

5. Protection against violence and harassment

5.1 Domestic violence

What is domestic violence?

Domestic violence occurs when one person tries to coerce or control another person in a family-like or **domestic relationship**. See ► *Chapter 8* for definition of domestic relationship.

Domestic violence involves an abuse of power and can take the form of physical violence, sexual abuse or sexual violence, emotional or psychological abuse, verbal abuse, **stalking** and intimidation, social and geographic isolation, financial abuse, cruelty to pets, or damage to **property** or threats to be violent in these ways. In the majority of cases, domestic violence is perpetrated by men against women. However, women can be perpetrators of violence in both heterosexual and same sex relationships.

What is the difference between domestic violence and family violence?

The terms 'domestic violence' and '**family violence**' are often interchanged. They both generally refer to violence between two or more people who are connected by a domestic relationship.

In NSW, the terms 'domestic violence' and violence in a 'domestic relationship' are used in the **Domestic Violence Act**. This legislation deals with personal protection orders called Apprehended Violence Orders (**AVOs**).

However, the federal *Family Law Act 1975* (**Family Law Act**) refers to 'family violence'. The definition of family violence in the *Family Law Act* changed in 2012 and acknowledges more types of abuse. See ► *Chapter 8* for the definition of 'domestic relationship' and 'family violence'.

The laws about domestic violence protection orders are different in each state or territory.

Is domestic violence a crime?

Domestic violence is a crime and should be reported to the police.

The police may charge the violent person with assault and/or apply for an **Apprehended Domestic Violence Order (ADVO)** for your protection. Many police stations also have **Domestic Violence Liaison Officers (DVLOs)** who should be helpful and understanding if you report domestic violence. Police can get a temporary ADVO quickly by email to protect you until you can go to court. This type of ADVO is called a **Provisional Order**.

If the victim would like to remain in the house with the children, Police have the power to exclude the violent person from the house.

Police should also remove any firearms from the violent person. If the violent person is on bail for assault or some other crime, you can ask that the person be ordered to report to a police station further away from where you and the children live.

Where do I go if I need to leave my house?

If you need to leave your home in order to be safe from violence, there are organisations that can support you. Women's refuges provide a safe place to stay and some time to work out future plans. Counselling services can help you emotionally and give you a chance to talk over your options. They can also give you referrals for financial help. The Domestic Violence Line can also provide information and referrals to women's refuges in your area. See ► *Chapter 9: Referrals and Resources* for details.

Renting

If you are renting and experiencing domestic violence, it is important that you seek advice from a lawyer or from your local Tenants Advice and Advocacy Service to understand your options.

Removing a perpetrator of violence from the house

If you are a victim of domestic violence, you may want the perpetrator removed from the home. You or a Police officer can make an application for an ADVO and ask for an exclusion order preventing the defendant from entering the property. If the defendant is named on the lease, and you have a final ADVO with an exclusion order that prevents the defendant from entering the property the defendant's tenancy will end automatically.

An interim ADVO, with an exclusion order preventing the perpetrator of violence from having access to your rental property will mean that you can continue to live safely in the property while the interim ADVO is in place. However, an interim ADVO will not end the defendant's tenancy.

Alternatively, if you do not have an ADVO, or you have an ADVO but the ADVO does not contain an exclusion order, you can apply to the NSW Civil and Administrative Tribunal for an order ending the perpetrator's tenancy in the 'special circumstances' of the case (*s 102 Residential Tenancies Act*).

Changing the locks

You can change the locks of your rental property, without the landlord's consent, if you have an ADVO with exclusion order (interim, provisional or final). You can also withhold copies of the new keys from the excluded person. If you do not have an ADVO with an exclusion order, you should seek the landlord's permission before changing the locks.

You want to end your tenancy and leave the property

If you are experiencing domestic violence by someone you have, or have had, domestic relationship with, you can end your tenancy immediately, without penalty, by giving the landlord and any co-tenants a Domestic Violence Termination Notice. A sample Domestic Violence Termination Notice is available from the Tenant's Union or Fair Trading NSW website. The notice you give the landlord **must** include one of the following:

- ▶ a domestic violence order (ADVO), or
- ▶ a **personal protection injunction** under the *Family Law Act*, or
- ▶ a copy of a **certificate of conviction** in proceedings against the relevant domestic violence offender for the domestic violence offence, or
- ▶ a **declaration by one of the following people**: a medical practitioner; an accredited social worker; an employee of a government agency that provides child welfare services; an employee of a non-government agency that receives government funding to provide services to victims of domestic violence or sexual assault, or refuge or emergency accommodation; a Victims Services approved counselor.

The declaration form is available on the Fair Trading NSW website.

Tenant databases

It is common for victims of domestic violence to be listed on tenant databases due to debts they have incurred as a result of abandoning the property or due to damage caused to the property by the perpetrator. If you terminate your tenancy by providing a Domestic Violence Termination Notice you cannot be listed on a residential tenancy data list.

Damage to property

You will not be liable for damage to a rental property, if you can show that the damage was caused by a perpetrator of violence during a domestic violence offence.

5.2 Apprehended Domestic Violence Orders

What is an ADVO and how can it protect me?

An ADVO is a court order that places restrictions on the person who is violent or abusive towards you. In ADVO matters, this person is referred to as the **defendant**. An ADVO can be tailored to your own circumstances so it provides the best possible protection. An ADVO can only stop a person from doing something like, for example, assaulting, coming to the house or destroying property. It cannot order a person to do something, for example, attend counselling or an anger management course.

What is the difference between a domestic violence and personal violence order?

There are two types of AVOs, Apprehended Domestic Violence Orders (ADVOs) and Apprehended *Personal* Violence orders (APVOs). You can apply for an **ADVO** if you are involved or were previously involved in a “**domestic relationship**” with that person. Section 5 of the **Domestic Violence Act** sets out the definition of “domestic relationship”. The definition is broad and includes the relationship between two people living in the same residential facility. A woman’s ex-partner and current partner are also considered to be in a domestic relationship with each other, even if they have never met.



You should apply for an **APVO** if you are not related to or have never been in a domestic relationship with the person, for example, you are neighbours or co-workers.

The information in this booklet is about ADVOs.

Is it a criminal offence if an ADVO is made against me or someone else?

The purpose of an ADVO is to protect you from the future behaviour of the violent person. Having an ADVO against you is not a criminal offence and is not listed on the defendant's criminal record.

If the defendant breaches (disobeys) the ADVO issued against them it can lead to a criminal offence, because it is a breach of a court order. If a breach occurs, the police will investigate the incident and where there is sufficient evidence, charge the violent person. If that person is found guilty of the charge, a criminal conviction can be recorded.

If I have an ADVO, does it mean my partner has to leave the house?

An ADVO does not automatically mean that the defendant has to leave your home. You can still be in a relationship and have an ADVO that orders your partner not to assault, threaten, stalk, harass, intimidate or destroy or damage property, and other orders to suit your circumstances.

How do I get an ADVO?

You can report the violence to the police who can then make an application on your behalf, or you can make a private **application** for an ADVO at your **Local Court**.

If you make a private application, you must explain to the court the reasons why you want an ADVO. You should also tell the court what has happened recently and in the past and why you are fearful. You need to know the address of the violent person. The court will prepare the application, which will be **served on** the violent person and order them to come to court.

What if I need immediate protection?

If you are asking the police to apply for an ADVO for your protection, the police can apply for a **provisional** or **interim** ADVO for your protection. The police will apply for a provisional ADVO when they believe that someone needs immediate protection. A provisional ADVO lasts until it is revoked,

or when an interim or final order is made at court, or the application for a final ADVO is withdrawn or dismissed. The provisional ADVO will not be enforceable until it is served on (formally given to) the defendant by the police.

If you are making a private application for an ADVO, you can ask the Registrar to apply for an interim ADVO.

An interim ADVO application can be considered by the Court even if the defendant is not in Court or aware of the application. However, it will not be enforceable until it is served on (formally given to) the defendant by the police. The interim ADVO will last until the case next comes to court where it can be extended, varied or made into a final order.

Will a lawyer help me at court?

If the police made the application on your behalf, the police prosecutor will represent you in court. You will not need to organise your own lawyer. You will still need to go to court to support the police application for an ADVO for your protection.

If you made the application privately, you can represent yourself or have a lawyer represent you. Legal aid is available in some cases to people who meet the legal aid means test and availability of funds test. There may be a duty solicitor to represent you for free as part of the **Women's Domestic Violence Court Advocacy Service (WDVCAS)**.

What support can I get at court?

Many Local Courts have a **WDVCAS** where you can get help from a court support worker. At a number of courthouses, there are 'safe rooms'. These are women only rooms where you can speak to a court support worker and/or lawyer. Call your Local Court to find out whether it has a WDVCAS and a free lawyer. If not, you should tell the court staff about your safety fears so the Court can make arrangements to protect you from threats of violence and intimidation. See ► *Chapter 9: Referrals and Resources* for more details.

What happens on the first day the application for an ADVO is at court?

On the first day the application for an ADVO comes to court, there are a few possible outcomes:

- ▶ The defendant may come to court and agree to the orders in your application. The violent person can consent to (agree to) an ADVO

without admitting what is in the application is true. This is called 'consenting without admission.' If the defendant consents to the orders you are seeking, a final ADVO will be made that day.

- ▶ If the defendant does not attend court but there is proof that he or she has been served with (received) the application to come to court, the Magistrate can order an ADVO in his or her absence. This is called an *ex parte* ADVO. The Magistrate can also make an interim ADVO if the defendant has not been served with the application. An *ex parte* or interim ADVO is not enforceable until it is served on the defendant.
- ▶ If the defendant has not been served and did not attend Court, the matter will be **adjourned** (postponed) to a later date so the defendant can be served. The ADVO is not enforceable until the order is formally served on (given to) the defendant. The Court can make an interim ADVO for your protection which will be enforceable as soon as it is served on the defendant.
- ▶ If the defendant comes to court but disagrees with the application for an ADVO, the Court will tell the parties to come back on a later date for a hearing. The Court can make an interim ADVO for your protection which will protect you until the hearing. The defendant can agree to this interim order without admitting to any of the allegations or behaviour. If the defendant does not agree to an interim order for your protection, you may need to tell the Magistrate why you need the order. The Magistrate will then decide if you need an interim ADVO for your protection. The Magistrate will also make a date to exchange statements before the hearing date. If the police are applying for an ADVO for your protection, police will draft your statement. If you are the defendant or if you are applying privately for your ADVO, you should get legal advice about drafting your statement. The WDVCS can help refer you for advice. See ▶ *What support can I get at court?* on page 58, and *Chapter 9: Referrals and Resources*.

What happens if my ADVO application goes to a hearing?

At the hearing, the Magistrate will listen to the evidence you give about the violence and/or threats of violence that make you afraid. The Magistrate will also hear the defendant's version of events and then decide on 'the balance of probabilities' whether or not you fear the defendant and if these fears are reasonable. If the Magistrate finds you have fears, an ADVO will be ordered for your protection.

What orders can be made?

Every ADVO includes the order that the defendant must not:

- ▶ assault or threaten;
- ▶ stalk, harass or intimidate;
- ▶ intentionally or recklessly destroy or damage property of;

you or anyone in a domestic relationship with you. This means anyone living with you or in a relationship with you but also includes other family members such as your parents.

These orders are called mandatory orders.

In addition to these mandatory orders the Magistrate can make orders depending on your circumstances. For example, these could be that the defendant must not:

- ▶ go to your home or workplace; and/or
- ▶ approach you (by telephone, text, email, social media or in person); and/or
- ▶ live at your place; and /or
- ▶ contact you except as agreed in writing between you and the defendant about contact with children.

When an ADVO is made the Magistrate can also make an order for you or the defendant to collect personal property. This is called an *ancillary property recovery order*. It can order that the police or another person must also go with the person collecting the property.

The orders in an ADVO stay in place for the time period set by the Court. ADVOs are usually made for two years but could be for more or less time.

What happens after the ADVO is made?

You will be given a copy of the order or interim order by the court staff or a copy will be mailed to you, and the police will keep a copy of it on their central computer. You should keep a copy of the order with you at all times. This will make it easier to tell the police about the ADVO if the order is breached.

The ADVO is not enforceable unless the defendant was in court when the order was made or until the police serve the order on the defendant. If the defendant disobeys the order, the police can arrest and charge the person



with breaching the order. If you think the defendant has breached the order, you should report it to the police.

Important Information

If the violent person breaches the ADVO there are a number of things that you can do:

- ▶ Keep a record of all breaches of the ADVO, no matter how small they may seem to you. This may help to establish a pattern of abusive behaviour over a period of time. Every time the violent person breaches the ADVO write details about:
 - the date and time of the incident;
 - what happened including what the violent person did or said and how you responded;
 - any witnesses who saw or heard what happened; and
 - what you did afterwards.
- ▶ Ask any witnesses to keep a record of the incident and write down what they saw or heard.
- ▶ Collect evidence of the breach:
 - A message from the violent person may be a breach of the ADVO. Save any emails, text messages, messages on social media, voicemail messages or messages on your answering machine. You can then show or play these messages to the police;
 - If you are physically injured, go to the doctor or hospital for medical care and ask the doctor to note your injuries and the cause;
 - Take photographs of any injuries (e.g. bruises or scratches).
- ▶ Report the breach to the police. You can telephone the police or go in person to the police station to make a statement. Use the notes you made to help you make a statement to the police. You should report all breaches of the ADVO to police no matter how small or insignificant they seem to you. By consistently making the reports, you can establish a pattern of abusive behaviour over a period of time.

- ▶ Keep a record of any reports you make to police. Write down:
 - the date(s) you made the report to the police;
 - how you made the report (by telephone or in person);
 - the name of the police station where you made the report;
 - the name of the police officer you spoke to; and
 - the police event number. This is a special number that records the incident on the police computer system.

What if I am still afraid when the ADVO period is up?

If you still fear violence when the ADVO is about to expire, you can apply for an extension of the ADVO. You must apply for an extension of the order before it expires. You should get legal advice about an extension 6–8 weeks before the ADVO expires.

If things change during the period of the ADVO, you can apply to the Court to have the ADVO varied.

If the order has expired and you still have fears, you can apply for a new ADVO.

Can my children and new partner be protected too?

The mandatory orders in an ADVO protect you and any person with whom you have a domestic relationship (such as children and a new partner).

You can also ask that your new partner be named separately as a protected person on your ADVO so that they are protected by any other orders on the ADVO.

If the Court issues an ADVO for your protection, the orders should include any child with whom you have a 'domestic relationship' (unless the Court thinks there are good reasons for not doing this).

Only the police can make an application for an ADVO for children aged under 16.

National Domestic Violence Order Recognition Scheme

AVOs (provisional, interim and final) made in any state or territory on or after 25 November 2017 will automatically be recognised in every other state and territory in Australia and therefore enforceable. For AVOs made



prior to 25 November 2017, an application for registration can be made to a court in the state or territory in which the person is living.

5.3 ADVOs and family law

What if my ADVO was made *before* my family law parenting orders?

If you have an ADVO, any later **parenting orders** that are inconsistent with your ADVO will override those sections of your ADVO. If this happens the Family Courts must state in the parenting order that it is inconsistent with your ADVO, give a detailed explanation in the order about how the children's time with the other parent is to take place, explain the order to all people affected by the order, and serve a copy of the order on other parties and on the police and Local Court.

Where there is an inconsistency the ADVO will be invalid to the extent of the inconsistency. For example:

- ▮ The ADVO states the father is to stay away from the mother's home.
- ▮ The parenting order states the father is to collect their child from the mother's home on Friday at 4pm.
- ▮ The father will not be in breach of the ADVO on Fridays at 4pm but he will be in breach if he goes to the home at any other time.

What if my ADVO is made *after* my family law parenting orders?

If you need to apply for an ADVO and parenting orders are already in place, the Local Court has the power to vary, suspend or discharge the parenting orders to suit the conditions in your ADVO, see ► s 68R of the *Family Law Act*. For example, if you hand the children over at your home or the violent person's home, you might ask to vary the parenting orders so you can hand the children over at a public place. The Local Court can only use this power if it has new material or fresh evidence that the Court that made the parenting order did not have when it made the order.

It is important to tell the Local Court if there are parenting orders in place and provide a copy. You should also take a copy of your family law orders to your local police if you are asking for an AVO for your protection and want orders that are inconsistent with the existing parenting orders.

You can ask the court to vary the parenting orders however in practice, Local Courts are reluctant to use this power to vary parenting orders.

In Family Law proceedings, family violence is a relevant factor for the court in deciding arrangements for children. This means that an ADVO naming the child or a member of the child's family is taken into account when the Court is deciding about the best interests of a child. This includes past and present ADVOs including interim ADVOs.

Can I get protection under the Family Law Act?

If you apply for parenting orders and your partner is violent, you can ask for an **injunction** under the *Family Law Act* to protect yourself and/or your children. An injunction is an order made by the Court to stop or restrain your partner from being violent towards you.

However, applying for an ADVO from the Local Court offers better protection. Breach of an ADVO is a crime and the police can make an immediate arrest.

Can I get counselling or other support after experiencing domestic violence?

The NSW government through **Victims Services** provides free counselling and may provide financial support and a recognition payment for people who have experienced physical or psychological injuries because of domestic violence which occurred in NSW. Victims of domestic violence have up to **2 years to claim** for financial support and up to **10 years to claim** for a recognition payment. See ► *Chapter 9: Referrals and Resources*. There is no time limit for applying for counselling.