

6. Structure of Part 15A

- Separate AVO legislation?
- Separate domestic violence legislation?

6.1 This chapter examines some of the issues that emerge concerning the structure of Part 15A and its location in the Crimes Act. As noted in Chapter 1,¹ Part 15A is a civil procedure obtained on the balance of probabilities, despite being located in the Crimes Act. Being placed in the Crimes Act has the benefit of reinforcing the fact that violence, abuse and harassment is a crime and should be taken seriously. However, it also has the disadvantage of giving the AVO procedure what has been referred to as the “taint of criminality”.² It could be argued that this detracts from the effectiveness of AVOs as many applicants may want to stop or prevent the violence they fear or are experiencing, without necessarily wanting to invoke criminal consequences for the defendant.³ This is particularly pertinent in cases of domestic violence where there is often a financial and emotional interdependence between the applicant and the defendant.

6.2 Another issue concerns the fact that the current Part 15A covers both domestic and personal violence. The *Crimes Amendment (Apprehended Violence) Act 1999* (NSW) affected a separation between ADVOs and APVOs to address the concern that had existed in the decade during which Part 15A made no distinction between the two type of orders.⁴ There was a feeling that the “conflation” of ADVOs and APVOs had done a disservice to victims of domestic violence and diminished the effectiveness of ADVOs.⁵ As the division between the two types of orders was only affected in 1999, there has been no analysis of the practical

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1. Para 1.7.
 2. M McMillan “Should we be more apprehensive about apprehended violence orders?” (1999) 37(11) *Law Society Journal* 48 at 50.
 3. See H Katzen, “How do I prove 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 71-72.
 4. See para 2.2-2.22 for a discussion of the history of AVOs.
 5. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3764; and NSW Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law* (Discussion Paper, 1999) (“CLRDR Discussion Paper”) at 13-14.

consequences that have ensued. The Commission is interested to learn what effect the distinction between ADVOs and APVOs has brought about, and whether the objective of improving the effectiveness of ADVOs has been achieved.

6.3 It may be that current legislation strikes the right balance between civil and criminal procedure, and domestic and personal violence. Alternatively, some may think that the effectiveness of AVOs could be better achieved by removing the provisions from the Crimes Act into separate legislation covering both ADVOs and APVOs. Another possibility is to follow the lead of other jurisdictions which have effected a more definite split between domestic and personal violence by having a separate Domestic Violence Act. Both of these options are discussed below.

SEPARATE AVO LEGISLATION?

6.4 Other jurisdictions have specific legislation which deals comprehensively with protection orders. For example, Western Australia has the *Restraining Orders Act 1997* (WA), which provides for violence restraining orders to protect against acts of personal violence,⁶ and misconduct restraining orders to prevent intimidating or offensive behaviour, property damage and disorderly conduct.⁷ Violence restraining orders may be in force for longer than misconduct restraining orders, and harsher penalties apply. The distinction is based on the defendant's behaviour, and not on the relationship between the applicant and the defendant.⁸

6. *Restraining Orders Act 1997* (WA) Part 2.

7. *Restraining Orders Act 1997* (WA) Part 3.

8. In practice, however, violence restraining orders tend to deal with domestic violence, and misconduct restraining orders are granted in neighbourhood disputes: see Western Australia, *Parliamentary Debates (Hansard)* Legislative Council, 25 March 1997 at 924.

6.5 Under the *Protection Orders Act 2001* (ACT), applicants may obtain a domestic violence order or a personal protection order.⁹ The legislation defines domestic violence and personal violence,¹⁰ sets out the objects of, and procedures for, obtaining protection orders, and provides examples and explanations throughout the legislation. It also contains cross references to other relevant legislation such as the *Crimes Act 1900* (ACT),¹¹ and the *Domestic Violence Agencies Act 1986* (ACT).

6.6 Adopting a similar approach in NSW could be beneficial in that it would provide a central legislative basis for AVOs. This could be seen as a recognition of the importance of AVOs as a means of combating violence, abuse and harassment. The legislation could refer to the domestic and personal violence offences contained in the Crimes Act, yet having separate legislation would help to clarify that AVOs are not criminal in themselves. Such legislation would also have the potential to be more “user friendly” than the Crimes Act, and could offer a more integrated approach by referring to violence support and prevention initiatives, references which may not be appropriate in the Crimes Act.

6.7 The major drawback of separate AVO legislation would be the perception that AVOs had been “sidelined” from the more mainstream Crimes Act. This may give the impression that violent actions which prompt the issuing of an AVO are somehow taken less seriously.

SEPARATE DOMESTIC VIOLENCE LEGISLATION?

6.8 Much has been written on the unique nature of domestic violence as opposed to violence in other relationships:

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9. A personal protection order may take the form of a workplace order: *Protection Orders Act 2001* (ACT) s 8.
 10. *Protection Orders Act 2001* (ACT) s 9 and s 10, respectively.
 11. For example, the Act contains a Schedule setting out the offences in the Crimes Act which constitute domestic violence offences for the purpose of the *Protection Orders Act 2001* (ACT).

There are added risks involved in a domestic relationship, including barriers to escaping violence, complex histories and the traditional reluctance of authorities to intervene in the “private” realm. The separation of parties in domestic violence cases, as opposed to non-domestic disputes, often exacerbates rather than diffuses the abuse.¹²

6.9 Domestic violence also involves issues of financial dependence, physical and emotional power and control, and shared emotional history, which set it apart from non-domestic abuse. The situation is further complicated where there are children of the relationship.

6.10 These differences may justify separate legislation dealing with ADVOs only. Some jurisdictions have a dual regime, whereby domestic violence and personal violence protection orders are dealt with under separate laws.¹³ Procedurally, those laws are similar to Part 15A.

6.11 Legislation and practice concerning domestic violence prevention in other jurisdictions has a focus beyond restraining orders. For example, New Zealand, Canada, the United States and the United Kingdom have integrated approaches to legislation, policy, practice and service delivery. This reflects an “international recognition that tinkering with reform in discrete sectors of the legal system is an inadequate response”.¹⁴

6.12 The New Zealand legislation serves as a useful model. The *Domestic Violence Act 1995* (NZ) has a rehabilitative focus, attempting to address the violent behaviour itself as well as

12. CLRD Discussion Paper at 13.

13. For example, the Northern Territory, Queensland, South Australia and Victoria all have legislation which provides separately for domestic violence and personal violence orders: see *Domestic Violence Act 1992* (NT), *Justices Act 1928* (NT), *Domestic Violence (Family Protection) Act 1989* (Qld), *Peace and Good Behaviour Act 1982* (Qld), *Domestic Violence Act 1994* (SA), *Summary Procedure Act 1921* (SA), and the *Crimes (Family Violence) Act 1987* (Vic).

14. R Hunter and J Stubbs, “Model Laws or Missed Opportunity?” (1999) 24(1) *Alternative Law Journal* 3.

delivering sanctions for breach. As noted in Chapter 3, two of the NZ Act's objects are to provide programs for victims of domestic violence, and to require perpetrators to attend programs that have the primary objective of stopping or preventing domestic violence.¹⁵ On the making of a protection order, the court must direct the defendant to attend a specified perpetrator program unless the court considers that there is a good reason for not making that direction.¹⁶ The programs available may be general violence prevention or anger management sessions, or may be specifically tailored so as to meet cultural or other needs.¹⁷ Free educational programs are also available to applicants (upon request made by, or on behalf of, an applicant) and their children.¹⁸ A recent evaluation of the NZ Act reported that the integrated, rehabilitative focus of the Act is seen by those who have used it as being particularly valuable.¹⁹

6.13 The primary advantage of introducing separate domestic violence legislation would be to emphasise that violence within domestic relationships involves difficult and delicate issues which do not occur in other relationships. It would also be a powerful legislative statement of the importance of measures, such as ADVOs, in combating domestic violence. Separate legislation could also facilitate formal links between the ADVO process and the role of police in domestic violence prevention and prosecution, Domestic Violence Liaison Officers and other victims support services.²⁰

15. *Domestic Violence Act 1995* (NZ) s 5. See para 3.8.

16. *Domestic Violence Act 1995* (NZ) s 32(1).

17. A 2000 evaluation of the NZ Act noted that the range of programs for defendants was improving, although there was a further need to develop programs for defendants from Maori or Pacific Island backgrounds, in same sex relationships, or with intellectual disabilities, mental illness or substance abuse problems: New Zealand, H Barwick, A Gray and R Macky, *Domestic Violence Act 1995: Process Evaluation* (Ministry for Justice and Department for Courts, April 2000) at 14.

18. *Domestic Violence Act 1995* (NZ) s 29.

19. Barwick, Gray and Macky at 121.

20. Liaison and co-ordination between services aimed at stopping or preventing violence is seen as vital: see Hunter and Stubbs at 4.

6.14 As with the option of separate AVO legislation, the major disadvantage of a specific law distinct from the Crimes Act would be the possible perception that domestic violence offences were thereby less serious than other criminal offences. Also, legislation which linked defendants and applicants with rehabilitation or educative programs would only be successful if adequate resources were allocated to fund appropriate programs, and to enforce attendance by defendants.²¹

Issue 7

Should the AVO provisions continue to be located in the Crimes Act? Why or why not?

Should the AVO provisions be contained in separate, comprehensive legislation covering both ADVOs and APVOs? Why or why not?

What has been the effect of the split between ADVOs and APVOs in Part 15A?

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- It was noted in the AIC study referred to in para 4.11 that a “co-ordinated approach which systematically links the court protection orders with police intervention may be the best way to protect young women from violence”: Young, Byles and Dobson at 6.
21. Of the 221 defendants directed to rehabilitation programs under the NZ Act, only 80 had completed, or were in the process of completing, the program. The most likely explanation for this is either that no suitable program was available or non-attendance at programs was not pursued by court staff: see Barwick, Gray and Macky at 129. It has also been noted that there has been no research on the proven methodologies for running successful programs: see R Busch and N Robertson, “The Gap Goes On: An Analysis of Issues Under the Domestic Violence Act 1995” (1997) 17 *New Zealand Universities Law Review* 337 at 345 and 363-367.

Should there be separate legislation covering only domestic violence? If so, should that legislation extend beyond ADVOs and take a comprehensive, holistic approach like the *Domestic Violence Act 1995* (NZ)? Why or why not?

If separate domestic violence legislation were to be introduced, how should non-domestic violence be dealt with?
