Chapter 3: Apprehended violence orders (AVOs)

This chapter will provide a step-by-step guide about how to deal with clients who are an applicant or defendant in AVO proceedings.

Practitioner tip

On 3 December 2016 changes were introduced to the Crimes (Domestic and Personal Violence) Act 2007 (NSW) (CDPVA) which included the introduction of "plain language" AVOs. The discussion about the wording of orders in this chapter reflect the wording used in AVOs made after 3 December 2016. AVOs made prior to 3 December 2016 will have orders which are worded and numbered differently to those made after 3 December 2016 but which still carry the same effect.

Purpose

An AVO prohibits the defendant from engaging in certain behaviours. The objects of an AVO are set out in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (CDPVA).

In *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, Spigelman CJ (Mason P and Beazley JA agreeing):

> The legislative scheme for apprehended violence orders serves a range of purposes which are quite distinct from the traditional criminal or quasi-criminal jurisdiction of the Local Court. The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking, intimidation and harassment. Apprehended violence orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law. [at 519]

In *Vukic v Edgerton* [2001] NSWCCA 2, Dowd J (Mason P and Austin J agreeing) observed that the underlying purpose of AVOs is to deter people from carrying out certain inappropriate conduct or harming persons and to protect people from future harm. [at 47]

In *R v Hamid* (2006) 164 A Crim R 179; [2006] NSWCCA 302 Johnson J refers to the New South Wales Law Reform Commission Report 103 (2003), Apprehended Violence Orders, which states that the, "underlying rationale of the AVO scheme is to stop or prevent criminal behaviour, and to send a clear message that any form of violence, intimidation or harassment is a crime".

Types of AVOs

There are two types of AVOs, apprehended domestic violence orders (ADVOs) and apprehended personal violence orders (APVOs). An ADVO protects people from people with whom they have a domestic relationship. The CDPVA defines domestic relationship as:

Meaning of 'domestic relationship'

Section 5 sets out the definition of domestic relationship:

(1) For the purposes of this Act, a person has a "domestic relationship" with another person if the person:

(a) is or has been married to the other person, or

(b) is or has been a de facto partner of that other person, or

(c) has or has had an intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature, or

(d) is living or has lived in the same household as the other person, or

(e) is living or has lived as a long-term resident in the same residential facility as the other person and at the same time as the other person (not being a facility that is a correctional centre within the meaning of the Crimes (Administration of Sentences) Act 1999 or a detention centre within the meaning of the Children (Detention Centres) Act 1987), or

(f) has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person, or

(g) is or has been a relative of the other person, or

(h) in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person's culture.

Note: 'De facto partner' is defined in section 21C of the Interpretation Act 1987.

(2) Two persons also have a "domestic relationship" with each other for the purposes of this Act if they have both had a domestic relationship of a kind set out in subsection (1) (a), (b) or (c) with the same person.

> *Note: A woman's ex-partner and current partner would therefore have a domestic relationship with each other for the purposes of this Act even if they had never met.*

APVOs protect people from people with whom they do not have a domestic relationship, for example, neighbours or work colleagues. This section will focus on ADVOs.

Legal test

Section 16 of the CDPVA states:

(1) A court may, on application, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears:

> *(a) the commission by the other person of a domestic violence offence against the person, or*
>
> *(b) the engagement of the other person in conduct in which the other person:*
>
> > *(i) intimidates the person or a person with whom the person has a domestic relationship, or*
> >
> > *(ii) stalks the person,*
>
> *being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.*

(2) Despite subsection (1), it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in, if:

> *(a) the person is a child, or*
>
> *(b) the person is, in the opinion of the court, suffering from an appreciably below average general intelligence function, or*
>
> *(c) in the opinion of the court:*
>
> > *(i) the person has been subjected at any time to conduct by the defendant amounting to a personal violence offence, and*
> >
> > *(ii) there is a reasonable likelihood that the defendant may commit a personal violence offence against the person, and*
> >
> > *(iii) the making of the order is necessary in the circumstances to protect the person from further violence, or*
>
> *(d) the court is satisfied on the balance of probabilities that the person has reasonable grounds to fear the commission of a domestic violence offence against the person.*

(2A) An apprehended domestic violence order that is made in reliance on subsection (2) (d) cannot impose prohibitions or restrictions on the behaviour of the defendant other than those prohibitions that are taken to be specified in the order by section 36.

(3) For the purposes of this section, conduct may amount to intimidation of a person even though:

> *(a) it does not involve actual or threatened violence to the person, or*
>
> *(b) it consists only of actual or threatened damage to property belonging to, in the possession of or used by the person.*

Section 11 of the CDPVA defines domestic violence offence as:

(1) In this Act "domestic violence offence" means an offence committed by a person against another person with whom the person who commits the offence has (or has had) a domestic relationship, being:

> *(a) a personal violence offence, or*
>
> *(b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or*
>
> *(c) an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).*

(2) In this section, "offence" includes an offence under the Criminal Code Act 1995 of the Commonwealth.

Section 4 defines a personal violence offence as:

> *(a) an offence under, or mentioned in, section 19A, 24, 25, 26, 27, 28, 29, 30, 31, 33, 33A, 35, 35A, 37, 38, 39, 41, 44, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66EA, 80A, 80D, 86, 87, 93G, 93GA, 195, 196, 198, 199, 200, 562I (as in force before its substitution by the Crimes Amendment (Apprehended Violence) Act 2006) or 562ZG of the Crimes Act 1900, or*
>
> *(b) an offence under section 13 or 14 of this Act, or*
>
> *(b1) an offence under section 109, 111, 112, 113, 114, 115 or 308C of the Crimes Act 1900, but only if the serious indictable offence or indictable offence*

referred to in those sections is an offence referred to in paragraph (a) or (b), or

(c) an offence of attempting to commit an offence referred to in paragraph (a), (b) or (b1).

Section 13 states:

(1) A person who stalks or intimidates another person with the intention of causing the other person to fear physical or mental harm is guilty of an offence.

Maximum penalty: Imprisonment for 5 years or 50 penalty units, or both.

(2) For the purposes of this section, causing a person to fear physical or mental harm includes causing the person to fear physical or mental harm to another person with whom he or she has a domestic relationship.

(3) For the purposes of this section, a person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person.

(4) For the purposes of this section, the prosecution is not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm.

(5) A person who attempts to commit an offence against subsection (1) is guilty of an offence against that subsection and is punishable as if the offence attempted had been committed.

Section 7 of the CDPVA defines intimidation as:

(a) conduct amounting to harassment or molestation of the person, or

(b) an approach made to the person by any means (including by telephone, telephone text messaging, e-mailing and other technologically assisted means) that causes the person to fear for his or her safety, or

(c) any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property.

(2) For the purpose of determining whether a person's conduct amounts to intimidation, a court may have regard to any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour.

PE v MU [2010] NSWDC 2 states "[h]arrassment is not defined in the Act but in its legal sense it refers to ongoing behaviours which are found to be threatening or disturbing".[13]

Murdoch v Hadley [2011] NSWLC 11 adopts the Macquarie Dictionary definition of harass:

> **verb** (**t**) **1.** to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid. **2.** to disturb persistently; torment. [French **harasser**, from Old French **harer** set a dog on] As a general proposition, there appears to be no reason why repeated verbal attacks upon a person could not amount to harassment as "repeated attacks" or as "torment", and evidence of such attacks is by no means uncommon in the evidence relating to apprehended violence orders, although rarely of attacks so openly publicized. Such an interpretation is consistent with the dictionary definition given above, and, if accepted, seems to be as applicable to verbal attacks broadcast via electronic media as it would be to verbal attacks made orally in the presence of the victim, or, for example, broadcast via telephone or loudspeaker. Also it would seem to follow that repeated unwanted telephone calls to another person could fall within any broad interpretation of "harassment" even if, as here, those calls do not fall within s 7(1)(b) because they do cause any genuine fear regarding physical safety of persons or property.[14]

Section 8 of the CDPVA defines stalking as:

the following of a person about or the watching or frequenting of the vicinity of, or an approach to, a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity.

(2) For the purpose of determining whether a person's conduct amounts to stalking, a court may have regard to any pattern of violence (especially violence constituting a domestic violence offence) in the person's behaviour.

Section 14 refers to contravening an AVO:

(1) A person who knowingly contravenes a prohibition or restriction specified in an apprehended violence order made against the person is guilty of an offence.

Maximum penalty: Imprisonment for 2 years or 50 penalty units, or both.

Gianoutsos v Glykis (2006) 65 NSWLR 539 found that the making of a final AVO "does not necessarily require a finding that any particular event has occurred (although such a finding could be made) and does not require a finding that a criminal act may have been committed".[15]

Consequences of AVOs

Civil order but breach is a crime

An AVO is a civil order of the court. It is not a criminal charge and will not be listed on a defendant's criminal record, however a defendant can be charged with a criminal offence for contravening an AVO (commonly referred to as breach AVO) if they

13 at [16].

14 at [11]-[13]

15 at [52]

continue to engage in the prohibited behaviour. See '**Contravening an AVO**' below for more information.

Firearms

Sections 23 and 24 of the *Firearms Act 1996* (NSW) (Firearms Act) automatically suspends a person's licence to possess or use a firearm on the making of an interim AVO and revokes it on the making of a final AVO. Sections 17 and 18 of the *Weapons Prohibition Act 1998* (NSW) duplicate these provisions.

Section 11(5)(c) of the Firearms Act provides that a person who is subject to a final AVO is prohibited from holding a firearm licence within ten years of the making of the final AVO. On the suspension or revocation of such licences or permits, the relevant firearms or weapons must be surrendered to the police or may be seized by the police.

Working with children check

Having an AVO against you may or may not affect your ability to work with children. Section 8 of the *Child Protection (Working With Children) Act 2012* requires people applying for jobs working with children to undergo a 'working with children check'. A police-initiated final AVO made against a person for the protection of a child will be recorded on a defendant's working with children check and they may not be considered eligible for child-related employment. Section 15 of the CPWWCA requires the Children's Guardian to undertake a risk assessment of an applicant for a working with children check clearance. Section 15(4) lists the matters that the Children's Guardian may consider in undertaking the risk assessment. These include seriousness of the matters that caused the assessment; length of time that has passed; how old the applicant was at the time etc.

Practitioner Tip

For more information about the working with children check see the Office of the Children's Guardian website at www.kidsguardian.nsw.gov.au/child-safe-organisations/working-with-children-check. Also, watch out for possible changes to the law following a review of the Working with Children Check undertaken in 2017.

Family law and AVOs

Section 60CC(3)(k) of the *Family Law Act 1975* (Cth) (FLA) requires the court, when considering making a parenting order, to take into account the nature of an AVO (provisional, interim or final), the circumstances in which an AVO was made, any evidence admitted in proceedings for the order and any findings made by the court in, or in proceedings for, the AVO.

Criminal records for domestic violence offences

Section 11 of the CDPVA defines a domestic violence offence as a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship.

According to section 12(2) of the CDPVA, if a person pleads guilty to an offence or is found guilty of an offence and the court is satisfied that the offence was a domestic violence offence, the court is to direct that the offence be recorded on the person's criminal record as a domestic violence offence.

Sections 27 and 49 of the CDPVA provide that if a person has committed a domestic violence offence, it will be relevant in determining:

- bail proceedings; and
- whether a person is guilty of stalking or intimidation, where previous behaviour constituting a domestic violence offence is taken into account for the purpose of determining whether a person's behaviour amounts to intimidation or stalking; and
- future ADVO applications, because police are required to make applications for ADVOs where a person in question has already committed a domestic violence offence; and
- an appropriate sentence for a future offence because previous convictions are considered to be an aggravating factor to be taken into account.

AVO orders

In deciding whether or not to make an ADVO, section 17(1) of the CDPVA requires the court to consider the safety and protection of the protected person and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order.

Section 17(3) of the CDPVA states that when making an ADVO, the court is to ensure that the order imposes only those prohibitions and restrictions on the defendant that, in the opinion of the court, are

necessary for the safety and protection of the protected person, and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order, and the protected person's property.

There is a standard form AVO that lists mandatory orders and the additional orders listed in section 35 of the CDPVA.

Mandatory orders

Section 36 of the CDVPA requires that every AVO include the following mandatory orders, which appear as Order 1 on an AVO, prohibiting the defendant from:

(a) You must not assault or threaten the protected person or any other person having a domestic relationship with the protected person.

(b) You must not stalk, harass or intimidate the protected person or any other person having a domestic relationship with the protected person intentionally.

(c) You must not recklessly destroy or damage any property that belongs to or is in the possession of the protected person or any other person having a domestic relationship with the protected person.

These orders offer a minimum level of protection. They can be made even when the defendant and the protected person are still living together and/or still in a relationship, as they do not prevent contact or involve any exclusion from premises.

Additional orders

A court can impose any prohibition or restriction on a defendant as appear 'necessary or desirable' to ensure the safety and protection of the person in need of protection and their child. Without limiting the prohibitions or restrictions a court can made, section 35 of the CDPVA sets out the additional orders that can be included on an AVO.

Orders about contact

The additional orders can include orders about contact:

(a) You must not approach the protected person or contact them in any way, unless the contact is through a lawyer.

(b) You must not approach:

5 The school of any other place the protected person might go for study,

6 Any place they might go for childcare, or

7 Any other place listed here _____.

(a) You must not approach or be in the company of the protected person for at least 12 hours after drinking alcohol or taking illicit drugs.

(b) You must not try to find the protected person except as ordered by a court.

Order 2 is the strictest no contact order. It is usually only used where the parties do not have any children together or there is no need for them to have any contact in the future or it is not safe to have any contact between the defendant and the protected person.

Orders about family law and parenting

Additional orders can include orders about family law and parenting.

(a) You must not approach the protected person or contact them in any way, unless the contact is:

6 through a lawyer, or

7 to attend accredited or court-approved counselling, mediation and/or conciliation, or

8 as ordered by this or another court about contact with child/ren, or

9 as agreed in writing between you and the parent(s) about contact with child/ren.

Order 6 is appropriate where the protected person and the defendant have children and do not have parenting orders. They may have no parenting arrangements or a parenting plan (i.e. written agreement).

If order 6(d) is made the defendant will not be able to contact the protected person until such time as an agreement in writing is reached. Some magistrates will not make order 6(d) unless an agreement is reached in relation to the defendant's contact and will encourage the protected person and the defendant to do this on the AVO list day. If your client wants to enter into a parenting plan, refer to the sample plan below for suggested wording and change as relevant to your client's circumstances.

However, victims of domestic violence are often at their most vulnerable and may not be in a position to consider parenting arrangements. Victims of domestic violence should be given the opportunity to get legal advice from a family lawyer before agreeing to anything in writing in relation to children. A written agreement that sets out arrangements for children, signed and dated by the parties, is a parenting plan under the Family Law Act (see ss 63C, 64D, 65DA and 70NBB).

A written agreement does not become a court order or part of the AVO, but it may be handed up to the magistrate and sit on the court file. Although not binding like a court order, if the written agreement is signed and dated (i.e is a parenting plan) it may be considered in family law proceedings as the parties' intentions in relation to the children and may have child support implications. A parenting plan also overrides an existing court order about children.

If, after advice, a written agreement in the form of a parenting plan is agreed to as part of Order 6 the sample format below can be adapted to the client's instructions.

Agreement in Writing / Parenting Plan

BETWEEN

[INSERT NAME] (Mother)

AND

[INSERT NAME] (Father)

This agreement is made subsequent to the Apprehended Violence Order

made by _____ Local Court on _____

for the protection of _____ (Protected Person)

This agreement is not a court order under the Family Law Act 1975 (Cth). It is an agreement about parenting arrangements until such time as another Parenting Plan or Court Orders are made between the parents.

The following arrangements are agreed in relation to the child/ren:

_____DOB: _____

_____DOB: _____

_____DOB: _____

The child/ children lives with Mother / Father / other person

The Mother / Father spends time with the children as follows:

Each (name day) from .....am/pm to .....am/pm

Every alternate weekend beginning [date]:

For the purpose of spending time with the Father, the Father will pick up [Name] from school 3pm Friday and drop them at school 9am the following Monday.

The Father can call [name] between 7pm and 7.30pm on Wednesday evenings.

[Add any additional agreements]

We agree to be bound by the above terms until such time as a new Parenting Plan or Orders under the Family Law Act 1975 (Cth) are made.

Dated: _____

_____ _____

Mother [Name] [Signature] Father [Name] [Signature]

Order 6(c) is appropriate where there are parenting orders in place. See **Chapter 5: DV and Family Law** for more information about parenting plans and parenting orders.

Orders about where a defendant cannot go

Additional orders can include an order about where a defendant cannot go.

(f) You must not live at:

(a) The same address as the protected person, or

(b) Any place listed here

_____.

(g) You must not go into:

- *Any place where the protected person lives, or*
- *Any place where they work, or*
- *Any place listed here*

_____.

(h) You must not go within _____ metres of:

- *Any place where the protected person lives, or*
- *Any place where they work or*
- *Any place listed here*

_____.

When making an order that would prohibit or restrict access to the defendant's residence, section 17(2) of the CDPVA requires the court consider:

- the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made; and
- any hardship that may be caused by making or not making the order, particularly to the protected person and any children; and
- the accommodation needs of all relevant parties, in particular the protected person and any children; and
- any other relevant matter.

In *Farthing v Phipps* [2010] NSWDC 317, when the court is deciding whether to make an AVO, 'any other relevant matter' can include a person's ability to understand an AVO.

Section 17(4) of the CDPVA states that if an application is made for an ADVO that prohibits or restricts access by the defendant to any premises or place and the court hearing proceedings in respect of the application decides to make an order without the prohibition or restriction sought, the court is to give reasons for that decision.

Section 35(2) of the CDPVA states that the defendant can be prohibited or restricted access to premises 'whether or not the defendant has a legal or equitable interest in the premises or place'. This is very important, as many victims feel that they have no rights to remain in the family home if the title is not in their name.

Order 7 only restricts the defendant from living at the premises. It does not restrict them entering the premises (upon invitation) to visit children for example.

Order 8 restricts the defendant from entering a particular place. Unfortunately, the word 'place' is not defined in the CDPVA and its meaning causes some confusion. Some people interpret the place as the house, whereas others interpret place as the front gate, fence or boundary line. The example provided in the pro forma orders is: You are not allowed to go within the boundary of those places. Advising clients to use caution and to take a liberal interpretation of the concept of place, such as the fence line, may be best.

In some cases where pick-up or drop-off of children is involved it may be prudent to redraft the order and specify an exact boundary. For example, the defendant must not go past the letterbox at the top of the driveway, so all parties are clear where the 'place' begins.

Order 9 is the most restrictive of the exclusion orders. It usually specifies an exclusion range of 50 or 100 metres from the place. If the protected person lives on a highway, or on a street the defendant needs to frequent to get to work or to visit family, a magistrate will be unlikely to make order 9. Therefore it is best to get instructions about the potential need for the defendant to go within 100 metres of the protected persons' place.

Practitioner tip

It is important that an AVO application seek appropriate and reasonable additional orders in each case. Some orders will cancel each other out and the wrong combination of orders may result in confusion for the defendant and the protected person, which can lead to breaches of the order. Some orders are broader than others and make lesser orders unnecessary. For example, by seeking exclusion order 9 you do not need order 7 or 8.

Orders about weapons

The additional orders include orders about weapons:

(a) *You must not possess any firearms or prohibited weapons.*

A court will make this order if the defendant has firearms or weapons. Even though it is not strictly necessary to make this order since a licence is suspended on the making of an interim AVO or revoked on the making of a final AVO, the inclusion of this order makes it clear on the face of the order that such items cannot be possessed. See '**Consequences of AVOs**' above.

Additional orders

Section 35(1) of the CDPVA allows courts to make orders that appear 'necessary or desirable' to ensure the safety and protection of the protected person, meaning the applicant can ask for additional orders not included on the standard form.

If your client is experiencing technology-facilitated stalking or abuse (see **Chapter 4: DV and Technology** for more information), you could seek the following orders.

If the perpetrator has been using surveillance devices, spyware, GPS tracking, online stalking or monitoring a person's accounts or devices, in addition to Order 5 you could ask the court to order: *'The defendant must not attempt to locate, ask someone else to locate, follow or keep the protected person under surveillance.'*

If a defendant has threatened to share an intimate image without consent, or has already shared the image and refused to remove the image, you could ask the court to make the following order: *'The defendant is prohibited from directly or indirectly publishing, sharing and threatening to publish or share images or videos of the protected person of an intimate nature.'*

Duration of an AVO

An interim order will remain in effect until the AVO is made final or it is revoked, dismissed or withdrawn (s 24).

A final order will remain in effect for the period of time specified in the AVO and in the absence of a time period being specified, for 12 months (s 79), subject to s 73 which addresses variations or revocations of interim and final AVOs.

It is usual for Courts to make orders for a period of 12 months or 2 years. On occasion and in the most serious of cases, a court might make an order for a period of 5 years.

Ancillary property recovery orders

A victim or defendant can seek a property recovery order as a means of recovering personal belongings from the house such as their personal clothes, children's clothes and personal effects.

They are not designed to be used as a quasi-property settlement and should not contain disputed major household goods or furniture or anything of significant value, which should be the subject of a family law property settlement. Clients need to bear in mind that the police do not have time to accompany someone to fill a whole truck or trailer.

An application for a property recovery order made by a protected person or a defendant must provide details of any relevant family law property order or pending application for a family law property order, which will then be taken into consideration (See s 37(1C) CDPVA).

Sections 37(1) and 37(1B) of the CDPVA provide that a property recovery order may be made by:

- a senior police officer;
- when making an interim AVO;
- on the making of a final AVO on the motion of a court or authorised officer; or
- on application of a police officer, the protected person or the defendant.

Section 37(1A) states that a court or authorised officer may make an ancillary property order only if satisfied that the protected person has left personal property at the premises, which the defendant occupies, or the defendant has left personal property at the premises which the protected person occupies. Section 37(5) requires a defendant be present if they want an order to recover their property.

Section 37(2) Crimes (Domestic and Personal Violence) Act 2007 (NSW)

A property recovery order may do any or all of the following:

- *direct the occupier to allow access to the premises to enable the removal of property,*
- *provide access at a time arranged between a occupier and a police officer,*

- *require the person who has left the personal property at the premises to be accompanied by a police officer when removing the property from the premises,*
- *provide the person who has left the personal property be accompanied by another specified person,*
- *specify the type of property to which the order relates.*

Sections 37(3) and 37(4) state that a property recovery order does not authorise entry to any premises by means of force or confer any right on a person to take property that the person does not own or have a legal right to possess, even if the type of property is specified in the order.

The maximum penalty for contravening a property recovery order or obstructing a person who is attempting to comply with a property recovery order, without reasonable excuse, is 50 penalty units (s 37(6)). Section 37(7) states that the accused bears the onus of proving reasonable excuse.

Children as additional protected persons

Section 38(2) requires that where a protected person who is 18 years old or older has a child, a court or issuing officer must list their child as an additional protected person unless they are satisfied there are good reasons for not doing so. The court or issuing officer must give reasons for not listing the child (s 38(3)). An AVO may be made for the protection of a child even though an application was not made by a police officer (s 38(5)).

Provisional orders – Part 7 CDPVA

Provisional AVOs are interim AVOs applied for by police to protect a person until the court has had the opportunity to hear the application. Like all AVOs, they are only enforceable if the defendant has been served with the application. Section 25 empowers a police officer to apply for a provisional AVO 'on the spot' eg by applying to a senior police officer by phone for an interim AVO (called a provisional AVO when made under Part 7 of the CDPVA).

Police may apply for a provisional order under section 26 of the CDPVA:

(1) An application may be made by telephone, facsimile or other communication device if:

a) an incident occurs involving the person against whom the provisional order is sought to be made and the person who would be protected by the provisional order, and

b) a police officer has good reason to believe a provisional order needs to be made immediately to ensure the safety and protection of the person who would be protected by the provisional order or to prevent substantial damage to any property of that person.

(2) An application may be made at any time and whether or not the court is sitting.

Section 28A allows a senior police officer to make a provisional order where there are reasonable grounds to do so but not where he or she is the applicant officer, in which case an 'authorised officer' must make the order.

Sections 89, 89A and 90 allow police to detain a defendant or order them to remain in a place for the purpose of serving them with a provisional AVO.

Provisional orders remain in place for 28 days or until revoked, varied or replaced by an interim or final order (s 32). Sections 33 and 33A allow provisional orders to be varied or revoked by a police officer or defendant under certain conditions.

Interim orders – Part 6 CDPVA

At the first court date or any court date after that, the court may, on application, make an interim AVO if it appears to the court that it is necessary or appropriate to do so in the circumstances (s 22(1)).

Section 40 requires an interim AVO to be made against a defendant if they have been charged with a serious offence against the protected person, whether or not an application for an order has been made. A serious offence includes a domestic violence offence (s 40(5)).

Section 22(3) allows an interim AVO to be made even when a defendant is not present at or aware of the proceedings. However, for the interim order to be enforceable it must be served on the defendant.

An interim court order remains in force until it is revoked, or a final AVO is made, or the application for a final AVO is withdrawn or dismissed, whichever first occurs (s 40).

An interim order, once served, has the same effect as a final AVO (s 22(6)).

See page 35 for further information on interim hearings.

Capacity

In *Farthing v Phipps* [2010] NSWDC 317, the court considered the question of a person's ability

to understand an AVO, with Lakatos SC DCJ holding that:

> Section 17, as I have said, allows a court, including this Court, to take into account any other relevant matter in determining whether or not to make an order. As I have said, the object of the Act is the protection of persons from domestic violence, intimidation and stalking. The Act proceeds on the basis that an order by the Court directed to the defendant would be understood by that defendant and acted upon, and I refer to my earlier references to the various sections of the Act. As a matter of principle it follows that if the Court concludes that the making of an order will not have the desired primary effect, then that will be a substantial reason in accordance with s 17 not to make the order. Furthermore, if the Court concludes that a person against whom the order is made cannot properly comprehend the terms of its order, so that the effect might be that he or she unwittingly breaches the order and therefore exposes him or herself to imprisonment, that in my view would also be a sufficient other reason why an order should not be made.[16]

In that case, Ms Phipps and Mr Farthing were placed in shared accommodation, and Mr Farthing sought an ADVO against Ms Phipps. It was successfully argued that Ms Phipps' conduct was attributable to her 'psychological makeup' and she did not have the capacity to understand the terms of an AVO should it be taken against her. On this basis, the court declined to make an AVO for the protection of Mr Farthing.

Applications for AVOs

Section 48(2) states that an application for an AVO may be made by:

- a person for whose protection the order would be made; or
- the guardian of the person for whose protection the order would be made; or
- a police officer.

Regardless of the manner in which the AVO application is initiated, they hold the same weight at law.

A defendant in an AVO application can also make an AVO application against the protected person. This is called a cross application.

Police applications

Police are obliged to take out an application for an AVO in certain circumstances. Section 27(1) of the CDPVA states that police must apply for a provisional AVO if:

- *A police officer investigating the incident concerned suspects or believes that:*
- *A domestic violence offence, or an offence against section 13 (stalking or intimidation) 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, or*
- *An offence under s227 (child and young person abuse) of the Child and Young Person (Care and Protection) Act 1998 (but only in relation to a child) 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, or*
- *Proceedings have been commenced against a person for an offence referred to in subparagraph (i) and (ii) committed against the person for whose protection an order would be made, and*
- *The police officer has good reason to believe that an order needs to be made immediately to ensure the safety and protection of the person.*

Section 49(1) requires police to apply for an interim or final AVO in the same circumstances as above. Section 48(3) states that police must also make applications for children under 16 years of age.

Practitioner tip

Practical tips to assist your client to get the police to apply for an AVO on their behalf:

Ask police if she or he can give a written statement. If there is a typed formal statement, police must investigate. If no statement is taken, make sure your client asks for an event or 'E' number;

Ask for the specific AVO orders they want, including listing their children as protected persons;

Your client should use the words that were used during the incident, she or he should not censor themselves. They should tell the police that the perpetrator said 'I'm going to fucking kill the lot of you if you ever leave', not 'He said he was going to kill me';

Your client should describe past incidents of domestic violence as well as recent incidents to contextualise their current fears;

16 at [33].

You could type up their instructions in their words for them to hand to the police;

If police refuse to apply for an AVO for your client, you can write to the police reiterating their instructions and refer them to the Code of Practice for the NSW Police Force Response to Domestic and Family Violence (Police Code of Practice) and ask for a written explanation as to why they did not apply for an AVO.

Private applications

Section 52 of the CDPVA allows a protected person to make an application for an AVO, by filing an application signed by a Registrar of a Local Court. A person can approach a local court registry for assistance with making a private AVO application. Some courts book the client in to see the Registrar in person to describe the grounds of the AVO and the orders that are being sought. Other courts may organise a telephone appointment with the Registrar to discuss the matter before a face-to-face appointment.

Registrars may encourage people to seek an ADVO through the police if they think it is a serious matter and the police should be acting. However, there are several reasons why victims may prefer, or have to, take out a private AVO instead of a police AVO:

- If the police currently have an AVO application against the person seeking protection for the same incident they cannot act for and against the same party at a hearing (see '**Cross applications**' below);
- If the victim has not had a good experience reporting the abuse to the police previously they may prefer to make a private application;
- Some groups in the community, such as Aboriginal and Torres Islander people and newly arrived migrants, may fear or distrust the police and may prefer to make a private application;
- If making a private application, the victim can opt out of an automatic referral to the Local Coordination Point for information and support by making a specific request to not share confidential details (whereas this referral is automatic in police applications).
- If a person makes a statement to police the perpetrator may be charged with a criminal offence, so if they do not want the perpetrator to be charged, they may prefer to make a private AVO application; or
- If the perpetrator is a police officer (note though the fact that the defendant is a police officer does not preclude police from taking out an AVO in circumstances where the defendant is a police officer. Where the defendant is a serving police officer, it is usual practice for the Crown Solicitors Office to appear on behalf of the police as complainant rather than the police prosecutor).

A child over 16 years of age but less than 18 years old has full capacity to make an application (s 48(6)).

Practitioner tip

Practical tips to assist your client make a private AVO application:

Your client should ask for the specific AVO orders they want, including listing their children as protected persons.;

Your client should use the words that were used (first person speech) and not censor themselves. Tell the Registrar what the perpetrator said: 'I'm going to fucking kill the lot of you if you ever leave', not 'He said he was going to kill me';

Your client should describe past incidents of domestic violence as well as recent incidents to contextualise their current fears;

If your client needs urgent protection, they should ask for the AVO application to be listed urgently or on the next available date;

Your client should know the perpetrator's last known address so they can be served with the application;

Your client should know that the Registrar cannot refuse to initiate an ADVO application;

Refer your client to the Women's Domestic Violence Court Advocacy Services (WDVCAS) for information, support and referrals. See **Chapter 14: Referrals and Contacts** for more information about the WDVCAS;

Refer your client to the Domestic Violence Duty Scheme (DVDS) for advice and representation (on a grant of legal aid) in their AVO application. See **Chapter 14: Referrals and Contacts** for more information about the DVDS;

Refer your client to Women's Legal Service NSW for legal advice.

The Registrar cannot refuse to take an application for an AVO. However, section 53 states that a Registrar can refuse to sign and file an application for an APVO if they are satisfied that the application is frivolous, vexatious, without substance or has no reasonable prospect of success or could be dealt with more appropriately by mediation or other alternative dispute resolution. If a Registrar refuses to accept an application notice for filing, the applicant can apply to have a Magistrate decide whether their application should be filed (s 53(8)).

Cross applications

If a defendant in an AVO application fears that the protected person will commit a personal violence offence against them, they can apply for an AVO to protect them from the protected person, which is known as a cross application.

Cross applications are usually dealt with together, however the court must determine each application separately, that is, each party must satisfy the court they have met the legal test set out in section 16 of the CDPVA. See '**Legal test**' above for more information.

Representing a client in an ADVO matter

If you are assisting a client in an ADVO matter, below is a list of instructions to seek from your client:

- name, including any other names they have been known by;
- date of birth;
- address, including whether it is safe to send post to that address and whether the defendant knows the address (if the defendant does not know the victim's address, it can be noted that the address is only to be known to the court);
- phone number, including whether it is safe to call that number and leave a message;
- an alternative way of contacting them;
- relationship to the other party, for example, married or de facto, and the length of their relationship, including when they separated and divorced, if appropriate;
- whether your client is the protected person or defendant;
- whether they want to make a cross application;
- whether there are any provisional or interim orders in place;
- other party or parties' name(s), including any other names they have been known by;
- other party or parties' date(s) of birth;
- other party or parties' address(es);
- alternative address(es) for the other party for service, for example, their workplace or their parents' house;
- any children's names;
- children's date(s) of birth;
- are there any parenting arrangements, parenting plans or parenting orders in place for the children;
- will the current parenting arrangements change with the proposed AVO;
- pending family dispute resolution (FDR) or family court dates;
- whether your client owns or rents their home;
- if they have a mortgage, whose name is on the title;
- if they rent, whose name is on the residential tenancy agreement (lease) (see **Chapter 11** for information on options regarding tenancy);
- whether there have been any previous AVOs;
- whether there have been any previous charges;
- details about any domestic violence during their relationship;
- details about the most recent domestic violence;
- whether anyone witnessed the domestic violence;
- whether there are any children listed on the AVO;
- if not, whether they want children listed on the AVO;
- what orders they want;
- if your client is seeking an order excluding the other party from their property, does the other party have any other accommodation options;
- are there any special reasons your client should remain in the house;
- whether your client seeks orders excluding the defendant from attending a school or child care place and addresses;
- whether they want to vary the AVO application or interim orders.

Service

Service of application notices

Section 55(1) of the CDPVA states that an application notice issued by a police officer must be served by a police officer in accordance with the rule 5.7 of the *Local Court Rules* 2009 (NSW) (LCR). Section 55(2) states that an application notice issued by a protected person must be served by a police officer or a person nominated by the court or a Registrar in accordance with rule 5.7 of the LCR.

Service of provisional AVOs

Section 31(1) of the CDPVA requires a provisional AVO to be served personally on the defendant by a police officer as soon as practicable after it is made. Section 89A of the CDPVA states:

(1) A police officer who is making or is about to make an application for a provisional order that is an interim apprehended domestic violence order may give any of the following directions to the person against whom the order is sought:

> *(a) that the person remain at the scene where the incident occurred that was the reason for making the application,*
>
> *(b) in a case where the person has left the scene of that incident – that the person remain at another place where the police officer locates the person,*
>
> *(c) that the person go to and remain at another place that has been agreed to by the person,*
>
> *(d) that the person go to and remain at a specified police station,*
>
> *(e) that the person accompany a police officer to a police station and remain at the police station,*
>
> *(f) that the person accompany a police officer to another place that has been agreed to by the person, or to another place (whether or not agreed to by the person) for the purpose of receiving medical attention, and remain at that other place.*

(2) If a person refuses or fails to comply with a direction under this section, the police officer who gave the direction or another police officer may detain the person at the scene of the incident or other place, or detain the person and take the person to a police station.

(3) If a direction is given under subsection (1) (e) or (f), the police officer may detain the person in the vehicle in which the person accompanies the police officer to the police station or other place for so long as is necessary to transport the person to the police station or other place.

(4) In considering whether to detain a person under subsection (3), a police officer may have regard to the following matters:

> *(a) the need to ensure the safety of the person for whose protection the interim apprehended domestic violence order is sought, including the need to:*
>
> > *(i) ensure the service of the order, and*
> >
> > *(ii) remove the defendant from the scene of the incident, and*
> >
> > *(iii) prevent substantial damage to property,*
>
> *(b) the circumstances of the defendant,*
>
> *(c) any other relevant matter.*

Service of interim, final, varied and revoked AVOs

According to section 90 of the CDPVA:

(1) A police officer who reasonably suspects that a person is the defendant in relation to an apprehended violence order may direct the person to remain where the person is for the purpose only of serving on the person a copy of the order, or a variation of the order, that is required to be served personally under this Act.

(2) If a person refuses or fails to comply with a direction under this section, the police officer who gave the direction or another police officer may detain the person at the place where the person is, or detain the person and take the person to a police station, for the purpose only of serving the order or variation on the person.

The Registrar of the court is required under subsection 77(3) of the CDPVA to serve a copy of the order or the record of the variation or revocation of the order personally on the defendant if the defendant is present at court.

If the defendant is not present at the time the order is made, the Registrar is to arrange for a copy of the order or of the record of variation or revocation to be served personally on the defendant by a police officer or such other person as the Registrar thinks fit (s 77(4)).

If the defendant is present at the time the order is made but the Registrar is unable to serve a copy of the order or the written record of the variation or revocation personally on the defendant, section 77(5) requires the Registrar to arrange for a copy of the order or record to be sent by post to the defendant or to such other person as the Registrar thinks fit.

Substituted service

Section 77(6) states that service on the defendant of a copy of the order or record concerned may be effected in such other manner as the court directs. The applicant can make an application to the court under this section to substitute service generally to the postal address of the defendant's home or work, or service on another person. Submissions need to be made about what attempts have been made to serve the defendant personally. It is preferable to have this evidence in the form of an affidavit by the police.

If seeking substituted service to another person, the Magistrate will want to hear why you are suggesting this person. The protected person is the best person to give this evidence through either sworn affidavit or under oath in the witness box. The protected person usually suggests a family member or friend they know the defendant has contact with on a regular basis.

Withdrawing an AVO application

A victim of domestic violence may want their AVO application withdrawn. This is a difficult situation as a victim of domestic violence is the expert in their own life and often has better knowledge of what will keep themselves and their family safe than anyone else. However, there is always a risk that the perpetrator may be pressuring them to withdraw the application.

The protected person cannot withdraw a police AVO application. They can ask the police to withdraw their application, however it is ultimately up to the police to decide how to proceed. Police are guided by section 27 and 49 of the CDPVA and their policies.

A protected person can apply to vary or revoke the AVO once made. See **Varying or revoking an AVO** on page 41.

The Police Code of Practice states:

> If a person who initially made a complaint of criminal behaviour in the context of domestic violence, against another person and thereafter makes admissions to fabricating the initial complaint, police will investigate this matter. In investigating the alleged fabricated complaint, police will be cognisant of the dynamic of domestic violence and the possibility that the admission of fabrication is based upon fear, intimidation or other pressures being brought to bear upon the person. Before any decision is made to initiate a prosecution of such persons, police shall seek approval to do so from a senior officer.

If the protected person wants the charges laid against the perpetrator withdrawn, the prosecutor should turn their mind to the Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales, particularly as currently outlined in Guideline 19 and Appendix E.

Public mischief charge

Victims have been charged with the offence of public mischief where they make a report to police and then later say that they made it up and retract their statement. Police tend not to charge victims of domestic violence with this offence, however there is no guarantee and clients need to be warned of the potential of such a charge.

Crimes Act 1900 (NSW) section 547B

(1) Any person who, by any means, knowingly makes to a police officer any false representation that an act has been, or will be, done or that any event has occurred, or will occur, which act or event as so represented is such as calls for an investigation by a police officer, shall be liable on conviction before the Local Court to imprisonment for 12 months, or to a fine of 50 penalty units, or both.

(2) For the purposes of subsection (1), a person shall be deemed to make a representation to a police officer if the person makes the representation to any other person and the nature of the representation reasonably requires that other person to communicate it to a police officer and that person does so communicate it.

Offence of perjury

Some victims believe that if the AVO application is going ahead despite their wishes they can just lie in court to say it didn't happen or they cannot remember.

Crimes Act NSW 1900 (NSW) section 327

(1) Any person who in or in connection with any judicial proceeding makes any false statement on oath concerning any matter which is material to the proceeding, knowing the statement to be false or not believing it to be true, is guilty of perjury and liable to imprisonment for 10 years.

(2) A statement can be considered to have been made in connection with a judicial proceeding whether or not a judicial proceeding has commenced, or ever commences, in connection with it.

(3) The determination of whether a statement is material to a judicial proceeding that has not commenced is to be made on the basis of any judicial proceeding likely to arise in connection with the statement.

(4) The question of whether any matter is material to a proceeding is a question of law.

Failure to comply with a subpoena to attend court

Police often subpoena victims to attend court if they suspect they may not attend the hearing. A subpoena to attend court is an order made by a judicial officer and must be complied with unless there is a lawful excuse. The Magistrate may issue a warrant to arrest the victim for failure to comply with a court order. According to section 24 of the *Local Court Act 2007* (NSW) and section 199 of the *District Court Act 1973* (NSW) a person may be found guilty of contempt of court, which is punishable by a fine of up to 20 penalty units or 28 days imprisonment.

The Police Code of Practice states that:

> if a victim does not attend court when required to give evidence police will consult with the domestic violence liaison officer and relevant victim/client advocates if present at court. Police will only seek a warrant for the arrest of an alleged domestic violence victim in exceptional circumstances.

Differences in court procedures

The Local Court deals with AVO applications involving defendants over 18 years old. The *Local Court Practice Note No. 2 of 2012 Domestic Violence Proceedings* sets out how AVO proceedings are managed.

The Children's Court deals with AVO applications involving defendants under 18 years old. The *Children's Court of New South Wales Practice Note No. 8 Apprehended Domestic and Personal Violence Proceedings in the Children's Court* sets out how AVO matters are managed.

The District Court deals with appeals against the making, varying or revoking of AVOs and the refusal to make, vary or revoke an AVO.

If an AVO is sought or proposed to be made for the protection of a child, section 41(2) of the CDPVA requires that the proceedings are to be heard in the absence of the public unless the court otherwise directs.

AVO court process

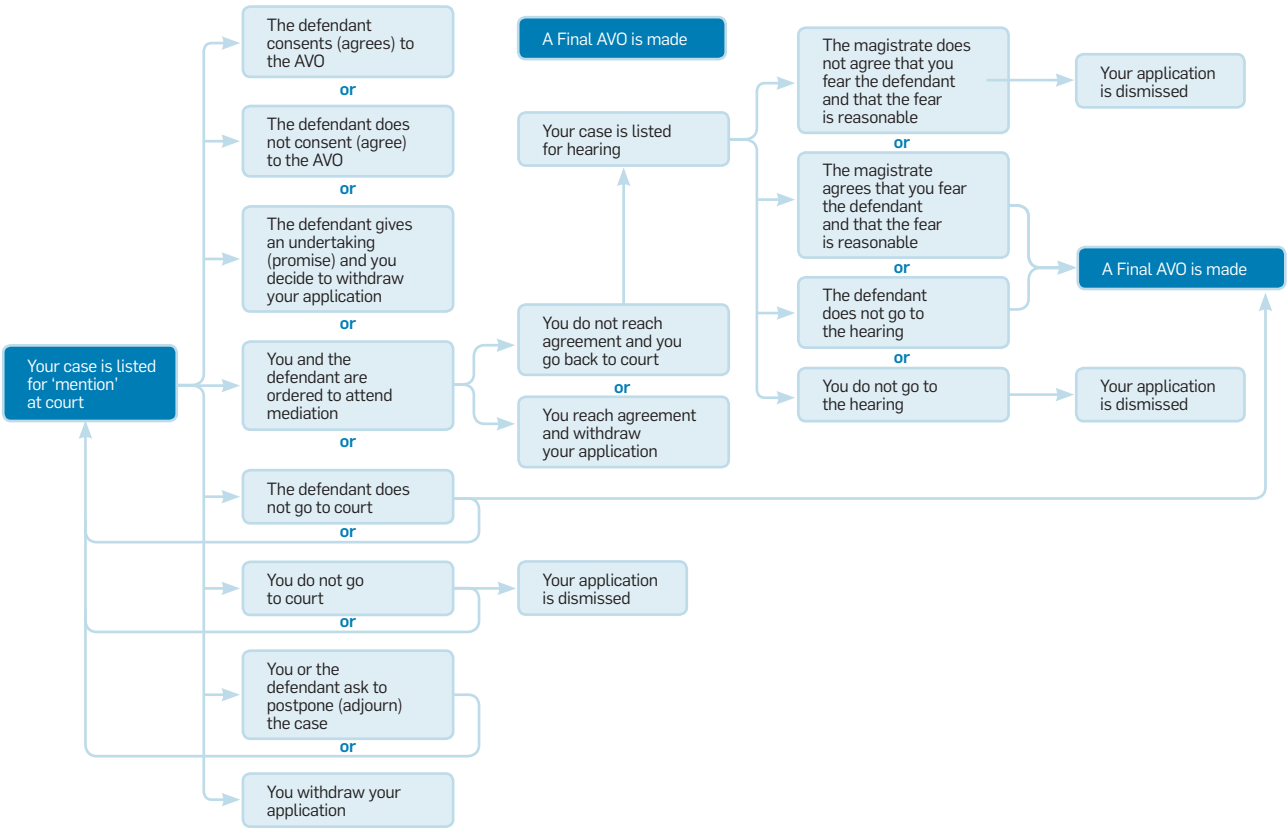

Image from Law Access[17]

17 www.lawaccess.nsw.gov.au/Pages/representing/lawassist_avo/lawassist_flowcharts_avo/lawassist_goingtocourt_applicant_flowchart_avos.aspx

When there are criminal charges

When a perpetrator has been charged with a criminal offence defined as a serious offence under section 40 CDPVA, the court must make an interim order against the defendant. Section 40 defines serious offence to include a domestic violence offence and an offence under section 13 CDPVA. The AVO follows the criminal proceedings and a final decision about the AVO application is not made until the criminal matter has been finalised.

Where the defendant is a police officer

The Police Code of Practice states that the Crown Solicitor is ordinarily instructed to appear in ADVO proceedings involving defendants who are police officers.

First mention

The first mention is usually within a month of making the AVO application. The victim should attend the first mention unless otherwise excused by the police. It is good for the victim to attend court even if they have been excused so that they can instruct the police prosecutor, their solicitor or the court (if they are self-represented) about any new incidents since the AVO was applied for, whether the orders need to be changed and whether an application for an interim AVO is contested (see '**Interim hearings**' below for more information).

While it is preferable for the victim to attend, if they do not attend and are represented by the Police Prosecutor *Underhill v Murden* [2007] NSWSC 761 at [14] makes clear that the court should deal with the AVO application in accordance with Part 6 of the *Local Courts Act 1982* (NSW). Section 46 provides:

Time for hearing

(1) On the first return date for an application notice in any civil proceedings, or at such later time as the Local Court determines, the Court must set the date, time and place for hearing and determining the matter.

(2) The Local Court must notify the respondent of the date, time and place, if the respondent is not present.

(3) However, if the respondent is not present at the first return date, the Local Court may proceed to hear and determine the matter on that day at its discretion.

Note. The powers of the Local Court to adjourn proceedings are set out in section 54.

Practitioner tip

Most Local Courts have safe rooms managed by the local WDVCAS. Women are able to sit in safe rooms during the court proceedings so they don't need to see the perpetrator. It is common practice for the WDVCAS staff to liaise with the police prosecutor and/or the domestic violence liaison officer (DVLO) about the victim's wishes. See **Chapter 14: Referrals and Contacts** for more information about the WDVCAS.

The defendant has the following options at the first mention:

- offer undertakings; or
- seek an adjournment for legal advice;
- consent to the AVO (without admissions); or
- contest the AVO.

Undertakings

A defendant may offer undertakings in place of consenting to the AVO. An undertaking is a promise to the court usually in the same terms as the AVO. It is not a court order and as such is not enforceable. Police do not accept undertakings because their Code of Practice aims to ensure strong and consistent responses directed at ensuring the safety and wellbeing of victims and holding perpetrators to account. However, it may be appropriate in certain circumstances, such as a one off non-violent incident between two people who have a very short relationship and no children together.

If acting for the defendant in a private application, particularly a female defendant who is a victim of domestic violence, you could approach the applicant and ask if they are willing to accept an undertaking. If the undertaking is breached this can be used as evidence for a future AVO application and generally adds weight to the need for such an application.

Seek an adjournment

A defendant can seek an adjournment for legal advice. It is usual for the case to be adjourned for a week and sometimes more.

The police or applicant can ask the court to make an interim AVO to protect the victim until the next court date. The defendant can consent to the making of the AVO on an interim basis. If the defendant contests the making of an interim AVO the

court may hold an interim hearing either on the first mention date or at a later date.

Consent without admissions

The defendant can consent to the AVO, usually without making any admissions about the truth of the contents of the application. If the defendant consents, a final AVO can be made on the first mention. Issues to take into account when advising a client whether to consent to the AVO without admissions include whether there may be family law proceedings either on foot or likely in the future. The transcript of a defended hearing can be admitted into evidence in family law proceedings. The court dealing with the family law proceedings will attribute greater weight to an AVO made following a defended hearing than an AVO consented to without admissions because there was a finding of fact following a defended hearing.

Contest the AVO

If the defendant contests the AVO, directions will be made for the exchange of written statements and another mention date is set for the purpose of checking that the statements have been exchanged and to set a date for the final hearing, if necessary. The parties will need to tell the court how many witnesses they intend on bringing to the hearing.

The police or applicant can ask the court to make an interim AVO to protect the victim until the next court date. If the defendant contests the making of an interim AVO the court may hold an interim hearing either on the first mention date or at a later date.

Interim hearing

A court can make an interim AVO if it appears it is "necessary or appropriate" to do so (s 22(1)). A court has a positive obligation to make an interim order when a person has been charged with a serious offence (s 40).

If the parties do not consent to an interim order, before making the order the court must be satisfied in applying the test under section 22 of the matters set out in section 17.

Where both the protected person and the defendant are present, the hearing can be conducted by one or more of the following: written grounds supporting the application; a written statement from any witness intended to be called at the interim hearing; evidence given orally (including in cross-examination) at the interim hearing; and/or any submissions made by the parties or their legal representatives.

Section 22(3) enables the court to make an interim order whether or not the defendant is present or has been given notice of the proceedings and section 22(4) and Part 5.5 of the Local Court Rules set out the circumstances where a court may make an interim order in the absence of the PINOP. An interim order may not be made unless the PINOP is present, unless according to section 22, the court is satisfied that the person is unable for good reason to be present and the matter requires urgent consideration by the court.

An application for an AVO where police are not involved may be short listed where the applicant is seeking an urgent ex parte interim order. This occurs prior to any service of the AVO if the registrar is satisfied there are urgent circumstances.

Part 5 of the *Local Court Practice Note No. 2 of 2012* sets out how interim hearings are to be conducted.

Evidence

Written statements

Part 6 of the *Local Court Practice Note No. 2 of 2012* requires that courts direct applicants and defendants to serve on the other party a written statement of the oral evidence that the party intends to adduce in evidence in chief on any question of fact to be decided at a hearing. The court may, if satisfied it is in the interests of justice to do so, dispense with compliance with any or all of this Part.

A person's written statement is to stand as the whole of his or her evidence in chief, so long as the person testifies to the truth of the written statement. A party may not adduce from that person any further evidence in chief, except by leave of the court.

Nothing in the Practice Note operates to make admissible any evidence that would otherwise be inadmissible or privileged.

There is no set form for a witness statement, however, statements should be set out in numbered paragraphs, include a statement of truth, and be signed and dated by the deponent.

An applicant's witness statement should include:

- information about the nature of their relationship with the defendant to prove they are in a

domestic relationship as defined by section 5 of the CDPVA;
- the names and dates of birth of any children they have with the defendant;
- whether any AVOs or other orders have been made in the past against the defendant;
- whether the defendant has ever been charged or convicted of any domestic violence offences;
- whether there are any parenting arrangements or parenting orders or family law court proceedings on foot regarding their children;
- whether Family and Community Services (FACS) is or has been involved;
- whether there has been any violence or threats towards them or their children by the defendant in the past;
- any recent incidents of domestic violence by the defendant, including places, dates, and what the party saw, heard, said and did;
- details of any reports or statements made to the police, including any event numbers;
- details of any doctors reports or treatment by a doctor or hospital relating to any injuries caused;
- evidence of any damage to property;
- the other party's alcohol or drug use;
- the other party's access to firearms or other weapons;
- whether there are any mental health issues;
- as fear is essential, you need to outline their fear and what they fear;
- any account of a conversation should include the actual words the parties used.

A defendant's witness statement should include the same details as the applicant's statement (with reference to the applicant) and should identify any paragraphs in the applicant's statement that the defendant disagrees with.

A person who witnessed domestic violence between an applicant and the defendant can provide a witness statement, which sets out what they saw and heard occur between the parties.

Practitioner tip

People making statements should be careful not to admit to committing any criminal offences in their statements.

In police-initiated applications a victim's police statement is provided to the defendant as the witness statement. Applicants in private applications and defendants who are primarily the victim in the relationship can get assistance with drafting their statements from a solicitor on a grant of legal aid or a solicitor volunteering as part of the DVDS.

Subpoenas

The rules regarding the issuing of subpoenas in AVO proceedings derive from section 70 of the CDPVA and are set out in Part 3 of Chapter 4 of the *Criminal Procedure Act 1986* (NSW) (CPA) and Part 6 of the LCR.

Applicants and defendants in AVO proceedings can issue subpoenas to require a person to give evidence. If a person has signed a written witness statement but there is a risk they won't attend the hearing, the applicant or defendant can complete a Subpoena to Witness to Give Evidence, file it at the Local or Children's Court and serve it on the relevant person.

Applicants and defendants in AVO proceedings can also issue subpoenas to require a person to produce documents. An applicant or defendant may want to subpoena the other party's police or FACS records. The applicant or defendant can complete a Subpoena to Witness for Production, file it at the Local or Children's Court and serve it on the relevant person or agency.

Under section 229 of the CPA, an arrest warrant can be issued for failure to comply with a subpoena to give evidence under Part 4 of the CPA.

A person may not be required to give evidence or produce evidence if it relates to 'a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence' (s 296(1) of the CPA). This is known as the sexual assault communications privilege (SACP). See **Chapter 8: DV and Sexual Assault** for more information.

Domestic Violence Evidence in Chief (DVEC)

On 1 June 2015, the *Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014 (NSW)* inserted Part 4B into the CPA allowing police to take a domestic violence victim's statement by video or audio recording, and use this recording as all or part of the victim's evidence in chief (s 289C and 289F(1)). Section 289H states that DVEC will only be used for defended hearings relating to criminal

charge matters and ADVO applications connected to these charge matters.

Victims will not have to give written statements, unless the police become aware of new evidence, in which case the victim will need to give a written statement about the additional evidence. The recording must be made as soon as practicable after the commission of the offence, with the victim's informed consent, which means usually at the scene of the incident or when the incident is reported to police (s 289D of the CPA).

A victim can make a request to police to give a further statement (written or oral) in circumstances where they feel they did not provide all relevant information to police when giving their DVEC statement. High levels of distress or injury at the time of the domestic violence incident may have impacted on the victim's capacity to give a clear and full account of the events. It is important to be aware that the defence may challenge this later evidence arguing it is an attempt to make the victim's case stronger and should therefore not be relied upon.

A solicitor representing the defendant will be given a copy of the recording, however they cannot give the defendant a copy of the recording (s 289L). According to section 289M, unrepresented defendants are not given a copy of the recording, however they must be served with the audio extract of the recording and police must, as far as is reasonably practicable, provide the unrepresented defendant with an opportunity to view the DVEC video recording at a police station.

The victim's consent is not required to play the recording at court (s 289G of the CPA). While the recorded statement will form their evidence in chief, victims must still attend court for cross-examination (s 289F(5) and s 289G).

Final hearing

Representation

In police-initiated applications the police prosecutor will represent the protected person and run the AVO hearing. People who have made a private application will have to represent themselves, pay a private solicitor, or apply for a grant of legal aid.

Legal aid for AVO hearings

Where your client is likely to be eligible for legal aid, it is important to apply as soon as possible because applications can take between two to five weeks to be determined. If your client's court date is fast approaching and the application is still to be determined, they can apply to the court to adjourn the proceedings under section 57 of LACA.

Legal Aid for private applicants

Legal aid is available to private applicants in ADVO matters where they meet the means and merit test (Legal Aid NSW policy 4.4.1).

Legal Aid for defendants

Legal aid is generally not available to defendants in ADVO hearings unless the defendant meets the means and merit test and there are exceptional circumstances (Legal Aid NSW policy 4.4.2)

Practitioner tip

If your client is a defendant to an application for an ADVO but is the primary victim in the relationship, she is still entitled to apply for legal aid under their 'exceptional circumstances' policy.

Legal Aid NSW policy 1.7.3 provides that exceptional circumstances include where the defendant in the ADVO proceedings is a victim of domestic violence. Legal Aid NSW will be satisfied that a defendant is a victim of domestic violence if any of the following criteria are satisfied:

- the application for legal aid is supported by a DVDS solicitor or a WDVCAS co-ordinator;
- the applicant for legal aid has previously been an applicant in an ADVO matter;
- the applicant for legal aid is currently living in a women's refuge or in alternative accommodation due to a domestic violence situation;
- the applicant provides evidence to support their application; or
- Legal Aid NSW is satisfied the applicant for legal aid is 'at special disadvantage', that is, accruing to Legal Aid NSW policy 1.7.2:
  - the applicant is a child or is acting on behalf of a child; or
  - the applicant is a person who has substantial difficulty in dealing with the legal system by reason of a psychiatric condition or developmental disability or intellectual impairment or physical disability.

Legal Aid NSW policy 11.4 states that an applicant or a defendant who is the primary victim of domestic violence in an ADVO matter is not required to pay an initial contribution to Legal Aid NSW. However section 46 of the *Legal Aid Commission Act 1979* (NSW) (LACA) requires Legal Aid NSW to make a determination at the conclusion of the proceedings, or if the legal aid grant is terminated, as to whether a final contribution is required.

Reviewing a refused application for legal aid

Your client can seek a review by the Legal Aid Review Committee (LARC) of a decision to refuse an application for a grant of aid. The review must be lodged within 28 days of receiving the decision and set out the reasons why your client disagrees with the decision (s 56(2)(a) of LACA). Your client can ask for more time to lodge a review under section 56(2)(b) by outlining the special circumstances that warrant the delay. Review applications can take between six and ten weeks to be determined so if your client's court date is soon they can apply to the court to adjourn the proceedings under section 57 of LACA.

Giving evidence in a hearing

Victims of domestic violence can find giving evidence in AVO proceedings very distressing, particularly being cross-examined. The experience can result in re-traumatisation, can compromise the quality of evidence given to the court, which can affect the court's ability to make safe and effective orders, and can allow the perpetrator to use court proceedings to control and dominate the victim. There are some options available to them about giving evidence, drawn from the provisions outlined below.

Section 67 of the CDPVA gives the court power to dispense with any rules, except mandatory rules, if it is in the interest of justice to do so.

Section 46(2) of the CDPVA entitles a protected person and a defendant to have a support person near them when giving evidence. The court can permit more than one support person if it is in the interest of justice to do so under section 46(5). Witnesses with a cognitive impairment are entitled to a support person when giving evidence (s 306ZK of the CPA). You can ask the court to make whatever direction is appropriate to give effect to your client's decision to have a support person present near them or within their sight.

Where a child is due to appear as a witness, section 41(2) of the CDPVA requires the proceedings be heard in the absence of the public unless the court otherwise directs. A child should not be required to give evidence in any manner about a matter unless the court believes that it is in the interests of justice for the child to do so (s 41(4)).

There is a ban on the direct cross-examination of children by unrepresented defendants in ADVO proceedings (s 41A CDPVA).

Dismissal

If an application does not meet the test set out in section 16 of the CDPVA then the application will be dismissed.

Costs

Only professional costs can be awarded in AVO proceedings (s 99(2)). Section 99(1) sets out professional costs as being 'costs relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a court (but not court fees payable to a court)'. Section 99A(1) of the CDPVA prohibits the award of professional costs against an applicant who is the protected person in an ADVO application, unless their application was frivolous or vexatious.

Justice Button in *Cunningham v Cunningham* [2012] NSWSC 849 referring to the phrase 'frivolous or vexatious' held at [63] that:

Those words are well known to the law and import a high degree of inappropriateness in a cause of action, approaching an abuse of process. I am content to proceed on the basis of definitions derived from *Bullen & Leake & Jacob's Precedents of Pleadings*[18] and provided in Peter Taylor et al, *Ritchie's Uniform Civil Procedure* NSW (2005) LexisNexis Butterworths at [4.15.10] – [4.15.15]: "*A matter is frivolous when it is without substance or groundless or fanciful ... A matter is vexatious when it lacks bona fides and is hopeless and tends to cause the opponent unnecessary anxiety, trouble and expense*".

A court cannot make an award of professional costs against an applicant who is a police officer seeking an AVO on behalf of a PINOP unless satisfied that the applicant made the application knowing it contained matters that are false or misleading in a material particular or the applicant deviated from the

18 12th ed (1975) Sweet and Maxwell at p 145

reasonable case management of the proceedings so significantly as to be inexcusable (s 99A(2)). These provisions in the CDPVA were introduced following the case of *Constable Redman v Willcocks* [2010] NSWSC 1268 in which professional costs were awarded against the police.

Appeals

Section 84 of the CDPVA provides that:

(2) An appeal may be made to the District Court

> *(a) by the defendant against the making of an apprehended violence order by the Local Court or the Children's Court, or*
>
> *(a1) by the applicant for an apprehended violence order (or, if the applicant was a police officer, either the applicant or the person for whose protection the order would have been made) against the dismissal of the application by the Local Court or the Children's Court, or*
>
> *(b) by the applicant for an order or a defendant against the awarding of costs under section 99 of this Act, or*
>
> *(c) by a party to an apprehended violence order against the variation or revocation of the order by the Local Court or the Children's Court, or*
>
> *(d) by a party to an apprehended violence order against a refusal by the Local Court or the Children's Court to vary or revoke the order.*

(3) An appeal under subsection (2):

> *(a) may be made under Part 3 of the Crimes (Appeal and Review) Act 2001 in the same way as an application may be made under that Part by a defendant against a conviction arising from a court attendance notice dealt with under Part 2 of Chapter 4 of the Criminal Procedure Act 1986, and*
>
> *(b) may be made only by leave of the District Court in the case of an appeal against the making of an apprehended violence order that was made with the consent of the defendant.*

(4) The Crimes (Appeal and Review) Act 2001 applies to an application or appeal arising under this section with such modifications as are made by or in accordance with the regulations under that Act.

(5) For the purposes of this section and the Crimes (Appeal and Review) Act 2001, an order made by a Registrar of a court is taken to have been made by the court.

(5A) Part 6 (Interim court orders) applies to proceedings with respect to an appeal to the District Court under subsection (2) in the same way as it applies to an application to the Local Court or the Children's Court under Part 4 or 5.

(5B) If the District Court allows an appeal made under this section against the refusal to annul an apprehended violence order and remits the matter to the Local Court or the Children's Court, the District Court must, unless the District Court is satisfied that it is not necessary to do so, make an interim court order under Part 6 as if an application for such an order had been duly made.

A person has 28 days to appeal the decision of a court to make, vary or revoke an AVO (s 11(2) of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA)). An appeal can be lodged at any Local Court by completing and filing a Notice of Appeal and paying a fee, currently $115. The fee may be waived or postposed if the applicant has evidence they are suffering financial hardship.

Sections 85(1) and 85(2) of the CDPVA state that lodging an appeal does not stay the AVO, however the court can stay the AVO if satisfied that it is safe to do so, having regard to the need to ensure the safety and protection of the protected person or any other person.

Section 18 of the CARA provides:

(1) An appeal against conviction is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings, except as provided by section 19.

(2) Fresh evidence may be given, but only by leave of the District Court which may be granted only if the Court is satisfied that it is in the interests of justice that the fresh evidence be given.

(3) The parties to an appeal are each entitled to be provided with one free copy of the transcripts of evidence relevant to the appeal and, if fresh evidence is given, one free copy of the transcript of the fresh evidence.

In *Mahmoud v Sutherland* [2012] NSWCA 306 Barrett JA held at [32] that:

> the appeal court is not required to proceed as if the decision of that court had never been made. The focus must be on the question whether there was "some legal, factual or discretionary error": Allesch v Maunz [2000] HCA 40; (2000) 203 CLR 172 at [23].

In *Charara v The Queen* [2006] NSWCCA 244 Mason P held:

> The appeal is to be by way of rehearing on the Local Court transcripts (s18(1)), obviously supplemented by reference to any exhibits tendered in the Local Court. Fresh evidence may be given by leave, subject to the District Court being satisfied that it is in the interests of justice that this should occur (s18(2)).

> The District Court is then required to apply the principles governing appeals from a judge sitting without a jury. The Judge is to form his or her own judgment of the facts so far as able to do so, i.e. recognising the advantage enjoyed by the magistrate who saw and heard the witnesses called in the lower court (*Bell v Stewart* (1920) 28 CLR 419 at 424-5, *Paterson v Paterson* (1953) 89 CLR 212, *Fox v Percy* (2003) 214 CLR 118)… The procedure to be adopted, powers to be exercised and function to be performed must first be sought in the language of the particular statute. One thing, however, is clear. "The 'rehearing' does not involve a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits" (*Fox* at 118[22] per Gleeson CJ, Gummow and Kirby JJ). Referring to the "requirements, and limitations, of such an appeal", their Honours continued (at [23], footnotes omitted):

On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.[19]

Section 19 of the CARA provides:

(1) The District Court may direct a person to attend and give evidence in proceedings on an appeal against conviction if it is satisfied:

> *(a) in the case of an appeal that relates to an offence involving violence against that person, that there are special reasons why, in the interests of justice, the person should attend and give evidence, or*
>
> *(b) in any other case, that there are substantial reasons why, in the interests of justice, the person should attend and give evidence.*

If the appellant wants to give evidence or call a witness to give evidence they need to file a Notice of Motion and an Affidavit explaining why the witness did not attend and give evidence in the Local Court.

All the documents the appellant intends to rely upon in the appeal need to be served on the solicitor for the Department of Public Prosecution (DPP), who acts in conviction appeals, before the court date if possible.

The District Court will usually make a decision based on the transcript and submissions made by the appellant and the DPP solicitor.

When a defendant appeals a criminal conviction and the AVO

Where a defendant appeals a conviction and the AVO to the district court and on appeal the conviction is over-turned, the district court should then consider the question of whether an AVO should be made, applying the test and standard of proof in the CDPVA. It is important that the DPP either asks the district court to deal with the appeal of the AVO or, if the court's intention is to remit it back to the local court, that the DPP requests an interim AVO to protect the victim until a final determination on the AVO is made.

Practitioner tip

Ensure your client is aware that the District Court may not consider the AVO in the event a conviction is overturned. Your client should speak with the DPP solicitor to ask them to ensure that the court considers the AVO or makes an interim order before remitting it back to the Local Court.

Annulments

Section 84 of the CDPVA states:

(1) An application may be made under Part 2 of the Crimes (Appeal and Review) Act 2001 by the defendant for the annulment of an apprehended violence order made by the Local Court or the Children's Court in the same way as an application may be made under that Part by a defendant for the annulment of a conviction arising from a court attendance notice dealt with under Part 2 of Chapter 4 of the Criminal Procedure Act 1986.

(1A) A person who applied to the Local Court or the Children's Court for an apprehended violence order may apply to the Court for the annulment of the dismissal of the application for the order by the Court, but only if the person was not in attendance before the Court when the application was dismissed.

19 at [17] – [19]

(1B) The Local Court or the Children's Court may grant an application for an annulment made under subsection (1A) if it is satisfied that, having regard to the circumstances of the case, there is just cause for doing so. If such an application is granted, the Court may deal with the application for the apprehended violence order as if the application for the order had not been dismissed.

In *Miller v Director of Public Prosecutions* [2004] NSWCA 90 Sheller JA, Beazley JA and Young CJ in EQ agreeing held at [6] that the "wide vague words" chosen by the legislature pertaining to annulment applications warrants a wide construction.

An annulment application must be made within two years after the relevant conviction or sentence is made or imposed (s 4(2) of the CARA).

Contravening an AVO

Section 14(1) of the CDPVA states that it is a criminal offence to knowingly contravene a prohibition or restriction specified in an AVO and is punishable by a maximum of 50 penalty units or imprisonment for 2 years or both.

Section 14(7) provides that a person is not guilty of an offence of aiding, abetting, counselling or procuring the commission of a contravention if the person is the protected person.

A person is not guilty of contravening an AVO if they were not served with a copy of the AVO or were not present in court when the AVO was made (s 14(2)), or the contravention of the prohibition or restriction concerned was necessary in order to attend mediation under section 21 (relevant in APVO matters) (s 14(3)(a)), or if the contravention of the prohibition or restriction concerned was done in compliance with the terms of a property recovery order (s 14(3)(b)).

A person who is convicted of contravening an AVO by an act of violence against a person must, in accordance with section 14(4), be sentenced to a term of imprisonment unless the court otherwise orders.

Where a police officer decides not to initiate criminal proceedings or not to proceed with criminal proceedings against a person for an alleged contravention they must make a written record of the reasons under section 14(8).

Varying or revoking an AVO

Who can make an application?

Sections 72A(1) and (2) of the CDPVA allows an application to vary or revoke an interim or final AVO to be made at any time by a police officer or an interested party in relation to the order. Section 72 defines an interested party as a protected person or a defendant under the order, a guardian of a protected person or if the protected person is a child, a parent of a protected person or the Secretary of the Department of Family and Community Services (FACS).

Section 72C requires a court to refuse to hear an application to vary or revoke a police-initiated AVO unless the application is made by a police officer or the court is satisfied that notice of the application have been served on the Commissioner of Police.

Section 72B(1) requires an interested person to seek leave of a court to vary or revoke a final or interim AVO which lists a child as a protected person. A court may grant leave if satisfied there are been a significant change in circumstances since the order was made or FACS is proposing a care plan that is inconsistent with the existing AVO or it is otherwise in the interest of justice to do so (s 72B of the CDPVA). According to section 48(6), a child who is over 16 years of age has full capacity to apply for a variation or revocation.

What are the requirements for an application?

Section 72A(3) requires an application to set out the grounds and nature of the variation sought. If there is more than one protected person, an application can be made to vary or revoke the AVO in relation to all of the protected persons or in relation to any one or more of the protected persons (s 74(2)).

According to sections 73(4) and 73(5), an AVO cannot be varied or revoked unless notice of the application has been served on each of the protected persons to whom it relates and on the defendant. Section 73(6) requires a notice of an application to be served personally or in such other manner as the court hearing the application directs.

When can an order to vary or revoke an AVO be made?

A court may vary or revoke a final or interim order if satisfied in all the circumstances it is proper to do so (s 73(1)).

The court can decline to hear an application for variation or revocation of final or interim AVO if there has not been a change in circumstances on which the making of the order was based and the application is in the nature of an appeal against the order under section 73(3).

Section 73(7) provides that the court may make an order extending the period that the final or interim AVO is in force without notice of the relevant application having been served on the defendant if the application was lodged before the day on which the AVO or interim order is due to expire. The AVO will be extended until the next mention but will not be enforceable until it is served on the defendant.

A party to the AVO can appeal the variation or revocation of the AVO under section 84(2)(c).

National domestic violence order recognition scheme

On 25 November 2017, amendments to the CDPVA came into force which allow NSW Police to enforce Domestic Violence Orders (DVOs) made on or after this date in other Australian states and territories (Part 13B). Other states and territories will also be able to enforce NSW ADVOs made from this date. These changes are known as the National Domestic Violence Order Recognition Scheme (the Scheme).

Any AVO (provisional, interim or final) made on or after 25 November 2017 will automatically be registered and therefore enforceable under the Scheme. For orders made prior to that date, the same process to register an interstate order applies as applied prior to the Scheme (see below).

Breaches of interstate DVOs

If the defendant breaches the DVO the Police will contact the state or territory that issued the order and obtain a copy before they can charge the offender and check that the DVO is current, has been served, has a condition that relates to the report of the breach and there is a 'geographical nexus' with the offence. This means that either one or both of the parties was in NSW at the time of the alleged breach. If the defendant was not in NSW at the time of the breach, Police will refer the matter back to the jurisdiction where the defendant was at the time of the breach for further investigation.

Varying or revoking interstate AVOs

The protected person or NSW Police can apply to vary or revoke an interstate DVO (Part 13B, Division 3). However, because the jurisdiction that made an interstate order is likely to hold the most information about the matter, if NSW Police are approached to make an application to vary an interstate DVO they will advise the parties to make such an application in the original jurisdiction. The only exception would be if the circumstances amounted to significant hardship for a protected person.

If police agree to assist with an application, they will need to consider three factors:

- is it more practical for both the NSW Police and the protected person to make a fresh application for a NSW ADVO? It may be easier for the protected person and police to simply make a fresh application instead of trying to source all of the background information from the original court where the order was made;
- can all interstate DVOs be varied or revoked? Some states have prohibitions on the variance or revocation of their orders;
- what is the effect of the variation being sought? Police will consider the effect of the potential variation on the level of protection given by the DVO to protected persons and affected children.

Section 98ZO requires a NSW court to consider the following when deciding whether to vary or revoke an interstate DVO:

- where the defendant and protected persons normally live;
- any difficulty the respondent to the proceedings may have in attending the court proceedings;
- whether there is sufficient information available to the court in relation to the making of the original DVO;
- whether any proceedings are being taken in respect of an alleged breach of the DVO and where those proceedings are being heard;
- the practicality of the applicant (if not the defendant under the DVO) applying for and obtaining a local DVO against the defendant with similar prohibitions or restrictions;
- the impact of the application on children who are protected persons under the DVO;
- any other matters the court considers relevant.

The amendments will allow other states and territories to vary or revoke orders made in NSW, and make new orders for the same parties. This means that an AVO made in NSW may be superseded by a new order or a variation/revocation made in another state or territory (section 98ZB).

Registering interstate ADVOs made before 25 November 2017.

Domestic violence protection orders from other states and territories in Australia and New Zealand (external protection orders) are enforceable in NSW, if registered.

An external protection order can, under section 95, be registered in NSW by applying to the Registrar of a Local or Children's Court for registration by completing a form and attaching the external protection order and evidence of service on the defendant. The external protection order must be registered or referred to a Magistrate for adaptation, modification or to vary the period it is effective in NSW (s 96(1) and s 96(2)).

On registering an external protection order the Registrar must provide the Commissioner of Police with a copy of the registered protection order under section 96(4). Section 96(5) requires that the notice of registration of an external protection order is not to be served on the defendant unless the protected person consents to that service.

A registered external protection order may be varied or revoked under section 98(2). Notice of an application to vary or revoke must be served on the other party in accordance with sections 98(4) and (5).