

# 5. Abuse of AVOs

- ADVOs in the context of family law proceedings
- “Frivolous” use of APVOs

5.1 Allegations are consistently made that AVOs are being sought and used inappropriately. This chapter explores the two major areas particularly affected by those allegations. First, it is suggested that ADVOs are being sought too readily, and often vindictively, in family law proceedings. Secondly, it is alleged that the recent proliferation of APVOs points to a preponderance of trivial applications.

## **ADVOS IN THE CONTEXT OF FAMILY LAW PROCEEDINGS**

5.2 Although domestic violence is commonly dealt with in the Crimes Act by way of AVOs, it is a very relevant issue in the context of family law proceedings. Domestic violence is often about control within relationships and this control factor is at its worst at the end of a relationship. In 1996, the Australian Bureau of Statistics found that 23% of women who had ever been married or in a de facto relationship, experienced violence at some time during the relationship.<sup>1</sup>

### **The Family Court's approach to family violence**

5.3 In the early years of the *Family Law Act 1975* (Cth) ("the FLA"), in keeping with the Act's focus on "no fault" divorce, the Family Court minimised the relevance of domestic violence as a factor affecting the welfare of the children. Thus, some of the very early cases distinguished between the father's affection for his children and his violent behaviour as a husband.<sup>2</sup>

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1. Australian Bureau of Statistics, *Women's Safety Australia* (Survey, 1996, Cat No 4128.0).
  2. In one case, in assessing the potential of a man accused of violence, the Judge noted that "as a custodial parent I have largely disregarded his behaviour as a husband": *Heidt and Heidt* (1976) 1 FLR 11 576 at 11579.

5.4 This approach had changed significantly by the mid-1990s. In 1994, in the case of *JG and BG*,<sup>3</sup> Chisholm J reviewed the legal principles relevant to allegations of family violence and stressed the importance of recognising its relevance in proceedings relating to custody, guardianship and access. The *Family Law Reform Act 1995* (Cth) (“the FLRA”) constructed a framework for dealing with issues of family violence. Section 68F(2) of the FLA now recognises the “need to protect the child from physical or psychological harm caused, or that may be caused” by factors including “family violence”.

5.5 However, the FLRA also introduced other principles aimed at shared parenting. This has resulted in the emergence of a very distinct “pro-contact” culture whereby the right of the child to have regular contact with both parents, except in the most serious cases, is now enshrined within the legislation. The relevant provision is section 60B(2) of the FLA which provides that:

- (a) children have the right to know and be cared for by both of their parents;
- (b) children have a right of contact, on a regular basis, with both of their parents;
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) such rights, duties and responsibilities are to exist except where it would be contrary to a child’s best interests.

5.6 While family violence is clearly unacceptable, there are now two almost contradictory responses to it within the family law context. On the one hand, the FLA recognises the serious nature of family violence by specifying it as a relevant factor in considering the “best interests of the child”,<sup>4</sup> and requiring that it be reported in all matters before the court.<sup>5</sup> Yet, simultaneously, a presumption in favour of contact appears to have developed.

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3. *JG and BG* (1994) FLC 92 515.

4. FLA s 68F(2)(i) and s 68F(2)(j).

5. FLA s 68J.

5.7 The provisions introduced by the FLRA have been under scrutiny in two research reports to ascertain if the best interests of children are being served. The first of these studies found that it is now more difficult to obtain orders for “no contact” at interim hearings, even when there are allegations of violence against the contact parent, and that the court is more likely than previously to try to preserve contact between the child and the non-resident parent, especially at interim hearings.<sup>6</sup>

5.8 A further research study on the operation of the FLRA between 1996 and 1999 found that the previously held view which recognised the impact of domestic violence upon children’s welfare appears to have been superseded by concerns about maintaining contact between a parent and child.<sup>7</sup>

5.9 The Chief Justice of the Family Court has also recently noted that there is:

tension between the increased emphasis on the protection of children from family violence in the Act and the right of contact principle....This tension, the research tells us, has translated into a greater tendency for non resident parents to expect contact, even when domestic violence is an issue, and for there to be pressure on resident parents to agree to contact, despite safety concerns.<sup>8</sup>

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6. J Dewar, S Parker, B Tynan and D Cooper, *Parenting, planning and partnership: The Impact of the New Part V11 of the FLA 1975* (Griffith University, Family Law Research Unit, Brisbane, March 1999).

7. H Rhodes, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years* (University of Sydney and the Family Court of Australia, 2000).

8. Chief Justice Nicholson, “In the child’s best interest: Inter-disciplinary approaches to child abuse and family violence” (paper delivered at the Columbus Pilot Launch and Symposium, Perth, 9 November 2001).

## **The interaction between ADVOs and contact orders**

5.10 Although there is a procedure for obtaining a restraining order or an injunction aimed at stopping domestic violence under the FLA,<sup>9</sup> it would appear that the ADVO provisions in the Crimes Act are more commonly used by people seeking protection. In many cases, people who have a matter in the Family Court, have either taken an ADVO against their partner or are subject to an ADVO, or are in the process of obtaining one.

5.11 Given that contact between children and non-resident parents is given great emphasis, it is important that contact orders need to focus on the safety of the children and the accompanying parent at the time of hand over as well as generally.

5.12 Clearly, both the Local Court and the Family Court jurisdictions need to take cognisance of the presence of ADVOs or contact orders, as the case may be. Both the FLA and Part 15A deal with the relationship between AVOs and contact orders. Section 562FA of the Crimes Act provides that a person applying for an ADVO or a variation of an ADVO must inform the court of a contact order or a pending contact order. Similarly, section 68K of the FLA requires that parties involved in Family Court matters are obliged to inform the court of any AVO which applies to the child or a member of the child's family. The Family Court has the discretion to make a contact order which is inconsistent with an AVO, but must explain the rationale of the order.<sup>10</sup> In AVO proceedings, the Local Court also the power to make, revive, vary, discharge,<sup>11</sup> or suspend a Division 11 contact order if the court considers that a person has been, or is likely to be, exposed to family violence as a result of the operation of the contact order.<sup>12</sup>

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9. FLA s 114 and s 68B. See para 2.30.

10. FLA s 68R. The contact order will prevail over the family violence order to the extent of the inconsistency: s 68S.

11. A State court cannot discharge a Division 11 contact order when making an interim family violence order, or an order varying a family violence order: FLA s 68T(2)(d).

12. FLA s 68T.

## Abuse of ADVOs

5.13 The Commission has received submissions from some groups alleging that the ADVO provisions are being abused to gain a tactical advantage in family law proceedings.<sup>13</sup> The CLRD review received similar submissions. This view was also put forward in a parliamentary debate:

There is some reluctance by defendants of an interim apprehended violence order to consent to an interim AVO because of the impact that that may have on custody or other proceedings. Whilst we might not like it, AVO proceedings are being used as tools in custody battles and in matrimonial arrangements.<sup>14</sup>

5.14 The Survey of Magistrates also found that 90% of respondents were of the view that ADVOs were used by applicants in Family Court proceedings as a tactic to aid their case and deprive their partner of access to children.<sup>15</sup>

5.15 Despite these claims, various reviews that have considered this issue have not found this assertion to be substantiated. The CLRD Review noted that “the allegation that women use AVOs to gain some tactical advantage in family law proceedings is not reflected in research on Family Court outcomes”. The CLRD Discussion Paper further stated that:

the reality is that a claim of domestic violence does not necessarily impact on family law proceedings. There is no empirical evidence to suggest that women are under the

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13. See for example, Family Law Reform Association, *Submission*.

14. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 1 July 1999 at 1818.

15. J Hickey and S Cumines, *Apprehended Violence Orders: a Survey of Magistrates* (Judicial Commission of NSW, Monograph Series 20, 1999) (“Magistrates Survey 1999”) at 37-38.

impression that it does and deliberately manufacture false claims of domestic violence for this purpose.<sup>16</sup>

5.16 The CRLD Review argued that the fact that an ADVO complaint is made at the same time as an application for a family court order makes sense, given the number of ADVO complainants with dependent children, and the fact that violence often escalates at the time of the separation, at which time future parenting arrangements also become an issue.<sup>17</sup>

5.17 This issue was also discussed in the research conducted by Rhodes, Graycar and Harrison on the first three years of the FLRA. They acknowledged suggestions that allegations of violence are sometimes used for strategic purposes in litigation. However, they referred to various research studies that have “shown conclusively that only a small proportion of such allegations fail to be established”.<sup>18</sup>

5.18 The study also negated the assertion that women were reluctant to facilitate a relationship between their child and his or her non-resident parent, citing a judge’s view that:

women [with domestic violence concerns] usually want contact, either because they genuinely want the children to see him, or because they know he wont get off their back otherwise. So you’re struggling to find a way to allow contact where the woman is not going to be exposed to vicarious violence.<sup>19</sup>

5.19 An English study<sup>20</sup> supports this view, where contrary to popular stereotypes, the majority of the women in this study

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16. NSW Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law* (Discussion Paper, 1999) (“CLR Discussion Paper”) at 8.
  17. CLR Discussion Paper at 8.
  18. Rhodes, Graycar and Harrison at 6.
  19. Rhodes, Graycar and Harrison at 76.
  20. L Radford, M Hester, J Humphries and K Woodfield, *For the sake of the children: the law, domestic violence and child contact in England* (Women’s Studies International Forum, 1997) at 471-482 referred to in L Laing, “Children, young people and domestic

initially supported continued contact between their ex-partners and the children. However, only seven of the 53 women were eventually able to establish contact in such a way that there was no further violence or harassment.

5.20 The Commission is interested to receive more information about the interplay between ADVOs and family law contact orders, and suggestions for any amendments to Part 15A in this regard.

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**Issue 3**

**What concerns are there about the use of ADVOs in family law matters?**

**Does the legislation sufficiently address those concerns? What improvements can be made?**

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## **“FRIVOLOUS” USE OF APVOS**

5.21 For some time, concern has been expressed over the growth in the number of APVO applications and the impact this has on the effectiveness of AVOs overall.<sup>21</sup> It has been alleged that APVOs are being sought regarding “trivial” issues, such as disputes over building being conducted in a neighbour’s backyard,<sup>22</sup> or even for vindictive purposes such as blackmail.<sup>23</sup> It has been suggested that the increasing popularity of APVOs as a way of dealing with friction between neighbours and colleagues has done a disservice to people

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violence” *Australian Domestic and Family Violence Clearing House* (Issues Paper 2, 2000).

21. In 2001, 39% of AVOs granted by local courts in NSW were APVOs: NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2001* at Table 1.18 (Statistical Services Unit, March 2002) «[www.lawlink.nsw.gov/bocsar1.nsf/files/ccs01.pdf](http://www.lawlink.nsw.gov/bocsar1.nsf/files/ccs01.pdf)».
22. *Wallin v Tiernan* [1999] NSWCA 353 (Meagher JA, Stein JA, and Davies AJA). See also Magistrates Survey 1999 at 44-45.
23. M McMillan “Should we be more apprehensive about apprehended violence orders?” (1999) 37(11) *Law Society Journal* 48 at 56.

who genuinely fear personal violence or abuse, and taken AVOs too far away from their original purpose of protecting against domestic violence. This view is supported by the majority of Magistrates surveyed in relation to AVO issues in 1999, where 71% of Magistrates surveyed considered APVOs to be an *ineffective* way of dealing with personal violence or harassment.<sup>24</sup> One of the major reasons given for this perception was the belief that APVOs were increasingly being used unmeritoriously in response to “trivial” matters.<sup>25</sup>

5.22 The CLRD Discussion Paper argued that there is “little empirical evidence either supporting or refuting the claim that APVOs are routinely being abused”.<sup>26</sup> However, that Discussion Paper also noted that even if APVOs were not being sought vexatiously, it could be argued that the Local Court is not the right forum for dealing with such disputes, given the court’s focus on adversarial litigation and the fact that the parties need to continue to live or work in close proximity.<sup>27</sup> This argument is supported by the Magistrates Survey, in which 52% of considered that APVOs would be better dealt with in other forums, such as Community Justice Centres or counselling services.<sup>28</sup>

5.23 The CLRD Discussion Paper noted that “careful consideration” should be given to providing alternative methods of resolving problems that form the basis of APVO complaints. To this end, the Paper put forward options for distinguishing between ADVOs and APVOs, some of which were implemented by the *Crimes Amendment (Apprehended Violence) Act 1999* (NSW). For example, there is a discretion to refuse to issue process in

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24. Magistrates Survey 1999 at 25-27. Conversely, all respondents to this survey considered that ADVOs were effective in responding to domestic violence.
  25. Magistrates Survey 1999 at 25-27.
  26. CLRD Discussion Paper at 11.
  27. CLRD Discussion Paper at 11.
  28. This is opposed to 68% who believed the Local Court was the most appropriate forum for dealing with ADVOs. Nearly one third of Magistrates said if an APVO involved physical violence, then the Local Court was the best forum, but if it was “trivial” or “non-violent”, then Community Justice Centres were more appropriate: Magistrates Survey 1999 at 21.

APVO applications which does not exist in relation to ADVOs. There is also more scope to award costs against the applicant in APVO matters. Both of these measures are discussed below.

### **The discretion to refuse to issue process in APVO matters**

5.24 Where an APVO complaint is made by an applicant in person, the court has a discretion to refuse to issue process. That discretion does not apply where the complaint is made by a police officer.<sup>29</sup> Section 562AK of the Crimes Act provides that a court may refuse to issue process if it is satisfied that the complaint is “frivolous, vexatious, without substance or has no reasonable prospect of success”.

5.25 The intention of Part 15A is that “genuine applicants for APVOs continue to have access to the courts for protection”.<sup>30</sup> Accordingly, there is a presumption in favour of issuing process where the complaint discloses allegations of:

- (a) a personal violence offence; or
- (b) stalking or intimidation with intent to cause fear of physical or mental harm; or
- (c) harassment relating to the complainant’s race, religion, homosexuality, transgender status, HIV/AIDS or other disability.<sup>31</sup>

5.26 In determining whether to make an APVO, the court must take the following matters into account:

- (a) the nature of the allegations,
- (b) whether the matter is amenable to mediation or other alternative dispute resolution,

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29. Crimes Act s 562AK.

30. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3674.

31. Crimes Act s 562AK(4).

- (c) whether the parties have previously attempted to resolve the matter by mediation or other means,
- (d) the availability and accessibility of mediation or other alternative dispute resolution services,
- (e) the willingness and capacity of each party to resolve the matter otherwise than through a complaint for an apprehended personal violence order,
- (f) the relative bargaining powers of the parties,
- (g) whether the complaint is in the nature of a cross application,
- (h) any other matters that the authorised justice considers relevant.

5.27 This provision attempts to facilitate the granting of APVOs in genuine circumstances while filtering out unmeritorious complaints. However, the wording of the provision may be self-defeating. There is a presumption against exercising the discretion to refuse to issue process where the complaint discloses allegations of a personal violence or stalking or intimidation offence, or harassment in certain circumstances. Yet, these are the very grounds on which most AVOs are based.

5.28 The Commission is interested to hear whether courts are in fact exercising the discretion to refuse to issue process in APVO matters, and, if so, in what circumstances. We would also like opinions on whether or not APVOs are being inappropriately sought, and, if so, the extent of the problem.

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**Issue 4**

**How effective has the discretion to refuse to issue process in APVO matters been? Has it resulted in fewer “frivolous” applications?**

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## Costs

5.29 Another measure introduced in 1999 to discourage frivolous or abusive APVO claims is the lower threshold for awarding costs against an APVO applicant. Prior to 1999, costs could be awarded against an applicant in all AVO proceedings only where the court was satisfied that the complaint was “frivolous or vexatious”. That provision was inserted in 1987 at a time when Part 15A applied only to ADVOs,<sup>32</sup> and reflected the policy that victims of domestic violence should not be deterred from seeking protection because of fear of having to pay the defendant’s costs.<sup>33</sup>

5.30 The CLRD Discussion Paper suggested that consideration should be given to whether the same “public policy reasons” for the awarding of costs extended to APVOs as well as ADVOs.<sup>34</sup> Accordingly, in 1999, Part 15A was amended to provide for costs to be awarded against an applicant in APVO matters where the court considers it to be “just and reasonable”.<sup>35</sup> Where a police officer applies on behalf of an applicant for an ADVO or an APVO, costs will only be awarded where the officer knew that the complaint “contained matter that was false or misleading in a material particular”.<sup>36</sup>

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32. See Chapter 2 for a discussion of the legislative history of AVOs.

33. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 17 November 1987 at 16140.

34. CLRD Discussion Paper at 26.

35. In accordance with the *Justices Act 1902* (NSW) s 81: see Crimes Act s 562N.

36. Crimes Act s 562N. In the ACT, there is a general presumption that each party must bear his or her own costs: *Protection Orders Regulations 2002* (ACT) reg 89. However, the court may order the applicant to pay another party’s reasonable expenses where the application is frivolous, vexatious or has not been made honestly: *Protection Orders Act 2001* (ACT) s 95. In the Northern Territory, costs are not awarded unless the court is satisfied that the application was unreasonable and made in bad faith: *Domestic Violence Act 1992* (NT) s 15. Under a new amendment, this rule will also apply to an application for a variation or revocation of an order: *Domestic Violence Amendment Act 2001* (NT) s 8. In Queensland, the court may not award costs unless the application is malicious, deliberately false, frivolous or vexatious: *Domestic Violence (Family*

5.31 The Commission would like to hear particulars about costs being awarded in APVO matters, and views on whether the costs provision discourages frivolous or abusive APVO complaints.

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**Issue 5**

**Does the costs provision act as a deterrent against unmeritorious claims? Please give examples.**

**Should the costs provision be strengthened?**

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### **Other measures**

5.32 Another measure to discourage the number of trivial APVOs discussed in the CLRD Paper included the introduction of a filing fee.<sup>37</sup> It was noted, however, that a filing fee may discourage genuine applicants with limited financial resources.

5.33 Another option was to refer APVO matters to mediation rather than deal with them in the Local Courts. Part 15A currently provides that, when considering whether or not to grant an APVO, the court must consider if the matter is suitable for mediation. The legislation does not, however, require APVO matters to be referred to mediation before coming to court. Mediation through organisations such as Community Justice Centres (“CJCs”) may be appropriate for some types of disputes, particularly those between

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*Protection) Act 1989 (Qld) s 61. In Tasmania, the court may order either party to pay costs, unless the application was made by a police officer: Justices Act 1959 (Tas) s 106H. In Victoria, each party bears his or her own costs, unless the court decides that exceptional circumstances warrant otherwise. Costs may be awarded against the applicant if the application is vexatious, frivolous or in bad faith: Crimes (Family Violence) Act 1987 (Vic) s 14A. In Western Australia, the court makes appropriate orders as to costs. However, if the application fails, the applicant is not ordered to pay costs to the respondent unless the court considers the application to be frivolous or vexatious: Restraining Orders Act 1997 (WA) s 69.*

37. CLRD Discussion Paper at 16.

neighbours, where the disputants have an on-going relationship. An option may be for AVO legislation to require mediation to have been attempted before an APVO can be granted. This could be done either through the parties demonstrating that they have attempted to have the matter mediated before seeking an APVO, or to provide for the court to refer parties to an APVO application to mediation. Should the matter fail to be mediated, and the threat of violence, intimidation or harassment still persist, then an APVO may be granted as a last resort.

5.34 This approach may help to deter trivial APVO applications. However, there would be drawbacks. Not all APVO-type matters, particularly those involving serious violence or stalking, may be amenable to mediation. It would also place the court in the unenviable situation of having to determine whether the threat of violence was insufficiently imminent to defer an APVO pending mediation. Furthermore, there are serious doubts as to the effectiveness of compulsory mediation where the parties do not consent. The proposal would also have significant resource implications as additional mediation would need to be funded. The Commission is interested to hear views on the role that mediation should play in APVO matters.

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#### **Issue 6**

**Should a filing fee be introduced for APVO matters? If so, in what circumstances?**

**What role should mediation have in the resolution of APVO disputes?**

**What other measures could be introduced to discourage unmeritorious or abusive APVO applications?**

**Should AVO legislation continue to provide for APVOs at all? If so, how?**

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