateral oral applications by defendants for review of an unconfirmed s41 DVO without notice to the protected person.

By way of example, on 9 February 2018 in the Darwin Local Court, a defendant's legal representative made an oral application for review of an unconfirmed s41 order without notice to and in the absence of the protected person or a legal representative on their behalf. The Court suspended the full no contact provisions. The effect of the Court's decision to "suspend" the full non-contact orders meant that the protected person was left without the full non-contact terms and as such with nothing to stop the defendant from attending her residence or contacting her.

Under Part 2.9, the Court is also at liberty to revoke the DVO as provided at section 74(2)(b). This is of concern as it is common practice of Police that protected persons subject to section 41 DVOs will be told by Police that they do not need to attend Court, especially if they are in agreement with the form of DVO that has been made.

Victims whose orders are revoked at court in their absence as part of an oral application for review are left entirely unprotected and would be required to seek protection through a section 28 application or await and be subject to a further incident of DV enlivening the making of a new s41 order by Police.

### **Urgent changes proposed**

As a matter of urgency, legislative changes proposed include the following:

- a) at 2.9, to ensure that where a variation under 2.9 is sought with the effect of reducing the level of protection provided by a DVO, the court must not proceed to vary the DVO by way of reducing the level of protection without notice to the protected person and/or without the protected person having been afforded the opportunity to be served and heard.
- b) at 2.9, to remove the power to revoke a DVO currently provided for at section 74(2)(b). Such a change will make Part 2.9 consistent with Part 2.8, Division 2, section 67(2) where, on an application for urgent review of a Court or Police DVO, there is no power to revoke. Such a change would guard against a defendant seeking summary revocation of a Police DVO without notice to the protected person and without the protected person having the opportunity to put further evidence in support of the DVO to the Court.

**Additional change to legislation: express power to make interim variation to a section 41 by consent**

A complementary proposed change to the legislation is one which addresses the current uncertainty around interim variations by consent to section 41 Police DVOs before these are finally determined. It is hoped that amending the legislation to provide for interim variation by consent may also have the effect of making the court less likely to hear and proceed on oral applications under Part 2.9 as having this provision as part of the scheme may serve to highlight that any changes not with the consent of the protected person are best dealt with at a hearing, with the Court then to have regard to evidence and submissions from the parties.

Further as discussed above, it is often necessary and desirable to make changes to a section 41 Police DVO before the matter is finally determined. Such a variation may provide for exceptions for contact via solicitor or family dispute resolution practitioner (where Police have not made the DVO with such an exception), exceptions providing for the making of arrangements for or contact with children, including children as protected persons or changes to vacate orders to ensure a party is not unnecessarily made homeless (for example or where Police make a vacate order in respect of the family home, but the protected person has decided to move out).

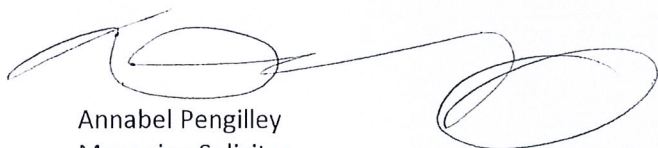
**Proposed change**

- At Part 2.10, to expressly provide for variations with the consent of all the parties to s41 orders on an interim basis (prior to a final hearing). This amendment will allow for sensible changes to orders prior to hearing or final resolution by consent of the parties, for example in relation to arrangements for children or property.

Should you require any further information please do not hesitate to contact the writer in the first instance.

Otherwise we thank you for your attention in this and look forward to your response.

Yours sincerely  
DOMESTIC VIOLENCE LEGAL SERVICE



Annabel Pengilley  
Managing Solicitor