

12. Miscellaneous issues

- Cross applications
- Multiple applications
- Variation and revocation
- The appeals process

12.1 This chapter examines miscellaneous practical issues concerning AVOs, such as cross applications, variation and revocation, costs and the appeals process.

CROSS APPLICATIONS

12.2 A cross application is where the defendant in AVO proceedings makes a complaint against the applicant. A cross application may be made where both parties fear each other, and both are in need of protection. This may be appropriate where there is no power imbalance between the parties, for example in the case of APVOs for violent neighbourhood disputes.

12.3 However, cross applications may be inappropriate where there is a power imbalance between the parties. For example, where a victim of domestic violence takes out an AVO, the defendant may make a cross application to intimidate the victim. This can undermine the beneficial effect the initial AVO may have had.

12.4 Cross applications may be taken out in circumstances where other dispute resolution strategies, such as mediation, would be more appropriate. If the parties have equal bargaining power and the dispute is not violent, it may waste the court's time to hear applications followed by cross applications.

12.5 Police will not normally make a cross application on behalf of a person. However, the two parties may use different police stations and different courts. In this situation, the police may end up applying on behalf of both parties where they are unaware of the other person's application.

Issue 22

How can the legislation prevent unwarranted cross applications?

Is there a way of keeping police and courts informed of cross applications?

MULTIPLE APPLICATIONS

12.6 There is no provision to stop people from making multiple applications. For example, where an application for an AVO has been withdrawn or dismissed, the person seeking protection can initiate new proceedings either in the same or in a different court. There may be legitimate reasons for reapplying after an application has been withdrawn. However, where the application has been dismissed after a hearing and the circumstances have not altered, there will be no basis for reapplying.

12.7 It takes some time to defend a final order and have the application dismissed. An interim order can be made without notice having been served on the defendant, and the defendant must comply with the order until the hearing. If the application is dismissed after a hearing, the person seeking protection can immediately reapply in a different court. The defendant has no remedy against this.

Issue 23

Is there a way of keeping police and courts informed of multiple applications?

Should the right to reapply for an order be limited, for example where an application has already been dismissed and the circumstances have not altered?

VARIATION AND REVOCATION

12.8 An AVO is an order of the court and so cannot be varied at will by the parties. It is important that the parties go to court where there is a change of circumstances. Otherwise, conduct which both parties consent to may amount to a breach.

12.9 An applicant, a defendant or a police officer can apply to have an AVO varied or revoked.¹ A police officer can only apply if the initial complaint was made by a police officer. This means that the police cannot apply for variation where the protected person initially applied on his or her own behalf. One issue for consideration is whether police should be able to apply for variation or revocation regardless of who made the initial complaint.

12.10 The grounds for variation or revocation are not specific – a court may vary or revoke an order “if satisfied that in all the circumstances it is proper to do so”.² The court can reject an application if it is satisfied there has been no change in circumstances and the application is in the nature of an appeal. Only a police officer can apply for a variation or revocation where the protected person is under 16 years of age. An AVO can be varied by extending or reducing its duration, or by changing, adding to or deleting the conditions in the order.³

12.11 An order cannot be varied or revoked unless the defendant has been served with notice of the application.⁴ However, the court can extend the duration of the order without notice being served on the defendant if:

- (a) the applicant lodged the application no later than 21 days before the day on which the order is due to expire, and
- (b) the application is listed for mention before the court no later than 14 days after the day the application was lodged, and

1. Crimes Act s 562F.

2. Crimes Act s 562F(3).

3. Crimes Act s 562F. In the ACT, there is a presumption in favour of extending domestic violence orders. A domestic violence order must be extended by up to a year upon the protected person's application, unless the court is satisfied that it is no longer necessary. However, the presumption is reversed for personal protection orders, as the order will only be extended if the court is satisfied that it is still necessary: *Protection Orders Act 2001* (ACT) s 37.

4. Crimes Act s 562F(6).

- (c) notice of the application has not been served on the defendant by the time the matter is heard by the court.

12.12 Such an order ceases to have effect 21 days after it is made (unless revoked sooner), or on an earlier date specified in the order.⁵ This section is very prescriptive. It would be simpler if the legislation provided that an application for extension can be made before the order expires.

12.13 An applicant cannot apply to have an order extended if the order has already expired. Because an AVO aims to prevent apprehended violence, it cannot act retrospectively. The proper remedy is to grant an interim order for the protected person's safety until the matter can be considered by the court.⁶

12.14 Similarly, a defendant cannot apply to have an order revoked if it has already expired. This is significant, because the consequences of revocation and expiration differ. Where an AVO expires, the defendant cannot hold a firearm licence for 10 years. This prohibition does not apply where the AVO has been revoked.⁷

12.15 It is important that the decision to vary or revoke an order reflects the best interests of all persons in need of protection. For example, there is a danger that, following a reconciliation with a violent partner, an adult protected person will vary or revoke the AVO, leaving the child without legal protection. The decision to vary or revoke the order stems from the adults' decision to be together, and may not be in the child's best interests. There is also a danger that the defendant has put pressure on the protected person to apply for a revocation.⁸

5. Crimes Act s 562F(8).

6. *Vukic v Edgerton* [2001] NSWCCA 2.

7. *Firearms Act 1996* (NSW) s 11(5).

8. In Queensland, the court must consider whether any pressure has been applied, or threat has been made, to the protected person by the defendant or anyone else: *Domestic Violence (Family Protection) Act 1989* (Qld) s 36(2)(c).

12.16 If an AVO is made for the protection of more than one person, its variation or revocation can affect any one or more of them. It is not necessary that all the persons on the order apply for variation or revocation. If one of the persons is a child, the court must be satisfied that the child is no longer in need of the level of protection afforded by the order.⁹

12.17 Under Part 15A, a defendant can apply for variation or revocation if the circumstances have changed. However, it may be more efficient if only the person in need of protection can apply for variation or revocation, especially if the order was imposed on the defendant after a hearing. Where the defendant consented to the order, it may be important to preserve the right to apply for variation or revocation, as the defendant may not have fully understood the implications of the order when giving consent.

Issue 24

Are the provisions regarding variation and revocation of AVOs adequate? Why or why not?

Should police officers be allowed to apply for a variation regardless of who made the initial complaint?

Is it possible to safeguard against variation or revocation where the protected person has been threatened or coerced?

Should section 562F(8) be simplified, to provide that an application for extension can be made before the order expires?

9. Crimes Act s 562F(4B).

Do the provisions dealing with variation and revocation provide adequate protection where more than one person is included on the order?

In what circumstances should defendants be able to apply to vary or revoke an AVO?

THE APPEALS PROCESS

12.18 If the order was made *ex parte*, the defendant may be able to apply to the local court for the case to be reviewed. The local court will review the case if satisfied that the defendant did not know about the proceedings until they were completed, the defendant was stopped from taking action because of accident, illness or misadventure or there are other good reasons why the application should be heard.¹⁰ The defendant cannot apply to the local court for a revocation of the AVO unless the circumstances have changed.¹¹ In this way an application for revocation or variation cannot be in the nature of an appeal.

12.19 The defendant can appeal to the District Court against the making of an AVO. If the order was made by consent, the defendant requires leave. A protected person, defendant or police officer can also apply to the District Court against an order varying or revoking an AVO. If the local court or children's court has dismissed an application for an AVO, the person seeking protection or police officer can appeal to the District Court for an AVO. In either case the person has 28 days to lodge the appeal.¹² Appeals in the District Court are held by way of rehearing on the transcripts of evidence of the local court proceedings. The appellant cannot call witnesses or give evidence unless the

10. *Justices Act 1902* (NSW) s 100K.

11. *Crimes Act* s 562F(4A).

12. However, an appeal can be brought outside the 28 day limitation period in some circumstances, in the interests of public policy: *Stanton v Jordon* (NSW, Supreme Court, 22 April 1998, unreported).

District Court is satisfied there are special or substantial reasons. The AVO remains in force pending appeal.¹³

Issue 25

Is the appeals process satisfactory? If not, how can it be improved?

13. Crimes Act s 562W and s 562WA; *Justices Act 1902* (NSW) Part 5A.