

The law and domestic and family violence

The legal system in NSW has two ways of responding to domestic and family violence:

- preventing future violence, through apprehended domestic violence orders (ADVOs)
- dealing with crimes that have already occurred. If there is evidence that a crime has been committed, a defendant will be charged with a criminal offence.

Apprehended domestic violence orders

What is an ADVO?

An apprehended domestic violence order or ADVO is an order that a court makes to protect people. The order tells the defendant what they must not do. The defendant must obey the order.

The ADVO will refer to you as the 'protected person' or 'the person in need of protection', and 'the defendant' is the person whose behaviour the order restricts.

The Local Court process for ADVOs

The application: Under NSW law, if a police officer has a concern for your safety they can apply to the Local Court for an ADVO on your behalf. You can also contact a police station to discuss the need for an ADVO.

You can also apply directly for an ADVO at any Local Court registry.

If possible, it is best to have police apply for the ADVO, as they know the legal process and can represent you in court.

Provisional or interim order: If police apply for an urgent order after they attend an incident of violence, it is called a provisional order. A provisional order is a temporary ADVO and lasts for 28 days, or until the Court makes another order.

If you need immediate protection and apply directly to the Local Court, the Court may make an interim order. This order lasts from one court date to the next, until the magistrate makes a final decision. An interim order can be made without the defendant being notified first. If you need an urgent order, explain why you need it to Local Court staff.

Both provisional and interim orders can be enforced once a copy has been given to the defendant.

The mention: The first time you go to court is called a mention. A number of things will happen there:

- the magistrate will check to see that the defendant has been 'served' or given a copy of the application notice. If the defendant has not been served or is not at court the magistrate may adjourn or postpone the case for a week or so to allow the defendant to be in court

- the magistrate will ask the defendant whether they agree to the order, do not agree or 'consent without admissions'. Consent without admissions means that they do not admit that anything occurred, but agree that the Court can make an ADVO. If they agree or consent without admissions an order will be made immediately

- If the defendant does not agree to the order, the magistrate will set a date for the protected person and the defendant to come back to court for a hearing. Sometimes there will be another mention before the hearing to allow the defendant to seek legal advice, or for another legal reason. Check with the Local Court registry or the police officer in charge of your case about when the matter will come back to court

- The magistrate will ask which orders are requested on the ADVO. Changes to a provisional order can also be made at this time. Information about the types of orders that can be made is included later in this section

- The magistrate may make an interim order or continue a provisional order. An interim order is in place until a final decision is made. The defendant must obey an interim or provisional order.

The hearing: At a hearing the magistrate examines the evidence and makes a decision about the ADVO.

You may be asked to give evidence about what happened to make you feel fearful. There are different steps to giving evidence in a court case:

- **Evidence-in-chief** is when the police prosecutor asks you questions about what happened

- **Cross-examination** is when the defence lawyer asks you questions

- **Re-examination** is when the prosecutor sometimes decides to ask you more questions

- **The magistrate** may also ask you questions about your evidence.

If police applied for the order, a prosecutor will question you, the defendant and witnesses.

In private applications your solicitor will ask the questions. If you do not have a solicitor to represent you, you will need to ask questions of the defendant and witnesses. The Women's Domestic Violence Court Advocacy Service (WDVCAS) may be able to help you to arrange legal representation. Contact LawAccess on 1300 888 529 to find out if there is a WDVCAS in your area.

The magistrate's decision: The magistrate's decision is based on whether your fear and/or the fears that police hold for your safety are reasonable. The magistrate will decide on the balance of probabilities whether there are reasonable grounds to make an ADVO.

The magistrate can make an ADVO even if you are not at court, if they are satisfied that you have been a victim of physical abuse and an ADVO is necessary to protect you from future violence.

If the ADVO is not granted, you can appeal this decision within 28 days.

Appealing the decision: If the Local Court or Children's Court dismisses an application for an ADVO, either you or the prosecutor may lodge an appeal in the District Court. The appeal notice must be made within 28 days after the original ADVO application was dismissed.

The staff at your Local Court office can give you information about making an appeal to the District Court for an ADVO. Contact the Police if a police officer made the original application. If you made the application, it is recommended that you arrange legal representation through Legal Aid NSW or by hiring a solicitor.

What orders can a court make?

Standard orders

All ADVOs contain standard orders that the defendant must not:

- assault, molest, harass, threaten or interfere with you
- intimidate you
- stalk you.

These three mandatory conditions also protect anyone in a domestic relationship with you, such as your children, or a new partner.

Other orders

A court can also make orders telling the defendant that they must not:

- live in the family home
- approach or enter places where you live, work or visit regularly
- approach or contact you
- go to your children's school or child care centre
- approach you, or places you may be, after drinking alcohol or taking drugs
- possess any firearms
- damage your property.

The magistrate can also make other conditions as needed. You can discuss the need for other orders with a Police Domestic Violence Liaison Officer (DVLO) or domestic violence support worker, who can ask the police prosecutor to request that the orders be made.

Exclusion orders

An exclusion order within an ADVO restricts the defendant from living in your home, visiting or going near your home. This kind of order can be made if the defendant normally lives with you, even if they own the home.

The Court will look at a number of things when deciding, such as:

- the safety and protection of you and your children, if such an order is not made
- any hardship it may cause
- the accommodation needs of you and your children, and the defendant.

When deciding whether you should ask for an exclusion order, think about your safety and discuss this carefully with a support worker. They can help you consider the risks and benefits.

It is important that you talk about this option with a lawyer, court support worker or police officer when you apply for an ADVO.

Some areas of NSW have a Staying Home Leaving Violence (SHLV) project. The program gives support and help to women who want to remain safely in the family home or another home of their choice. Contact the Community Services Domestic Violence (DV) Line on 1800 656 463 to see if there is a SHLV project in your area.

Property recovery orders

A magistrate can also make an order to allow you to recover your property from the defendant, or allow the defendant to collect their property from your home. This kind of order is not intended to resolve disputes about who owns personal property, but it can ensure that items can be recovered without further problems occurring.

You, the police, or the defendant can request the order, or the magistrate can decide that it is necessary. The order can specify the items to be collected, the time of collection, and whether the defendant must be accompanied by the police or another person. Such an order does not mean that a person has the right to enter another person's property by force.

Property recovery orders can only be made at the same time the Court is making an interim, provisional or final ADVO.

Criminal charges for domestic violence

If a person is charged with a criminal offence, the legal process can be different depending on the seriousness of the charges.

Most charges for domestic violence are heard in the Local Court and prosecuted by a police prosecutor. Matters such as sexual assaults or physical assaults where someone is badly injured might be transferred to the District Court where the NSW Office of the Director of Public Prosecutions prosecutes the case.

Local Court process if a person is charged

After an incident of domestic violence police will investigate and collect any evidence. If they find evidence that a crime was committed, police will charge the accused with an offence. If the offence is against a person with whom they are in a domestic relationship (a partner, ex-partner, family member or someone they live with), this is called a domestic violence offence.

If a person is charged with a domestic violence offence, police are required by law to apply for an ADVO. Generally the Local Court will deal with the criminal charges and the ADVO at the same time.

An overview of the process

Police prepare a brief of evidence: When someone is charged with an offence, a police officer must prepare a brief (or folder) of evidence. It will include all relevant witness statements, photographs and other evidence.

A copy of the brief of evidence must be given to the prosecutor and to the accused or their legal representative. In domestic violence cases, key parts of this brief are provided the first time the case goes to court in order to reduce the time it takes to go through the court process. The rest of the brief will be served at a later time if the matter is defended.

The mention: The first time the matter goes to court is called a mention. The process for mentions of charges in the Local Court is similar to the ADVO process and is described earlier.

The accused is asked whether they are prepared to enter a plea (they either plead guilty or not guilty). If they have not yet had legal advice they will be given the opportunity to do so. If so, the Court will adjourn (reschedule) the matter for a week or more.

In criminal cases there is often more than one mention. It is important that you know when you need to return to court. You can find out when the next court date is from the police or court staff.

If the accused pleads guilty there will be no hearing and the matter will go straight to sentencing.

The hearing: A hearing for a charge is also similar to the ADVO process, which is described earlier. At a hearing the magistrate listens to or examines the evidence and makes a decision about the charges.

At the hearing you may be asked to give evidence about the events that led to the charges. The accused and other witnesses may also give evidence. For more information about giving evidence at court see Fact Sheet 3 – *Preparing for Court*.

In a criminal matter, the prosecution must prove their case 'beyond reasonable doubt'. This differs from an ADVO, where the magistrate decides 'on the balance of probabilities'.

Sentencing: In criminal cases, if the accused is found guilty the magistrate may give a sentence such as a bond, fine or prison sentence or other penalty.

If the magistrate needs more information to help them decide on the appropriate sentence, sentencing may take place on another day.

Appeals: Sometimes an appeal is made to the District Court to have the conviction overturned or the sentence changed.

If there is an appeal the Office of the Director of Public Prosecutions will take over the case instead of the Police. A crown prosecutor will act on behalf of the victim in court, instead of a police prosecutor.

Frequently asked questions about the legal process, charges and ADVOs

Q When does an ADVO begin and end?

- A** If the defendant is in court when an ADVO is made, the order begins immediately. If the defendant is not in court when an ADVO is made, the order will not begin until they are given or 'served with' a copy of the ADVO.

The ADVO will last for the period of time written in the order. Orders usually last one or two years. The magistrate can make a longer order if there are good reasons for doing so.

Q Is an ADVO a criminal charge?

- A** No. An ADVO is not a criminal charge so the person named in the order will not get a criminal record. It is a crime to disobey an ADVO.

Q What happens if the defendant disobeys the ADVO?

- A** If the defendant disobeys any of the orders in the ADVO, contact police immediately. Call '000' if you are in immediate danger, otherwise go to your local police station and report the breach as soon as possible.

If the defendant disobeys an ADVO, they are seen to 'breach' or 'contravene' the order, and may be arrested and charged. The maximum penalty for disobeying an ADVO is two years' imprisonment and/or a fine of \$5,500.

Q What if I don't want the ADVO?

- A** Sometimes victims are fearful or reluctant about taking out an ADVO. To lessen the pressure victims might get from defendants, the law says police must take action if they have concerns for the safety of a victim—even if the victim does not want an ADVO. Talk to a police officer about any concerns you have and why they are making a court application.

Q Can an ADVO be cancelled or changed?

- A** ADVOs can be changed or cancelled by applying to the Local Court. If children are named on the ADVO, then only the Police can ask the court for it to be cancelled or changed. If you would like more information about changing or cancelling an ADVO, contact your Police Domestic Violence Liaison Officer (DVLO) or Local Court office.

Q Can an ADVO be extended?

- A** Yes. Before the order expires, if you still have fears for your safety you can apply to have the order extended. If a police officer applied for the order, discuss an extension with the DVLO or contact your Local Court registry. Try to apply to the court at least six weeks before the order expires to avoid having to apply for a new order.

Q Is there any cost for applications for an ADVO?

- A** There is no cost to apply for an ADVO, however, in cases where the Local Court believes that an application is frivolous (where there is no real basis for one) or vexatious (where it is made to threaten or annoy the other person) the court can award costs against the applicant.

Q What is a cross application?

- A** A cross application is where the defendant applies for an ADVO against the protected person. If a defendant makes a cross application the Local Court is obliged to consider their application. Support and legal representation for women who are defendants in ADVO matters, including cross applications, may be available from the Women's Domestic Violence Court Advocacy Service (WDVCAS).

Q Do I need a solicitor?

- A** If police apply for your ADVO, the police prosecutor will usually represent you in court, so you will not need a private solicitor.

If you applied for an ADVO yourself, you can have a solicitor represent you, or you can represent yourself. Representation for women in private applications for ADVOs may be available through the WDVCAS.

Q Is my family protected by the ADVO?

A The standard orders in an ADVO automatically apply to people who are in a domestic relationship with you. They protect members of your family, your children, or a new partner, if they are also at risk of violence from the defendant.

If additional orders are required to protect these people, you can ask the Local Court to have them named on the order. Talk to the Police DVLO about this, or if you are applying privately for the ADVO, explain to the magistrate why there are also concerns for their safety.

In NSW the law requires that children of the protected person are named on an ADVO, unless there is a good reason for not doing so. If children are named on the ADVO, this can affect orders made by the Family Court. If you have children it is important to get legal advice about the implications of the ADVO.

Q Can children apply for ADVOs?

A If you are a child or young person aged under 16 years a police officer must apply for an ADVO on your behalf. They must also apply to change or revoke the order.

Q Where can I get more information about ADVOs or criminal charges?

- A** LawAccess NSW on 1300 888 529 or on their website www.lawaccess.nsw.gov.au
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- Wirringa Baiya Aboriginal Women's Legal Service on 1800 686 587
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- Domestic Violence Liaison Officer at your local police station
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- Women's Domestic Violence Court Advocacy Service at your local court – for details visit the website at www.legalaid.nsw.gov.au and go to >get legal help>specialist services
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- Department of Justice and Attorney General's Victims Services website at www.lawlink.nsw.gov.au/vs Justice Journey section
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- Women's Legal Services NSW – Domestic Violence Advocacy Service on 02 8745 6999 or Rural Free Call Line 1800 810 784.

Information about where to get help and support is available in *Your Court, Your Safety* online at www.lawlink.nsw.gov.au/cpd