

Apprehended Violence Orders

The criteria that must be met

**Mario Licha – Barrister
Clarence Chambers
Level 11, 65 York Street
Sydney NSW 2000
Telephone: 0402 968 997
Email: info@guiltynotguilty.com.au**

Introduction

In New South Wales all applications for Apprehended Violence orders are made under the Crimes (Domestic and Personal Violence) Act 2007 and the Local Court Practice Note No 2 of 2012.

The Crimes (Domestic and Personal Violence) Act 2007 is clear and unambiguous on the criteria to be satisfied by a Court when making an Apprehended Domestic Violence Order (ADVO) or an Apprehended Personal Violence Order (APVO). In spite of the clarity practitioners and Magistrates often fail to apply the relevant sections to the facts in issue.

This paper is designed to attempt to clear up any confusion in what is needed before an ADVO or APVO is made by a court without consent from the defendant. In this paper an ADVO and an APVO will be referred to as an apprehended violence order (AVO) because it is convenient to do so.

Some common errors as to the criteria required

It is well known that in AVO proceedings the standard required is the civil standard and in appropriate circumstances the Briginshaw standard. There are four common errors I find consistently throughout the AVO jurisdiction. They are as follows;

1. Provisional orders become an interim order automatically;
2. The criteria for granting an interim AVO is that it is 'necessary or appropriate to do so';
3. The criteria for granting a final AVO is that the Person In Need Of Protection (PINOP), 'has reasonable grounds to fear and in fact fears'.
4. If the court cannot be satisfied on the criminal standard that the offence is proven (but/however) on the civil standard the court can be satisfied in granting the AVO.

I will deal with each of these common areas separately.

Statutory provisions about AVO's

The courts power to grant an AVO's is found in the following sections of the Crimes (Domestic and Personal Violence) Act 2007;

Section 22 (1)

A court may...make an interim apprehended domestic violence order or an interim apprehended personal violence order if it appears to the court that it is necessary or appropriate to do so in the circumstances.

Section 16 (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 personal 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.

Section 17 - Matters to be considered by court

(1) In deciding whether or not to make an apprehended domestic violence order, the court must 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.

(2) Without limiting subsection (1), in deciding whether or not to make an apprehended domestic violence order, the court is to consider:

(a) in the case of an order that would prohibit or restrict access to the defendant's residence-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

(b) any hardship that may be caused by making or not making the order, particularly to the protected person and any children, and

(c) the accommodation needs of all relevant parties, in particular the protected person and any children, and

(d) any other relevant matter.

Section 19 (1)

A court may, on application, make an apprehended personal violence order if it is satisfied on the balance of probabilities that a person has reasonable grounds to fear and in fact fears:

(a) the commission by the other person of a personal violence offence against the person, or

(b) the engagement of the other person in conduct in which the other person:

(iii) intimidates the person, or

(iv) stalks the person,

being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

Section 20 - Matters to be considered by court

(1) In deciding whether or not to make an apprehended personal violence order, the court must consider the safety and protection of the person seeking the order and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order.

(2) Without limiting subsection (1), in deciding whether or not to make an apprehended personal violence order, the court is to consider:

(a) in the case of an order that would prohibit or restrict access to the defendant's residence—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

(b) any hardship that may be caused by making or not making the order, particularly to the protected person and any children, and

(c) the accommodation needs of all relevant parties, in particular the protected person and any children, and

(d) any other relevant matter.

Provisional orders become an interim order automatically

A provisional order cannot become an interim order without the consent of the Defendant. The only exception is if the order is made because the defendant is charged with an offence that is caught under section 40 Crimes (Domestic and Personal Violence) Act 2007.

Section 32 provides that a provisional order has a duration of 28 days unless it is sooner revoked or the court makes an apprehended violence order. The court cannot under section 34 of the AVO Act renew a provisional order. A provisional order is designed to protect a PINOP from the time it is served on the defendant till the first day in court.

On the first day an interim or final AVO can be consented to by the defendant, or the interim or final AVO can be objected to by the defendant. On any objection to the making of an interim or final AVO a defendant would be denied procedural fairness if they were not given the opportunity to cross-examine the witnesses or to call evidence. *Smart v Johnson (SC(NSW), Dunford J, 8 October, unreported)*.

The criteria for granting an interim AVO is that it is 'necessary or appropriate to do so'

This is a common error in granting an interim AVO. Section 22 (1) Crimes (Domestic and Personal Violence) Act 2007 clearly states the criteria necessary before such an order is made.

The error clearly is that practitioners and the court neglect the words, "in the circumstances". During a contested interim hearing the defendant has a right to cross-examine witnesses and call evidence on the issues relevant to the interim AVO but not to the general issues relevant to a final AVO.

Smart v Johnson (SC(NSW), Dunford J, 8 October, unreported) held page 5;

"In many cases under this part of the Act, there will be allegation, and counter allegation and denial; and in such cases, it may well be "appropriate" to make orders to, in effect, keep the parties apart until the final hearing, but only after the evidence of both has been heard and both sides given reasonable (as opposed to unlimited) opportunity to cross-examine. I emphasise that the opportunity to cross-examine,

and indeed the opportunity to lead evidence, must be directed on such applications not to the general issue of whether the complaint has been established on the balance of probabilities, which would be the issue at the final hearing, but to the much more limited issue as to whether it is “necessary or appropriate” to make an interim order.

...

Here there was no evidence of any actual violence and nothing to suggest that the making of an interim order was either urgent or “necessary”. An interim order may, on the other hand, have nevertheless been “appropriate”, but I am satisfied that the Magistrate erred in law in not directing himself to the proper test, and that he denied natural justice and procedural fairness to the plaintiff in refusing to allow his solicitor to call any evidence or to cross-examine the first defendant at all.

In some cases a defendant may be able to show, by cross-examination or other evidence, that the complainant is clearly lying or that the complaint has been brought for an ulterior or improper purpose, in which case it may not be proper to make the interim order...”

The criteria for granting a final apprehended violence order is that the Person In Need Of Protection (PINOP), ‘has reasonable grounds to fear and in fact fears’

This is another common error when granting a final AVO.

Practitioners and the court often refer to the criteria, in error, before making an order for an ADVO or an APVO, that is the PINOP has reasonable grounds to fear and in fact fears.

Clearly the error is that the actual criteria is that the PINOP has reasonable grounds to fear and in fact fears those facts found in section 16 (1) (a) and (b) (i) and (ii) or section 19 (1) (a) and (b) (i) and (ii) Crimes (Domestic and Personal Violence) Act 2007.

The word “apprehend” as defined in the Macquarie Dictionary is, “to entertain suspicion or fear of; anticipate: *I apprehend no violence.*”

The word “apprehension” as defined in the Macquarie Dictionary is, “anticipate of adversity; dread or fear of coming evil.”

The word “apprehensive” as defined in the Macquarie Dictionary is, “uneasy or fearful about something that may happen: *apprehensive of (or for) one’s safety.*”

The power to make an apprehended violence order is enlivened only if the court is satisfied, on the civil standard, that the criteria of section 16 or 19 Crimes (Domestic and Personal Violence) Act 2007 have been satisfactorily met. Behaviour amounting to something in the future. Once that standard and satisfaction is reached then the question is whether the court ought to make the order by considering the matters in section 17 (1) and (2) for an ADVO and section 20 (1) and (2) for an APVO Crimes (Domestic and Personal Violence) Act 2007. Mahmoud v Sutherland [2012] NSWCA 306 at [23].

Mahmoud v Sutherland [2012] NSWCA 306, Barrett JA (Tobias AJA and Blanch J agreeing) held at [40],

“...The emphasis of the statutory provisions is upon conduct grounding physical fear or fear of physical violence going beyond rude, offensive and boorish behaviour...”

The behaviour in that case at [37] – [38];

37. *"The Applicant and the Defendant are residents in a large Department of Housing Unit complex located at [address], Surry Hills.*

...

On 18th December, 2009 at 1.40pm the Applicant entered an elevator on the 15th floor. The elevator descended to Level 14 where the Defendant entered the elevator. As the elevator descended the Defendant became agitated, stepped close to the Applicant, raised his right hand appeared to be about to hit the Applicant. The Defendant took objection to the Applicant standing on a piece of newspaper in the elevator, shouting repeatedly at the Applicant 'this is filthy vandal'. The Defendant appeared furious at the Applicant for no apparent reason. The Defendant hit the wall of the elevator several times with his fist in a violent and threatening manner towards the

Applicant. The Defendant kicked the Applicant's trolley, shouted at the Applicant and said 'move that shit out of there'.

The elevator arrived at the entry level of the building and the Applicant exited the elevator. The Defendant exited the elevator after the Applicant. The Applicant walked through a hallway towards the building exit/entry doors to the street. The Defendant followed behind, yelling at the Applicant all the way to the street.

The Defendant's behaviour was threatening and intimidating and the Applicant held genuine fears for his safety."

38. In the course of the hearing, the magistrate summarised this written complaint and obtained Mr Mahmoud's agreement with the accuracy of the summary. The magistrate then obtained from Mr Mahmoud brief particulars of subsequent events:

(a) on 31 December 2009, when Mr Sutherland allegedly placed a bundle of newspapers outside the front door of Mr Mahmoud's flat and banged loudly on the door which, Mr Mahmoud said, caused him to be frightened;

(b) on 18 March 2010, when Mr Sutherland again allegedly deposited a bundle of newspapers outside Mr Mahmoud's front door;

(c) on 26 March 2010, when Mr Sutherland allegedly encountered Mr Mahmoud in the street, made a gesture with his fingers and nose suggesting a bad smell, said either "another smelly bastard" or "a bloody smelly bastard" and spat.

The behaviour in Mahmoud V Sutherland above was not enough to grant an APVO against the defendant. The behaviour must cause the PINOP to have reasonable grounds to fear and in fact fear the commission of the type of offence in section 17 or section 20 Crimes (Domestic and Personal Violence) Act 2007 and behaviour must go beyond rude, offensive and boorish behaviour and must be apprehended by the PINOP under the required standard to apply to the future.

If the court cannot be satisfied on the criminal standard that the offence is proven (but/however) on the civil standard the court can be satisfied in granting the AVO

The court often hears criminal charges against a defendant with a related AVO. After the hearing is concluded the prosecution may or may not have met their burden to prove the essential elements on the criminal standard. Assuming they have not met the standard the charges are dismissed but the AVO matter continues. Further evidence may be called but usually the evidence relied on by the prosecution is the same evidence relied on for the AVO matter.

Often the prosecution submits that even though the court could not be satisfied, on the criminal standard, to convict the defendant nevertheless could, on the civil standard, make an order for an AVO. That is the error commonly found at the end of a summary hearing. The evidence must support the criteria set out in section 16 (1) (a) and (b) (i) and (ii) for an ADVO and section 19 (1) (a) and (b) (i) and (ii) for an APVO.

Past or current behaviour may not be enough to satisfy the court but any behaviour suggesting some future act may be enough to satisfy the court.

Mario Licha
Barrister