

8. Applying for an AVO

- How does a person apply for an AVO?
- What happens in court when a person applies for an AVO?
- What if it's an emergency?
- Police applications
- What if the person seeking protection wants to withdraw the application?

8.1 The aim of the legislation is to ensure “that access to courts is as speedy, inexpensive, safe and simple as is consistent with justice”.¹ This chapter examines the procedural aspects of applying for an AVO and asks whether the application process is adequate to fulfil the objectives of Part 15A of the Crimes Act.

HOW DOES A PERSON APPLY FOR AN AVO?

8.2 Several avenues are open to people seeking advice about AVOs. They can approach a solicitor, the Chamber Magistrate at the local court, a community legal centre or community advocacy group, a women’s refuge, the Legal Aid Commission or the police about obtaining an AVO. The police can either apply on the person’s behalf, or can provide information about how to apply in person, through the police Domestic Violence Liaison Officer or Victim Support Officer. In the case of domestic violence orders, applicants can receive information and support from programs such as the Women’s Domestic Violence Court Assistance Scheme, which provides support workers and legal representation in most Local Courts.

8.3 An application for an AVO is made by way of complaint made to an “authorised justice”,² who will usually be a Magistrate.³ The Local Courts Practice and Procedure Manual states that “the role of the authorised justice is to consider the safety of persons in need of protection (including any children), to provide information and explain court procedures and to assist the complainant in preparing a complaint for court”.⁴ The complaint must contain all the relevant information the court needs to decide whether to make an order.⁵ It may be made orally or in writing.⁶ The applicant

1. Crimes Act s 562AC(2)(b).
2. Crimes Act s 562A.
3. Crimes Act s 562AD and 562AH.
4. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo#applying».
5. This should include the protected person’s details; the defendant’s details, address for service, including his or her work address; the relationship between the protected person and the defendant; when the violence, harassment, molestation, intimidation or

is required to swear an oath or make an affirmation about the truth of the reasons for the order.⁷

WHAT HAPPENS IN COURT WHEN A PERSON APPLIES FOR AN AVO?

8.4 Either the person in need of protection or the police can apply for an AVO.⁸ If the police make the application, they arrange for the Police Prosecutor to represent the person in need of protection. People who apply for ADVOs on their own behalf can represent themselves, or arrange for legal representation through legal aid,⁹ the Domestic Violence Advocacy Service or by hiring their own lawyer. Legal aid is not available for APVOs, but applicants can ask the duty solicitor for advice. Legal aid is not available for defendants in any AVO proceedings unless there are exceptional circumstances.¹⁰ Interpreters are provided free of charge for people seeking AVOs.

8.5 The defendant can agree or disagree with the order being made. If the defendant agrees, the Magistrate makes the order that day. If the defendant disagrees, the matter is scheduled for hearing at a later date. An interim order can be made for the applicant's protection in the meantime. If there is a criminal charge pending, the court can impose bail conditions until the

stalking commenced; the general history of violence or harassment; specific examples of the defendant's behaviour, including what the defendant said or did; the most recent and/or most serious example of behaviour; details of any existing Family Law Orders or applications; any previous, pending or existing AVOs or police charges; the period of orders sought; the particular orders sought; and any firearms or weapons available to defendant: see Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo#offpro».

6. Crimes Act s 562C(1)(a).
7. Crimes Act s 562C(1)(b).
8. Crimes Act s 562C(2). In the case of telephone interim orders, only a police officer can apply: Crimes Act s 562H.
9. Provided they meet the means test requirements.
10. See «www.lawlink.nsw.gov.au/lac/lac.nsf/pages/avo_defendants».

matter is heard. At the hearing, the Magistrate hears evidence from both parties, and decides whether or not to make an order.

8.6 If the police were unable to serve the defendant with the complaint and summons in time for the hearing, the case is adjourned. This gives the police more time to serve the defendant. If the defendant has been served with the documents but fails to appear, the Magistrate can make an AVO in the defendant's absence. A copy of the order is given to the applicant by the court staff and a copy is served on the defendant.¹¹

Court must explain consequences of an AVO

8.7 The legislation provides that the court must explain to the defendant and the protected person, if they are present:

- (a) the effect of the order (including any prohibitions and restrictions imposed by the order), and
- (b) the consequences that may follow from a contravention of the order, and
- (c) the rights of the defendant and the protected person in relation to the order.¹²

8.8 Similarly if the court varies an order, it must explain the effect of the variation and the consequences that may follow from contravention.¹³ The court must also provide a written explanation of these matters to both parties.¹⁴ Part 15A also provides that, as far as it is reasonably practicable to do so, the explanation should be given in a language that is likely to be readily understood by the person.¹⁵

8.9 It is important that both parties understand the effect of the order. A simple act such as making a telephone call may amount to a breach, which is a criminal offence. The defendant must

11. See para 10.30-10.31.

12. Crimes Act s 562GC(1).

13. Crimes Act s 562GC(2).

14. Crimes Act s 562GC(3).

15. Crimes Act s 562GC(4).

appreciate this in order not to breach the order inadvertently. The protected person must also understand this so he or she can call the police if a breach occurs. There may be problems understanding the order where, for example, one of the parties does not understand English, has poor literacy skills or has an intellectual disability. This problem is exacerbated where court lists are crowded and the court has little time to explain the order. Understanding the order may also be a problem where the hearing is *ex parte*.

8.10 The Commission would like to hear views on whether the current provisions in Part 15A regarding explaining the consequences of an AVO need expansion and clarification. For example, the legislation could state that an authorised justice is required to explain the type of behaviour that would involve a breach of an AVO, how the AVO sits with family law contact orders, the defendant's right of appeal, and the procedure for varying or revoking an AVO.

WHAT IF IT'S AN EMERGENCY?

8.11 The Local Courts Practice and Procedure Manual states that urgent domestic violence applications should be identified and dealt with expeditiously:

In domestic violence applications, local courts staff should, in consultation with the applicant, assess the urgency of the situation, the perception of safety and the immediacy of any danger and risk to the applicant and any children prior to attending for an appointment with a Chamber Magistrate. Appointments for urgent domestic violence applications should be provided on the same day as requested.¹⁶

8.12 If the person seeking protection does not have safe accommodation for the period between the complaint being made and the hearing, the court can make an interim order. If the complainant requests an interim order, the complaint should be

16. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo».

placed immediately before the court for consideration.¹⁷ An interim order can be made without notice having been served on the defendant. However, the order is not enforceable until it has been served.

8.13 The person seeking protection normally has to go to court so a Magistrate can decide whether to make an AVO or not. However, affidavit evidence can be tendered on behalf of the person seeking protection, if the person is unable for good reason to be present, and the matter requires urgent attention.¹⁸ Police can apply for an order over the telephone, where protection is needed outside court hours.¹⁹ They can direct the defendant to remain at the scene of the incident while the telephone application is made. Defendants who refuse can be arrested and detained.²⁰ The Local Courts Practice and Procedure Manual states that although the majority of telephone interim orders are applied for after hours, police officers can apply for telephone interim orders during business hours, when they are unable to attend the court office to make a complaint.²¹

17. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_orders».

18. Crimes Act s 562BB(3). Note that in New Zealand, the person in need of protection does not have to go to court. If, because of physical incapacity, fear of harm or other sufficient cause, the person seeking protection is unable to appear, any other adult can apply for an order on that person's behalf: *Domestic Violence Act 1995* (NZ) s 12. While this makes it easier to obtain protection, one view is that "because women no longer need to come to court, they no longer appear in front of a judge and get the institutional affirmation that what the perpetrator is doing is wrong. For many women, domestic violence is a very isolating experience and to be able to do the process completely on paper compounds the isolation – there is no chance of meeting other women in the same situation. Under the Act it is more likely that respondents will go to court and they are the ones accessing the support offered by the court staff, rather than the women": New Zealand, *Domestic Violence Act 1995: Process Evaluation* (New Zealand Ministry of Justice, 2000) at 106.

19. See para 10.12-10.17.

20. Crimes Act s 562H(12).

21. Local Courts Practice and Procedure Manual: «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_orders».

Issue 10

Does Part 15A provide fair and effective access to AVOs?

How can procedures for applying for AVOs better reflect the objectives of Part 15A?

Should the provisions requiring authorised justices to explain the consequences of granting an AVO be clarified or expanded?

Do the AVO provisions offer adequate protection in emergency situations?

POLICE APPLICATIONS

8.14 Police officers must apply for an AVO if they suspect or believe that a domestic violence,²² stalking²³ or child abuse offence²⁴ “has recently been or is being committed, or is imminent, or is likely to be committed, against the person for whose protection an order would be made”.²⁵ A police officer must apply for an AVO unless the person is at least 16 years of age and intends to make the complaint themselves. Police officers need not apply if they believe there is good reason not to.²⁶

8.15 Consequently, while the legislation requires police to apply for AVOs in certain circumstances, there is still a degree of police discretion involved. Various views have been expressed to the Commission concerning the interpretation and desirability of this discretion. For example, some consider that police have too little

22. See Crimes Act s 4(1).

23. See Crimes Act s 562AB.

24. As defined in s 227 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

25. Crimes Act s 562C(3) and s 562H(2A).

26. However, if they decide not to apply, they must make a written record of the reason for that decision: Crimes Act s 562C(3A) and s 562H(2B).

discretion in applying for AVOs, and should be assisted with a protocol to help them better identify cases where people are genuinely in need of protection.²⁷ Others consider that too much discretion already exists, placing too great a burden on the person in need of protection to pursue the matter. Particular criticism has been directed at the practice sometimes adopted of asking a victim of domestic violence, in the presence of the perpetrator, whether she or he wants an AVO, rather than taking the decision out of the victim's hands and applying for one automatically.²⁸ The Commission is interested in hearing views on this matter.

Issue 11

How effective are the current provisions in Part 15A dealing with police applications for AVOs?

Should police have more or less discretion when applying for AVOs?

Should police discretion be more prescribed in AVO legislation?

Is the AVO application process more effective in stopping or preventing violence when police lay the complaint?

27. Correspondence from the Family Law Reform Association dated 17 December 2001.

28. Similar comments have been made in relation to police discretion in prosecuting for breaches of AVOs: 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 of NSW* (Northern Rivers Community Legal Centre, 2000) at 72.

WHAT IF THE PERSON SEEKING PROTECTION WANTS TO WITHDRAW THE APPLICATION?

8.16 Applicants can withdraw from proceedings before a final order is made. If the police apply for an order on behalf of a person in need of protection, only the police can withdraw the application. The Local Courts Practice and Procedure Manual advises that people who do not want the proceedings to go ahead can discuss their concerns with the police officer who made the application, the Police Prosecutor or the Police Domestic Violence Liaison Officer. Local Court staff also provide information to people who enquire about withdrawing their complaint or other options, including variation of the order, and generally advise a person to seek further advice before withdrawing from proceedings.²⁹

8.17 It is estimated that approximately 40% of AVO applications are withdrawn or dismissed prior to the final hearing.³⁰ As noted in Chapter 4, this figure is open to a number of interpretations. For example, some commentators claim that this indicates that the applications were not soundly enough based to begin with, while others argue that the rate of withdrawal could reflect factors such as pressure on the applicant from the defendant, family, friends or the community, fear of reprisal, or uncertainty concerning legal processes, or technical problems such as failing to serve the summons on the defendant.³¹

8.18 While the reason why so many applications fail to proceed is matter of speculation, the high number of withdrawals is nevertheless an issue of concern. Some AVO applications would be withdrawn because the threat of violence had ceased or diminished. However, it is fair to say that, in at least some cases,

29. Local Courts Practice and Procedure Manual «www.lawlink.nsw.gov.au/lc/dvlink.nsf/pages/lc_avo_offpro».

30. In 2001, approximately 44% of ADVOs were withdrawn or dismissed prior to the final hearing (2.39% were dismissed following the hearing. For APVOs, the withdrawal/dismissal rate is over 50%: note that this information is based on unofficial, unaudited figures provided to the Commission on a confidential basis by the Local Courts Statistics Unit.

31. See para 4.4.

people in danger of experiencing violence, particularly domestic violence, are withdrawing AVO applications out of fear. It is indeed arguable that it is in the worst cases of violence, where this fear is greatest, that the withdrawal of an application may be more likely. This presents a problem for police trying to stop the incidence of violence, as it will be harder for them to establish the need for an AVO if they don't have the co-operation of the person in need of protection.

8.19 The prevention of domestic and personal violence is a matter of public interest, not just a private matter. Accordingly, there is an argument that police should be able to proceed with an AVO application where they have reasonable grounds to believe that there is an imminent threat of violence, even in the face of strong reluctance by the applicant. This would, however, need to be balanced with the undesirability of overpowering the will of the applicant. The Commission would like to hear views on this matter.

Issue 12

Given that the primary objective of Part 15A is to protect victims of violence, are the provisions relating to the withdrawal of AVO applications satisfactory?

Should the legislation require certain criteria to be satisfied before an application can be withdrawn?

If so, what should those criteria be?

Should police be able to proceed with an AVO application without the consent of the applicant in certain circumstances?
