

Crimes (Domestic and Personal Violence) Act 2007 NSW

This Act commenced on the 10th March 2008. The act repeals and replaces Part 15A of the Crimes Act with modifications. The act deals with the issuing of apprehended domestic violence orders (ADVO) and apprehended personal violence orders (APVO) by courts and the enforcement of those orders.

Two substantive offences are contained in the Act:

- **Section 13 – Stalking or Intimidation** with intent to cause fear of physical or mental harm. Intimidation is defined in section 7 to include harassment and molestation and intimidation by way of electronic device. Maximum penalty imprisonment 5 years and or a fine of \$5500.00.
- **Section 14- Contravening an AVO.** Maximum penalty imprisonment 2 years and or a fine of \$5500.00. If the person is over 18 years and the contravention is by committing an act of violence then, unless the court orders otherwise, the person must be sentenced to a term of imprisonment

Domestic Violence Offence is defined by section 11 to mean a personal violence offence committed by a person against another person with whom the person has or had a domestic relationship. Domestic relationship has a wide definition under section 8.

Section 12 provides for the recording of offences as domestic violence offences on the person's criminal record. It also provides that previous domestic violence offences may be so recorded. This is intended to make it apparent to the court that a person is a repeat domestic violence offender in relation to bail and sentencing proceedings.

Personal Violence Offence is defined by section 4 and covers various offences under the Crimes Act.

Making of ADVOs

Part 4 sets out the provisions relating to the making of ADVOs. Section 16 allows the court to make an order if it '*is satisfied on the balance of probabilities*' that the applicant '*has reasonable grounds to fear and in fact fears*' certain behaviour of the defendant including:

- a) the commission of a personal violence offence, or
- b) intimidation or stalking being conduct that, in the opinion of the court, is sufficient to warrant the making of an order

If the person for whose protection the order is sought is a child or suffering from '*an appreciably below average general intelligence function*' it is not

necessary for that person to hold such fears. The court may also make an order if it is satisfied that the person has previously been subjected to conduct by the defendant amounting to a personal violence offence and there is a reasonable likelihood that a further personal violence offence may be committed and an order is necessary to protect the person. This presumably will enable the court to make an order in those circumstances where victims of domestic violence assert that they no longer hold fears.

For the purposes of section 16, conduct may amount to intimidation even though:

- a) it does not involve actual or threatened violence to the person, or
- b) it consists only of actual or threatened damage to property

Section 17 sets out the matters to be considered by the court in deciding whether to make an order. The emphasis is on the *'safety and protection of the protected person and any children directly or indirectly affected'*. It does however provide that the order is only to impose *'those prohibitions and restrictions... that are necessary for the safety and protection of the protected person and any child ...'*

Making of APVOs

Part 5 sets out the provisions relating to the making of APVOs which are similar to the provisions in relation to ADVOs. Section 21 allows for the referral of matters to mediation by the Community Justice Centre.

Interim Orders

Part 6 gives the court the power to make interim orders *'if it appears to the court that it is necessary or appropriate to do so in the circumstances'*.

Provisional Orders

Part 7 sets out the provisions for the police to apply, usually by telephone or fax, to an authorised officer for an urgent order. An order will be made if the authorised officer is *'satisfied that there are reasonable grounds'* for making a provisional order.

Final Orders

Orders may be made by consent and without admission: *section 78*.

AVO conditions

Section 36 provides that the three **mandatory orders** prohibiting:

- A. Assaulting, molesting, harassing, threatening or otherwise interfering with
- B. Intimidating
- C. Stalking

All apply to the protected person and anyone with whom he/she has a domestic relationship.

Section 35 provides for other conditions prohibiting or restricting behaviour including:

- approaching the protected person
- access to premises – residential, work or other specified premises
- approaching within 12 hours of consuming alcohol or drugs
- destroying property
- other specified behaviour

Section 37 allows for **property recovery orders** which may provide that the protected person may retrieve personal property from the defendant's premises or vice versa, with or without police assistance. It is an offence to contravene a property recovery order or obstruct a person who is attempting to comply with a property recovery order. Maximum penalty \$5500.00 fine.

Compulsory Orders

Section 40 provides that an interim AVO is to be made when a person is charged with a serious offence which is defined within the section to include a domestic violence offence and stalking/intimidating.

Section 39 provides that the court must make an AVO if the defendant pleads guilty or is found guilty of a domestic violence offence or stalking/intimidating.

Both sections 39 and 40 provide that an order need not be made if the court is satisfied that it is not required. The example given is where there is already one in existence. It is open for submissions to be made that there may be other reasons why an order may not be required. These may include the nature or circumstances of the offence, the time lapse since the offence, the geographical distance between the parties, the current relationship between the parties.

Children

When representing defendants in AVO proceedings care must be taken to be aware of arrangements (including orders and pending applications for orders) for children between the applicant and the defendant. Under *section 42* the applicant is required to inform the court of any relevant parenting order or pending application for a relevant parenting order. The court is required to inform the applicant of this obligation. Advice must be given in relation to the effect of an AVO on those arrangements, orders or applications.

Regard should also be had for those provisions in the Family Law Act (*sections 68P,Q,R*) which have an impact on AVOs. *Section 68R* allows a state court (including the Local Court) to revive, vary, discharge or suspend an existing family law order.

Section 38 enables the court to extend any order to the protection of a person in a domestic relationship with the protected person. It further provides that the order must include any child of that person “*unless the court is satisfied that there are good reasons for not doing so.*” Given the very wide definition of ‘relative’ in *section 6* and ‘domestic relationship’ in *section 5* there may well be good reasons for not including every such person, including children, in an order.

Clearly there may be many people who are relatives of the applicant who would either have absolutely nothing to do with the defendant or, even if they have contact, would not be involved in the conflict between the defendant and protected person. Regard should be had to the possible impact on the defendant of the referral of AVOs involving children to the Commission of Children and Young People under *section 38* of the *Commission of Children and Young People Act*.

Proceedings involving children

Section 41 provides that proceedings relating to AVOs in which a child is involved either as a protected person or as a witness are to be heard in the absence of the public unless the court otherwise directs. The child will not be required to give evidence unless the court determines that it is in the interest of justice for the child to do so. The relevant provisions of the *Criminal Procedure Act 1986* apply.

Variation or revocation of AVOs

Division 5 of Part 10 provides for the variation or revocation of orders. Any of the protected persons, a police officer or the defendant may make an application. In the case of a protected person who is a child the application must be made by a police officer.

The court may decline to hear an application if it is satisfied that there has been no change in circumstances and it considers the application to be in the nature of an appeal.

Although normally notice of the application is to be served on the other party, the court may extend the period an order is to remain in force without notice to the defendant if the application was lodged prior to the expiry of the existing order. Such an extension may last for 21 days and may be further extended. Presumably until it is served it can have no effect as a defendant could not be proved to have ‘knowingly’ breached an order if he or she was not served with the extended order.

Orders may be varied or revoked in relation to all protected persons or one or more of them. Hence the situation may arise that an AVO may have different conditions relating to various protected persons.

Variations to existing AVOs may be made after a guilty plea or finding of guilt. Presumably this may occur when an AVO is made after one incident and is

subsequently breached by more serious conduct which would justify more stringent conditions being imposed.

Appeals

Division 7 of Part 10 deals with appeals. Appeals can be made against the making of an AVO, refusal to make an AVO, making of a variation or revocation, refusal to make a variation or revocation and the awarding of costs. An appeal does not automatically stay an AVO. The original court may stay an order if it is satisfied that it is safe to do so: *section 85*.

Warrants for arrest and powers of detention of defendants

Part 11 provides for the issue of warrants for the arrest of defendants where an application for an AVO has been made even though it is not alleged that an offence has been committed: *section 88*. In this case the Bail Act applies: *section 83*.

Section 89 allows a police officer who intends to make an application for a provisional order to direct a person to remain at the scene, and if the person refuses to remain, to arrest, detain, or take him or her to a police station until the provisional order is made and served. Similarly *section 90* provides that a police officer who reasonably suspects that a person may be a defendant in relation to an AVO may direct the person to remain where he or she is for the purpose of serving the order and arrest and detain or take a person to the police station if he or she refuses to remain.

Costs

Section 99 gives the court the power to award costs against an applicant or defendant.

In ADVO proceedings the court is not to award costs against an applicant unless satisfied that the application was frivolous or vexatious. The 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.

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

TODD RITCHIE

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