

**ITTT CONFERENCE**  
**20<sup>TH</sup> FEBRUARY 2013**

**LAWS PROTECTING CHILDREN**

- Crimes (Personal and Domestic Violence) Act 2007
- Crimes Act 1900
- Criminal Procedure Act 1986
- Children and Young Persons (Care and protection) Act 1998
- Local Court Practice Direction 2 of 2012
- Family law Act 1975

**Crimes (Personal and Domestic Violence) Act 2007**

Definition Section 3: *child* means a person under the age of 16 years

“Child” is relevant to the following sections of the Act:

Section 9 Objects of the Act in relation to domestic violence

Section 16(2) Court may make ADVO

Section 17 Matters to be considered by court

Section 19(2) Court may make APVO

Section 20 Matters to be considered by court

Section 27 Obligation to apply for a provisional order in certain circumstances

Section 35 Prohibitions and restrictions imposed by AVOs

Part 9 Additional measures for support and protection of children and others in proceedings

Section 38 Apprehended violence orders made by court or authorised officer can also protect persons with whom person seeking protection has a domestic

relationship

Section 41 Measures to protect children in apprehended violence order proceedings

Section 42 Consideration of contact with children

Section 45 Publication of names and identifying information about children and other persons involved in apprehended violence order proceedings

Section 46 Right to presence of supportive person when giving evidence

Section 48(3) Making of application for an order

Section 49 Circumstances in which police must make application for order

Section 72(3) Application for variation or revocation of final apprehended violence orders

Section 74(3) Variation or revocation of final apprehended violence orders and interim court orders where more than one protected person

### **Police are required to apply for an AVO:**

- Where the investigating officer suspects or believes that:
  - a domestic violence offence; or
  - a personal violence related stalking or intimidation offence; or
  - a child abuse offence,
- has recently been or is being committed, or is imminent, or is likely to be committed against a PINOP or such charges have been laid.

### **Only Police can apply for AVO's for Children**

Section 48 (3) states that an application for an AVO for a child must be only be applied for by a police officer.

An applicant aged between 16 and 18 is capable of applying for an order or a variation or revocation of the order.

### **Only Police can make application to vary or revoke a provisional/final order:**

Once a provisional order is granted the provisional order remains in force for 28 days. Section 33 (3) states that the only a Police Officer may make an application for the variation or revocation of a provisional order.

Similarly an application to vary or revoke either a final AVO or an interim court order under section 72(3) can only be made by a police officer where one of the protected persons under the order is less than 16 years old at the time of the application.

This is a useful section to ensure that children are protected from the first instance and the defence can not make application to alter the conditions of that provisional order, interim orders or final orders.

### **Considerations by the Court when granting an AVO:**

The paramount consideration for the Court is the safety and protection of the person seeking the order and any child directly or indirectly affected by domestic violence. Children can be affected by domestic violence in so many ways including being directly involved or affected by the violence (eg assaulted or present when assaults take place) or indirectly involved or affected (eg affected by changed moods and behaviours of victim or offender, or mimics their behaviours). Children often see and hear a lot more than their parents etc believe.

In deciding whether or not to make an ADVO the court is to consider the effect that prohibition or restricted access to the defendant's premises, any hardship that may be caused, the accommodation needs of all relevant parties and any other relevant matter. The weighting of these considerations is clearly directed

towards the needs and wellbeing of the protected person and any children involved.

The decision to restrict a defendant from his/her premises is not an easy one to make and may not always result in the best outcome for a protected person. Courts will weigh up the danger of violence together with the hardships faced by the parties (including financial) in making a determination.

In making an order the court is required to only make those conditions necessary for the safety and protection of the protected person and any children. This means that the restrictions and prohibitions must be commensurate with the risk of harm and no more.

Under section 17(4) if the court refuses to include a prohibition or restriction sought, it must give reasons.

### **Additional measures to protect children in AVO proceedings:**

Section 41 allows proceedings which involve children to be heard in the absence of the public unless the court hearing the proceedings directs otherwise. Proceedings involving children include:

- proceedings where an AVO is sought for or proposed to be made where the protected person is a child,
- proceedings relating to a variation or revocation of an AVO if the protected person or one of the protected persons is a child,
- any part of proceedings where an AVO is sought or sought to be varied or revoked in which a child appears as a witness.

Closed courts are a part of the normal process for a Children's Court but are disruptive to a Local Court. Section 41 gives the court a discretion to override section 58 which provides that application proceedings are to be heard in open court. It allows the court to direct a person to leave the court while a witness is being examined if the proceedings involve children, as long as a party to the proceedings is not directed to leave.

During the Second Reading Speeches the Honourable Penny Sharpe (Parliamentary Secretary) stated:

“This bill contains a very important protection for children in response to the argument about adverse impacts on children who have to appear in court. The amendments ensure that in proceedings relating to apprehended violence orders either for the protection of a child or a child as a witness, the court is to be closed to the public in all cases but for an exceptional few.”

***Section 41(4) provides that in some proceedings children should not be required to give evidence in any manner about a matter unless the court finds that it is in the interests of justice for the child to do so.***

Section 41(5) incorporates the provisions of sections 306R to 306ZI of the *Criminal Procedure Act 1986* in matters where children are giving evidence in AVO applications. Section 306U of the *Criminal Procedure Act* allows vulnerable persons to give their evidence in chief via a prior recording, unless this is contrary to the interests of justice. Section 306ZB of the same Act gives a child a right to give evidence using Closed Circuit Television (CCTV).

Section 41(6) provides that for the purpose of subsection 5, the provisions of 306R-306Z *Criminal Procedure Act 1986* apply in the same way they do to criminal proceedings to the giving of evidence of out of court representations by vulnerable persons.

### **Local Court Practice Direction 2 of 2012**

This direction ensures that children are protected if they are required to give evidence in and AVO hearing.

Part 8 'Procedures for protection of children' states if the defendant is unrepresented then they can not cross examine the child witness, the same as Section 306ZL of the Criminal Procedure Act.

### **Court must have consideration of contact with children:**

Section 42 requires that a person who applies for an AVO or the variation of an AVO must inform the court of any relevant parenting order or any pending application of which the person is aware. The court is required to advise the applicant of this obligation.

The court must, in considering whether to make or vary an AVO or interim AVO, consider the safety of the protected person and any children directly or indirectly affected by domestic or personal violence. Subsection (3) provides an inclusive list of considerations for the court. The court may consider other factors. The failure of the court to comply with this section does not invalidate the AVO.

Police can make a one off application under **Section 68R Family Law Act 1975** to suspend any current family law orders or parenting orders. The Court has to be satisfied that it is appropriate to suspend or vary the orders because the child had been exposed or likely to be exposed to family violence. If granted it has effect for 21 days only allowing the parties to attend the Federal Magistrates Court to make any relevant applications to the existing orders.

### **Non publication orders in relation to child in domestic violence proceedings:**

Section 45 provides that the names and identifying information about children who are involved in proceedings **must not be published** prior to the proceedings

being commenced, or after they have commenced and before they are completed. The section also allows the court (including a Registrar) discretion to direct that the name and any identifying information of a person, who is not a child, **not** be published prior to the proceedings being commenced, or after they have commenced and before they are completed.

The section creates two offences:

1. Publish/broadcast name of child, and
2. Publish/broadcast name of adult.

These offence carries a maximum term of imprisonment of 2 years and 200 penalty units for an individual and 2000 penalty units for a corporation. Each penalty unit is currently valued at \$110. The offence is a strict liability offence meaning that mens rea (guilty intent is not a requisite proof. Pursuant to subsection (7) a court may vary or revoke a direction given under this section.

### **Offences:**

The offences of stalking/intimidation S13 and contravene apprehended violence order Section 14 can be found in the Crimes(Personal and domestic violence) Act.

## **Crimes Act 1900**

The majority of criminal offences including domestic violence offences are found in the Crimes Act and they are the same for children as they are for adults.

Specifically Assaults are found in Section 59 and section 61.

Of particular note there is a criminal defence relating to proceedings brought against a person arising out of physical force to a child. Section 61AA is the defence of Lawful Correction.

## **Children and Young Persons (Care and Protection) Act 1998**

The relevant offences in this Act are:

Section 227 – Child and Young person abuse

Section 228 – Neglect of children and young persons

Section 231 – Leaving children and young persons unsupervised in motor vehicles

