

APPREHENDED VIOLENCE ORDERS (AVO)

Introduction

AVO = Appended Violence Order

ADVO = Apprehended Domestic Violence Order

APVO = Apprehended Personal Violence Order

A reference to 'the Act' is a reference to the Crimes (Domestic and Personal Violence) Act 2007.

There is no shortage of AVO matters in Local Courts across NSW. In 2013 the Local Court issued over 25,000 ADVO's and over 6,000 APVO's. It is inevitable that if you practice criminal law you will have to deal with these matters.

Any discussion on AVO's must start with recognition that an AVO can be a vital tool in the fight against domestic violence. Many victims of real domestic violence need and should have the protection of an AVO.

Sadly a piece of paper does not always protect victims of domestic violence but there are no doubt many instances where the existence of an AVO has played a part in protecting a victim from further domestic violence.

In drafting AVO legislation the government of the day took AVO's away from the criminal justice system and relied on civil procedures and the civil standard of proof. This makes it easier to get an AVO against a defendant than to get a conviction against the same defendant for the same conduct. On the whole I think this is the correct approach.

The downside of such an approach is that it is open to abuse. AVO legislation is trying to regulate human relations. This invariably leads to problems. We have seen a proliferation of AVOs in the last decade, probably longer.

The Legislation

However we need to start with a quick overview of the current legislation including frequently used terms.

Any discussion of the relevant legislation must start at the stated objects of the law. In AVO land there is a clear distinction between AVOs and APVOs. The term AVO is the generic term used to describe all types of order. it includes ADVO and APVO.

9 Objects of Act in relation to domestic violence

(1) The objects of this Act in relation to domestic violence are:

(a) to ensure the safety and protection of all persons, including children, who experience or witness domestic violence, and

(b) to reduce and prevent violence by a person against another person where a domestic relationship exists between those persons, and

(c) to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women, and

(d) to enact provisions that are consistent with the United Nations Convention on the Rights of the Child.

(2) This Act aims to achieve those objects by:

(a) empowering courts to make apprehended domestic violence orders to protect people from domestic violence, intimidation (including harassment) and stalking, and

(b) ensuring that access to courts is as safe, speedy, inexpensive and simple as is consistent with justice.

(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

(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.

(4) A court that, or person who, exercises any power conferred by or under this Act in relation to domestic violence must be guided in the exercise of that power by the objects referred to in this section.

10 Object of Act in relation to personal violence

(1) The object of this Act in relation to personal violence is to ensure the safety and protection of all persons who experience personal violence outside a domestic relationship.

(2) This Act aims to achieve that object by:

(a) empowering courts to make apprehended personal violence orders in appropriate circumstances to protect people from violence, intimidation (including harassment) and stalking, and

(b) ensuring that access to courts is as safe, speedy, inexpensive and simple as is consistent with justice, and

(c) ensuring that other avenues of dispute resolution are encouraged where appropriate.

The term Apprehended Violence Order covers the field and includes apprehended domestic violence orders and apprehended personal violence orders. The legislation sometimes uses each of these terms and it is important to be sure which type of order is under consideration.

Whether or not a matter calls for an ADVO or APVO depends on the relationship between the warring parties. See section 5.

5 Meaning of “domestic relationship”

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 .

For the purpose of ss (g) the word 'Relative' is also defined in the Act. See s6.

*For the purposes of this Act, a person is a
"relative" of another person (the
"other person"):*

(a) if the person is:

(i) a father, mother, grandfather, grandmother, step-father, step-mother, father-in-law or mother-in-law, or

(ii) a son, daughter, grandson, grand-daughter, step-son, step-daughter, son-in-law or daughter-in-law, or

(iii) a brother, sister, half-brother, half-sister, step-brother, step-sister, brother-in-law or sister-in-law, or

(iv) an uncle, aunt, uncle-in-law or aunt-in-law, or

(v) a nephew or niece, or

(vi) a cousin,

of the other person, or

*(b) where the person has a de facto partner (the
"person's partner")-if the other person is:*

(i) a father, mother, grandfather, grandmother, step-father or step-mother, or

(ii) a son, daughter, grandson, grand-daughter, step-son or step-daughter, or

(iii) a brother, sister, half-brother, half-sister, step-brother or step-sister, or

(iv) an uncle or aunt, or

(v) a nephew or niece, or

(vi) a cousin,

of the person's partner.

If a protected person does not fit into one of these categories then you have an APVO.

Starting an AVO

Provisional Orders

Police applications

Often police are called to an incident or take a report of an incident and it involves an allegation of conduct that is

- a a domestic violence offence - see s 11 & 4 OR
- b an allegation of an offence against section 13 - stalking etc. and
- b it is necessary to make the application 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.

These circumstances allow police to make an application for a provisional order. A provisional order is made and there is a return date (not less than 28 days away) and the application for provisional order is then treated as an application under s48. See s29. The distinction between ADVO and APVO is that police can issue provisional order for ADVO. If it is an APVO police have to make application to an authorised office for a provisional order.

Interim Orders

An applicant can go to a court and see a registrar and make an application for an ADVO or APVO. In urgent situations the court can make an Interim Order in the absence of the defendant.

Where a provisional order has been made by the police or an authorised justice (usually out of hours) a court can extend the operation of the provisional order. It is then called an interim order.

Dealing with AVO matters

At some stage a client will turn up at the office with a copy of a provisional or interim order. The client has 3 choices.

- 1 Admit the conduct alleged and consent to an order (in terms sought or agreed to)
- 2 Deny the conduct alleged and have the matter listed for defended hearing
- 3 Deny the conduct but consent to orders as sought or as agreed. See s 78

In my view the terms of s 78 do not allow a defendant to consent to an order but have a hearing on which terms should be in the order. Both parties have to consent for the operation of s78 and if they can't agree on the terms of the order then the only option is to have a full hearing of the matter. This places additional pressure on defendants to consent to terms which they might not be entirely happy with.

If there is no consent about a final order then there will be a hearing. The course of a defended AVO hearing is regulated by Local Court Practice Note 2 of 2012.

The basis for the making of an AVO is exactly the same for ADVO's and APVO's. See s 16 and 19.

Defending AVO's

There is no magic to defending AVO matters. They are just like every other case involving accusation and denial. The case requires the one thing critical to success in any litigation - preparation.

- Full instructions from the client.
- Exploration of motive on behalf of the pinop
- Obtaining evidence from external sources i.e. subpoena

Costs

Once you have won your AVO hearing - talking about a case with no associated criminal charge- most clients will want to explore recovery of their legal costs.

Costs are governed by s99 of the Act and the Criminal Procedure Act 1986, mainly s214. There is some recent controversy about costs in APVO matters. First the legislation.

99 Costs

(1) A court may, in apprehended violence order proceedings, award costs to the applicant for the order or decision concerned or the defendant in accordance with this section.

(2) Costs are to be determined in accordance with Division 4 of Part 2 of Chapter 4 of the Criminal Procedure Act 1986 .

(3) A court is not to award costs against an applicant who is the person for whose protection an apprehended domestic violence order is sought unless satisfied that the application was frivolous or vexatious.

(4) A court is not to award costs against a police officer who makes an application unless satisfied that the police officer made the application knowing it contained matter that was false or misleading in a material particular.

(5) Subsections (3) and (4) have effect despite any other Act or law.

214 Limit on award of professional costs to accused person against prosecutor acting in public capacity

(1) Professional costs are not to be awarded in favour of an accused person in summary proceedings unless the court is satisfied as to any one or more of the following:

(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,

(b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,

(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.

(2) This section does not apply to the awarding of costs against a prosecutor acting in a private capacity.

(3) An officer of an approved charitable organisation under the Prevention of Cruelty to Animals Act 1979 is taken not to be acting in a private capacity if the officer acts as the prosecutor in any proceedings under that Act or section 9 (1) of the Veterinary Practice Act 2003 .

ADVO matters are divided into two groups.

- 1 those prosecuted by the police
- 2 those prosecuted privately

For those prosecuted by police you cannot get costs unless you satisfy one of the tests in s214 Criminal Procedure Act PLUS satisfy the court that the application was frivolous or vexatious AND the police officer new the application contained false or misleading material.

For ADVO matters prosecuted privately (and there aren't many) you still have to satisfy the court that the application was frivolous or vexatious.

For APVO matters there is confusion as a result of a recent Court of Appeal matter *Mahmoud v Sutherland* [2012] NSWCA 306. **This is a classic example of why it is” sometimes prudent to avoid these matters.** (unless fully funded)

My interpretation of the legislation is as follows.

Costs are determined by reference to the Criminal Procedure Act. s214 places limits on the award of costs. s214 (2) creates a situation where matters prosecuted by private persons are not protected by 214(1). This means that the common law applies to the awarding of costs. See *Latoudis v Casey* [1990] HCA 59; 170 CLR 534. Therefore if you successfully defend a private APVO application you are entitled to an order for costs. The Court of Appeal has a different view.

Wang v Farkas [2014] NSWCA 29

I have included a reference to this case as a great example of how out of hand APVO matters can get. This case was about neighbours fighting over a development application. In the Local Court it ran for 24 days over 3 years and in the District Court the appeal ran for 6 days!!!!!!

Offences

offences are created in s 13 and 14. They are:

- s13 Stalking or intimidation
- s14 breach of AVO

Stalking and intimidation

It is important to remember that an element of this offence is that the conduct must be intended to cause the other person to fear physical or mental harm. The defendant doesn't have to achieve that aim but must have that intention.

Intimidation is defined in the Act:

7 Meaning of "intimidation"

(1) For the purposes of this Act,

"intimidation" of a person means:

(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.

The difficult part of the definition is 'conduct amounting to harassment....' this is very broad and in my experience captures relatively innocuous conduct. Harassment is not defined in the act.

See ***Vella v. DPP* [2005] NSWSC 897**

[27] In the context of a statutory provision creating an offence, inter alia, in respect of any act calculated to harass, annoy or cause harm of distress to any person on account of his or her performance of duties ordinarily performed in the course of his or her employment in connection with the supply of electricity under s.5(1)(c) of the *Electricity (Continuity of Supply) Act 1985 (Q)*, Gibbs, CJ. was prepared to accept that the word *harass* meant *to trouble or vex*: **O'Sullivan v. Lunnon** (1986) 163 CLR 545, 550.

[28] The Macquarie Dictionary, Revised 3rd Edition, defines *harass* as including:-

1. to trouble by repeated attacks, incursions, etc., as in war ... harry; raid. 2. to disturb persistently; torment, as with troubles, cares, etc."

See also *Murdoch v Hadley* [2011] NSWLC 11 where the same definition is adopted.

In respect of breaches of AVO's the most important aspect of sentencing is s14 (4) which states:

(4) Unless the court otherwise orders, a person who is convicted of an offence against subsection (1) must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person.

Important factors in mitigating a sentence for breaching an AVO are:

- if violence is involved - the level of violence
- the role of the protected person in the breach - note that protected persons cannot be guilty of aiding, abetting, counselling or procuring a breach of an AVO s15 (7)
- the period of compliance prior to the breach
- extenuating circumstances i.e. emergency
- the possibility of further breaches

Phillip Gibson

Timetable for Statements

(Practice Note 2 of 2012)

Applicant's evidence

1. The Applicant is to serve on the Defendant a copy of:
 - The Applicant's own written statement, and
 - Any written statement/s of witness/es from whom the Applicant intends to call evidence at hearingon or before _____ (*approximately 2 weeks*).
2. In proceedings where the Defendant is unrepresented, the statements may be placed with the registry for collection by the Defendant.

Defendant's evidence

3. Subject to any claim under s 87 of the *Civil Procedure Act 2005*, the Defendant is to serve on the Applicant a copy of:
 - The Defendant's own written statement, and
 - Any written statement/s of witness/es from whom the Defendant intends to call evidence at hearingon or before _____ (*approximately 4 weeks*).
4. In proceedings where the Applicant is unrepresented, the statements may be placed with the registry for collection by the Applicant.

Mention

5. The matter is next listed on _____ (*approximately 5 weeks*) ('the mention date') to review compliance with this timetable and, if ready, to list the matter for hearing.
6. Unless the Court otherwise orders, and subject to the interests of justice, on the mention date:
 - If the Applicant has failed to comply with these directions and does not appear at Court, the application may be struck out.
 - If the Defendant has failed to comply with these directions and does not appear at Court, an Apprehended Violence Order may be made.

It is important to comply with the above timetable. If statements are not exchanged prior to the hearing date, it will be necessary to seek leave of the Court to give oral evidence.