

1. Introduction

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1.1 The prevention, detection and punishment of violence in all its forms has been a pressing matter on social, political and law reform agendas for many years. The focus of the criminal law is to punish the offender after the commission of an offence has been proved beyond reasonable doubt. While the imposition of criminal sanctions following a breach of the law is a necessary element in our society, it is not always sufficient to protect those who fear for their safety. A person may fear violence at the hands of another in circumstances where the conduct of that person may either not amount to criminal conduct, or may not be able to be proved to the criminal standard. A classic example is obsessive behaviour, such as constant telephone calls or sending disturbing, unsolicited gifts or messages. In domestic situations, it is possible for patterns of intimidation and abuse to continue for years without there being enough corroborating evidence to support a criminal conviction. To alleviate fear in these circumstances, a system of restraining or protection orders operates in every Australian State and Territory, and in many overseas jurisdictions. In NSW, they are known as Apprehended Violence Orders (“AVOs”), and are contained in Part 15A of the *Crimes Act 1900* (NSW) (“Part 15A”). As the name suggests, these orders are intended to act as a circuit breaker, to apprehend or prevent existing or potentially violent situations from escalating.

1.2 Since the introduction of AVOs in NSW 20 years ago, the number of applications has increased dramatically.¹ While AVOs originated as a means of preventing domestic violence,² they are now able to be sought generally, regardless of whether the

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1. A total of 26,407 final AVOs were granted by NSW local courts in 2001, up from 21,923 in 2000: NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2001: Table 1.18* (Statistical Services Unit, March 2002) «www.lawlink.nsw.gov/bocsar». Note that this figure only refers to AVOs that were finalised, and does not include interim AVOs or AVOs issued from the Children’s Court. Accordingly, the total number of AVOs issued will be much higher. By way of comparison, 1,462 AVOs were issued in 1987: L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme*, (NSW Bureau of Crime Statistics and Research, Sydney, 1997) (“BOCSAR Report 1997”) at iii.
 2. See para 2.3-2.14.

applicant and defendant are in a domestic relationship. Because of the surge in the number of AVO applications, and the fact that they deal with sensitive and controversial subject matter, AVO legislation has been reviewed and amended several times over the years. These are detailed in Chapter 2. In the latest round of legislative amendments, a provision was included requiring a review of Part 15A to determine whether the policy objectives of the Part remain valid, and whether the terms of the Part remain appropriate for securing those objectives.³ The Commission has been asked to conduct that review.

TERMINOLOGY

1.3 Throughout this Discussion Paper, the Commission refers to the person who applies for an AVO, or on whose behalf an AVO is applied for by a police officer, as the “applicant”. The person against whom an AVO is taken out is referred to as the “defendant”. The term “AVO” is a general one used to refer to the protection orders available under Part 15A. However, in practice, people are granted either an Apprehended Domestic Violence Order (“ADVO”) or an Apprehended Personal Violence Order (“APVO”), depending on the relationship between the applicant and defendant. There are some differences in the way Part 15A applies to each type of order, but largely the procedural elements and requirements are the same for each. Consequently, the Commission uses the terms “ADVO” and “APVO” when discussing the provisions peculiar to each type of order, but uses the general term “AVO” to discuss provisions common to both. This reflects the terminology and structure of Part 15A.⁴

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3. *Crimes Act 1900* (NSW) (“the Crimes Act”) s 562Z. That section also provides that the review must be undertaken as soon as possible after a period of two years following the commencement of the *Crimes Amendment (Apprehended Violence) Act 1999* (NSW). That Act commenced on 26 April 2000.
 4. Part 15A is divided into sections: Division 1A contains the objects and provisions specific to ADVOs, while Division 1B contains the APVO provisions. Divisions 2-5 deal with the procedural requirements relating to AVOs generally.

THE CURRENT LAW

1.4 AVOs are the primary legal means by which people may seek protection against threatened acts of personal violence.⁵ AVOs can be obtained relatively quickly and easily.⁶ Under Part 15A, any person may apply to the local court⁷, for an order against another person if he or she suspects that some form of personal violence, or other abuse, harassment or intimidation, is occurring or is imminent. A police officer may apply for an AVO on behalf of an applicant, and *must* apply for an order where the officer suspects that a domestic violence offence⁸ or a stalking offence⁹ has been, or is likely to be, committed, or where the applicant is under the age of 16 years.¹⁰

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5. It should be noted that protection orders do not, and should not, act as a replacement for the laying of criminal charges in cases of violence, abuse, stalking or harassment.
 6. Providing speedy, inexpensive, safe and simple access to justice is one way that Part 15A, Division 1 (dealing with ADVOs) aims to achieve its objects. The ease with which AVOs may be obtained is a controversial issue, and is discussed throughout this Discussion Paper.
 7. Where the applicant is under 18 years of age, the matter will be dealt with in the Children's Court: Crimes Act s 562G. Applications in both the Local Court and the Children's Court are made by way of complaint made orally or in writing and substantiated on oath: see Crimes Act s 562C.
 8. A domestic violence offence is a personal violence offence committed within a domestic relationship, as defined in s 4 and s 562A of the Crimes Act. See definition of personal violence offence in Crimes Act s 4.
 9. Crimes Act s 562C(3). Section 562AB of the Crimes Act provides that a person who stalks or intimidates another person with the intention of causing that person to fear physical or mental harm, is guilty of an offence. The test for establishing that intention is an objective one: it is assumed to exist where the conduct in question is likely to cause fear: s 562AB(3). It does not matter whether the person being stalked or intimidated actually feared physical or mental harm: s 562AB(4).
 10. Crimes Act s 562C(2A).

1.5 As noted above, the applicant will seek either an ADVO and APVO, depending on the relationship he or she has with the defendant. An application for an ADVO may be made where the applicant and the defendant are in a domestic relationship. A domestic relationship is defined as one where the applicant and defendant:

- are or were married or in a de facto (including same sex) relationship;
- are or were in an intimate personal relationship (whether or not there is a sexual element);
- share or have shared a household or residential facility;
- are or were in a relationship involving dependence or ongoing care (paid or unpaid); or
- are or have been relatives.¹¹

Where the applicant and defendant are in a relationship other than a domestic one, the applicant must apply for an APVO.

1.6 The order may be granted if the defendant consents,¹² or if the court is satisfied that a person, on the balance of probabilities, has reasonable grounds to fear, and does in fact fear:¹³

- the commission of a personal violence offence;¹⁴ or

11. Crimes Act s 4 and s 562A.

12. The defendant may consent to the AVO without admitting the veracity of the claims upon which the application is based: Crimes Act s 562BA. Where the defendant consents, the AVO becomes effective immediately without the need to return to court.

13. It is not necessary for the person actually to fear the commission of a personal violence offence where the person is under the age of 16 years, or is, in the opinion of the court, appreciably below general intelligence level: Crimes Act s 562AE(2) and s 562AI(2).

14. Personal violence offence is defined in s 4 of the Crimes Act to include offences such as murder, manslaughter, malicious wounding and damage, sexual assault, indecent assault, assault with or without inflicting actual bodily harm, and breaching an AVO.

- conduct amounting to harassment or molestation, being conduct sufficient, in the opinion of the court, to warrant the making of the order;¹⁵ or
- conduct which is either intimidating or amounts to stalking.¹⁶

1.7 Legal aid may be available for an ADVO applicant,¹⁷ but not for an ADVO defendant,¹⁸ and is not available at all in relation to APVO proceedings. After an application for an AVO is made, the defendant is notified by the court issuing either a summons or a warrant for the purpose of bringing the defendant to court.¹⁹ An AVO may be made on an interim or a final basis, and regardless of whether the defendant is present in court or not. The AVO will take effect when the order is served on the defendant. It can remain in force for as long as necessary²⁰ and may be varied or revoked upon application to, and agreement by, the court.²¹ An AVO may contain “such prohibitions or restrictions on the behaviour of the defendant as appears necessary or desirable to the court”.²² Despite its location in the Crimes Act, the AVO process is not a criminal one, and the defendant will not incur a criminal record. However, a *breach* of an AVO constitutes a criminal offence.²³

15. Conduct may amount to harassment or molestation even though it does not involve actual or threatened violence to the person, or consists only of actual or threatened damage to property belonging to, in the possession of, or used by, the applicant: Crimes Act s 562AE(3) and s 562AI(3).

16. See Crimes Act s 562AE and s 562AI.

17. Providing the means test requirements can be satisfied: see «www.lawlink.nsw.gov.au/lac.nsf/pages/avoapply».

18. Unless exceptional circumstances exist: see «www.lawlink.nsw.gov.au/lac.nsf/pages/avodefen».

19. Crimes Act s 562AF and s 562AJ. A summons is the dominant method of notifying the defendant in both ADVO and APVO proceedings.

20. Crimes Act s 562E.

21. Crimes Act s 562F.

22. Crimes Act s 562AE(4) and s 562AI(4). See also s 562D for an indication of the types of prohibitions and restrictions the court may impose.

23. Crimes Act s 562I.

1.8 AVOs have generated considerable controversy. Some of the heated debates have erupted because of the nature of the subject matter: in dealing with violence in domestic and other personal relationships, they touch on raw and sensitive issues which are extremely complex in themselves, quite apart from any legal or policy considerations surrounding the AVO process. Other issues touch on more practical or procedural matters which will be examined by the Commission in this Paper and over the course of the review.

1.9 For example, some argue that AVOs place restrictions on defendants that can be quite onerous, yet an AVO may be granted in a matter of minutes without the defendant being present, and may be based on little evidence. It is also alleged that the relative ease of obtaining an AVO, based on the balance of probabilities rather than the criminal standard of beyond reasonable doubt, exposes the provisions to a greater risk of abuse: that is, there is considerable scope to use the provisions inappropriately or even maliciously.²⁴ Alternatively, others argue that the focus of AVOs should be on protecting people against future acts of violence, not on the “rights” of the defendant, and for AVOs to be obtained on the basis of anything other than the lower standard of proof would defeat their purpose of preventing future conduct rather than acting as a sanction for past misdemeanors.²⁵ Some commentators have suggested that the real “abuse” regarding AVOs is that the law is not enforced or implemented properly.²⁶

24. See for example, J Hickey and S Cumines, *Apprehended Violence Orders: A Survey of Magistrates* (Judicial Commission of NSW, Monograph Series 20, 1999) at 44-45; M McMillan, “Should we be more apprehensive about apprehended violence orders?” (1999) 37(11) *Law Society Journal* 48; T Nyman, “Apprehended Violence: Industry or Disease?” (1999) 37(11) *Law Society Journal* 52.

25. See for example, Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999) and NSW Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law* (Discussion Paper, 1999) (“CLR Discussion Paper”). See also N Gouda, “The AVO Backlash” (2000) 38(1) *Law Society Journal* 63.

26. R Hunter and J Stubbs, “Model Laws or Missed Opportunity?” (1999) 24(1) *Alternative Law Journal* 3; H Katzen, “How do I prove

THE COMMISSION'S REVIEW

The Commission's approach

1.10 The Terms of Reference for the Commission's review arise from the requirement in section 562Z of the Crimes Act, inserted by the *Crimes Amendment (Apprehended Violence) Act 1999* (NSW), to examine the validity of the policy objectives of Part 15A and to determine if the provisions of that Part remain appropriate for securing those objectives. In assessing the validity of those objectives, the Commission's focus is on the effect of the most recent legislative amendments in 1999, and on the issues raised in past reviews, or brought to our attention through consultations, which may help to further or hinder the policy objectives of Part 15A.

1.11 In order to meet its Terms of Reference, the Commission considers that the following questions need to be addressed:

- (1) What are the stated and implied policy objectives?
- (2) What are the barometers that measure the validity, success or otherwise of those objectives?
- (3) What do we know about the operation of Part 15A, from consultation, research and statistics?
- (4) Applying the criteria for success (identified in 2 above) to what we know about Part 15A, what issues emerge as the main strengths and weaknesses of the legislation?
- (5) How can Part 15A operate more effectively to meet the policy objectives of the legislation?

These questions form the basis of the Commission's review and underpin our approach in this Discussion Paper.

I saw his shadow? Responses to breaches of Apprehended Violence Orders, A consultation with women and police in the Richmond Local Area Command in NSW (Prepared for the Northern Rivers Community Legal Centre, 2000) at 308.

Major issues canvassed

1.12 In Chapter 2, the Commission traces the legislative history of AVOs, and discusses the most relevant recent reviews of Part 15A.²⁷ This discussion provides the context for attempting to identify the broad policy objectives of AVOs in general, and Part 15A in particular.²⁸ The Commission examines the validity and effectiveness of those objectives, and asks whether AVOs are effective as a method of preventing physical violence and mental or emotional abuse.²⁹ One of the major barriers to the effectiveness, or the perceived effectiveness of AVOs, is allegations that they are being sought and used inappropriately. The Commission looks at this issue in Chapter 5, and seeks suggestions for amending the legislation to limit the possibility of AVOs being abused.

1.13 The scope of AVO legislation, for example, whether it should apply only to domestic violence, and whether ADVOs and APVOs should be dealt with separately or together, have been a recurring theme in legislative reviews and amendments. In Chapter 6, the Commission discusses the separation between ADVOs and APVOs that resulted from the 1999 amendments and asks how that has worked in practice, and whether that separation should be taken further. A related issue is whether the Crimes Act is the appropriate statute in which to locate AVO provisions, given that they do not actually involve the criminal law unless they are breached.³⁰ The Commission also examines the adequacy of the definitions of “domestic violence”, “personal violence” and “domestic relationship” in Part 15A.³¹

1.14 For AVOs to be truly effective, they must be accessible. The procedure for applying for AVOs is discussed in Chapter 8. Part 15A is framed so that it applies equally to all people who fear

27. Chapter 2.

28. Chapter 3.

29. Chapter 4.

30. That is to say, an AVO in itself is a civil and not a criminal procedure. The conduct which gives rise to the AVO, if proven beyond reasonable doubt, will constitute a crime.

31. Chapter 7.

personal violence. Yet, the practical application of the provisions may not affect everyone equally. Chapter 9 examines the impact of AVO legislation on the more marginalised groups in society, including Aboriginal communities, people with disabilities (particularly intellectual disabilities), people living in rural or regional areas, children and older people.

1.15 The Commission also looks at the provisions of Part 15A which deal with granting an AVO,³² the consequences that follow the issuing and breach of an AVO for both the applicant and the defendant,³³ and other practical issues such as the appeals process.³⁴

1.16 The final issue considered by the Commission in this paper is the offence of stalking and intimidation.³⁵ Although not directly part of the AVO process, the substantive criminal offence of stalking and intimidation is contained in Part 15A. It is therefore necessary for the Commission to determine whether these provisions remain appropriate for securing the policy objectives of the Part. Stalking and intimidation is also relevant to AVOs as a ground on which an order may be sought, and a prohibition against stalking and intimidation is a standard term of every AVO unless otherwise ordered.³⁶

Inherent difficulties in the review of AVOs

1.17 The Commission's brief is to review the validity of the policy objectives in Part 15A. As the primary objective is to prevent violence, it is difficult, *prima facie*, to deny its validity. Yet, the real test of whether the policy objectives remain valid is not in the abstract, but in how effectively they work in practice to prevent violence. Assessing this is more difficult than it sounds, due to the nature of AVOs and the behaviour they are designed to address.

32. Chapter 10.

33. Chapter 11.

34. Chapter 12.

35. Chapter 13.

36. Crimes Act s 562BC.

AVOs are preventative measures: they are granted based on indications of past behaviour but essentially go to preventing future conduct. It is difficult to say for certain whether AVOs prevent future conduct, since that conduct may or may not have occurred anyway, irrespective of the AVO.³⁷

1.18 Another difficulty involves the nature of the violent behaviour AVOs are intended to prevent, particularly domestic violence. There is a significant amount of written material asserting that the incidence of domestic violence is vastly under-reported to police. Assuming this to be true, any study of the effectiveness of AVOs and the validity of the policy objectives must be seen in that light: they can only be measured against the people who have been able to access the “system”.

1.19 Violence prevention is a complex issue, requiring a comprehensive response extending beyond legislation. Part 15A is only one element among many which need to work together to prevent violence. Any evidence that violence is not being effectively prevented could point to the need for better implementation of the legislation, for more legal or community support services, or greater community education, rather than faults with Part 15A.

1.20 The Commission makes these observations at this initial stage of its review not to pre-empt any findings, but to note the context in which it is happening and the limits of what it can do.

Preliminary consultations

1.21 In addition to researching legislation, articles and reports pertinent to AVOs, the Commission has conducted a number of preliminary consultations with particular groups and individuals in Sydney and regional NSW, with a view to isolating the most

37. This was acknowledged in the BOCSAR Report 1997, yet considered unlikely in that particular evaluation because of the fact that there had been a continuing pattern of violence in most cases before the AVO was taken out, which ceased or was significantly reduced in 90% of cases following the AVO: see BOCSAR Report 1997 at para 3.6.1 and para 4.1, and discussion at para 2.32-2.33.

relevant issues for discussion in this Paper. Those consulted include: a number of Magistrates and Chamber Magistrates; the Family Law Reform Association; Domestic Violence Liaison Officers and staff of the Domestic Violence Court Assistance Scheme; the Domestic Violence Advocacy Service; the Violence Against Women Unit in the NSW Attorney General's Department, NSW Police and various solicitors.

1.22 The Commission has also obtained the latest available statistics relating to AVOs from the Bureau of Crime Statistics and Research, and has observed at meetings of the Apprehended Violence Legal Issues Co-ordinating Committee.

Our need for feedback

1.23 The preliminary consultations have helped the Commission isolate some relevant issues regarding Part 15A, but have not yet led to definitive conclusions. In order to gauge the effectiveness of Part 15A, the Commission needs to know how the provisions operate in practice. This Discussion Paper is designed to promote discussion and generate responses to the policy and procedural issues surrounding AVOs. The Commission would like to receive submissions from any interested person or group on the issues raised in this paper, or other issues which impact on the effectiveness or otherwise of the AVO provisions, and any suggested improvements to the legislation. The feedback from those submissions, together with further consultation and research, will form the basis of our final recommendations in a Report to be delivered in early 2003.