



DOMESTIC VIOLENCE ACT 1994

No. 22 of 1994

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ELIZABETHAE II REGINAE

A.D. 1994

No. 22 of 1994

An Act to provide for restraining orders in cases of domestic violence; to make amendments to the Criminal Law Consolidation Act 1935, the Bail Act 1985 and the Criminal Law (Sentencing) Act 1988; and for other purposes.

[Assented to 26 May 1994]

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

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

"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.

Note: For definition of divisional penalties see Appendix.

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 gives 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

- (v) the defendant keeps a family member under surveillance; or
 - (vi) the defendant engages in other conduct,
- so as to reasonably arouse a family member's apprehension or fear.

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.

(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.

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;
- (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. 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.

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) A tape recording must be made of any oral proceedings conducted by telephone under this section.

(3) 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 after the date of the domestic violence restraining order but, if it then appears—

- (a) that the summons has not yet been served; or
- (b) that there is some other adequate reason to defer the date of the hearing,

the Court may, without requiring the attendance of any party, adjourn the hearing to a later date.

(4) Successive adjournments may be granted under subsection (3) but no such adjournment may be for more than 7 days unless the Court is satisfied that there is adequate reason for a longer adjournment.

(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 unless—
 - (i) the defendant does not appear at that hearing in obedience to the summons; or
 - (ii) the Court, having considered any evidence given by or on behalf of the defendant, confirms the order.

(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—

- (a) the Court must summon the defendant to appear before the Court to show cause why the order should not be confirmed; and
- (b) the order is not effective after the conclusion of the hearing to which the defendant is summoned unless—
 - (i) the defendant does not appear at that hearing in obedience to the summons; or
 - (ii) the Court, having considered the evidence of the defendant and any other evidence adduced by the defendant, confirms the order.

(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 date fixed in the first instance for the hearing to which a defendant is summoned under subsection (2) must be within 7 days after the date of the order but, if it then appears—

- (a) that the summons has not yet been served; or
- (b) that there is some other adequate reason to defer the date of the hearing,

the Court may, without requiring the attendance of any party, adjourn the hearing to a later date.

(5) Successive adjournments may be granted under subsection (4) but no such adjournment may be for more than 7 days unless the Court is satisfied that there is adequate reason for a longer adjournment.

(6) If the hearing is adjourned under subsection (4) or (5), the domestic violence restraining order continues in force until the conclusion of the adjourned hearing.

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.
- (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.

Service

11. 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.

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.

(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, allow all parties a reasonable opportunity to be heard on the matter.

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.

Penalty: Division 5 imprisonment.

(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.

SCHEDULE
Related Amendments

Amendment of the Criminal Law Consolidation Act 1935

1. The *Criminal Law Consolidation Act 1935* is amended—

(a) by repealing section 39 and substituting the following section:

Common assault

39. (1) A person convicted of common assault is liable to be imprisoned for a term not exceeding two years or, where the victim was at the time of the commission of the offence a family member of the offender, for a term not exceeding three years.

(2) In this section—

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

“**family member**” of an offender means—

- (a) a spouse or former spouse of the offender;
- (b) a child of whom the offender, or a spouse or former spouse of the offender, is the parent or guardian;
- (c) a child who normally or regularly resides with the offender or a spouse or former spouse of the offender;

“**spouse**” of an offender includes a person of the opposite sex who is cohabiting with the defendant as the husband or wife *de facto* of the defendant.;

(b) by inserting after paragraph (b) of the definition of “**ancillary order**” in section 348 the following paragraph:

(ba) a restraining order issued under section 19A of the *Criminal Law (Sentencing) Act 1988*;

Amendment of Bail Act 1985

2. The *Bail Act 1985* is amended—

(a) by striking out paragraph (c) of section 10(1);

(b) by inserting after section 10(3) the following subsection:

(4) Despite the other provisions of this section, where there is a victim of the offence, the bail authority must, in determining whether the applicant should be released on bail, give primary consideration to the need that the victim may have, or perceive, for physical protection from the applicant.;

(c) by repealing section 24 and substituting the following section:

Act not to affect provisions relating to restraining orders

24. Nothing in this Act affects the operation of—

- (a) the *Domestic Violence Act 1994*; or
- (b) the provisions of the *Summary Procedure Act 1921* relating to restraining orders.

Amendment of Criminal Law (Sentencing) Act 1988

3. The *Criminal Law (Sentencing) Act 1988* is amended by inserting after section 19 the following section:

Restraining orders issued on finding of guilt or sentencing

19A. (1) A court may, on finding a person guilty of an offence or on sentencing a person for an offence, exercise the powers of the Magistrates Court to issue a restraining order against the defendant under the *Summary Procedure Act 1921* or the *Domestic Violence Act 1994* as if a complaint had been made under that Act against the defendant in relation to the matters alleged in the proceedings for the offence.

(2) A restraining order issued under this section—

- (a) has effect as a restraining order under the *Summary Procedure Act 1921* or the *Domestic Violence Act 1994* (as the case may require); and
- (b) is not a sentence for the purposes of this Act.

APPENDIX
Divisional Penalties

At the date of assent to this Act divisional penalties are, as provided by section 28a of the *Acts Interpretation Act 1915*, as follows:

Division	Maximum imprisonment	Maximum fine
1	15 years	\$60 000
2	10 years	\$40 000
3	7 years	\$30 000
4	4 years	\$15 000
5	2 years	\$8 000
6	1 year	\$4 000
7	6 months	\$2 000
8	3 months	\$1 000
9	-	\$500
10	-	\$200
11	-	\$100
12	-	\$50

Note: This appendix is provided for convenience of reference only.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

BASIL S. HETZEL, Governor's Deputy