NSW Legislative Council Hansard

CRIMES AND FIREARMS LEGISLATION AMENDMENT (APPREHENDED VIOLENCE ORDERS) BILL

Bill introduced, read a first time and ordered to be printed.

Second Reading

The Hon. JOHN TINGLE [2.49 p.m.]: I move:

That this bill be now read a second time.

Let me make one thing quite clear from the start: This bill is not about dismantling the apprehended violence order [AVO] laws; it is about trying to make them more sensible, more fair and more workable and to remove some glitches that allow these laws to be used in a way that was never intended and result in injustice flowing from their use. Let me explain what I mean. The whole concept of creating a system of apprehended violence orders was and is a good thing. I remember when it was introduced the Attorney General at the time stressed that it was particularly intended to give women some protection against men who might have inflicted physical injury on them or who might be likely to do so. It was particularly focused on the sort of domestic violence that occurred between spouses or partners sharing a domicile, and nobody could object to that. A man who takes advantage of a superior strength to hurt or intimidate a woman is beneath contempt and outside the pale of decency.

Long before these laws were even thought of, I had a female work colleague who regularly turned up for work with black eyes, which she tried to hide with dark glasses, and with visible bruises, which were much harder to hide. When her work colleagues expressed concern for her, it turned out that her husband was a sadist of the worst sort. They had a little boy whom the husband used as a weapon against his wife. He threatened to beat up or kill the boy unless she submitted without fuss to almost nightly beatings. In fact, she was not allowed to try to defend herself and was warned if she screamed or made a noise that might alert the neighbours he would take it out on the boy. On occasions he made the boy stand outside a window on a high ledge in the darkness and told the woman he would push the boy off if she resisted or if she delayed the beating, the boy might tire and fall off.
The neighbours did become aware that something was wrong because of her constant bruises. One night they could hear the sound of the beating through the wall and called the police. When the police arrived the husband told them nothing was wrong and that his wife had fallen down the stairs. She was forced to back up his story for fear he would hurt or kill her son. Eventually, of course, she fled with the boy. But she did not have the protection of laws like this, nor of a refuge, and her husband has never been brought to account or punished for several years of deliberate brutality. I mention this case to stress that I have no brief for domestic violence or threat of violence under any circumstances, and with a knowledge of the history of this and other cases I have always welcomed the concept of apprehended violence orders as a crucial shield against violence.

However, the AVO—good idea that it was—has gone astray. What was intended as a shield has become a weapon, often used maliciously, frivolously and vexatiously. I will offer some examples. It is a common understanding in the legal fraternity that in a marriage break-up a wife is likely to be told by her solicitor that she should take out an AVO against her husband. This is designed to put the husband at a disadvantage in the divorce negotiations by having to fight an extra action in court. It is the AVO being used as a lever or a bludgeon. If the husband also owns firearms, an AVO against him becomes an even greater lever to force him to agree to the wife's terms in a divorce. The point is that when an AVO is confirmed the husband will lose his firearms licence and firearms and will be unable to hold another licence for at least 10 years.

I point out that I am using a generic description of the situation and I would not want it to be thought that this is all about women lashing out at men. I know of many cases in which the gender roles have been reversed and a husband has taken out punitive AVOs against his wife. I have had a box full of letters about the wrongful use of AVOs sitting in my office since I first gave notice of this bill and the word spread. A man in the Central West whose marriage broke down five years ago, who had an AVO taken out against him and whose ex-wife has since remarried and lives 1,350 kilometres away from him in another State, is still subject to the AVO because she refuses to agree to its revocation. There was no violence or threatened violence in their relationship and they have not seen each other for several years, but he still carries the stigma of the AVO, which he sees as retributive punishment by his ex-wife. I agree.

A man on the mid North Coast suffered a marriage break-up. His children remained with his wife in a different part of the town. One of his children was given a pet rat and the wife refused to have it in her house. He agreed to keep it for the child. Subsequently that man became the victim of an AVO taken out by his daughter, who said that she feared he might harm the rat. Of course, that was claimed as vicarious violence to the daughter. I have many more examples, and some of them are just as bizarre as a protected rat. I had intended to read extracts from the piles of letters and other documents I have, but I formed the view that to do so anonymously would make it much less effective and to detail the names of the people concerned would be an invasion of their privacy. In any case, any honourable member who has any knowledge of

AVOs will know how prolific they are and how easily issued. They are virtually available for the asking. Anyone can have an AVO fall on them without warning from the clear blue sky and be immediately put to the trauma and expense of having to defend it in court.

The subject of the AVO is also placed at an even greater disadvantage because, while the person taking out the AVO may get legal assistance for the court case, the defendant does not. Courts spend a great deal of time dealing with AVOs. I have been advised that the Bankstown Local Court spends about 30 per cent of its time dealing with them. I put that to the Attorney General in an estimates committee hearing a few weeks ago and he said that he believed it was possible that that was the proportion of AVOs in the matters dealt with by the court. However, he then added that he also believed that in many courts in New South Wales the ratio could be even higher. That suggests either that we have become a much more violence-prone society or that the AVO device is being overused. I believe the evidence supports the latter case.

I have spoken to a number of legal people about this phenomenon. I am particularly grateful for the detailed advice of Stephen Mainstone of the law firm Macedone Christie Willis of Jannali. He has considerable experience of these cases and he has helped me to prepare this legislation and negotiate on it with the Attorney General's office. Not being a lawyer, I found it to be a bewildering labyrinth that became much more confusing the further I went into it. There is a commonly held view among the lawyers to whom I have spoken that the AVO, whether it be a domestic violence order or a personal violence order, is used too frequently and too readily for sometimes flimsy reasons. However, the main cause of its proliferation is the way it is usually obtained.

We have a catch-22 situation particularly affecting the police. It has been explained to me that if a person, particularly a female, goes to the police to report an apprehension of violence, the police do not hesitate to immediately set the application for AVO in process. The reason is simple and understandable. If a police officer is approached by a woman who says she fears violence from a person that police officer is in a bind. If he ignores or delays the approach and the woman is subsequently attacked, he could find himself in an invidious position and possibly held liable because he did nothing when she reported her fear. The probability is that he will immediately process an application for an interim AVO just to be sure. That usually means that the officer will have no opportunity to check the information or to contact the person who will be the subject of the AVO to get that person's version of the situation to establish whether the applicant's claim is able to be substantiated. The apparent urgency creates a pressure of time for the police officer, so he acts immediately.

This obviously allows the original complaint to go unchallenged and untested and the AVO process has to be set in train even if the report is completely false. In almost every case reported to me, the police have followed up the first processing of the application by visiting the person against whom it was issued and seizing any firearms in the house, even if they belong to someone other than the subject of the AVO. This allows an AVO to be used as a means of bringing pressure on the person who was the subject of it. It certainly makes it possible for the order to be used vindictively, maliciously or in retribution for a wrong—real or imagined. That is the sort of situation that that bill seeks to remedy.

Some of the concerns expressed by many people who have written or talked to me about AVOs served on them have been that often they do not understand the implications of being under an AVO. These implications are not explained in a court, nor are they advised of avenues of appeal or how to have the AVO revoked. Inevitably a high percentage of people also claim that the AVO is unjustified. Of course, one would expect a plea of not guilty in that case. I admit openly that when I first set out to draft this bill my main concern was the effect on licensed firearm owners.

I had received endless complaints from licensed firearms owners who had had an AVO taken out against them and had immediately had their licence suspended or revoked and their legally owned firearms confiscated, without compensation. They also discovered that because of the AVO they would be banned from holding a firearm licence, and therefore banned from owning a firearm for 10 years. In most cases, when the AVO process was first started their firearms were taken by police. When the AVO was tested by a court and rejected, many of these people had great difficulty getting their firearms returned and, because the firearms had not been properly looked after, some were damaged. Quite expensive firearms with expensive attachments, such as telescopic sights, were returned in a very poor condition. I have attempted to address that point in the bill, and I will return to the matter later.

When word spread that this bill was in the pipeline I received a vast amount of information from people who were the subjects of AVOs. My interest in the injustices and misuse involved, and my own concerns about the AVO process, led me to widen the scope of the bill. Incidentally, in negotiating with the Government, seeking support for the bill, I found it interesting that the Government apparently differentiates between the APVO, the apprehended personal violence order, and the ADVO, the apprehended domestic violence order. While the Government is supportive of some of the bill's proposals, it is supportive only where an APVO is concerned; it will not support any modification or change where ADVOs are concerned.

I believe that to categorise the general AVO system in that way is to miss the point that all AVOs are able to be misused and, as experience shows, have been extensively misused. This is not a large or complex bill, so I will deal with it in some detail. The underlying principles of the bill would affect the way a court deals with somebody who has had an AVO issued against them, the way licensed firearms are confiscated from a person who has an AVO against them, and how those firearms are stored and returned if the AVO does not succeed.

Part 15A of the Crimes Act deals with apprehended violence. It stipulates that a court may make an AVO only if it is satisfied on the balance of probabilities that the person it seeks to protect has reasonable grounds to fear and, in fact, does fear violence. That is fine and necessary. But what the provision does not cover is the process by which the original AVO was issued. The inarguable fact about that is that in practice, in real life, there is no provision insisting that the issuing officer has to check the complaint or hear from the proposed defendant. In real life, the AVO process is set in

motion purely on the word of the complainant, and in my opinion that makes it much too easy for vindictive, malicious, frivolous—call them what you will—complaints to succeed.

Schedule 1 of the bill make amendments to the Crimes Act regarding apprehended violence orders, either ADVOs or APVOs. Items [1] and [3] insert provisions to require that a court must refuse to make an AVO if is satisfied that the defendant was not advised on the particulars of the complaint before the complaint was made, or was not given an opportunity to be officially interviewed about the particulars of the complaint before the complaint was made, or that the particulars of the complaint were not adequately investigated before the complaint was made, or that the complaint is frivolous, vexatious or without substance. This would create an important change in the way AVOs are issued, by requiring that there be an investigation of the complaint, that the defendant should have a chance to state a case before the AVO is issued, and particularly—and this is possibly the most significant part—that prospective defendants should be protected against frivolous or vexatious complaints or complaints that have no substance.

This goes to the heart of most of the material I have received about AVOs in general, and especially where they have been sought in a vindictive or retributive way. Item [7] inserts new section 562BB (7), which provides for similar requirements where a court is considering whether to confirm an interim AVO. Items [2] and [5] insert provisions requiring that a court has an obligation to refuse to issue process in respect of AVOs if it believes that the complaint is frivolous, vexatious or without substance. Item [6] inserts new section 562BA (4), which deals with AVOs made with the consent of the parties. The new section provides that a court must not make an AVO or interim AVO with consent of both parties unless it is satisfied that before giving his or her consent to the making of the order the defendant was given a written statement explaining the consequences of consenting to an order on his or her right to hold a firearm licence or permit, or to own and use firearms, and his or her eligibility to hold certain employment.

This is an important improvement on the existing system. I have received numerous complaints from defendants who have consented to AVOs being issued because they thought that by being co-operative they would ease, or even escape, some of the consequences of the order—only to later discover that they had unwittingly surrendered their right to own and use firearms and had disadvantaged themselves in several other ways. I believe it is crucial that before a defendant consents to an order against him or her, the defendant should be advised in writing so that he or she fully understands the consequences flowing from consenting to that order.

Schedule 1 [8] inserts new section 562DB, which states that a court making an AVO is required to ensure that the defendant is given a written statement explaining how long the AVO would be in force, the fact that it can be revoked and the procedure for revocation. This amendment is designed to address the most frequent single complaint I have received from people who are subject to AVOs. That complaint is that nobody really explained what the order meant, how long it would be in force, the fact that the defendant could apply for a variation or revocation, or how to go about making such an application. The new section will also ensure that the defendant is given written advice pointing out that unless the order is revoked, the defendant will not able to hold a firearms licence, or own or use a firearm for a period of up to 10 years. In other words, the new section seeks to ensure that somebody who is subject to an order clearly understands how it works, how it could be revoked, and what other effects it has on the defendant and his or her rights.

This would seem to be a basic right that should never be in question. In fact, the amount of information provided to defendants appears to be—to put it mildly—inadequate or, in some cases, non-existent. Schedule 1 [9] inserts new section 562F (9), which provides that if the defendant is able to have the order revoked he or she will not have to pay court costs or any other participant's costs. Of particular importance to licensed firearms owners is schedule 1 [10]. At present, a court making an AVO can order the defendant to surrender any licence or permit held under the Firearms Act. Section 562F of the Crimes Act provides for an AVO to be revoked but does not explain what impact the revocation has on the defendant's former firearms licence. Item [10] inserts new section 562FAA, which provides that if a court revokes an AVO it must also make an order requiring the Commissioner of Police to return to the defendant any licence or permit previously surrendered under the AVO. At present this does not necessarily happen. Even though the AVO has been revoked, the licence status remains in limbo, with subsequent serious disadvantage to the former defendant.

One category of firearms owner who is particularly affected by the loss of a firearms licence, and firearms themselves, is the primary producer—the farmer. For the farmer, a firearm is a tool of trade, and I am aware of numerous instances of farmers and farm managers whose farming activities have been devastated by the loss of their firearms after the issue of an AVO and the prospect of a 10-year inability to retrieve their firearms. It appears that the requirement set out in new section 562FAA is inevitable justice, but I am led to believe that the Government is opposed to such a logical restorative measure. I wait with interest to hear the grounds for such opposition! Schedule 1 [11] inserts new section 562XA, which makes it an offence to make a frivolous or vexatious complaint, seeking an AVO or interim AVO, or to make such a complaint or request that is without substance or contains false or misleading information. The penalty proposed for these offences is 20 penalty points. Interestingly, the new section also provides that in determining a penalty for complaints that are false in these respects, the court may take into account the effect the complaint had on the defendant's life, employment, reputation, rights and liberties. I believe it is an important amendment.
Schedule 2 amends the Firearms Act 1996. Items [1] and [7] make amendments to provide that the present restriction on being issued with a licence, which applies to a person who has been the subject of an AVO, at any time in the 10 years before applying for a licence, only applies if that person held a firearms licence or permit at the time the AVO was made. I believe that this is commonsense because if the person did not hold a licence at that time there was no licence or firearm to surrender and the question of holding a licence is irrelevant. Items [2], [3], [4] and [8] of schedule 2 make amendments to provide that a firearms licence is automatically suspended on the making of an interim AVO. The amendments provide that a licence is revoked only if the court makes a specific revocation order.

Item [6] inserts new section 25A, which provides that a court making an AVO against a person may direct that the order is to be disregarded where its existence would disqualify a person from holding a licence, a permit or certain employment.

This is an attempt to address the hardline provisions of the Firearms Act 1996, which allow no room to move when a court issues an interim order, even though suspension of the licence could mean that a person could lose employment or be otherwise disadvantaged in a way not originally envisaged by the order. Item [5] of schedule 2 inserts new section 25 (3), which is designed to address a major problem that often arises when a defendant's firearms are seized after the making of an AVO. That problem is that there have been instances of expensive, high-quality firearms being literally dropped into the boot of a police car, without regard to dislodging expensive telescopic sights and possibly damaging the firearm. One person who contacted me about this said that police who took her firearms put them in the back of a truck, in a puddle of rainwater.

And what happens to the firearms while they are in the possession of the police is another question. Firearms need to be kept clean and dry, and properly maintained. This new section requires the commissioner to ensure that any firearm surrendered or seized is maintained in the same condition as it was when it was seized or surrendered. Bearing in mind that one day the defendant could be entitled to the return of those firearms—even if it is 10 years later, and after the defendant is granted a new licence—that private property, formerly legally owned, and still the defendant's property, morally, ought to be returned in the same condition it was in when it was taken away.

Schedule 2 [6] inserts a measure that provides that when a court revokes an AVO, any licence or permit which was revoked when the AVO was imposed is automatically restored. The commissioner must immediately return such licence or permit and any firearm surrendered or seized when the AVO was imposed. As I said, this bill is not designed to dismantle or damage the current system of AVOs, which are an essential and effective shield for many people who fear or who suffer violence, intimidation or harassment. However, it is an attempt to stop widespread misuse of the AVO.

Anyone, at any time—including any honourable member in this Chamber—for even the flimsiest of reasons, can be hit with an AVO. They might be quite unprepared for it, totally confused by the meaning of it and absolutely unsure of their rights of defence or how to react. That may be fine when the AVO is deserved, but when the defendant has not committed the actions on which the AVO is based it is an aberration of justice for that person to be unjustly victimised in this way. There is a principle in our justice system that says it is better for 10 guilty people to go free than for one innocent person to be unjustly punished. This bill seeks to build restorative justice into the Crimes Act's apprehended violence orders provisions to provide protection not only for people at risk, but also for people wrongly accused. I commend the bill to the House.

Debate adjourned on motion by the Hon. Peter Primrose.

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- Speakers:
  Tingle The Hon John
- Speech Type:
  Motion
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