Legal Aid NSW Criminal Law Conference 2014

Domestic violence: new laws

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Purpose of paper

1. On 20 May 2014, amendments to the *Crimes (Domestic and Personal Violence) Act 2007* came into effect. The purpose of this paper is to summarise the effect of those changes. It is also to highlight problem areas with the new legislation, in relation to which criminal lawyers will need to be vigilant in protecting the rights of their clients.

Nature of changes—overview

2. The *Crimes (Domestic and Personal Violence) Amendment Act 2013* ('the amending Act') wrought 2 major types of change on the domestic violence regime in NSW:

    a Senior Police officers may now make provisional apprehended domestic violence orders (ADVOs), and

    b Police officers (of any rank) may now give a wide array of directions, and even order the 'detention' of persons not under arrest (including at a Police station), during the period between when the Police officer decides to apply for an ADVO, and when that ADVO (having been applied for and granted) is served on the defendant.

Is the sky falling?

3. The new rules are theoretically far-reaching. However, in practical terms, they will have drastic effects only on defendants in ADVO applications who are *not* charged with a criminal offence arising from the incident the subject of the ADVO. In the 'classic' scenario, the new rules will be employed where attending Police believe that a domestic violence has occurred but have inadequate evidence to charge (usually because the alleged victim declines to provide a statement).

4. The pointy end of the amendments for criminal defence practitioners is that our clients may, at the discretion of investigating Police, face charges of assaulting, resisting or hindering Police in execution of their duty where they are regarded as not having been sufficiently compliant with 'directions' or orders for 'detention' under the new regime. A close consideration of the facts and legislation will then be required to determine whether the Police were actually acting in execution of their duty.

5. The other issue is that the pre-existing *Crimes (Domestic and Personal Violence) Act* ('the Act') was a badly-structured and over-complex piece of legislation[1] whose contents did not, in some important respects, match its intentions[2]. The amending Act makes it worse in both respects. Where the offence of contravening ADVOs is such a significant driver of charges and imprisonment[3], the system fails in one of its principal goals if it is not readily understood by defendants and those it is designed to protect.

Detail of change—Police making AVOs

6. The new section 28A of the Act provides that a senior Police officer (of or above the rank of Sergeant) may make a provisional ADVO. The threshold is merely that the senior Police officer is satisfied that there are "reasonable grounds for doing so"—a vague and contentless test, but one that is consistent with the existing test to be applied by authorised officers (generally Registrars and Magistrates) under section 28 of the Act.

7. Because there is no additional threshold for a Police officer to pass before applying to a co-worker, rather than an independent umpire, it is to be expected that the vast majority of applications for provisional ADVOs will now be made to senior Police officers.

8. In a case where the defendant has been directed to remain, or detained, at the Police station while the application is made, it will be a nice question that will hopefully eventually be tested in the Courts, whether a senior Police officer is obliged to afford natural justice to a defendant. Natural justice is not excluded by the Act. Difficulties with communication and security (where the authorised officer may be, e.g., sitting in a

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1 For example, the Act obscures the practical process by which ADVOs are applied for, granted and continued while related criminal charges go on—ADVOs are brought into existence by Part 4, but then Part 7 governs the making of provisional ADVOs, Part 6 governs interim ADVOs (which are generally made *after* provisional orders), confusingly the term "interim ADVO" is defined to include both a true interim order and a provisional order; and then Part 10 is a dog's breakfast that governs the process for the making of final AVOs of all kinds (whether ADVOs or Apprehended Personal Violence Orders), and also a range of other things like hearing procedure and applications for variation of interim AVOs.

2 Section 9 of the Act, entitled 'Objects of Act in relation to domestic violence', cites one of the purposes of the Act as being to enact provisions consistent with the UN Convention on the Rights of the Child. However, Article 9 paragraph 1 of that Convention states that children shall not be separated from their parents against the parents' will, except when under a process subject to judicial review a determination is made that separation is necessary for the best interests of the child—particular examples of abuse or neglect are given. Section 38(2) of the Act, on the contrary, creates a presumption that a defendant in a 'no contact' (interim or final) ADVO will also be prevented on pain of imprisonment from having contact with his or her children where those children are in a "domestic relationship" with the protected person (a very broad term defined in ss 5 and 6 of the Act), unless the decision-maker determines that there are "good reasons" for not adding children as protected persons in the ADVO. Despite the title of section 42 of the Act, the decision-maker is nowhere directed to consider the desirability of children having contact with both parents, in determining whether "good reasons" exist.

3 Judicial Commission statistics indicate that in the 4 years ending December 2013, there were 13,568 findings of guilt for the offence of contravening an ADVO, resulting in 1870 sentences of full-time imprisonment.

home office out of business hours) have reduced effectively to nothing the content of natural justice afforded to defendants where applications for ADVOs are made by Police to authorised officers. No such issues arise where the defendant is potentially sitting in a Police station right in front of the decision-maker.

9. A senior Police officer may *not* make an ancillary property recovery order: section 37(1) of the Act. Experienced practitioners will have an opinion on the frequency with which our clients will make application to their Local Court Registry for amendment of existing Police-made ADVOs and patiently await service on all interested parties and a hearing date on the application being allocated—as opposed to, for example, simply breaching the ADVO by going to collect their clothes.

10. There are some additional powers set out in section 33A of the Act for defendants subject to Police-made provisional orders to apply to the Court to vary or revoke that order before the first return date, but section 33A(2) prevents such a variation or revocation application from being made by anyone other than a Police officer if any one of the protected persons is a child. To be clear: under the Act as it now is, Police may make an unreviewable decision, for up to 28 days[4], preventing an ADVO defendant from approaching or contacting their children on pain of criminal sanction—even if those children are not alleged to have suffered or witnessed any violence, abuse or neglect (or indeed if they weren't in the house, or the same city, when the alleged incident giving rise to the application occurred).

Detail of change—directions and detention of defendants in proposed ADVO applications

11. Police have rightly pointed out[5] that NSW Police have had power since 1993 to direct defendants in proposed ADVO applications to remain at certain locations (and to arrest and detain the defendant if they refused to comply with the direction). Those powers simply weren't used in practice, apparently due to Police resourcing issues. In apparent breach of Judge Haesler's famous 'broccoli principle'[6], the legislature has decreed that the answer to the dilemma is to create a complex and invasive system of cascading and alternative directions and detentions.

12. There are six different 'directions' that may be given to proposed defendants in intended ADVO applications. They are set out in section 89A of the Act, and will need to be read closely in a case where Police allege they have exercised a power under this section. However, in broad terms, the 'directions' available are to remain at the place where the Police found the proposed defendant, to go to some other place agreed to by the proposed defendant, to go to a Police station, to accompany a Police officer to a place of medical treatment (without any agreement), or to accompany a Police officer to

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[4] Section 32(1) of the Act

[5] Inspector Sean McDermott, "Improving outcomes for victims of domestic violence", *Law Society Journal*, May 2014, p 67

[6] You don't get more powers until you use up the ones that you have

some other place (which must be agreed to by the proposed defendant). In any case where the proposed defendant is travelling somewhere else, they can also be directed to remain there after arrival until the ADVO application process is finished (for a maximum of 2 hours: section 90A(2) of the Act).

13. Generally, the system works on the model of 'a direction is given, and then detention may be ordered if there is no compliance'. However, in the case of a direction to accompany Police to a Police station, to accompany Police compulsorily to a place for medical attention, or even to *voluntarily* accompany Police to some other location, Police may 'detain' the person (even if there is no hint of non-compliance) in a Police vehicle while they are being conveyed to that other place.

14. Police interpretation of the new legislation is that a proposed defendant in that common scenario, will be 'directed' into the Police car, 'detained' in the Police car while being driven to the station, and then after release from the car and being walked into the station they will have their legal status again revert to being subject to a mere 'direction'—which may result in their subsequent 'detention' if they don't comply with the direction and decide to walk out! Police have stated that their intention is that compliant 'directees' will sit around at the front counter of the station, while non-compliant 'detainees' may be placed in the dock.

15. Section 90B of the Act provides basic protections to detainees under the Act (whether held at a Police station, at another place or in a vehicle), most relevantly that they should not be held in a cell unless necessary and should be given an opportunity to contact a friend, family member or other support no matter where they are.

16. The questions that arise from the new regime are fairly extensive, and the only way to determine the answers will be by close monitoring of how Police exercise the new powers in practice. Those questions include:

    a What rights and protections, if any, does a compliant person who is merely 'directed' to remain at a Police station have? The suite of rights granted by section 90B of the Act (e.g. the right to communicate, be held separately from those arrested for an offence, be provided with food, drink and blankets) on its face only extends to those 'detained'. What policy or practical basis is there to treat those who are cooperating, less favourably at law?

    b The power to search under section 90C of the Act only extends to a person "detained". Do Police therefore have no rights to inspect or interfere with the property of those compliant individuals subject to a "direction"—no matter where that person and their property are? And for those in the legal netherworld of being 'directed' to get in a Police vehicle, being 'detained' in a Police vehicle during transportation, and then again being 'directed' to remain at the Police station or other place after arrival—is any search of their property legal if conducted while they are being transported (for example, by a 2IC who removes their seatbelt for the purpose), but otherwise illegal?

c Are persons given a direction to remain in the company of Police somewhere other than a Police station (whether for the purpose of being transported or otherwise), required to be cautioned? It is inevitable that some things said by persons directed to remain in the company of Police, subsequent to that 'direction', will subsequently be used against them in Court.

d What procedures exist, or will exist, for a proper and lawful transition when, during the 2-hour period, Police change their mind and decide to arrest and charge a 'directed' or 'detained' person? (This will happen not too infrequently, as during the relevant period, Police will talk the alleged victim into providing a statement.)

e Records containing particulars of detention are required to be kept of persons 'detained', pursuant to section 90D(1) of the Act and clause 4 of the *Crimes (Domestic and Personal Violence) Regulation 2014*. No such records are required to be kept regarding the 'directed'. There is no statutory protection for the 'directed' giving them the right to remain in public areas of the Police station (or other place of 'direction'). Indeed, one would expect that it's perfectly common that they'll be kept in the cell area where the front counter area is deemed unsuitable and there are no other appropriate spaces within the Police station. What record will there be of the fact that these people have been, by force of law, deprived of their liberty for up to 2 hours?

17. What is clear is that the new regime, superimposed on top of an existing creaky and badly structured Act, is not one that frontline Police nor defendants are likely to understand—and that lack of understanding is liable to lead to non-compliance by both sets of parties.