

THE CRIMES ACT, THE BAIL ACT, AND THE NSW POLICE: DOMESTICS AND THE LAW

22 September 2006

INTRODUCTION

The purpose of this paper to provide an over view of the relationship between apprehended violence orders and related criminal proceedings. The perspective is that of a defense lawyer called upon to advise a person at the centre of an allegation of domestic violence. I also intend to focus on domestic violence as a legal construct.

There is a strong desire on the part of the legislature to reduce the incidence of and provide protection for victims of domestic violence. This is reflected in various laws that focus on domestic violence. Inevitably the laws relating to apprehended violence orders and bail are used to provide this additional protection.

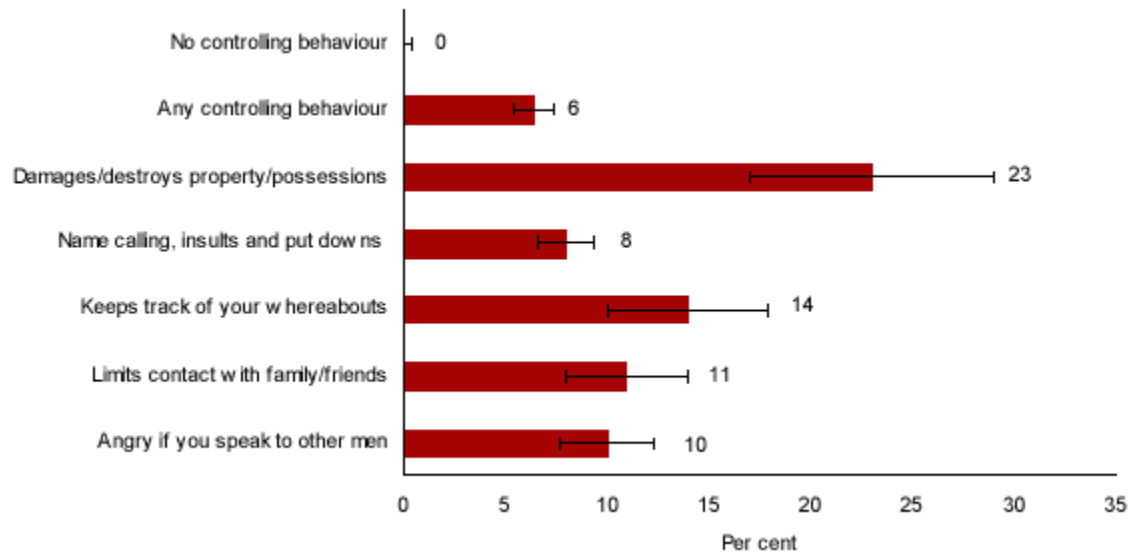
These protections are reflected in the fact that there are significant differences for an accused at the centre of an allegation of domestic assault in terms of the treatment received in the criminal justice system. The treatment is more onerous. These provisions are fundamentally in aid of the prosecution and the assumption that they protect victims of domestic assaults relies on the belief that a victim's interest is closely aligned to that of the prosecution. This is not always the case.

DOMESTIC VIOLENCE

The term domestic violence encompasses a wide range of aggressive behaviors that take place between persons in domestic relationships. Some behaviors are criminal some simply unpleasant. The victims are predominately woman and the perpetrators are mainly men.

The table below is from research conducted by the Australian Institute of Criminology. It includes behaviors that would not generally be classified as criminal. A greater proportion of the behaviors would be classified as criminal once an apprehended violence order is in place against a perpetrator of domestic violence. The definitions are fairly broad but they illustrate the heightened risk that an individual will have of involvement in the criminal justice system once that person is subject to an order.

Women's experiences of current intimate partner violence during the previous 12 months by controlling behaviours (n=5,074)



SOURCE: Australian Institute of Criminology 2004. Controlling behaviours of male partners. *Crime facts info* no. 85, 16 November.

A killing in the home is the ultimate expression of domestic dysfunctionality. Homicide is rare. Despite this, the statistics are fairly grim when it comes to who kills who at home. According to research conducted by the Australian Institute of Criminology, the majority of female homicide victims were killed at home. The victim is almost always in a (bad) relationship with the offender and the killing is commonly precipitated by a dispute over custody of children or termination of the relationship.

The statistics clearly show that men are more frequently victims of homicide but women are overwhelming victims of 'domestic' homicide. Men kill each other when they are intoxicated and argue over money or drugs: women are killed by their partners in the home. The table quoted below is produced from the Australian Institute of Criminology *Crimes Fact Sheet* No.22.

Percentage of victims by alleged motive, 2000-2001



Source: Mouzos, J. 2002, Homicide in Australia: 2000-2001 National Homicide Monitoring Program (NHMP) Annual Report, Research and Public Policy Series, no. 40, Australian Institute of Criminology, Canberra.

The wretchedness of the destruction of a life, and sometimes multiple related lives, in the home colours the approach of all involved to the prevention of domestic violence. These killings are particularly nasty. The author can relate anecdotally that one such killing in an area has an immediate and profound effect on the behaviour of police and judicial officers in relation to 'domestics'. Police are less inclined to caution rather than charge and bail becomes harder to get. The greater awareness of the problem posed by domestic violence is reflected in a number of domestic violence specific laws that have been enacted over the last 10 years.

APPREHENDED VIOLENCE

Part 15A of the Crimes Act 1990 is titled *Apprehended Violence*. Various predecessors to the current Part have been in the NSW Crimes Act since 1951. Orders under the Part are preventative and intended to provide protection against apprehended breaches of the law. They are foremost injunctions against breaches of the criminal law and domestic violence.

A typical order will also prohibit a person from conduct that is less than criminal such as harassing and intimidating the person in need of protection ('PINOP') and stop the defendant attending places frequented by the PINOP. A knowing contravention of an order is a criminal offence punishable by up to 2 years imprisonment.

There is in fact no such thing as an AVO. There are apprehended domestic violence orders (ADVOs) and apprehended personal violence orders (APVOs). The defining characteristic is the relationship between the person in need of protection (PINOP) and the defendant. If you are in a domestic relationship with the one you fear you get an APVO, everyone else gets an ADVO. There is no great difference once an order is in place and the process is broadly similar.

Apprehended domestic violence orders (ADVO) are commonly applied for and obtain in response to an allegation of domestic violence. Frequently the parties will continue to live together or resume cohabitation at some stage during the proceedings. Proceedings for an ADVO will run in tandem with criminal prosecutions generally for assault or malicious damage. The police will apply for the ADVO on behalf of the PINOP. The PINOP will also generally be the main prosecution witness for the criminal charge.

LEGISLATIVE RECOGNITION OF DOMESTIC VIOLENCE.

The NSW *Crimes Act 1900* contains definitions of '*domestic violence offences*' and '*personal violence offences*'. The relevant definitions states:

'Domestic violence offence' means a personal violence offence committed against:

- (a) a person who is or has been married to the person who commits the offence, or*
- (b) a person who has or has had a de facto relationship, within the meaning of the Property (Relationships) Act 1984 , with the person who commits the offence, or*
- (c) a person who has or has had an intimate personal relationship with the person who commits the offence, whether or not the intimate relationship involves or has involved a relationship of a sexual nature, or*
- (d) a person who is living or has lived in the same household or other residential facility as the person who commits the offence, or*
- (e) a person who has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the person who commits the offence, or*
- (f) a person who is or has been a relative (within the meaning of section 4 (6)) of the person who commits the offence.*

'Personal violence offence' means:

- (a) an offence under, or mentioned in, section 19, 24, 27, 28, 29, 30, 33, 33A, 35, 39, 41, 44, 46, 47, 48, 49, 58, 59 (assault occasioning actual bodily harm), 61 (common assault), 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 195 (maliciously destroy*

property), 196, 198, 199, 200 or 562I (contravene apprehended violence order), or
(b) an offence of attempting to commit an offence referred to in paragraph (a).

All the offences that will be commonly charged after a 'domestic' are personal violence offences and capable of being domestic violence offences.

THE MAKING OF THE INTERIM ORDER

The usual scenario where the criminal justice system intervenes in a 'domestic' is where there is an altercation in the home (usually involving a large amount of alcohol), there is a notification, the police attend and the perpetrator is arrested and charged with a personal violence offence and an interim telephone ADVO is made for the protection of the victim.

Section 562H of the Crimes Act deals with the making of telephone interim orders. The section severely restricts the discretion of the police when dealing with allegations of domestic violence. The section provides a capacity for police officers to apply by telephone for apprehended violence orders. Subsection 562H(2A) reads:

*'the police officer attending the incident **must** (emphasis added) make an application under the section if the officer suspects or believes that a domestic violence offence ... has recently been or is being committed, or is imminent, or is likely to be committed , against the person for whose protection an order would be made.'*

If the attending police officer declines to make an interim telephone order in the face of an allegation of a domestic violence offence, the police officer must provide written reason as to why an order wasn't applied for. There is no equivalent provision concerning charging an accused with a domestic violence offence but it appears, from my experience, if the police attend and an interim order is applied for, a charge of some description is likely. This is for the simple reason that the criteria that demand that an order must be applied for are very similar to that necessary to charge a person.

If, for some reason, the police officer forgot to get the telephone interim order, the court who subsequently deals with the accused must make an interim order. Section 562BF requires a magistrate to make an interim apprehended violence order when a person is accused of a domestic violence offence. The section uses the word '*must*' although the court can decline to make the order if it is satisfied that an order is not required. Once again, reasons must be given.

An interim telephone order and an interim court order all serve as applications under the Part.

BAIL

Making bail harder to get for an accused is one of the ways that the Parliament expresses the community's condemnation of certain allegation of criminal conduct. Bail is an interlocutory order allowing an accused to be at liberty and designed to ensure the accused's attendance at the next court date. It is not about punishment although the protection of witnesses is a legitimate concern and also whether or not the accused will re-offend in determining bail. Bail is generally about the strength of the prosecution case, the accused's community ties and whether or not the accused will attend court on the next occasion.

According to the *Bail Act* 1978, there is a presumption of bail for all offences (section 9, Bail Act) except for offences where there is no presumption of bail or where there is a presumption against bail. In making a determination as to bail and irrespective of any presumption in favour of or against bail, the court is required to take into account the considerations specified in section 32 (so far as reasonably ascertained) and only those considerations: subsection 32 (1). The considerations are, in summary, the probability of the applicant appearing in court in respect of the offence, the interests of the applicant, the protection of any particular person or persons, and the protection and welfare of the community.

If there is a presumption against bail, this does not mean that a person to whom the presumption applies cannot get bail. The applicant has to displace the onus and make out his or her case for bail. Especially for serious offences, a presumption against makes bail much harder to get. Historically, the Bail Act was first modified for serious drug offences (section 8A). The general approach is that when the presumption for bail is restricted, the applicant's community ties and antecedents become less significant and the strength of the Crown case is the prime consideration (see: **Iskandar** [2001] NSWSC 7).

There are a number of provisions of the Bail Act that will be relevant in relation to situations involving domestic violence.

First, section 9A of the Bail Act removes the presumption in favour of bail for certain domestic violence offences and the offence of contravening an apprehended domestic violence orders. Most of the common offences that will be charged after a '*domestic*' carry a presumption in favour of bail. Subsection 9A (1A) removes this presumption for an accused persons with a '*history of violence*' or violence to another person in the past (whether convicted or not) or who has a failure to comply with bail conditions. According to the section, an accused will have a '*history of violence*' if the accused has been found guilty within the last 10 years of a personal violence offence or an offence of contravene an apprehended violence order by an act of violence. In relation to the more general criteria namely that the accused has been violent to another persons in the past, the prosecution can trigger this by presenting bail facts that detail the applicants

violent past. This can include allegation such as repeated attendances by the police at the home that did not result in proceedings.

Section 9B of the Bail Act will also apply to a recidivist. Section 9B creates an additional exception to the presumption in favour of bail for persons charged with further offences on bail or subject to a good behaviour bond.

Section 9D of the Bail Act states that bail should only be granted in exceptional circumstances to a person in respect of a '*serious personal violence offence*' if the applicant is a repeat offender. Serious personal violence offences are not the same as personal violence offences. Significantly common assault, assault occasioning actual bodily harm and malicious damage simpliciter are not serious personal violence offences. Section 9D concerns murder, malicious wounding and sexual assaults and will not apply to most domestic assaults. This provision will apply to extreme examples of domestic violence.

A magistrate when considering a grant of bail will look at an applicant's history and past compliance with court orders. Irrespective of section 9A, a history of contravening courts orders will not assist an applicant when he or she is asking a judicial officer to allow him or her to be at liberty pursuant to a court order. Police will likely refuse to grant police bail in circumstances where an accused is a repeat offender or on bail.

A fundamental condition of bail is to be of good behaviour for the duration of the bail. Any conditional bail can have conditions similar to any interim order. Accordingly, misbehaving whilst on bail can constitute a contravention of the interim order. Breach of Bail is not an offence. There is an offence of failing to appear. Any breach of bail can cause the bail to be re-determined on the basis of section 9A. In practice the accused will be arrested, refused police bail and then brought before a magistrate to have a bail determination made.

THE COMPELLABILITY OF WITNESSES

The main prosecution witness often gets less enthusiastic about giving evidence for the police as time elapses. Practitioner will be frequently confronted with questions about '*dropping the charges*'. The correct reply to this is of course that the continuance of the prosecution is a question for the police.

Often in cases concerning domestic assaults, and proceedings for apprehended violence orders, the prosecution will be relying on only one witness. Once this witness becomes unreliable, the prosecution's reasonable prospect of a conviction disappears.

From my experience, an absence of reliable evidence does not deter the NSW police in continuing a prosecution. The NSW police will not discontinue a prosecution concerning domestic violence on the basis that the principal witness

does not want the matter to proceed. Many prosecutions fail due to the reluctance of the complainant to attend and give evidence. There is no property in a witness and there is nothing wrong with a practitioner talking to any witness in a proceeding if that witness is willing to communicate with the practitioner. Practitioners should deal with prosecution witnesses with carefully.

The basic consideration for both practitioners and accused is that any witness must not be in any way influenced about his or her evidence. Suborning perjury or perverting the cause of justice is a serious criminal offence. Any practitioner should make it very clear to an accused that if he or she seeks to influence any witness in giving anything less than a complete and truthful account of events that this is a serious criminal offence. From a practitioner point of view, if the accused and complainant attend a conference together, I usually ask the accused to leave the room and clarify with the complainant that he or she is not being put under any pressure to seek the withdrawal of the prosecution. I also obtain signed instructions to this effect.

The witnesses should have the effect of being subject to a subpoena explained to them. Further, the witness should also have some of the practicalities of giving evidence explained. It should be noted to the witness that if he or she gives evidence that contradicts his or her earlier statement, the witness could be declared an unfavourable witness in terms of section 38 of the Evidence Act.

There is a qualified spousal privilege provided at section 18 of the *Evidence Act* 1995. A person who, when required to give evidence, is the '*spouse, de facto spouse, parent or child of a defendant*' may object to being required to giving evidence. According to subsection 18(6):

A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:
(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence.

The court should also have regard to (according to subsection 18(7):

(b) the nature and extent of that harm outweighs the desirability of
(a) the nature and gravity of the offence for which the defendant is being prosecuted,
(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,
(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,

(d) *the nature of the relationship between the defendant and the person,*
(e) *whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.*

The objection needs to come from the witness and generally should be made when the witness is called to give evidence. As a matter of practicality it can be made at the start of the prosecution case as frequently, if the objection succeeds, the prosecution will not have a prima facie case.

Section 279 of the *Criminal Procedure Act 1986* is titled *Compellability of spouses to give evidence in certain proceedings*. The section appears to be designed to clarify that spouses are compellable against each other in domestic violence offences. Section 279 is much narrower than section 18 of the Evidence Act. The section also provides a means for spouses to be excused from giving evidence if the spouse wishes to be excused and does so 'freely and independently of threat or any other improper influence', their evidence is 'relatively unimportant' and other evidence is available and if the alleged offence is of a minor nature. Further, the court must state its reason for excusing the witness and record those reasons. The provision is significantly more restrictive than section 18. Theoretically any person who is the sole witness to a minor domestic assault and in a relationship with the accused should not be excused from giving evidence due to section 279.

As a subsequent specific enactment designed to deal with domestic violence section 279 qualifies the earlier general enactment of section 18. Section 279 applies to domestic violence offences, section 18 to other proceedings.

SENTENCING CONSIDERATIONS

Common assault is punishable by 2 years imprisonment. A person who knowingly contravenes a prohibition or restriction specified in an order (section 562I, Crimes Act) is also guilty of an offence that carries a maximum of 2 years imprisonment. The 2 offences can be constituted by identical facts. The offence created by section 562I can be committed when an offender does things that would not constitute an assault. Contravention of an order will generally be considered a more serious offence as it involves the addition element of a breach of a court order. Offenders are routinely imprisoned for serious or repeated contraventions of orders.

After a finding of guilt, the sentencing tribunal in NSW for a NSW criminal offence is required to sentence a person in accordance with the aggravating, mitigating and other factors set out in section 21A of the *Crimes (Sentencing Procedure) Act 1999*. This section is a part codification of sentencing principles and needs to be scrutinized in relation to any serious criminal offence. An element of an offence cannot be an aggravating factor (**Ibrahimi** [2005] NSWCCA 153).

Contravention of an order is an element of the offence of contravention of an order. Therefore disregard of a court order is not an aggravating factor. Many magistrates sentence persons who are convicted of contravening an order on the basis that disregard of the order is an aggravating factor. It is not and some regard should be had to fact that the Parliament has determined that it has the same maximum penalty as common assault.

One of the reasons why contravention of the order is a serious offence is that offenders will frequently be recalcitrant. Offenders should be warned about some of the risks of persisting in their recalcitrance. According to section 22 of the Crimes Sentencing Procedure Act, a plea of guilty must be taken into account. Running a hearing and forcing the victim to give evidence will not '*facilitate the course of justice*' as the High Court in **Cameron** (2002) 76 ALJR 382 sought to characterize what was previously known as the utilitarian discount.

The guideline judgment on pleas of guilty is still relevant and according to **Thomson & Houlton** (2000) 49 NSWLR 383, the utilitarian value of a plea should be assessed in the range of 10-25%. This is before other considerations such as contrition are taken into account. A discount of 25% is a fairly common for a plea of guilty.

Alcohol may aggravate an offence as it demonstrates reckless or mitigate as it show that an offence is out of character: **Coleman** (1990) 47 A Crim R 306.

The fact that an offence is committed by a person in a domestic relationship with the victim is not an aggravating factor. The courts have nevertheless made it clear that a domestic context does not excuse an offence or make it less serious.

In **Powell** (1999) NSW CCA 13 March 2000, the Court of Criminal Appeal emphasized in the case of an Aboriginal offender with a history of disadvantage and alcohol abuse that '*violent acts in domestic situations must be treated with real seriousness*'.

Similarly in **Fahda (Abdulrahman)** [1999] NSWCCA 267, the Court of Criminal Appeal, stated in relation to a violent assault by an mentally disturbed man on his wife (at 26):

Generally speaking, as a matter of public policy ... a merciful attitude by the victim of an offence of domestic violence ought not to influence a sentencing decision - any more than an unforgiving or vengeful attitude by the victim ought to do so. Domestic violence is a problem of considerable proportions in this community and the courts must be strong to ensure that it is adequately punished. Victims ought not be placed in a position where they hold, or appear to hold, the keys to the offenders' release. To put them in

that position is to impose on them a burden they ought not be required to bear.

In **Fahda**, the Court of Criminal Appeal traversed some well known authorities concerning the application of general deterrence in relation to persons affected by mental illness or a developmental disability. In **R v Letteri** (unreported, NSW CCA, 18 March 1992) Badgery-Parker J said:

*There is ample authority for the proposition that in the case of an offender suffering from a mental disorder or abnormality, general deterrence is a factor which should be given relatively less weight than in other cases because such an offender is not an appropriate medium for making an example to others: **Moonie** (sic) (CCA Victoria, unreported 21 June 1978); **Anderson** (1980) 2 A Crim R 379; **Kilmartin** (1989) 41 A Crim R 22; **Man** (1990) 50 A Crim R 79; **Currie** (CCA unreported 25 February 1992).*

It should be noted that while general deterrence may be diminished, in the case of mentally unwell accused who continually commits serious domestic assaults specific deterrence will fill the vacuum. Incapacitation is also an implicit consideration in such matters. Mental illness will not necessarily assist an offender avoid punishment.

Suspended sentence under section 12 of the Crime (Sentencing Procedure) Act 1999 should be approached with care. Once a section 12 bond is breached the best that an offender can do is periodic detention. Frequently such bonds are for durations that are longer than what would be the appropriate sentence of imprisonment. There are also issues with the setting of the ratio between non-parole period and the head sentence and the finding of '*special circumstances*'. The current position of the Court of Criminal Appeal is that the ratio should be set at the time that the bond is given rather than when it is quashed which means that an offender's circumstances at the time of effectively being sentenced are not taken into account (see: **Tolley** [2004] NSWCCA 165).

CONCLUSION

In 1988, the then Chief Justice of NSW Street noted in **Bradford** NSWCCA 6 May 1988 in relation to a appellant who had very badly beaten his wife and then resumed cohabitation with her that '*punishment can properly be tempered in the light of the victim's attitude.*' This approach that reflected a view that there was something private about domestic violence has been comprehensively rejected.

The various provisions the subject of this paper are in combination all designed to ensure that a crime committed in the home is treated as serious as a crime committed in a public place against a stranger. The ultimate objective is the reduction of violence which is an undeniably powerful one.