29 January 2016

Ms Jenni Daniel-Yee
Director, Legal Policy
Department of the Attorney-General and Justice
GPO Box 1722
DARWIN NT 0801

By email: Policy.AGD@nt.gov.au

Dear Ms Daniel-Yee,

Re: Personal Violence Restraining Orders Bill 2015

Thank you for inviting comments on the Personal Violence Restraining Orders Bill 2015 ('the Bill'). The Top End Women's Legal Service Inc. ('TEWLS') welcomes the opportunity to make comments in response to the Issues Paper of December 2015.

TEWLS reaffirms the position that there needs to be extensive reform of the law regarding Personal Violence Restraining Orders ('PVROs'). TEWLS raised these concerns with the Attorney-General and Minister for Justice Elferink in 2013 and 2014, and provided detailed written submissions to improve the PVRO legislative regime to Minister Elferink via email on 13 February 2015.

Our submissions dated 13 February 2015 are attached to our current response at "**Attachment A**".

About TEWLS

TEWLS is a community legal centre focused on the advancement of women's rights. We are funded by the Commonwealth Attorney General's Department to provide referrals, legal advice and information, casework and community legal education to women in the Top End of the Northern Territory. TEWLS provides assistance in a number of areas of law including domestic and family violence, sexual assault, family law, compensation for victims of crime, housing, discrimination, workplace health and safety, employment law, motor vehicles and consumer credit debts. We provide outreach services for culturally and linguistically diverse women, Aboriginal women in the town communities surrounding Darwin and women in prison.

Our Submission

Interim PVROs

TEWLS strongly supports the inclusion of a provision permitting the granting of an interim PVRO. As previously stated in our submissions dated 13 February 2015, victims remain in a vulnerable position while waiting for their application to reach a final hearing.

Expecting a victim to wait until the situation escalates so as to warrant police intervention is inadequate and inappropriate. The power to request an interim PVRO would go some way to providing immediate protection for a party genuinely in fear.

Relevantly, all other State and Territories legislation (apart from Queensland legislation) relating to personal violence restraining orders (or their equivalent) provide for the making of an interim protection order.[1] These relevant sections further highlight the current gap in the NT legislation in relation to a power for the Court to make an interim PVRO.

Amendment of mediation provisions

TEWLS strongly supports the need for changes to be made in respect of the provisions on mediation. These provisions are found in clause 10(2) of the Bill and current section 86(2) of the *Justices Act* (NT).

Clause 10(1) of the Bill provides that before hearing an application for a PVRO, the Court must refer the person whose protection is sought and the defendant for mediation.

Clause 10(2) of the Bill provides:

> *However, the Court must not make a referral and must proceed to hear the application if it is satisfied it is in the interests of justice to do so, including, for example, because:*
>
> *(a) there is a history of violence committed against the person by the defendant; and*
>
> *(b) there has been a previous attempt at mediation between the person and defendant in relation to the application and the attempt was not successful.*

TEWLS experience is that the application of this provision can differ depending on the presiding magistrate. TEWLS believes that this is because of the unclear wording of the current provision. Although clauses 10(2)(a) and

[1] See section 22(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); section 35 of the *Personal Safety Intervention Orders Act 2010* (Vic); section 29 of the *Restraining Orders Act 1997* (WA); section 21 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA); section 29 of the *Domestic Violence and Protection Orders Act 2008* (ACT); and section 106D of the *Justices Act 1959* (Tas).

(b) of the Bill are provided as examples only, this is not immediately clear on the face of the provision. Moreover, because of the use of the word "and" between clauses 10(2)(a) and (b), a strict interpretation could be that even if there is a history of violence, the parties must still be referred to mediation where there have been no previous attempts at mediation.

Mediation is clearly an inappropriate mechanism where there is a history of violence, fear or intimidation from the defendant towards the person seeking protection, where the applicant is a minor and the defendant is an adult, or where for other reasons an applicant does not feel able to participate in a fully informed manner in mediation.

TEWLS notes that the Issues Paper accompanying the Bill states that the provisions could be amended to enable the court to hear an application without the need for mediation in circumstances *where the court considers it appropriate to do so*. TEWLS believe that the current test, where the Court can decline to make a referral to mediation "*if it is satisfied it is in the interests of justice to do so*", should remain as this is a legally recognised form of words. The phrase "*in the interests of justice*" has no precise definition as it is used in a variety of different contexts. However, it is understood to confer a broad discretion on the Court to make a decision where justice requires.

TEWLS believes that the provision could be more clearly drafted as follows:

Clause 10(2)

However, the Court must not make a referral and must proceed to hear the application if it is satisfied it is in the interests of justice to do so.

Clause 10(2A)

For the purposes of section 10(2), in deciding whether or not it is in the interests of justice, the Court must have regard to:

(a) the relationship between the person seeking protection and the defendant; and

(b) whether there is a history of violence committed against the person seeking protection by the defendant; and

(c) any other relevant matter.

This clause would be quite similar to section 21(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which provides a non-exhaustive list of matters which must be considered in determining whether there is a good reason not to refer a matter to mediation, including whether there has been a history of violence or harassment against the person seeking protection or there have been previous unsuccessful attempts at mediation.

Option for longer-term orders in exceptional circumstances

The Bill and current *Justices Act* (NT) are silent on the length of term of a PVRO. Normal practice is that an order is made for a period of 12 months. TEWLS is not aware of a PVRO that has been made for greater than 12 months.

Similarly, the *Domestic and Family Violence Act* (NT) is silent in relation to the period of time for which a DVO can last. Normal practice is that an order is made for a period of 12 months, but it is also commonplace for orders to be made for a longer period of time, particularly where the degree of violence experienced by the protected person has been high.

Given the lack of free legal services that represents clients in PVRO matters (due to the lack of directed funding for these services), many persons seeking protection are self-represented litigants. These persons are unfamiliar with the legislation and court process and would be unlikely to make submissions in relation to the length of order sought, leaving the Court to most likely an order in line with standard practice (12 months). In circumstances where a 12 month PVRO is insufficient, the protected person would need to make an application to extend the period of order (section 91 of the *Justices Act* (NT) and clause 15 of the Bill), which would incur a further filing fee.

Instead of amending the legislation to provide for a set time period for which a PVRO must last, a better approach may be to amend the application form for a PVRO to include a "tick a box" option in relation to the duration of the PVRO sought by the person seeking protection. For example, the application form in Victoria for a personal safety intervention order includes a question "*How long do you want the intervention order to last?*" with the options being less than 12 months, 12 months or more than 12 months. There is also space in the application form to explain why the order is sought for this length of time.

Amending the PVRO form would provide some much-needed guidance to the applicant and perhaps prompt questioning from the Magistrate as to the need for a longer term PVRO depending on the circumstances of the case.

Filing fee for PVROs

TEWLS strongly supports the reduction or waiving of the filing fee for a PVRO. As stated in our submissions dated 13 February 2015, the current filing fee is excessive and prohibitive to vulnerable victims experiencing hardship.

Under regulation 6(3) of the *Justices Regulations*, no fee is payable for an application made under the *Domestic and Family Violence Act* (NT). The *Justices Regulations* could likewise contain an exception in relation to fees payable for PVRO applications.

It should also be noted that the cost for applying for a PVRO (or its equivalents) in other States and Territories is markedly lower than the fee payable in the Northern Territory (apart from South Australia, where the fee for the filing of a private PVRO application is $256). In NSW, Victoria, Queensland and Western Australia there is no fee payable; in Tasmania, the fee is $29.60; and in Queensland, the fee is $86.40.

There is currently no express power under the *Justices Regulations* for the Court to waive a filing fee or any other fee required by the legislation. However, a form is available on request from the registry at the Court of Summary Jurisdiction whereby a person can apply for a waiver or deferral of fees. The form requires the applicant to divulge a large amount of personal financial information to the Court, without any guarantee that the fee will be waived or reduced.

As such, TEWLS submits that the *Justices Regulations* be amended to include an exception in relation to fees for a PVRO.

Definition of "personal violence offence"

As recommended in TEWLS submissions dated 13 February 2015, the current definition of a "personal violence offence" (section 80 of the *Justices Act* (NT) and clause 3 of the Bill) is deficient in two ways.

First, the definition does not standalone, i.e. it refers to a "personal violence offence" as being an offence against Part V Division 2, Part VI Divisions 3 to 6A, and sections 211 or 212 of the *Criminal Code* (NT). This makes it very difficult for a self-represented litigant to understand what a "personal violence offence" is and address this in their application.

Second, the definition is inadequate, in that it does not capture some behaviours which ought to be restrained. The omission of "intimidation" which does not amount to stalking or threat of assault (as would be covered under the Criminal Code) is but one example. Another example is that property damage is not captured by the definition of a "personal violence offence". The offence of property damage is found in section 241 of Part VII, Division 6 of the *Criminal Code*.

TEWLS experience is that these are behaviours for which a PVRO should provide protection.

The object of the Bill under clause 5(1) is to "ensure the safety and protection of persons who experience personal violence outside a domestic relationship as defined in the Domestic and Family Violence Act". It is difficult to reconcile this object with the restrictive definition of "personal violence offence".

It should also be noted that legislation relating to personal violence restraining orders (or their equivalent) in Victoria, Western Australia, South Australia, the ACT, Queensland and Tasmania contains stand-alone definitions of a personal violence offence/act/behaviour.[2]

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[2] See section 5 of the *Personal Safety Intervention Orders Act 2010* (Vic); section 6 of the *Restraining Orders Act 1997* (WA); section 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA); section 14 of the *Domestic Violence and Protection Orders Act 2008* (ACT); section 4 of the *Peace and Good Behaviour Act 1982* (Qld); and section 106B of the *Justices Act 1959* (Tas).

A personal violence offence in NSW is defined by reference to certain sections of the *Crimes Act 1900* (NSW) and the *Crimes (Domestic and Family Violence Act 2007* (NSW), but contains a broader range of offences than the Bill (including property damage): see section 4 of the *Crimes (Domestic and Family Violence) Act 2007* (NSW).

Additional changes to PVRO scheme

In addition to those areas identified in the Issues Paper, TEWLS makes the following recommendations as previously outlined in our submissions dated 13 February 2015:

- Police be provided with professional development seminars in understanding the potentially serious and negative consequences of issues between non-related parties and their powers to obtain PVROs on a victims' behalf;

- CLCs be provided with funding and resources to assist applicants and defendants in PVRO matters in circumstances where it is inappropriate for police to utilise their discretion in obtaining PVROs. Consideration could also be given to the scheduling of lawyers' fees for PVRO matters;

- Focus be turned to legislative construction to ensure accessibility for self-represented litigants;

- Specify provisions as to party costs;

- For a fair and expeditious process, the PVRO application should be amended to contain orders that an applicant could seek appropriate to their situation and level of protection required, such as that contained in a DVO application. As noted above, there should also be an option in relation to the duration of the orders sought. Further, a covering sheet to the application in a number of different languages explaining the options for an applicant or defendant to seek independent legal advice should be included;

- Provision be made to enable the Court to make an order for the person seeking protection to ascertain the identity of the defendant where this is unknown. The provision could be similar to that found in regulation 5.2 of the NSW Uniform Civil Procedure Rules which states that the Court may make an order for a person to divulge the identity or whereabouts of the defendant in a situation where the applicant, having made reasonable inquiries, is unable to sufficiently ascertain the identity or whereabouts of the defendant for the purpose of commencing proceedings.

We thank you for your consideration of the above and would be pleased to be contacted should you wish to discuss this submission further. Should you require further information, please do not hesitate to contact our office on (08) 8982 3000.

Yours sincerely,
TOP END WOMEN'S LEGAL SERVICE INC.

Vanessa Lethlean
Managing Solicitor