

## Apprehended Violence Orders

### What is an Apprehended Violence Order and what does it do?

An AVO is a protection/restraining order. It is designed to protect a woman and/or her children in the future and reduce and prevent violence between persons in a domestic relationship with each other.

A woman can apply for an AVO if she is afraid of violence, harassment, molestation, intimidation, stalking or threats to her property from someone she is in a domestic relationship with. She does not have to have experienced physical violence to be able to apply for an AVO.

An AVO usually states that the man cannot assault, threaten, harass, stalk, intimidate or damage the property of the protected person or intimidate anyone she has a domestic relationship with. It may also restrict the man from contacting and approaching the woman or prohibit him from going within a certain distance of her home or work address.

AVOs can be tailored to suit a woman's needs by adding various conditions. Chamber magistrates have standard AVOs that can be amended to suit a woman's circumstances. However the magistrate will make the final decision about the conditions he/she believes are necessary to ensure the applicant's safety.

### What don't AVOs do?

While an AVO can prohibit a person from doing certain things, it cannot direct him to do other things. For example, an AVO cannot require him to attend counselling or Alcoholics Anonymous (AA) meetings or perpetrator programs.

### Who can apply for an AVO?

Any person who fears (or who has experienced) violence, harassment, intimidation, stalking or possible damage to their property from someone they are in a domestic relationship with, can apply for an AVO.

The legal information about Apprehended Violence Orders and firearms, has been reviewed by Domestic Violence Advocacy Service (DVAS). It is accurate as at January 2001.

We gratefully acknowledge this input.

The *Crimes Amendment (Apprehended Violence) Act 1999* has expanded the definition of a domestic relationship to include situations where the offender is someone who is living or has lived in the same household or other residential facility as the victim or someone who is a paid or unpaid carer to the victim. A domestic relationship could now include a relationship with:

- A current or former spouse.
- A current or former partner from a de facto relationship (including same sex couples) as defined in the *Property (Relationships) Act 1984*.
- Someone they have (or had) an intimate personal relationship with (that does not have to be of a sexual nature).
- Someone that lives (or has lived) in the same household or residential facility.
- A carer (whether paid or unpaid).
- A relative, including parents, grandparents, stepparents, children, grandchildren, stepchildren, siblings, half-siblings, uncles, aunts, nieces, nephews and cousins and all in-laws.

### Can an AVO protect children and other family members?

When a woman applies for an AVO, she can ask to include the names of any person with whom she has a domestic relationship that

## A legal response to domestic violence

In 1982, the NSW legal system introduced Apprehended Violence Orders (AVOs) under section 547AA of the *Crimes Act 1900*. This allowed courts to make an AVO that restricted or prohibited behaviour if there was reasonable evidence of domestic violence committed by a spouse (either married or de facto). Failure to comply with the AVO was an offence.<sup>1</sup>

Since then, this legislation has been reviewed regularly. The most recent amendment is the *Crimes Amendment (Apprehended Violence) Act 1999* and this makes changes to the law surrounding AVOs and stalking/intimidation. This Act commenced on 26 April 2000.

Apprehended Violence Orders that are used to protect people from a domestic violence offence is formally known as an Apprehended Domestic Violence Order.

### Summary of significant changes enacted by the *Crimes Amendment (Apprehended Violence) Act 1999*<sup>2</sup>

- There is a new legislative distinction between Apprehended Domestic Violence Orders (ADVOs – involving persons in a domestic relationship) and Apprehended Personal Violence Orders (APVOs – all other matters).
- The definitions of 'domestic violence offence' and 'personal violence offence' have been extended. Domestic violence offences now include breach of ADVO and malicious damage.
- The definitions of 'domestic relationship' have been extended.

- Further protection of the victim's address is provided for.
- Further protection of the identity of children, protected persons, defendants or witnesses in AVO proceedings are provided for.
- The test for intention in relation to stalking has now changed.
- To enhance the protection afforded to the victim, Police Prosecutors may now seek variations of existing AVO/s when the defendant pleads guilty or is found guilty of a domestic violence offence (including a breach of an AVO) or stalking/intimidation offence.
- Police Prosecutors may seek direction from the court to serve the complaint and summons on the defendant in alternative ways.
- There are broader circumstances under which an officer may seek a Telephone Interim Order (TIO) and the conditions possible on a TIO are now consistent with those available on an Interim and final AVO.
- The enforceability of TIOs is improved by ensuring that TIOs 'continued' by the court are deemed to be fresh Interim AVOs.
- Where a breach of an ADVO is reported to police and police take no action in respect of that report, the police officer must make a written record of the reasons for taking no action.
- Police are not required to personally serve orders if the defendant was in court when the order was made.
- AVOs may be extended without service in certain circumstances.
- Protection Orders made in New Zealand can now be registered in NSW.

may also require protection. This includes her children and other family members. These people do not have to be living with the woman to be protected by her AVO. However, this does not happen automatically and must be specifically sought if necessary.

The only other way children under 16 years can be protected by an AVO is if the police apply for an AVO on their behalf.

### **Are AVOs the same as criminal charges?**

No. The purpose of the AVO is to protect the woman in the future, not to punish the man for what he has done in the past. Although AVOs are dealt with under the Crimes Act, applications for AVOs are not criminal matters. Being served with an AVO summons is not the same as being charged with a crime. Taking out an AVO against a man does not in itself give him a criminal record.

However, if criminal charges are being laid by police, they will usually apply for an AVO at the same times.

### **Does an AVO stop him from seeing the children?**

Unless the children are specifically protected under an AVO that prohibits the man from contacting or approaching them, the AVO in itself will not stop him from seeing them. Sometimes an AVO will say that the man cannot contact or approach the woman, or go to her home, except in strict compliance with Family Law Orders or contact arrangements.

### **What if there is an AVO and a Family Law Contact Order (FLCO)?**

If either party applies for a FLCO after an AVO is made, the law requires that the Family Court is made aware of the AVO. The court should consider the terms of the AVO and the FLCO should not conflict with the AVO nor expose a person to any unacceptable risk.

Similarly, if there is a FLCO when an application for an AVO is made, the conditions of the AVO should be consistent with the nature of the contact order. If the contact order is inconsistent with the AVO, the contact order will prevail but only to the extent of the inconsistency.<sup>3</sup> (Note however, that no FLCO allows for abuse or harassment, so any behaviour of this nature constitutes a breach of an AVO and should be dealt with accordingly.)

Where there is a preexisting FLCO and an AVO is being made or varied, the magistrate may vary, suspend or discharge the contact order if they are satisfied that the child/ren has been or is likely to be, exposed to violence as a result of the contact order. The magistrate may only exercise this power when granting or varying a final or interim AVO. In the instance of an interim AVO, the magistrate may not discharge the contact order but may vary or suspend it for the period of the interim AVO.

### **Does the AVO work if the woman moves to another State?**

An AVO is not automatically effective in other States and Territories. However, an AVO made in NSW can be registered in other States (except WA) and Territories by providing a copy of the AVO and proof that it has been served on the man.

Registration of an AVO can be done through the court office, without having to go into the court room. The man need not be notified that the woman resides in the new area if he has been served with the original order at the court of origin.

Likewise, protection orders made in other States (except WA) and Territories and in New Zealand, can be registered in NSW.

## How to get an AVO

### Applying for an AVO

A police officer may apply for an AVO on behalf of a woman and her children or she may apply for one herself. Both applications are made to the local court.

If a woman is making the application herself, she should go to the local court and ask for an appointment with a Chamber Magistrate. However, if a Chamber Magistrate is not available, any authorised justice can take the complaint and issue a summons.

The Chamber Magistrate will fill in the application, which includes a brief statement and a list of orders that the woman is seeking. They must then issue a summons or warrant for the man to attend court on a later date.

To help in preparing the complaint, the person seeking protection should tell the Chamber Magistrate if:

- there are any Family Court residence or contact orders
- if the defendant owns or has access to firearms
- if they are a Department of Housing tenant
- if they wish to have any children included in the AVO.

The address of the person seeking protection will not be included in the complaint form unless the complainant agrees.

If the person is under the age of 16, only the police can apply for an AVO on their behalf.

### Are the police required to apply for AVOs?

When police are called to a domestic violence situation, they are required to apply for an AVO on a person's behalf if a domestic violence offence, a stalking offence or an act of child abuse has been, is being, or is likely to be committed.

However, if the person is over 16 years of age, a police officer need not apply for an AVO if the officer believes that the person herself will apply for an AVO, or if they believe there is a good reason not to do so. If police believe there is good reason not to apply for an AVO, they must record this reason in writing in their notebook and include it on COPS (the police computer record system).

### Can a woman take out an AVO as well as having him charged?

Yes, if an assault has taken place. The police can charge a man with assault (a criminal charge) and use the same incident as the basis for an AVO application.

If the man appears before the court charged with a domestic violence offence, the court must make an Interim AVO against him, unless there is some good reason not to. If the man is later convicted of a domestic violence offence, the court must make a final AVO, again unless there is a good reason not to do so.

### Can the woman vary the conditions of the AVO?

Yes. An AVO can be revoked (cancelled) or varied (conditions are added or taken away) by applying to the court. If the police originally applied for the AVO, the woman can ask them to apply for the variation for her or apply for the change herself.

The application has to go before the court in the same way as a complaint for an AVO. It must include the reasons why the revocation or variation is sought. The request is dealt with in the same way as the original application. The court may revoke or vary the AVO if it is satisfied that this is the right thing to do. The court may also refuse to hear the application if it believes the circumstances have not changed and that the application is really an appeal.

If the woman changes her job or home address while the AVO is in force, and the man is prohibited from going to those

premises, the woman should check the AVO and make sure the conditions will protect her at the new premises. If they do not, she should apply for a variation.

Some women apply for their AVOs to be extended for a longer period of time. If this is necessary, the woman should apply for the extension 4-6 weeks before the AVO expires.

An application can also be made for an AVO to be revoked completely, for instance, if the parties decide to resume a relationship. In this instance, it would also be possible to vary the AVO so that the man can have contact with the woman but he is still prohibited from assaulting, harassing, intimidating or threatening her. This way, the woman can resume a relationship with the man, but still be protected by the AVO.

### What is an Interim Order?

An Interim Order is a temporary AVO made by the court to protect the woman during the time it takes to hear the complaint. The court will make a temporary order if the magistrate believes it is necessary and appropriate to do so in the circumstances.

If the woman feels she needs immediate protection, she should ask for an interim AVO. This would involve having her case added to the court list for that day, going into the court room and asking the magistrate for an interim AVO. This interim AVO would last until the case comes back to court, but is not enforceable until it has been served on the man.

### What is a Telephone Interim Order (TIO)?

A TIO is an urgent protection order that the police can apply for when it is not possible to attend court because of the time (ie it is outside the court's working hours) or because of geographic isolation. A police officer must apply for a TIO where they believe:

- a domestic violence offence or an act of child abuse has been committed, is being

committed or is likely to be committed; and

- the time or location of the incident means that it is not possible to make an immediate complaint at a court for an AVO; and
- the police officer believes a TIO is necessary to ensure the safety of the person/s protected by the order or to prevent substantial damage to any property of that person.

A TIO may:

- prohibit or restrict a person from approaching the protected person
- prohibit or restrict access by the defendant to any premises occupied by the protected person, including the protected person's workplace or any place frequented by the protected person, whether or not the defendant has a legal or equitable interest except if the defendant is under 16 years of age
- prohibit or restrict the defendant from approaching the protected person or any such place within 12 hours of consuming intoxicating liquor or illicit drugs
- prohibit the defendant from destroying or interfering with the protected person's property.

A TIO lasts for a maximum period of 14 days. It must be served on the defendant to be enforceable and it will summon the defendant to attend court some time within the next 14 days. A TIO cannot be renewed and if it is 'continued' by the court, it will be taken as an interim AVO.

### What if the defendant is under 18?

If the defendant is under 18 years of age at the time the complaint was made, the matter should be dealt with in the Children's Court. A Local Court can sit as a Children's Court by closing the court to the public.

## Going to court for an AVO

### Getting help to go to court

Women's Domestic Violence Court Assistance Schemes (WDVCAS) operate in a number of local courts to help women going to court for an AVO. WDVCAS can provide information as well as support on the day and some Schemes have solicitors who will provide representation on the day of mention and in some cases, for the hearing.

### Does the woman need a lawyer?

If the police have applied for an AVO on a person's behalf, that person will be represented in court by the police prosecutor. Therefore, a solicitor is not required.

However, if the woman has made a private complaint through the local court, she should seek legal advice through Domestic Violence Advocacy Service (DVAS), a community legal centre or Legal Aid (if she is eligible for Legal Aid) or from a private solicitor. She could also ask her nearest WDVCAS about representation. Police prosecutors are directed by the Police Commissioner to represent private applicants that are unrepresented.

### What happens at court?

The woman's case is usually listed for 'mention' at the local court a few weeks after the application for the AVO is made. The woman should attend court on this date. There are six possible outcomes from this:

1. The man does not attend court because he has not yet been served with the complaint and summons. The case should be adjourned for a few weeks to give the police more time to serve the papers. The woman or her representative should ask for an interim AVO until the next mention.
2. The man does not attend court but there is written proof that he has been served with the summons. If there is an Affidavit of Service on the court file, the woman or her representative should ask for a final AVO

to be made in the man's absence. The woman is usually required to give brief oral evidence in court to support the application. This is called an 'ex parte' order and it is effective from the time it is served on the man by the police.

3. The man attends court and asks for an adjournment for a few weeks to obtain legal advice. The woman or her representative should ask for an interim AVO until the next mention.
4. The man attends court and consents (agrees) to the AVO being made. He can do this without admitting that he has done anything alleged in the complaint. If the man consents to the AVO, the court grants the order without having to hear any evidence from the woman.
5. The man attends court and does not consent to the AVO being made. If the woman wishes to proceed with the matter, the case is adjourned for a hearing. The woman or her representative should ask for an interim AVO until the hearing.
6. The woman withdraws her application and accepts undertakings. An undertaking is a promise to the court by the man that he will not do certain things, like assault, harass or contact the woman. Undertakings are not legally enforceable. A woman should get legal advice before accepting undertakings in return for withdrawing an AVO application.

### What happens at a hearing?

If the man does not consent to the AVO and the matter goes to a hearing, both parties (and any witnesses they may have) give evidence in court and can be cross-examined. After hearing both sides, the magistrate decides whether or not to grant an AVO on the balance of probabilities (that is, that it is more likely than not that the woman requires the protection of the AVO).

### Can the court make the man leave the house?

The court does have power to make an order

excluding the man from his home, whether or not he has a legal or equitable interest in it. This is called an 'exclusion order'. Before making an exclusion order, the court must consider the accommodation needs of the parties and the consequences for the woman, and any children living at the home, if an exclusion order is not made. Primary consideration will be given to the physical safety of the woman.

It may be difficult to get an exclusion order but it is worthwhile asking the court for one. If an exclusion order is sought but not granted, the court must now give reasons for its refusal.

### Breaching an AVO

#### What happens if he breaches the AVO?

Breaching an AVO is a criminal offence. If the man breaches the AVO (and this includes an interim AVO) in any way, the woman should immediately report the breach to the police. The police may then charge the man with breaching the AVO. (Police have the discretion to charge or not, they will look at all the facts/evidence and then decide.) The police may arrest the man without a warrant or summons him to attend court to answer the charge.

If a police officer decides not to take action against a person for breach AVO, they need to make a written record of the reasons for that decision.

The man cannot be charged with breaching the AVO unless it was first served on him. If he pleads not guilty to the charge, the police will have to prove the offence beyond a reasonable doubt. The woman is usually required to give evidence at the trial.

#### What happens if he is convicted of breaching an AVO?

If convicted of breaching the AVO, the man will get a criminal record. The maximum penalty is a \$5,500 fine or two years in gaol,

or both. If the breach consists of an act of violence against the woman, the court must sentence the man to a term of imprisonment, unless the court orders otherwise, or unless the offender is under 18.

### Firearms

#### What if he has a gun?

If called to a domestic violence incident, the police must ask whether there are any guns in the home. If they are told that there are, the police must search for the firearms and seize them. If the police are told that there are no guns, but they have reasonable cause to believe that there are in fact guns in the home, they can apply for a search warrant and take any guns found.

If the incident occurs away from the house, the woman may request that the police attend and search the house for firearms.

#### What happens to his firearms licence?

If the man holds a gun licence or permit, the police must suspend it if:

- a) he is charged with a domestic violence offence;
- b) the police have 'reasonable cause' to believe he has committed or threatened to commit a domestic violence offence;
- c) an application for an AVO against him has been made; or
- d) an interim AVO has been granted.

If an interim AVO has been granted, the gun licence will be suspended for the length of the interim AVO.

#### Can he apply for another gun licence?

If a final AVO is granted, the man's gun licence is automatically revoked. He can apply for another license, but he will not be eligible until ten years from the expiry date of the AVO has elapsed.

## Family Law

### The *Family Law Act*

The *Family Law Act 1975* (Cth) is the law that covers divorce, property division of married couples and spouse maintenance. It also covers all issues concerning where children will live and who has responsibility for their continued care, welfare and development after their parents separate (formerly, children's custody, access and guardianship). The *Family Law Act* applies to children of married couples, de facto couples, gay and lesbian couples and parents who had no, or merely a casual, relationship.<sup>4</sup>

### The *Family Law Reform Act 1995*?

The *Family Law Act* was substantially amended by the *Family Law Reform Act 1995*. The amendments made fundamental changes to the operation of family law and to the philosophy and terminology relating to children and parenting arrangements.

The *Family Law Reform Act 1995* attempts to put mediation, conciliation and arbitration of marital disputes ahead of an adversarial and legalistic approach to divorce proceedings, property settlements and parenting arrangements after separation.

The information about family law has been reviewed by the Women's Legal Resources Centre. It is accurate as at January 2001.

We gratefully acknowledge this input.

For more information about family law, a booklet titled *Women and Family Law* has been published by Women's Legal Resources Centre and Redfern Legal Centre Publishing. The booklet is available from your nearest community legal centre.

The *Family Law Act* refers to domestic violence as 'family violence' and defines it as: conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for or to be apprehensive about, his or her personal well being or safety; 'family violence order' means an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from 'family violence'. (s. 60D. (1))

### What is mediation?

During mediation, a couple is joined by one or two neutral person/s, the mediator/s, to develop a property settlement and make parenting arrangements.

A successful mediation requires a degree of equality of negotiating ability between the partners and a commitment to working out a fair settlement.

### Mediation in domestic violence situations

In cases of domestic violence, the power imbalance is often so great that women may be intimidated into mediating away what they are entitled to in property settlements. They may also agree to arrangements for the children that are not in the children's best interests. The process of mediation may in itself provide another opportunity for the man to abuse his former partner.

Family mediators, whether they are employed by the Family Court or are private mediators accredited by the Family Court, are required to consider whether mediation is appropriate. They are required to consider issues such as: whether the former partners have equal bargaining power; the risk of child abuse; the risk of family violence; the emotional and psychological state of the parties; or whether one partner is using mediation as a way of gaining an advantage over the other partner.

Real caution needs to be exercised to ensure that women who are or have been, experiencing domestic violence are not encouraged towards mediation. The use and threat of violence can create a power imbalance between the perpetrator and the woman, making genuine negotiation impossible. The Australian Feminist Law Journal did a critique of mediation and concluded: 'While the use of mediation for some couples can prevent costly, time consuming and traumatic litigation, it is clearly an inappropriate measure for women separating from violent men.'

### What is a family mediator?

The Family Court of Australia has a mediation service. Family mediators must be registered. Government, church sponsored or private organisations such as Relationships Australia and Centacare can be registered as family mediators and can apply for government subsidies.

### What is conciliation?

Conciliation is offered by the Family Court. It is offered by a court counsellor in children's matters, and by a court registrar (lawyer) in property matters. The counsellor or registrar acts like a mediator assisting the parties to reach an agreed settlement. The counsellor or registrar may be more

The *Family Law Act* now refers to domestic violence as 'family violence' and defines it as: ' "family violence" means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for or to be apprehensive about, his or her personal well being or safety; "family violence order" means an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from "family violence".' (s. 60D. (1))

proactive in describing how the law may be applied in a particular case. They may also offer their opinion about what they would consider to be the best result, or the most likely result should the parties proceed with litigation.

### What is arbitration?

Arbitration is when a third person is hired privately to settle a dispute between individuals, in a situation less formal than a court hearing. Presently, arbitration is possible under the *Family Law Act* for financial matters, but it is rarely used.

## The children

### What happens to children after separation?

Amendments to the *Family Law Act* that took effect on 11 June, 1996 replaced the terms 'guardianship', 'custody' and 'access' with the terms 'parental responsibility', 'residence' and 'contact'. The new law attempts to change the perception that parents have a right to custody and access of their children, to an awareness of their responsibility for the care and welfare of their children. It focuses on children's rights and parents' responsibilities.

In a new section on children's rights, the *Family Law Act* says children have a right to know and be cared for by both parents and have a right to regular contact with both parents and other 'significant' people. These rights are said to apply '..... except when it would be contrary to the child's best interests'.

Parental responsibility is the most significant new idea. It replaces both guardianship and custody and covers 'all the duties, powers, responsibilities and authority that, by law, parents have in relation to children'. This definition does not include 'rights'. The child now has the right to be cared for and a right to have a relationship with both parents but a parent does not have a right to

see the child or any other right concerning the child.<sup>5</sup>

Under the new amendments, each parent whether they were ever married, de facto or merely acquainted, has a long-term responsibility to their children. They have the opportunity to make decisions regarding that child, whether the child lives with them or not, until there is a court order that takes that away.

## **The child's best interest is the primary consideration**

In all decisions the Court makes concerning children, it must make the best interest of the child the primary consideration. When determining what is in the child's best interest the Court must consider, among other things: 'the need to protect the child from physical or psychological harm caused or potentially caused by:

- being subjected or exposed to abuse, ill-treatment, violence or other behaviour
- being present when another person is subjected or exposed to abuse, ill-treatment, violence or other behaviour'

## **How do couples decide where the children will live?**

Parents are encouraged to develop parenting plans that organise who the children will live with, and the contact they may have with the other parent.

These parenting plans can be formally registered with the court. Then they become enforceable, like court orders.

Once registered, parenting plans cannot be varied. It can be difficult to get a court to replace a parenting plan unless a fairly dramatic change in circumstances can be demonstrated. Women should be careful about signing a parenting plan and only sign after obtaining independent legal advice.

## **Can the court make orders about the children?**

The court can order where the children are to live and any other arrangements about the children. These are called parenting orders. Parenting orders may be made by consent, that is the parent's agreement itself becomes the order of the courts.

Alternatively, parenting orders can be made by a judge after a final hearing.

A parenting order may replace a parenting plan with different orders. Orders do not extinguish the parental responsibility, unless the court specifically says so.

## **Residence orders**

A residence order says where and with whom the child will live. It replaces what was called a custody order.

A residence order does not give the adult (usually a parent) living with the child complete control over them. If the adult wants this they have to apply for a specific issues order which asks for sole authority for day to day parental responsibility.

## **Contact orders**

A contact order is similar to what was called an access order. It says when a child is to see the other parent. Contact includes face-to-face visits as well as phone calls and letters.

The Act clearly states the child has the right to regular contact with both parents. Contact may also be with others besides parents, for example grand-parents.

## **Specific issues orders**

Specific issues orders cover any area of parental responsibility. For example, a specific issues order may give one parent responsibility for the long-term care, welfare and development of the child (formerly known as guardianship), or for the day to day care, welfare and development of the child (formerly part of a custody order).

A specific issues order may take some or all of parental responsibility from one parent.

## What if there is, or has been, domestic violence?

Women who have experienced domestic violence from former partners may need to take out specific issues orders to protect their children. This order may take away or limit the parental responsibility of the violent partner.

Specific issues orders may also place conditions on the contact the father has with the children. For example, it may say he is not to consume alcohol when he is with the children.

If the woman or her children are in danger of abuse during a contact visit, the woman should seek legal advice as soon as possible.

If the children are in danger of violence, a woman can apply at a Local Court or at the Family Court for an urgent order for residence and care. In a genuine emergency, a court can make orders without the usual requirement that notice be given to the other parent. An order made without the other parent being present is known as an *ex parte* order. These are only made in an emergency and generally only last for a short time until the Court can hear both sides of the story.<sup>6</sup>

### Family Law and Apprehended Violence Orders (AVOs)

The Family Court must ensure that the orders it makes are consistent with Local Court AVOs and do not expose anyone to risk of family violence 'to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration'. (s. 68K(1))

Parties are required to tell the Family Court of existing AVOs. If the Family Court makes an order that is inconsistent with an AVO, it must explain why.

### Can a Local Court vary a Family Court order?

When a woman applies for an AVO from the Local Court, the Local Court can vary, discharge or suspend a Family Court order. This can only occur when the person applying for the AVO and any children she has in her care, need protection from family violence.

When the Local Court is only making an Interim Order, it can only suspend the Family Court orders for the duration of the Interim Order.

When the Local Court makes a final AVO, it may vary or permanently discharge a parenting order.

When a Local Court is making a final AVO, they do have the power to vary or permanently discharge a parenting order from the Family Court.

This applies only to new AVOs.

When a Local Court is making a final AVO, they do have the power to vary or permanently discharge a parenting order from the Family Court.

This applies only to new AVOs and only when the person

applying for the AVO and any children she has in her care, need protection from family violence.

## Family Law and property

### What is property?

For the purposes of a property settlement after separation or divorce, property is considered to be all of the assets a couple has: house, land, insurance, company shares and trust funds. Financial resources like superannuation are also considered.

Property can be things owned jointly by the couple as well as things owned separately by either person. This means it doesn't matter if all property is only in one person's name.

If a woman was married, the property will be divided under the Federal *Family Law Act*. If she was in a de facto relationship, the governing law is the *Property (Relationships) Act* (a state law).

Recent provisions have been added to the *Family Law Act* that allow binding agreements to be made before, during or after a marriage.

### What sort of property agreements are there?

If the couple can agree on how to split up their property, there are a number of things the woman can do:

- Agree to an informal arrangement. If problems develop, either party can apply to the court for property or spouse maintenance orders for up to 12 months after the divorce is finalised. If the parties never formally divorce, then there is no time limit.
- Make a written agreement and ask the court to make a consent order based upon that agreement. The court can enforce this order. A consent order is a final order like most other court orders. They can only be changed in special circumstances.

- Make a written agreement which can be registered by the court. Registered agreements can be enforced (s 86) and can be varied for up to 12 months.
- Agree to a final settlement of all financial affairs and approved maintenance payments. This can be enforced (s87), and can only be altered under special circumstances.

### What if a couple can't agree on how to split things up?

If, because of the domestic violence (or any other reason), couples can't come to an agreement, the court will have to decide the matter. Proceedings can be started in the Family Court or the Federal Magistrates Court if the amount of property is worth less than \$300 000 or the Local Court if the amount of property is worth less than \$20 000 for married couples or \$40 000 for couples who were in a de facto relationship. If the couple were never married, they must apply to the District or Supreme Court (depending on how much their property is worth).

However, it is important to consider the cost in legal fees before going to the courts. Ten per cent of the value of the settlement is not unusual. It is extremely difficult to get legal aid in these cases.

### Can a woman just go back to the house and take what's hers?

Yes. But the woman needs to consider her safety. She can request a police escort, but police will usually only allow a woman to take essential items and things that obviously belong to her.

Women might be advised to return to the home with a removal van when they know the man is not going to be there and take whatever they need for themselves and the children. Women who have experienced

abuse may be too afraid to do this, even though they have every right to.

While these strategies allow the woman to pick up clothes, furniture and mementos, they may still need a property settlement.

### **Is there some way to make him leave the house?**

Maybe. Courts can make exclusion orders to exclude the violent partner from the home. An exclusion order, however, does not extinguish the financial stake the violent partner has in the house, so permanent property settlements still need to be sought. Exclusion orders are covered in the AVO section on pages 88-89.

Usually both parties have the right to stay in the former matrimonial home until there is a property settlement. However, in limited circumstances, such as being subjected to violence in the home, a woman may be able to get an order giving her the right to exclusive use of the house until the property settlement is finalised. This is called a sole occupation order or an exclusive use order.<sup>7</sup>

### **Can a woman take their car?**

Yes, a woman may take any property. Any property that either the woman has or takes will be taken into account in a property settlement. It is a good idea to make a list of any property taken by either party.

## What if he starts selling their assets?

A woman can ask the Court for an urgent order or injunction to protect her property or her interest in her husband or partner's property. An injunction will stop him selling anything that is in his name alone until the Court divides the property between them. A woman can also stop property from being sold by lodging a caveat at the Land Titles Office. She should get legal advice before doing this.<sup>8</sup>

## What if he starts giving away their assets?

If the woman suspects the violent partner might be giving away their assets or transferring them to other people or dealing with the assets unwisely she needs to get urgent legal advice. Solicitors can apply for an injunction to stop him.

If the house is in both names the violent partner cannot legally do anything without her consent.

If he has already disposed of assets, the court can in some instances cancel the transfer of assets or order him to repay the woman's share of the assets.

## Is the woman liable for his debts?

If the debt was in both names and the man stops paying, the woman will be equally liable. If she pays the debt, this should be considered in the property settlement. If the woman cannot repay the debt she should seek advice on delaying or reducing the amount of the repayments.

If the debt is in his name alone, then she is not responsible.

When a woman leaves her partner, she should cancel any joint accounts they have.

The Consumer Credit Legal Centre (NSW) Inc has produced a useful resource about debt associated with family breakdown called *Making ends meet: Family breakdown and debt* by R Payget. It is available from the legal centre by calling 02 9212 4111.

## What if all the money is in trust?

The court has limited power over monies held in trusts or other companies. A woman in this situation should get legal advice about getting a bigger share of remaining assets not controlled in this way.

## How does a woman file a property order with the court?

A woman may, with or without the assistance of a solicitor, file an application for a property settlement with the Family Court. These applications must be made within 12 months of the divorce being finalised. If parties never get a divorce, the application can be made at any time after the separation.

The woman will have to disclose information about all her financial arrangements and will be able to inspect information about her former partner's finances.

The court has the power to alter the ownership of homes (say from joint ownership to the woman owning it) or to divide any assets or debts between the former partners in a way that is fair in the circumstances.

### **How does the court decide who gets what?**

The court has wide discretion in how it decides the property settlement. It follows two broad guidelines — the contribution made by both partners and the present and future income, needs and responsibilities of the partners.

Contributions to the value of assets can include income and savings contributed during the marriage, non-financial contributions such as maintaining the home or work in the family business and things such as

caring for the children, housework, running the family finances etc. It may also consider if one partner's family has helped the couple to buy the house.

The Family Court now accepts that domestic violence is relevant and can be taken into account in property cases. The violent person's contributions may be reduced and the contributions of the target of violence may be increased because of the violent behaviour.<sup>9</sup>

Future income and needs which may be considered include the age and health of both partners, their income and earning capacity, whether or not they have children, whether they are being supported by someone else or whether the marriage has affected their ability to get a job.

The court may also order that one partner receive a greater share of the property to balance the other's superannuation entitlements.

### **How are property settlements finalised?**

If the court is involved in the property settlement, a directions hearing with a registrar will be held before the matter proceeds to a court hearing. If an agreement is reached on the day, the registrar can make consent orders to finish the case. If not, the registrar will order both parties to attend a conciliation conference with another registrar at some later date.

Many cases settle by agreement at one or other of these stages and never go before a judge. However, a woman does not have to settle if she is not being offered a fair settlement, and she should not feel pressured to do so. She needs to feel confident that her legal advisers are serving her best interests.

A case may be finalised by agreement and when consent orders are made, or by order of a judge after a final hearing. In either case the orders are enforceable should the other side not comply.

# Domestic Violence Provision of Immigration Law

## Who does the Domestic Violence Provision apply to?

The Domestic Violence Provision applies only to people who have made an application for residency in Australia on the basis of:

- being married to or in a de facto relationship with an Australian citizen or permanent resident
- being in a lesbian or gay relationship with an Australian citizen or permanent resident
- being the spouse of someone who has made an application for a permanent visa on skilled and onshore business grounds.

The provisions do not apply to applicants on any other ground.

## What is the Domestic Violence Provision?

If applicable, this Provision enables a woman who is not a resident of Australia, to leave a violent relationship and still be eligible for permanent residency.

## How is domestic violence defined?

Domestic violence is defined by the regulations to be: violence or threats of violence,

towards the applicant, a family member or property, that causes fear or apprehension about well-being or safety. It includes violence perpetrated against a child.

## Can the Domestic Violence Provision include children?

The Domestic Violence Provision applies to applicants who can show that their partner has been violent towards them, their children or other members of the family who are included in the application for permanent residence.

## What forms of evidence does the woman need?

Evidence accepted by the Department of Immigration and Ethnic Affairs in support of domestic violence claims include:

- Court orders (AVOs or injunctions under the *Family Law Act*)
- A certified copy of a court-recognised joint undertaking between the applicant and their partner where there is an allegation of domestic violence
- A statutory declaration by the person who has experienced the violence (or on behalf of the person if they are under age) and a statutory declaration from two 'competent persons'
- A statutory declaration by the person who has experienced the violence (or on behalf of the person if they are under age) and a statutory declaration from one 'competent person' and a police record of the assault. The police record of assault must be a statement made by police that confirms the violent incident and attests that they have charged the perpetrator with assault.

# It's not love – it's violence

For the purposes of verifying violence, a 'competent person' could be a:

- doctor (including psychiatrist)
- psychologist
- nurse
- social worker
- family court counsellor
- manager or co-ordinator of a women's refuge or specialist domestic violence crisis or counselling service, or, where there is a collective structure, a person with decision making responsibility and who is responsible for domestic violence matters.

If domestic violence has been committed against a child, a competent person can also include a government employed child protection officer.

It should be noted that coordinators of migrant resource centres, lawyers or police officers are not considered 'competent persons' unless otherwise qualified.

**Note:** if two statutory declarations from 'competent' people are required, they must be two different sorts of competent people. For example, a doctor and a refuge worker would be acceptable. Two refuge workers would not be acceptable.

## What do the statutory declarations need to contain?

A statutory declaration from a competent person must contain:

- the name of the person who (in the opinion of the competent person) has experienced the violence

- the name of the person who (in the opinion of the competent person) perpetrated the violence
- a statement that in their opinion, domestic violence has been experienced
- the evidence on which the opinion is based
- an outline of their basis for being a competent person, including their name, place of work, contact phone number and qualification.

A statutory declaration from the applicant must:

- contain the name of the perpetrator
- set out the allegation of violence.

A statutory declaration made on behalf of the applicant must contain:

- the name of the person who has experienced the violence
- detail of their relationship to that person
- the name of the perpetrator
- the allegation of violence
- the evidence on which the allegation is based.

To apply for permanent residency under the Domestic Violence Provision – contact the nearest Department of

Immigration and  
Multicultural  
Affairs office  
and ask to  
speak to the  
domestic  
violence  
contact  
officer, *or*:

## contact

For more  
information,  
contact:

Immigration Advice  
and Rights Centre on:  
(02) 9281 8355

# Victim Compensation

## What is Victim Compensation and who is eligible?

Victims of acts of violence (including domestic violence) may be eligible for compensation for injuries sustained as a result of the 'act of violence'.

The definition of a victim of an act of violence includes only those people who have been injured as a result of a violent criminal act. This definition includes injuries resulting from sexual assault and apprehended domestic violence.

Claims for compensation are made through the Victims Compensation Tribunal (a state government tribunal). Claims are dealt with under the *Victims Support and Rehabilitation Act 1996* (the new name for the NSW *Victims Compensation Act 1996*).

## What will compensation be paid for?

Compensation may be paid for injury, actual expenses, lost income and loss of personal effects.

## What determines if compensation will be paid?

An applicant must establish on the balance of probabilities that they have suffered injury as a result of violence occurring in the course of a crime. The tribunal determines applications on the basis of documentary evidence of the act of violence, injuries received and expenses incurred.

A compensation assessor may reduce or refuse to make an award of compensation where the victim has failed to take reasonable steps to mitigate the extent of their injury, such as seeking appropriate medical advice or treatment.

Awards will be determined by a Schedule of Injuries, which identifies the maximum amount of compensation to be awarded for each named injury. If two or more compensable injuries are claimed for, the maximum amount will be awarded for the worst one, and the awards for the second and third named injuries will be scaled down by 10% and 5% of the standard amount and no amount will be payable for further injuries.

Compensation is not payable unless the total amount of compensation for injuries payable to a victim is at least \$7500.

The minimum amount of compensation for the compensable injuries of domestic violence or sexual assault has been increased to \$7500.

## When can applications for compensation be made?

Applications must be made within two years of the date of the act of violence.

However, an application for leave to apply for compensation out of time will be considered by the Director. Leave should be given in cases of domestic violence, sexual assault and child abuse unless there is good reason not to do so.

Applicants in severe financial hardship can apply for an interim award.

### **contact**

**For more information, contact:**

Victims of Crime Bureau  
**(02) 9374 3005**

Victims Compensation Tribunal  
**(02) 9374 3111**

Put your local numbers in the spaces provided

# contacts

as at / /

## YOUR LOCAL CONTACTS

### Your nearest Community Legal Centre

Town: .....

: .....

### Your nearest Legal Aid office

Town: .....

: .....

### Local Solicitors

Town: .....

: .....

Town: .....

: .....

Town: .....

: .....

### Your local Chamber Magistrate

Town: .....

: .....

### Other important numbers

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### Community Legal Centres – statewide

#### Domestic Violence Advocacy Service

PO Box H154  
Harris Park NSW 2150  
Ph: (02) 9637 3741  
Freecall: 1800 810 784  
TTY: 1800 626 267 (for deaf women)

#### Wirringa Baiya Aboriginal Women's Legal Centre

Freecall: 1800 686 587

#### Women's Legal Resource Centre (WLRC)

PO Box 37  
Lidcombe North NSW 2141  
Ph: (02) 9749 5533 or  
Freecall: 1800 801 501  
TTY 1800 674 333 (for deaf women)

#### WLRC Indigenous Women's Contact Line

Freecall: 1800 639 784  
TTY 1800 674 333 (for deaf women)

#### Regional

Blue Mountains Community Legal Centre  
80 Main St  
Katoomba 2780  
Ph: (02) 4782 4155

Campbelltown Legal Centre  
4 Broughton St  
Campbelltown NSW 2560  
Ph: (02) 4628 2042

Central Coast Legal Centre  
114 Pacific Highway  
Wyong NSW 2259  
Ph: (02) 4352 2627

Dubbo Community Legal Centre  
51 Bultje St  
Dubbo NSW 2830  
Ph: (02) 6884 9422

Hawkesbury Community Legal Centre  
13 Bosworth Street  
Richmond NSW 2753  
Ph: (02) 4588 5618

Illawarra Community Legal Centre  
7 Greene St  
Warrarong 2502  
Ph: (02) 4276 1939

Kingsford Legal Centre  
11 Rainbow St  
Kingsford 2150  
Ph: (02) 9398 6366

Macquarie Legal Centre  
94 Harris St  
Harris Park 2150  
Ph: (02) 9689 1777

Marrickville Legal Centre  
338 Illawarra Rd  
Marrickville 2204  
Ph: (02) 9559 2899

Mt Druitt Community Legal Centre  
Shop 7, Daniel Thomas Plaza  
Mount St,  
Mount Druitt 2770  
Ph: (02) 9675 2009

North and North West Community Legal Services  
129 Rusden St  
Armidale 2350  
Ph: (02) 6772 8100

## contacts

Northern Rivers  
Community Legal Centre  
10 Club Lane  
Lismore 2580  
Ph: (02) 6622 3386

South West Sydney  
Legal Centre  
30 Pirie St  
Liverpool 2170  
Ph: (02) 9601 7777

### Specialist Community Legal Centres

#### NSW Disability Discrimination Legal Centre

99/1-5 Meeks St  
Kingsford NSW 2032  
Ph: (02) 9313 6000  
Freecall: 1800 800 708  
TTY: (02) 9313 7190  
TTY Freecall: 1800 644 419

#### Disability Advocacy Service – Hunter

408 King St  
Newcastle West 2302  
Ph: (02) 4927 0111

#### HIV/Aids Legal Centre

PO Box 350  
Darlinghurst 2010  
Ph: (02) 9206 2060

#### Immigration Rights and Advice Centre

Level 4, 414 Elizabeth St  
Surry Hills 2010  
Ph: (02) 9281 8355

#### Intellectual Disability Rights Service

Level 1, 128 Chalmers St  
Surry Hills 2010  
Ph: (02) 9318 0144

#### National Children and Youth Law Centre

C/ University of NSW  
Sydney 2052  
Ph: (02) 9398 7488

#### Public Interest Advocacy Centre (PIAC)

46-48 York St  
Sydney 2000  
Ph: (02) 9299 7833

#### Welfare Rights Centre

Level 5, 414 Elizabeth St  
Surry Hill 2010  
Ph: (02) 9211 5300  
Freecall: 1800 226 028

#### Legal Aid Commission

Head Office  
323 Castlereagh St  
Sydney 2000  
Ph: (02) 9219 5000  
Freecall: 1800 806 913

#### Victims of Crime Bureau

Ph: (02) 9374 3005

#### NSW Police Service Domestic Violence Policy Officer

Head Office  
14-24 College St  
Darlinghurst 2010  
Ph: (02) 9339 5112

#### Complaints, investigative and review bodies

#### Human Rights & Equal Opportunity Commission

Level 8, Picadilly Tower  
133 Castlereagh St  
Sydney 2000  
Ph: (02) 9284 9600

#### Anti-Discrimination Board

Level 17, 201 Elizabeth St  
Sydney, 2001  
Enquiries: (02) 9268 5544

#### Community Services Commission

Level 3, 128 Chalmers St  
Surry Hills  
Ph: (02) 9384 4999  
Freecall: 1800 060 409

#### Community Services Appeals Tribunal

Freecall: 1800 060 410

#### NSW Ombudsman

3rd Floor, 580 George St  
Sydney 2000  
Ph: (02) 9286 1000  
Freecall: 1800 451 524  
TTY: (02) 9264 8050

#### Immigration

#### Review Tribunal

Ph: (02) 9290 7222

#### Refugee Review Tribunal

Ph: (02) 9951 5800

#### Social Security Appeals Tribunal

Ph: (02) 9202 3400  
Freecall: 1800 011 140

## Further reading

Domestic Violence Advocacy Service 1997 – solicitor review and update.

Domestic Violence Advocacy Service 1994, *Domestic Violence Solicitors' and Advocates' Kit 5th Edition plus updates.*

Pearl Watson Foundation and Women's Legal Resource Centre (eds) 1991, *Family Law Kit for Women's Refuge Workers*, Pearl Watson Foundation and Women's Legal Resource Centre.

Public Interest Advocacy Centre 1996, *Working the System* Pluto Press & PIAC.

Redfern Legal Centre 1996, *Domestic Violence Court Assistance: An Information and Training Kit* Redfern Legal Centre Publishing, Sydney.

Women's Legal Resource Centre 1997 – solicitor review and update.

Women's Legal Resource Centre and Redfern Legal Centre Publishing 1997, *Women and Family Law*, Sydney.

## Endnotes

- 1 Informed by NSW Police Service 2000, Domestic Violence Policy and Standing Operating Procedures, page 14
- 2 Informed by NSW Police Service 2000, Domestic Violence Policy and Standing Operating Procedures, pages 14 and 15
- 3 Ibid, page 35
- 4 Women's Legal Resources Centre and Redfern Legal Centre Publishing 1997, *Women and Family Law*, page 6
- 5 Ibid pp 30
- 6 Women's Legal Resources Centre and Redfern Legal Centre Publishing 1997 (reprint 1999), *Women and Family Law*, page 39
- 7 Ibid, page 71
- 8 Ibid, page 71
- 9 Ibid, page 65