

Sentencing considerations - breaches of protection orders

This list of considerations is adapted from the Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders prepared by the Sentencing Advisory Council (Victoria) 2009 [[Sentencing Advisory Council Vic 2009](#)] and recommended by the Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence – A National Legal Response (ALRC Report 114) 2010 (rec. 12.8) [[ALRC/NSWLRC 2010](#)].

Sentencing a breach of a protection order can be an extremely complex task. Subject to legislation and relevant case law that requires a specific approach (see [Table 1](#) below), in sentencing an offender for breach of a protection order, the following matters may be important to consider:

1. The purposes of sentencing an offender for breach of a protection order:

- (a) Appropriately balancing the purposes of sentencing is a delicate task in family violence cases, where measures intended to protect the victim can place them at increased **risk**, and sentences designed to punish the offender may indirectly punish the victim.
- (b) As the function of a protection order is to protect the victim from future harm, an important purpose of sentencing for breach of an order should be to deter non-compliance with the order or future orders to ensure the safety and protection of the victim. The protection of the community, which encompasses protecting the victim, is an important consideration.
- (c) Denunciation and punishment are also important purposes in sentencing for contravention of a protection order. The integrity of an intervention order system relies on there being serious consequences if orders are breached.
Some sentences which are intended to punish the offender may have an unintended consequence. The dynamics of domestic and family violence may mean the imposition of a fine can also punish the victim. Sentences which are structured to ensure that it is the offender who is punished may be more effective in achieving this sentencing purpose (for example orders that require the offender comply with conditions such as completing community work).
- (d) Another sentencing purpose which can be compatible with protecting the victim (particularly in the long term) is rehabilitation. There will be occasions where a sentence with coercive rehabilitation requirements (such as mandatory attendance at a **behavioural change course** or parenting course) as well as a punitive element (such as community work, a financial condition or a jail term) strikes a better balance between the purposes of sentencing than a sentence such as a fine.

2. Sentencing factors

(a) Factors relating to the victim include:

i) **Nature of the breach and its impact on the victim**

The nature of the breach of the protection order and its impact on the victim are important factors.

When sentencing for a breach of a protection order regard should be had to the fact that the damage caused to **victims who have suffered years of domestic and family violence** may make them particularly vulnerable to conduct that in another context would seem relatively innocuous.

Breaches not involving physical violence can have a significant impact on the victim and should not necessarily be treated as less serious than breaches involving physical violence.

Where an offence has taken place in or in the vicinity of the victim's home, thereby depriving the victim of any feeling of safety or sanctuary, the breach may be regarded as more serious.

Consider whether, if there is no victim impact statement, the judicial officer should enquire as to whether the victim has been given the opportunity to make such a statement. It is however important not to insist on the provision of a victim impact statement and judicial officers should not underestimate the effect of the breach on the victim in the absence of a victim impact statement. Victims may feel it is not safe for them to provide a victim impact statement (see (iv) below.)

ii) **Abuse of power**

People in family relationships generally have ongoing emotional, legal and/or financial ties, which can also include the **joint care of children**. They are therefore in a position to commit the kind of breach that could more seriously affect a family member, not merely physically, but so as to cause mental anguish.

iii) **Presence of children**

When sentencing breaches of protection orders, information about the **exposure of any children** to family violence may be relevant. Where the original order was imposed to protect **children**, whether or not alongside another victim or victims, any breach of this order will generally be more serious. This will be so whether or not the children are direct victims or were exposed to the breach behaviour.

iv) **Attitude of the victim**

In NSW the attitude of the victim is not to be taken into account.

In all other jurisdictions generally, the views of the victim should not significantly influence the appropriate sentence for a particular offence. Because victims of family violence may be placed in danger of further violence if they are regarded by the perpetrator as being responsible for the sentence, a court should be mindful as to whether the victim has provided any views on sentence free of pressure or coercion. This may require some consideration of the dynamics of the relationship between the victim and the offender.

iv) **Contribution of the victim**

It may be relevant that the conditions of the order were breached following contact initiated by the victim. However, in assessing the degree to which this may mitigate the seriousness of the offence it is important to consider the history of the relationship between the parties, the nature of the contact and the victim's motivation in making contact (and in particular whether the victim was acting under any pressure or coercion). This may require some consideration of the dynamics of the relationship between the victim and the offender.

Some victims have reported that they feel safer if they maintain contact with the offender so they can monitor their **level of risk**.

v) **Vulnerability of the victim**

The particular circumstances of the victim—including any **special vulnerability**—are relevant to the nature and impact of a breach. Victim vulnerability may aggravate the seriousness of a breach of a protection order such that a higher penalty is justified.

(b) Factors relating to the offender include:

i) **Nature of the breach**

Depending on the dynamics of the relationship even apparently 'minor', 'trivial', 'technical' or 'low level' breaches can have a serious impact on the victim.

ii) **Culpability**

In considering the offender's culpability in a breach of protection order offence, the court should consider whether the offence was committed intentionally, recklessly or negligently and the offender's level of understanding of the order.

Generally, the fact that the offender was not present in court when the original order was made and the consequences of breach explained should not mitigate culpability. However, there may be situations in which the offender has not properly understood the conditions of the order (for example, where the offender has **poor English skills**, an **intellectual disability** or a **mental illness**).

iii) **Prior convictions and other offending behaviour**

A court should take into account information about prior convictions in particular any that relate to the victim in question or other family violence offences, where that information is available.

iv) **Previous good character**

If there is a proven pattern of domestic and family violence, any evidence of the offender's 'good behaviour' and reputation in society generally should be considered in light of the proven pattern.

v) **Timing of the breach**

Where an order is contravened only a short time after the making of the protection order or there has been an earlier breach, this may be an aggravating factor.

(c) Where a criminal offence is charged in combination with a breach of a protection order:

Where the facts which formed the basis of both charges are the same, consideration must be given to the question of 'double punishment' (see **Table 2** below).

Table 1: Jurisdictional approaches to sentencing breaches of protection orders

Australian Capital Territory	section 34(2) <i>Crimes (Sentencing) Act 2005</i> (ACT) section 43 <i>Family Violence Act 2016</i> (ACT) <i>Alchin v McInerney</i> [2015] ACTSC 300 (25 September 2015)
New South Wales	section 14(4) <i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) Judicial Commission of NSW, <i>Sentencing Bench Book</i> (2018) [NSW Sentencing Bench Book 2018] <i>Browning v The Queen</i> [2015] NSWCCA 147 (17 June 2015)
Northern Territory	section 121(7) <i>Domestic and Family Violence Act 2007</i> (NT) <i>Bush v Lyons</i> [2018] NTSC 20 (28 April 2018)
Queensland	section 9(10A) <i>Penalties and Sentences Act 1992</i> (Qld) sections 73, 178-179 <i>Domestic and Family Violence Protection Act 2012</i> (Qld) <i>Queensland Domestic and Family Violence Protection Act (2012) Bench Book</i> see section 19.9 [DFV Protection Act 2012 Bench Book 2018]
South Australia	Section 31 <i>Intervention Orders (Prevention of Abuse) Act (2009)</i> SA <i>R v Fox</i> [2017] SASC 5 (3 February 2017)
Tasmania	<i>section 35 Family Violence Act 2004 (Tas)</i> <i>Maingay v Seabourne</i> [2009] TASSC 67 (19 August 2009) [14]-[16]
Victoria	sections 37, 37A, 123,123A <i>Family Violence Protection Act (2008)</i> Vic. <i>R v Cotham</i> [1998] VSCA 111 (17 November 1998)
Western Australia	Sections 61-61C <i>Restraining Orders Act (1997)</i> WA Sections 67A, 76A, 84CA, 124D-124G <i>Sentencing Act (1995)</i> WA <i>Bernard v Williams</i> [2015] WASC 182 (30 April 2015)

Table 2: Double Punishment Considerations

Australian Capital Territory	<i>Roberts v Smorhun</i> [2013] ACTSC 218 (1 November 2013)
New South Wales	See Sentencing Bench Book (NSW) at [63-518] [NSW Sentencing Bench Book 2018]
Northern Territory	<i>Andalong v O'Neill</i> [2017] NTSC 77 (19 October 2017)
Queensland	Queensland <i>Domestic and Family Violence Protection Act (2012)</i> Bench Book see [20.8] [DFV Protection Act 2012 Bench Book 2018]; <i>R v Dibble; ex parte Attorney-General (Qld)</i> [2014] QCA 8 (11 February 2014) <i>R v MKW</i> [2014] QDC 300 (18 June 2014)
South Australia	<i>Mullins v Police</i> [2013] SASC 148 (20 September 2013) <i>R v McMutrie</i> [2002] SASC 253 (8 August 2002)
Tasmania	<i>Rae v State of Tasmania</i> [2010] TASCRA 8 (31 May 2010)
Victoria	See Family Violence Bench Book (Victoria) at [4.1.1.5] [Vic FV Bench Book 2014]
Western Australia	<i>Sackers v Thornton</i> [2009] WASC 175 (22 June 2009) <i>Musgrove v Millard</i> [2012] WASC 60 (22 February 2012)

Relevant sections of the above cases are extracted at [9.3.1 Sentencing considerations - breaches of protection orders - Cases](#)

See also 9.3 Sentencing:

Table 1: [Approaches to sentencing where offences committed in the context domestic and family violence](#)

Table 2: [Where an offence is committed in the context of domestic and family violence and breaches an existing protection order.](#)

Amendments to the Sentencing Act (1995) WA that allow courts to declare persons convicted of multiple family violence offences (including an offence against section 61(1) or 61(1A) of the Restraining Orders Act 1997 for breach of an FVRO or VRO) as serial domestic violence offenders (see ss 124D-124G) and to allow electronic monitoring of convicted domestic violence offenders while they are subject to orders or suspended terms of imprisonment (see ss 67A, 76A, 84CA) are now in force.