

11. Consequences of an AVO

- What happens after the court makes an AVO?
- What if the defendant breaches the AVO?
- What happens if the applicant contributes to the breach?

11.1 This chapter discusses the consequences that the granting of an AVO may have for both the applicant and the defendant. Because breaching an AVO is a criminal offence, the consequences for the defendant are potentially quite serious.

WHAT HAPPENS AFTER THE COURT MAKES AN AVO?

Consequences for the applicant

11.2 An AVO protects the person from violence. Importantly, it provides protection from behaviour which is not in itself criminal, such as threats or unwanted communication. Applying for an AVO is also likely to empower a victim of violence, as it moves the issue from the private to the public realm, and indicates to the defendant that violence will not be tolerated.

Consequences for the defendant

11.3 The consequences for the defendant can be significant. For example, defendants can be prevented from residing in, or restricted in approaching, their homes. An AVO is a civil order so it does not give the defendant a criminal record. However, a record of the order is kept on a police database.

11.4 Defendants must dispose of any firearms in their possession or surrender them to the police,¹ and a licence or a permit to possess a firearm must not be issued to a person who is, or who has, at any time within 10 years before the licence or permit application was made, been subject to an AVO.² A licence or a permit is also automatically suspended when an interim AVO is

1. Crimes Act s 562D(3).

2. Unless that AVO has been revoked: *Firearms Act 1996* (NSW) s 11(5)(c) and s 29(3)(b) and *Weapons Prohibition Act 1998* (NSW) s 10(3)(b).

taken out against the licence or permit holder,³ and automatically revoked if the interim AVO becomes final.⁴ This will be significant where the defendant requires a firearms licence for work, for example, defendants in rural areas or who work as security guards.

11.5 A defendant is also disqualified from serving on a jury for the duration of the AVO.⁵

WHAT IF THE DEFENDANT BREACHES THE AVO?

Consequences for the applicant

11.6 It is a crime to breach an AVO.⁶ If the defendant breaches any of the terms in the order, the applicant should report the breach to the police. Police are instructed to “treat all breaches of AVOs seriously, no matter how minor”.⁷ Police can take immediate action, for example by removing the defendant from the protected person’s house. They should also investigate the breach, take evidence and lay a charge. If the police believe that the defendant has breached an AVO, they can arrest and detain the defendant without a warrant.⁸

11.7 Effective police response is the key to ensuring the safety of the protected person. The effectiveness of AVOs may be undermined where police response is inadequate. Police are advised not to mediate or counsel parties as a substitute for charging.⁹ In practice, however, police may take informal action

3. The suspension remains until the interim AVO is confirmed or revoked: *Firearms Act 1996* (NSW) s 23(2) and *Weapons Prohibition Act 1998* (NSW) s 17(2).
4. *Firearms Act 1996* (NSW) s 23 and s 24 and *Weapons Prohibition Act 1998* (NSW) s 17 and s 18.
5. *Jury Act 1977* (NSW) Schedule 1(3)(a).
6. Crimes Act s 562I.
7. *Police Service Handbook* (NSW Police Service, 2000) at D-22.
8. Crimes Act s 562I(3). See also *Bhattacharya v Hamilton* [2000] NSWSC 102.
9. *Police Service Handbook* (NSW Police Service, 2000) at D-18.

only, such as warning the perpetrator.¹⁰ Difficulties can arise for the police where there is insufficient evidence to support a charge.

Consequences for the defendant

11.8 A defendant who breaches any of the terms in the order may be arrested and charged with an offence. If the police believe that a person has breached an AVO, they can arrest and detain the person without a warrant,¹¹ and as soon as is practicable bring the person before a court.¹²

11.9 It is not an offence unless the defendant was in court when the order was made, or has been served with a copy of it.¹³ Further, the defendant must “knowingly” contravene the order.¹⁴ This means that the defendant must be aware of the circumstances that make the behaviour illegal. A defendant who inadvertently breaches the order, for example by entering a building without knowing the protected person is inside, will not be guilty of an offence.¹⁵

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10. 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 138.
 11. Crimes Act s 562I(3). See also *Bhattacharya v Hamilton* [2000] NSWSC 102.
 12. Crimes Act s 562I(4).
 13. Crimes Act s 562I(2).
 14. Crimes Act s 562I(1).
 15. *R v Sarri* [1999] ACTSC 109 at para 25 (Crispin J). A strict liability basis for contravention of a protection order has also been rejected in New Zealand. The prosecution does not have to show that the defendant intended to breach the order, but does have to show that the defendant knew of the existence of the order and knew that his or her conduct may be in breach of the order: *R v Police* [1999] 2 NZLR 501. In the Northern Territory, it is a defence that the act complained of was necessary to enable the defendant to exercise a legal right or perform a legal duty, or that the contravention was the result of an emergency and a similarly circumstanced ordinary person would have done the same: *Domestic Violence Act 1992* (NT) s 10.

11.10 Conduct constituting a breach may be a criminal offence in itself, for example a physical assault. Where an offender is sentenced for assault, the existence of an AVO may be an aggravating factor.¹⁶ Alternatively, conduct which is otherwise lawful will be criminal if it amounts to a contravention of the civil order. For example, telephoning the protected person will be a criminal offence where the AVO states that the defendant must not contact the protected person. It is no defence that the protected person initiated the breach.¹⁷

11.11 The maximum penalty for breaching an AVO is 2 years imprisonment, a fine of \$5,500, or both.¹⁸ If the breach involves

16. *R v Moran* [2000] NSWCCA 379 at para 11 (Dowd J).

17. See para 11.12-11.19.

18. Crimes Act s 562I(1). In the ACT, the maximum penalty for breaching a protection order is, for a first offence, 50 penalty units, 2 years imprisonment or both. For a subsequent offence, it is 50 penalty units, 5 years imprisonment or both: *Protection Orders Act 2001* (ACT) s 34. In the Northern Territory, the maximum penalty is \$2,000 or 6 months imprisonment. A subsequent offence attracts a mandatory prison term of between 7 days and 6 months: *Domestic Violence Act 1992* (NT) s 10. In Queensland, the maximum penalty for breaching a protection order is 40 penalty units or 12 months imprisonment: *Domestic Violence (Family Protection) Act 1989* (Qld) s 80. In South Australia, the maximum penalty for breaching a domestic violence restraining order is 2 years imprisonment: *Domestic Violence Act 1994* (SA) s 15. In Tasmania, the maximum penalty is 10 penalty units or 6 months imprisonment: *Justices Act 1959* (Tas) s 106I. In Victoria, the offender is liable, for a first offence, to a maximum penalty of 240 penalty units or 2 years imprisonment. Subsequent offences carry a maximum penalty of 5 years imprisonment: *Crimes (Family Violence) Act 1987* (Vic) s 22. In Western Australia, The penalty for breaching a violence restraining order is \$6,000 or 18 months imprisonment, except where there is a “cooling off” order (lasting 72 hours or less), in which case it is \$2,000 or 6 months imprisonment. The penalty for breaching a misconduct restraining order is \$1,000: *Restraining Orders Act 1997* (WA) s 61. The *Model Domestic Violence Laws Report* recommend a maximum penalty of \$24,000 or 1 years imprisonment for a first offence, or 2 years imprisonment for a subsequent offence: see Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999) s 64.

violence by a defendant who is 18 years or over, the defendant *must* be sentenced to a term of imprisonment, unless the court orders otherwise. The court must give reasons if the offender is not imprisoned.¹⁹ There is a concern about the appropriateness of fines as penalty for breaching an AVO. For example, where the parties live together and share a household income, the applicant would effectively be paying part of the fine. Further, a fine may trivialise the seriousness of the breach.²⁰

WHAT HAPPENS IF THE APPLICANT CONTRIBUTES TO THE BREACH?

11.12 Under Part 15A, breaching an AVO is still a crime, even if the applicant contributes to the breach. For example, if the AVO prohibits the defendant from entering the premises, it will not be a defence that he or she was invited in by the applicant.

11.13 In one survey, police officers were asked how often they considered that applicants contributed to a breach of an AVO. It was reported that some police officers “believe women have some role in the breach of the AVO”.²¹ Further, a majority of the police officers surveyed indicated they would consider charging the applicant for aiding or abetting the breach,²² where he or she

19. Crimes Act s 562I(2A) and s 562I(2C). Between January 1998 to December 2001, only 11% of offenders were imprisoned for contravention of an AVO, while 28% received a fine only. Other penalties included good behaviour bonds (39%), community service orders (7%), and periodic detention (2%). 7% of offenders who were found guilty of the offence had charges dismissed without proceeding to conviction, and 4% had their sentences suspended: Judicial Commission of NSW, *Judicial Information Research System*.

20. H Douglas and L Godden, “The Decriminalisation of Domestic Violence” (2002) 11 *Australian Domestic and Family Violence Clearinghouse Newsletter* at 8.

21. Katzen at 269.

22. The Crimes Act provides that “any person who aids, abets, counsels or procures, the commission of a minor indictable offence ... may be indicted, convicted, and punished as a principal offender”: s 351.

provoked the defendant, or encouraged the defendant to breach the AVO.²³

Consent as a defence

11.14 Western Australia is the only Australian jurisdiction that currently provides for consent as a defence to a breach:

It is a defence to a charge of breaching a restraining order for the person who is bound by the order to satisfy the court that the person acted with the consent ... of the person protected by the order.²⁴

11.15 “Consent” must be freely and voluntarily given. It does not include consent obtained by force, threat, intimidation, deceit, or any fraudulent means.²⁵ The defence is not available where the protected person is a child or someone for whom a guardian has been appointed.²⁶ Further, the court may revoke the restraining order where the defence is established.²⁷

11.16 The defence was included because in some circumstances, there may be a genuine reason for breaching a restraining order. For example, there may be an emergency such as a funeral or a child’s operation, where there is no time to go to the court for a variation.²⁸ In other circumstances, the parties may have reconciled without seeking a variation or revocation. It would also provide a defence where the applicant contributed to or encouraged the breach.

23. Katzen at 88-89 and 269-270.

24. *Restraining Orders Act 1997* (WA) s 62(1).

25. *The Criminal Code Act Compilation Act 1913* (WA) s 319(2)(a).

26. *Restraining Orders Act 1997* (WA) s 62(2).

27. *Restraining Orders Act 1997* (WA) s 62(3).

28. Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 June 1997 at 4017. See discussion at para 12.8-12.17 regarding variation and revocation of an AVO.

11.17 The inclusion of the defence in the Western Australian legislation was controversial. It was argued that, because domestic violence often involves a power imbalance between the victim and perpetrator, the defence would further the interests of perpetrators and would weaken the legal position of people in need of protection.²⁹ There was some concern that a defence of consent might undermine the whole purpose of the restraining order legislation, creating “a huge loophole in what is otherwise very sound and well-constructed legislation”.³⁰

11.18 The consent defence has reportedly made enforcement difficult, as police are uncertain when to take action for a breach.³¹ The Auditor General for Western Australia reported recently that police are instructed not to charge for a breach where they are satisfied that the applicant consented.³² The Western Australian Department of Justice has recommended the removal of consent as a defence.³³ Instead, orders should permit a degree of contact agreed by both parties, which could be varied by the normal processes.

29. Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 June 1997 at 4001.

30. Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 June 1997 at 4009. See also Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 May 1997 at 3487; Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 May 1997 at 3490; and Western Australia, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 June 1997 at 4005.

31. Auditor General for Western Australia, *A Measure of Protection: Management and Effectiveness of Restraining Orders* (Report 5, October 2002) at 38.

32. Police in 70% of localities interviewed reported that they do not lay charges for breach where there is evidence of consent unless an assault has occurred: Auditor General for Western Australia, *A Measure of Protection: Management and Effectiveness of Restraining Orders* (Report 5, October 2002) at 38.

33. Western Australia, *Evaluation of the Restraining Orders Act 1997* (Department of Justice, 1998) at Recommendation 27.

11.19 The *Model Domestic Violence Laws Report* did not support including consent as a defence to a breach of a protection order:

Submissions were largely opposed to this defence being incorporated into the Model Laws because of concerns that the “consent” may often have been a response to a fear or a threat. Further, it was stated in submissions that the defence failed to acknowledge that a domestic violence order is an order of a court, and not an agreement between two individuals which is capable of being varied at will.³⁴

Issue 21

Are the provisions relating to the breach of AVOs appropriate?

Are they adequately enforced?

Are the penalties for breaching an AVO appropriate?

**Should there be defences to the breach provisions?
In particular, should consent be a defence?**

34. Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (Report, April 1999) at 215.

