

South Australia

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DOMESTIC VIOLENCE ACT 1994

An Act to provide for restraining orders in cases of domestic violence; and for other purposes.

*This Act is published under the Legislation Revision and Publication Act 2002 and incorporates all amendments in force as at **3 March 2003**.*

Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.

DOMESTIC VIOLENCE ACT 1994

being

Domestic Violence Act 1994 No. 22 of 1994
[Assented to 26 May 1994]¹

as amended by

Statutes Amendment (Attorney-General's Portfolio) Act 1996 No. 67 of 1996 [Assented to 15 August 1996]²

Statutes Amendment (Restraining Orders) Act 1999 No. 24 of 1999 [Assented to 1 April 1999]³

Statutes Amendment (Stalking) Act 2001 No. 55 of 2001 [Assented to 8 November 2001]⁴

Statutes Amendment (Attorney-General's Portfolio) Act 2002 No. 33 of 2002 [Assented to 28 November 2002]⁵

¹ Came into operation 1 August 1994: *Gaz.* 14 July 1994, p. 68.

² Came into operation 17 October 1996: *Gaz.* 17 October 1996, p. 1361.

³ Part 3 (ss. 5-12) came into operation 16 May 1999: *Gaz.* 13 May 1999, p. 2502.

⁴ Part 3 (s. 5) came into operation 13 January 2002: *Gaz.* 10 January 2002, p. 4.

⁵ **Part 5 (s. 7) came into operation 3 March 2003: *Gaz.* 27 February 2003, p. 807.**

NOTE:

- Asterisks indicate repeal or deletion of text.
- Entries appearing in bold type indicate the amendments incorporated since the last reprint.
- For the legislative history of the Act see Appendix.

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LEGISLATIVE HISTORY**

The Parliament of South Australia enacts as follows:

Short title

1. This Act may be cited as the *Domestic Violence Act 1994*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Interpretation

3. In this Act, unless the contrary intention appears—

"**child**" means a person who has not attained 18 years of age;

"**Court**" means the Magistrates Court of South Australia;

"**defendant**" means a person against whom a domestic violence restraining order is sought or made;

"**domestic violence restraining order**" means an order under section 4 and includes a firearms order that is supplementary to that order;

"**firearms order**" means an order under section 10 supplementary to an order under section 4;

"**foreign domestic violence restraining order**" means an order made under a law of another State or a Territory of the Commonwealth or New Zealand declared by regulation to be a law corresponding to this Act;

"**member of the defendant's family**", or "**family member**" in relation to a defendant, means—

- (a) a spouse or former spouse of the defendant;
- (b) a child of whom the defendant or a spouse or former spouse of the defendant has custody as a parent or guardian;
- (c) a child who normally or regularly resides with the defendant or a spouse or former spouse of the defendant;

"**Principal Registrar**" means the Principal Registrar of the Court;

"**relevant family contact order**", in relation to a domestic violence restraining order or an application for a domestic violence restraining order, means a Division 11 contact order within the meaning of Part 7 of the *Family Law Act 1975* of the Commonwealth, as amended from time to time, that relates to contact between—

- (a) the person for whose benefit, or against whom, the domestic violence restraining order is made or sought; and
- (b) a child of, or in the care of, either of those persons;

"**rules**" means the rules of the Court;

"**spouse**" of a defendant includes a person of the opposite sex who is cohabiting with the defendant as the husband or wife *de facto* of the defendant;

"telephone" includes any telecommunication device.

Grounds for making domestic violence restraining orders

4. (1) On a complaint under this Act, the Court may make a domestic violence restraining order against the defendant if—

- (a) there is a reasonable apprehension that the defendant may, unless restrained, commit domestic violence; and
- (b) the Court is satisfied that the making of the order is appropriate in the circumstances.

(2) For the purposes of this Act, a defendant commits domestic violence—

- (a) if the defendant causes personal injury to a member of the defendant's family; or
- (b) if the defendant causes damage to property of a member of the defendant's family; or
- (c) if on two or more separate occasions—
 - (i) the defendant follows a family member; or
 - (ii) the defendant loiters outside the place of residence of a family member or some other place frequented by a family member; or
 - (iii) the defendant enters or interferes with property occupied by, or in the possession of, a family member; or
 - (iv) the defendant—
 - (A) gives or sends offensive material to a family member or leaves offensive material where it will be found by, given to, or brought to the attention of a family member; or
 - (B) publishes or transmits offensive material by means of the internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of, a family member; or
 - (iva) the defendant communicates with a family member, or to others about a family member, by way of mail, telephone (including associated technology), facsimile transmission or the internet or some other form of electronic communication; or
 - (v) the defendant keeps a family member under surveillance; or
 - (vi) the defendant engages in other conduct,

so as to reasonably arouse in a family member apprehension or fear of personal injury or damage to property or any significant apprehension or fear.

(3) The Court may—

- (a) in determining whether there is a reasonable apprehension that the defendant may, unless restrained, commit domestic violence, take into account events that have taken place outside of this State; and

- (b) make a domestic violence restraining order against a defendant whether resident in or outside of this State.

(3a) For the purposes of this section, the circumstances of a dealing with material may be taken into account in determining whether the material was offensive material but, if material was inherently offensive material, the circumstances of a dealing with the material cannot be taken to have deprived it of that character.

(4) If a defendant disputes some or all of the grounds on which a domestic violence restraining order is sought or made but consents to the order, the Court may make or confirm the order without receiving any further submissions or evidence as to the grounds.

Terms of domestic violence restraining orders

5. (1) A domestic violence restraining order—

- (a) may impose such restraints on the defendant as are necessary or desirable to prevent the defendant acting in the apprehended manner; and
- (b) may apply for the benefit of—
 - (i) the member of the defendant's family who made the complaint or on whose behalf the complaint was made; or
 - (ii) any other family member specified in the order.

(2) Without limiting the effect of subsection (1), a domestic violence restraining order may—

- (a) prohibit the defendant from being on premises at which a family member resides or works;
- (b) prohibit the defendant from being on specified premises frequented by a family member;
- (c) prohibit the defendant from being in a specified locality;
- (d) prohibit the defendant from approaching within a specified distance of a family member;
- (e) prohibit the defendant from contacting, harassing, threatening or intimidating a family member, or any other person at a place where a family member resides or works;
- (f) prohibit the defendant from damaging property of a family member;
- (g) prohibit the defendant from taking possession of specified personal property reasonably needed by a family member;
- (h) prohibit the defendant from causing or allowing another person to engage in the conduct referred to in any of paragraphs (e) to (g);
- (i) direct the defendant to return specified personal property to a family member or to allow a family member to recover or have access to or make use of specified personal property;
- (j) specify conditions subject to which the defendant may—
 - (i) be on specified premises or in a specified locality; or

- (ii) approach or contact a family member, or any other person at a place where a family member resides or works;
- (k) if the defendant has possession of a weapon or article (other than a firearm) that has been used, or that there is some reason to believe might be used, by the defendant to threaten or injure a family member or to damage the property of a family member—
 - (i) order that the weapon or article be confiscated and disposed of or dealt with as directed by the Court; and
 - (ii) if the circumstances of the case so require—authorise a member of the police force to enter any premises in which such a weapon or article is suspected to be, and search for and take possession of the weapon or article.

(3) A domestic violence restraining order may be made against the defendant in relation to premises or property despite the fact that the defendant has a legal or equitable interest in the premises or property.

(4) If a domestic violence restraining order that includes an order for the confiscation of a weapon or article is subject to confirmation and the domestic violence restraining order is not confirmed, any weapon or article confiscated under the order must be returned to the defendant.

Factors to be considered by Court

6. (1) In considering whether or not to make a domestic violence restraining order and in considering the terms of a domestic violence restraining order, the Court must have regard to the following:

- (a) the need to ensure that family members are protected from domestic violence;
- (b) the welfare of any children affected, or likely to be affected, by the defendant's conduct;
- (c) the accommodation needs of family members and any children of the defendant;
- (ca) any relevant family contact order of which the Court has been informed;
- (cb) how the domestic violence restraining order would be likely to affect contact (in accordance with a relevant family contact order or otherwise) between—
 - (i) the person for whose benefit, or against whom, the order is sought; and
 - (ii) any child of, or in the care of, either of those persons;
- (d) hardship that may be caused to the defendant or to any other person as a result of the making of the order;
- (e) if considering whether to direct the defendant to return property to a family member or to allow a family member to recover or have access to or make use of property—the income, assets and liabilities of the defendant and the family member;
- (f) any other legal proceedings between the defendant and a family member;
- (g) any other matter that, in the circumstances of the case, the Court considers relevant.

(2) The Court must consider the factors set out in subsection (1)(a) and (b) as being of primary importance.

Complaints

7. (1) A complaint may be made—

- (a) by a member of the police force; or
- (b) by a person against whom, or against whose property, the behaviour that forms the subject matter of the complaint has been, or may be, directed.

(2) The complainant must inform the Court of any relevant family contact order, or any pending application for a relevant family contact order, of which the complainant is aware (but a domestic violence restraining order is not invalid merely because the complainant fails to so inform the Court).

Complaints by telephone

8. (1) A complaint may be made and dealt with by telephone as follows:

- (a) the complainant must be—
 - (i) a member of the police force who establishes his or her identity and official position in a manner acceptable to the Court; or
 - (ii) a person introduced by a member of the police force who establishes his or her identity and official position in a manner acceptable to the Court;
- (b) the Court must satisfy itself (as far as practicable) that the complaint is genuine, and that the case is of sufficient urgency to justify making a domestic violence restraining order without requiring the personal attendance of the complainant, by the oral questioning of the complainant and any other available witnesses by telephone;
- (c) if the Court is then satisfied that it is appropriate to make a domestic violence restraining order, the member of the police force who made the complaint or introduced the complainant—
 - (i) must make out, in accordance with directions communicated by the Court by telephone, a document in the form required by the rules comprising—
 - (A) the terms of the Court's order; and
 - (B) a summons requiring the defendant to appear before the Court at a specified time and place to show cause why the order should not be confirmed;
 - (ii) must return a copy of the completed document, or send it by facsimile, to the Court;
- (d) if the Court is not satisfied that it is an appropriate case for making a domestic violence restraining order without requiring the personal attendance of the complainant, the Court may adjourn the hearing of the complaint to a time and place fixed by the Court and inform the complainant of the time and place so fixed.

(2) Proceedings conducted by telephone under this section—

- (a) need not be open to the public;

(b) must be recorded by audio tape or other form of recording from which sound can be produced.

(3) The Court may, from time to time without requiring the attendance of any party, adjourn the hearing to which a defendant is summoned under subsection (1)(c) to a later date if satisfied that the summons has not been served or that there is other adequate reason for the adjournment.

(4) The date fixed in the first instance for the hearing to which a defendant is summoned under subsection (1)(c) must be within 7 days of the date of the order, and the date fixed under subsection (3) for an adjourned hearing must be within 7 days of the date on which the adjournment is ordered, unless the Court is satisfied—

(a) that a later date is required to enable the summons to be served; or

(b) that there is other adequate reason for fixing a later date.

(5) A domestic violence restraining order issued on a complaint made by telephone without requiring the personal attendance of the defendant—

(a) continues in force until the conclusion of the hearing to which the defendant is summoned or, if the hearing is adjourned, until the conclusion of the adjourned hearing; but

(b) will not be effective after the conclusion of the hearing to which the defendant is summoned, or the adjourned hearing, unless the Court confirms the order—

(i) on failure of the defendant to appear at the hearing in obedience to the summons; or

(ii) having considered any evidence given by or on behalf of the defendant; or

(iii) with the consent of the defendant.

(5a) The Court may confirm a domestic violence restraining order in an amended form.

(6) If a hearing is adjourned under this section, the Court need not be constituted at the adjourned hearing of the same judicial officer as ordered the adjournment.

(7) If a member of the police force has reason to believe that a complaint is being, or is about to be, made against a person by telephone, the member may—

(a) require the person to remain at a particular place while the complaint is made and dealt with so that any order or summons made or issued on the complaint may be served on the person; and

(b) if the person refuses or fails to comply with the requirement or the member has reasonable grounds to believe that the requirement will not be complied with, arrest and detain the person in custody (without warrant) for—

(i) so long as may be necessary for the complaint to be made and dealt with and any order or summons made or issued to be served on the person; or

(ii) two hours,

whichever is the lesser.

Issue of domestic violence restraining order in absence of defendant

9. (1) A domestic violence restraining order may be made in the absence of the defendant if the defendant was required by summons or conditions of bail to appear at the hearing of the complaint and failed to appear in obedience to the summons.

(2) A domestic violence restraining order may be made in the absence of the defendant and despite the fact that the defendant was not summoned to appear at the hearing of the complaint, but in that case, the Court must summon the defendant to appear before the Court to show cause why the order should not be confirmed.

(3) The Court may make an order under subsection (2) on the basis of evidence received in the form of an affidavit but, in that case—

- (a) the deponent must, if the defendant so requires, appear personally at the proceedings for confirmation of the order to give oral evidence of the matters referred to in the affidavit; and
- (b) if the deponent does not appear personally to give evidence in pursuance of such a requirement, the Court may not rely on the evidence contained in the affidavit for the purpose of confirming the order.

(4) The Court may, from time to time without requiring the attendance of any party, adjourn the hearing to which a defendant is summoned under subsection (2) to a later date if satisfied that the summons has not been served or that there is other adequate reason for the adjournment.

(5) The date fixed in the first instance for the hearing to which a defendant is summoned under subsection (2) must be within 7 days of the date of the order, and the date fixed under subsection (4) for an adjourned hearing must be within 7 days of the date on which the adjournment is ordered, unless the Court is satisfied—

- (a) that a later date is required to enable the summons to be served; or
- (b) that there is other adequate reason for fixing a later date.

(6) A domestic violence restraining order made under subsection (2)—

- (a) continues in force until the conclusion of the hearing to which the defendant is summoned or, if the hearing is adjourned, until the conclusion of the adjourned hearing; but
- (b) will not be effective after the conclusion of the hearing to which the defendant is summoned, or the adjourned hearing, unless the Court confirms the order—
 - (i) on failure of the defendant to appear at the hearing in obedience to the summons; or
 - (ii) having considered any evidence given by or on behalf of the defendant; or
 - (iii) with the consent of the defendant.

(7) The Court may confirm a domestic violence restraining order in an amended form.

(8) If a hearing is adjourned under this section, the Court need not be constituted at the adjourned hearing of the same judicial officer as ordered the adjournment.

Firearms orders

10. (1) Subject to subsection (2), when the Court makes a domestic violence restraining order, it must also make the following supplementary orders:

- (a) if the defendant has possession of a firearm—
 - (i) an order that the firearm be confiscated, and disposed of or dealt with as directed by the Court; and
 - (ii) if the circumstances of the case so require—an order authorising a member of the police force to enter any premises in which such a firearm is suspected to be, and search for and take possession of any such firearm; and
- (b) if the defendant has a licence or permit to be in possession of a firearm—an order that the licence or permit be cancelled and delivered up to the Registrar of Firearms; and
- (c) an order that the defendant be disqualified from holding or obtaining a licence or permit to be in possession of a firearm; and
- (d) an order that the defendant be prohibited from possessing a firearm in the course of his or her employment.

(2) If the domestic violence restraining order is subject to confirmation—

- (a) an order for confiscation of a firearm must provide for the return of any confiscated firearm to the defendant if the domestic violence restraining order is not confirmed; and
- (b) if the defendant has a licence or permit to be in possession of a firearm—an order will be made in the first instance for the suspension of the licence or permit until the court determines whether to confirm the domestic violence restraining order, but if the domestic violence restraining order is confirmed, an order must then be made for the cancellation of the licence or permit and its delivery up to the Registrar of Firearms; and
- (c) an order disqualifying the defendant from holding or obtaining a licence or permit to be in possession of a firearm will lapse if the domestic violence restraining order is not confirmed; and
- (d) an order prohibiting the defendant from possessing a firearm in the course of his or her employment will lapse if the domestic violence restraining order is not confirmed.

Service

11. (1) A domestic violence restraining order must be served on the defendant personally and is not binding on the defendant until it has been so served.

(2) If a domestic violence restraining order is confirmed in an amended form or is varied before being confirmed or at any other time, the order in its amended form must be served on the defendant personally and until so served—

- (a) the variation is not binding on the defendant; but
- (b) the order as in force prior to the variation continues to be binding on the defendant.

(3) If a member of the police force has reason to believe that a person is subject to a domestic violence restraining order that has not been served on the person, the member may—

- (a) require the person to remain at a particular place for—
 - (i) so long as may be necessary for the order, and, if the order is subject to confirmation, the summons to appear before the Court to show cause why the order should not be confirmed, to be served on the person; or
 - (ii) two hours,whichever is the lesser; and
- (b) if the person refuses or fails to comply with the requirement or the member has reasonable grounds to believe that the requirement will not be complied with, arrest and detain the person in custody (without warrant) for the period referred to in paragraph (a).

(4) The Court may, when making a firearms order, order that a member of the police force, the complainant or the defendant serve a copy of the firearms order on an employer of the defendant specified by the Court in whose employment the Court has reason to believe the defendant may be supplied with or have access to a firearm.

Variation or revocation of domestic violence restraining order

12. (1) The Court may vary or revoke a domestic violence restraining order on application—

- (a) by a member of the police force; or
- (b) by a person for whose benefit the order was made; or
- (c) by the defendant.

(1a) An application for variation or revocation of a domestic violence restraining order may only be made by the defendant with the leave of the Court and leave is only to be granted if the Court is satisfied there has been a substantial change in the relevant circumstances since the order was made or last varied.

(2) A firearms order cannot be revoked unless the Court is satisfied—

- (a) that the domestic violence restraining order should be revoked in its entirety; or
- (b) that the defendant has never been guilty of violent or intimidatory conduct and needs to have a firearm for purposes related to earning a livelihood.

(3) The Court must, before varying or revoking a domestic violence restraining order under this section—

- (a) allow all parties a reasonable opportunity to be heard on the matter; and
- (b) have regard to the same factors that the Court is required to have regard to in considering whether or not to make a domestic violence restraining order and in considering the terms of a domestic violence restraining order (see section 6).

Notification of making etc of domestic violence restraining orders

13. (1) Where a domestic violence restraining order is made, the Principal Registrar must forward a copy of the order to the Commissioner of Police and, if the complainant is not a member of the police force, the complainant.

(2) Where a domestic violence restraining order is varied or revoked, the Principal Registrar must notify the Commissioner of Police, and where the complainant is not a member of the police force, the complainant, of the variation or revocation.

Registration of foreign domestic violence restraining orders

14. (1) The Principal Registrar may, subject to the rules, register a foreign domestic violence restraining order in the Court.

(2) Subject to subsection (3), a registered foreign domestic violence restraining order has the same effect, and may be enforced in the same way, as a domestic violence restraining order made under this Act.

(3) The Court may—

(a) give such directions; and

(b) make such adaptations or modifications to the order (as it applies in this State),

as the Court considers necessary or desirable for the effective operation of the order in this State.

(4) The Court may—

(a) vary a registered foreign domestic violence restraining order as it applies in this State; or

(b) cancel the registration of a registered foreign domestic violence restraining order,

at any time on application—

(c) by a member of the police force; or

(d) by a person for whose benefit the order was made; or

(e) by the person against whom the order was made.

(5) If a foreign domestic violence restraining order is registered under this section, the Principal Registrar must forward a copy of the order to the Commissioner of Police.

(6) If the Court varies a registered foreign domestic violence restraining order as it applies in this State, or cancels the registration of the order, the Principal Registrar must notify the Commissioner of Police of the variation or cancellation.

Offence to contravene or fail to comply with domestic violence restraining order

15. (1) A person who contravenes or fails to comply with a domestic violence restraining order or a registered foreign domestic violence restraining order is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

(2) If a member of the police force has reason to suspect that a person has committed an offence against subsection (1), the member may, without warrant, arrest and detain that person.

(3) A person arrested and detained under subsection (2) must be brought before the Court as soon as practicable, and in any event, not more than 24 hours after arrest, to be dealt with for the offence.

(4) In calculating the time that has elapsed since arrest for the purposes of subsection (3), no period falling on a Saturday, Sunday or public holiday will be counted.

Complaints or applications by or on behalf of child

16. A complaint or application that could otherwise be made by a person under this Act may, if the person is a child, be made—

- (a) by the child with the leave of the Court, if the child has attained the age of 14 years; or
- (b) on behalf of the child—
 - (i) by a parent or guardian of the child; or
 - (ii) by a person with whom the child normally or regularly resides.

Burden of proof

17. In proceedings under this Act other than for an offence, the Court is to decide questions of fact on the balance of probabilities.

Priority of domestic violence restraining orders proceedings

18. The Court must, as far as practicable, deal with proceedings for domestic violence restraining orders as a matter of priority.

Relation to Summary Procedure Act

19. (1) Subject to this Act and the rules, the *Summary Procedure Act 1921* applies to a complaint and proceedings under this Act.

(2) A complaint made under this Act that should have been made under Division 7 Part 4 of the *Summary Procedure Act 1921* may be dealt with as if it had been made under that Division.

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Domestic Violence Act 1994

APPENDIX**LEGISLATIVE HISTORY****Amendments**

The *Domestic Violence Act 1994* amended the following:

Bail Act 1985

Criminal Law Consolidation Act 1935

Criminal Law (Sentencing) Act 1988

Legislative History

(entries in bold type indicate amendments incorporated since the last reprint)

| | |
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| Long title: | amended under <i>Legislation Revision and Publication Act 2002</i> 3.3.03 |
| Section 3: | definition of "member of the defendant's family" amended by 33, 2002, s. 7 |
| | definition of "relevant family contact order" inserted by 67, 1996, s. 15 |
| Section 4(2): | amended by 24, 1999, s. 5(a); 55, 2001, s. 5(a) |
| Section 4(3): | inserted by 24, 1999, s. 5(b) |
| Section 4(3a): | inserted by 55, 2001, s. 5(b) |
| Section 4(4): | inserted by 24, 1999, s. 5(b) |
| Section 5(2): | amended by 24, 1999, s. 6(a) |
| Section 5(4): | inserted by 24, 1999, s. 6(b) |
| Section 6(1): | amended by 67, 1996, s. 16 |
| Section 7: | redesignated as s. 7(1) by 67, 1996, s. 17 |
| Section 7(2): | inserted by 67, 1996, s. 17 |
| Section 8(2): | substituted by 24, 1999, s. 7(a) |
| Section 8(3) and (4): | substituted by 24, 1999, s. 7(b) |
| Section 8(5): | amended by 24, 1999, s. 7(c) |
| Section 8(5a): | inserted by 24, 1999, s. 7(d) |
| Section 9(2): | substituted by 24, 1999, s. 8(a) |
| Section 9(4) - (6): | substituted by 24, 1999, s. 8(b) |
| Section 9(7) and (8): | inserted by 24, 1999, s. 8(b) |
| Section 10(1): | amended by 24, 1999, s. 9(a) |
| Section 10(2): | amended by 24, 1999, s. 9(b) |
| Section 11: | redesignated as s. 11(1) by 24, 1999, s. 10 |
| Section 11(2) - (4): | inserted by 24, 1999, s. 10 |
| Section 12(1a): | inserted by 24, 1999, s. 11(a) |
| Section 12(3): | substituted by 67, 1996, s. 18; amended by 24, 1999, s. 11(b) |
| Section 15(1): | amended by 24, 1999, s. 12 |
| Schedule: | omitted under <i>Legislation Revision and Publication Act 2002</i> 3.3.03 |