

AVOs: provisional and interim orders, drafting statements, variation, appeals & annulment



This fact sheet summarises the Ask LOIS webinar on this topic, presented Alicia Jillard on 3 July 2014. This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- Interim and provisional AVOs
- Exchange of statements
- How can an AVO be challenged after it is made?
- Helping clients prepare statements in AVO proceedings

Apprehended Domestic Violence Orders (ADVOs or AVOs) can be provisional, interim or final. The relevant legislation is the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*

Provisional AVOs

- Provisional AVOs are a type of 'on the spot AVO' for urgent matters and are made for safety and protection of a person(s)
- They are issued where police believe there has been a domestic violence offence or where there is an *imminent or likely risk* of one being committed
- They are deemed to be an application for an AVO
- Their maximum duration is 28 days
 - This is unless the defendant is not at court at the first mention date where a court decides to make an interim order. In these circumstances, the provisional order continues to be in effect until the interim order is served on the defendant

New Police Powers for Provisional AVOs

- Since 20 May 2014, police powers have expanded to help police make faster provisional Apprehended Domestic Violence Orders (ADVOs) and have them served on the defendant (these powers do not apply to Apprehended Personal Violence Orders – APVOs)
- Police no longer need to refer to the Central Justice Panel to make a provisional ADVO. Now, a senior police officer of Sergeant rank and above can determine applications by other police
- Police have expanded powers to direct and detain. There are now six specific new powers of direction, set out in s 89A. These include making the defendant remain at the scene, go to the police station or go to another location and remain there
- If a person does not comply with a direction they may be arrested for the purpose of service. A person resists arrest or assaults police in the course of this process, there may be other charges
- The maximum time a person can be detained for this purpose is 2 hours plus any reasonable travel time
- Police cannot make ancillary property recovery orders (an order to recover the protected person's property from a location) in a provisional order
- Defendants can apply to vary or revoke a provisional order issued by police.

What your client needs to know about provisional orders

If your client is the defendant to the provisional order:

- Seek legal advice, don't breach the order!
- Can apply to revoke/vary order before listed court date, otherwise turn up on first mention date
- If children are listed, only police can apply to vary or revoke the order

If your client is the protected person on a provisional order:

- Seek legal advice

- Defendant may apply to vary/revoke the order (unless children are listed), otherwise turn up on first mention date
- Report any breaches of the orders to police and keep a record of dates/times



Interim orders

- Unlike provisional orders, interim orders are made from one court date to the next
- They can be made by the court if it is *necessary and appropriate* to do so
- Not effective until served on the other party
- On the first court date for a provisional order, if the court finds that it is necessary and appropriate to do so, the court can make an interim order until the final hearing date

Exchange of statements

- If your client is bringing a private application, or is the defendant in a matter (in a contested hearing), they will need to prepare a statement to be exchanged with the other party. If it is a police application, the police will prepare the protected person's statement for them (usually their police statement)
- The rules around exchange of statements are in the *Local Court Practice Note No. 2 of 2012*

What generally goes in a statement?

1. History of relationship between protected person and defendant
2. Background information and context of violence
3. Recent issues in client's own words & using direct speech
4. How the recent incidents made the client feel
5. Fears for the future in relation to the defendant
6. While not essential, it is a good idea for your client to attach any other information they want to rely on, eg, photos, emails, text messages transcripts

Where clients can get further information or assistance with preparing their statement:

- May be eligible for Legal Aid
- Domestic Violence Solicitor Scheme (DVSS) and the Women's Domestic Violence Court Advocacy Service (WDVCAS)
- Community Legal Centres or Women's Legal Services NSW on **(02) 8745 6999**
- Law Access **1300 888 529**
- Law Assist resources - www.lawassist.lawaccess.nsw.gov.au/lawassist/lawassist_avo/
- Private solicitor
- Ask LOIS AVO Exchange of statement factsheet (in the Ask LOIS library under Domestic Violence)

Challenging AVOs

If the court makes a provisional, interim or final AVO, to challenge that AVO, there are 3 types of actions:

- Application to vary, revoke or extend
- Appeal
- Application to annul

If your client is deciding whether or not to take one of the above actions or is at the receiving end of such an application - it is important to refer them on to legal advice

Applications to vary an order

s 73 Variation or revocation of final apprehended violence orders and interim court orders

(1) The court may, if satisfied that in all the circumstances it is proper to do so, vary or revoke a final apprehended violence order or interim court order.



(2) In particular, a final apprehended violence order or interim court order may be varied under this section in any one or more of the following ways:

- (a) by extending or reducing the period during which the order is to remain in force,
- (b) by amending or deleting any prohibitions or restrictions specified in the order,
- (c) by specifying additional prohibitions or restrictions in the order.

- The conditions of a final AVO may be subject to change on the application of a protected person, the defendant or a police officer applicant
- In most cases protected persons and defendants can apply to increase or decrease or otherwise change the conditions of the AVO. For example, changing the details of a home address the defendant cannot approach or adding additional protected persons
- **Exception:** If children under 16 are listed on an order, only the police can apply to vary that order
- If there is more than one protected person on the AVO aged 16 years or over then all additional protected persons must be given notice of any variation applications
- A variation can only be made if there has been a change in circumstances, a court can decline to hear an application where there is no change in circumstances
- **Application to extend** an AVO: the existing AVO will be deemed to continue for a further 21 days. An application to extend must be made at least the day before it is due to expire
- **Application to revoke an order:** revocation of an order means the order ceases, it does not mean the order is taken to have never have been effective. It is most commonly used **after** the AVOs duration is completed. For example, where the defendant wants to apply for a Firearms Licence. Ordinarily a final order prevents any application for a firearms licence for 10 years

Appeals

Defendants, police and protected persons may appeal against interim or final AVO to the **District Court**, because:

- They want more, less, or different conditions
- Because the AVO was or was not made
- Generally there's a **28 day time limit** to appeal after the decision but there may be exceptions
- If a defendant consented to an AVO and then appeals against it, they will need the leave (permission) of the district court to appeal
- In general, AVOs will continue in effect until the appeal is dealt with. However, on the application of the defendant the court may consider 'staying' the operation of the order
- As with ADVOs generally, a court can only order a person making an appeal to pay the professional legal costs of another party if the appeal is frivolous and vexatious, ie, made without substance and/or only with the view to harass and annoy the other party

Referrals for legal assistance with appeals:

- Grant of legal aid for a private solicitor may be available for clients who meet legal aid policy guidelines
- Community Legal Centres (including Women' Legal Services NSW)
- Pro bono (free) assistance through NSW Bar Association & NSW Law Society Solicitor Referral Schemes

Annulment

If a defendant is not at court and an AVO is made against them, they can apply to 'annul' it:

- Application to the **Local Court**
- Must present a good reason for not being at court
- Technical legal test to establish why you had a good reasons for not being at court, including 'illness and misadventure'
- Time limits apply – refer your client to a lawyer

For more information, also see the Ask LOIS webinars and factsheets on AVOs: basics & AVOs: Advanced