



Legal Services Commission
OF SOUTH AUSTRALIA

RESTRAINING ORDERS FOR PERSONS RESTRAINED

This information is general and not a substitute for legal advice. The Legal Services Commission provides free advice for most legal problems.

Contact the Legal Helpline 1300 366 424

(TTY 8463 3691) www.lsc.sa.gov.au www.lawhandbook.sa.gov.au

WHAT IS A RESTRAINING ORDER?

A restraining order is a law made by a Magistrate which limits how you can behave towards another person (it is not a criminal charge). The Magistrate decides the restrictions which will apply in your particular case. Restraining orders usually say that you must not communicate with the other person, and not go near their home or workplace. The order can also stop you from going to other places, from harassing the other person, from damaging or taking property, or any other behaviour, as the Magistrate considers necessary.

WHEN CAN SOMEONE APPLY FOR AN ORDER AGAINST ME?

If someone claims that you have threatened or injured them, or that you have damaged their property or done other things to frighten them, and that they fear this will happen again, they can ask the court to restrain you. They need to convince the court that some such events have occurred and they are afraid it will happen again. Behaviours that often lead to restraining orders may also be crimes, for example assault, stalking, or making threats, but non-criminal behaviour, such as verbal harassment, can also lead to an order. The police may help the person to ask for the order, or the person can ask the court themselves without police help.

HOW DO I KNOW WHEN SOMEONE APPLIES FOR AN ORDER AGAINST ME?

You will not necessarily know when the person first asks for the order. The order can be made by the Magistrate even though you are not there and do not know. However, it does not apply to you until the police give you a copy of the order. When they do, the order will tell you when to come to court, so that the court can hear from you. There will be a court appointment usually within a few days.

WHAT HAPPENS IN COURT?

At court, you will have the chance to tell the Magistrate whether you agree to the order or not. If you agree, the order is confirmed and becomes final. If you don't, the Magistrate will set a later date for a trial about it. The order still applies in the meantime.

WHAT HAPPENS IF I DON'T GO TO COURT?

If you are not there, the Magistrate will probably make the order final. By staying away, you can lose the chance to dispute the order, and to suggest any changes that you need. Of course, if you accept the order and do not need any changes to it, you do not have to go to court. There will not be a warrant for your arrest, as an application for a restraining order is not a criminal case.

HOW DO I DISPUTE THE ORDER?

The only way to dispute the order is to take it to court. At the trial, you will be able to challenge the evidence presented by the other person, give evidence yourself and call your witnesses. The Magistrate will hear all the evidence and decide whether the order is justified. If the Magistrate thinks this is the case, the order will be confirmed. If not, then it will end. Remember that even if you think the person has no need to fear you, if they are really afraid, and their fear is based on real incidents involving you, the order will be made. It does not matter that you may have no intention of harming them in future or are sorry for what happened. Remember, too, that if you agree that some incidents that harmed or scared the other person really happened, the precise details of what happened are not really important to the court. For example, if the person claims that they are afraid because you have repeatedly damaged their property, and you agree that you did damage their property, it does not really matter which items were damaged, or exactly how. There is no point in trying to dispute the order on the basis that the person is wrong about the details. The order will still be made if there has been property damage and the Magistrate thinks that the person is really scared of you. Likewise, if you agree that you have threatened, assaulted or injured the person, there is nothing to be gained from arguing about the exact details of what happened. Of course, there is no need to dispute the order if you do not have any particular need to see the other person or go to places where he or she might be. If the order does not cause you any real difficulties in your daily life, you may choose not to dispute it.

CAN I HAVE A LAWYER?

You can have a lawyer to handle the case for you if you wish. Names of lawyers who do this type of case can be obtained from the Law Society (phone 8229 0222) or the Yellow Pages. Charges will vary and you should ask about the cost when making the appointment or at the first interview. Legal aid is not normally granted for restraining order cases, so if you hire a lawyer you will have to pay their bill. Of course you do not have to have a lawyer if you do not want to and often people represent themselves in court in these cases. If you are thinking of this, you may want to visit your local court sometime and see how cases like this are dealt with.

WHAT CAN I DO IF THE ORDER IS UNREASONABLE?

The purpose of the order is to protect the other person. If it is really necessary to restrict your activities to achieve this, then the Magistrate will do so. However, if you think the order will create unreasonable restrictions on your activities that are not necessary for the other person's safety, you should point this out to the Magistrate at the first court appointment. Inconvenience is not enough. You must show that you will have a serious problem. For example, if the order will stop you from earning your living or doing other legitimate and necessary things, tell the Magistrate about this the first time you are in court. Suggest ways the order could be changed to solve the problem without affecting the other person's safety. If the problem cannot be solved, then you can take the case to trial and bring evidence of why the order should not be made in those terms. For instance if the order stops you working, you might want evidence from your employer or other proof. In the end, it is up to the Magistrate to decide.

CAN I APPEAL AGAINST THE ORDER?

Yes. You can appeal to the Supreme Court within 14 days. It is a good idea to get legal advice first, because you may have to pay expensive court fees to appeal, and legal costs to the other side if you lose. Sources of advice are listed at the end of this information. Of course, the order still applies while the appeal is being decided (unless you get a court order stopping it).

HOW LONG DOES THE ORDER LAST?

Orders last forever unless they specify a time period. However, the court has power to change or lift them at any time.

DOES THE ORDER APPLY IN ANY OTHER STATES?

Not automatically, but it can be made to apply there by registering it there. If this has been done, the police there can enforce it just as they can here.

WHAT IF THE SITUATION CHANGES AND THE ORDER IS NOT NEEDED?

You can apply to the court to change the order at any time, for example to remove restrictions that are no longer relevant, e.g. because the person has moved away. You do this by completing an application form at the court and making a sworn written statement about the changed situation. An appointment will be made for another hearing. You will need to convince the court that the order can be changed without risk to the other person. The other person is entitled to have their say as well.

CAN THE ORDER STOP ME FROM GOING TO MY OWN HOME?

Yes, if the Magistrate thinks it's necessary. This can include stopping you from going to a house you own or rent, to the place where you normally live, or anywhere else. However, the court must think about where you are going to live, whether there are Family Court orders entitling you to go there and your contact with your children (see below). If your personal possessions are still in the house, you can ask the Magistrate to make an order about their return or collection. Or you may be able to arrange for a friend or family member to collect them and bring them to you. Be careful, though, because some restraining orders are written so as to prevent this. You should get legal advice. Of course, if the house is yours or jointly owned, the order does not affect your legal ownership. It only stops you from going there. When a marriage has broken down, the Family Court can share out the property, and you should get legal advice about this.

WHAT ABOUT CONTACT WITH THE CHILDREN?

If your children are living with the person protected by the order, then the order may stop you from seeing them. If possible, the order should be designed to take the children's needs for contact into account. If there are Family Court orders giving you contact, show the Magistrate the orders when you go to the court appointment. The Magistrate can make a restraining order which fits in with the contact orders. If there are no Family Court orders, you can ask the Magistrate to consider the children's need for contact in deciding about the order. An order can be made which allows contact and/or communication with the other person about contact arrangements, and/ or allows you to attend counselling or mediation together. However, it is up to the Magistrate whether this will happen. If there are no Family Court contact orders, and the restraining order makes contact impossible, you could go back to the court and ask that the order be changed. If this does not work, however, the solution is to apply for Family Court orders. You should not try to contact the children if the restraining order stops you. You now need a Family Court order, even if you were having regular contact before. Breaking the restraining order is a crime with serious penalties. Also, breaking the order could affect the Family Court's decision about your future contact. It is very important not to harm your case for contact by making any mistakes about the restraining order. Once you have a Family Court order, the restraining order can be changed to take this into account.

DOES A RESTRAINING ORDER GIVE ME A CRIMINAL RECORD?

No. You are not being charged with breaking the law. It is a civil matter between you and the other person. (Of course, if you have also committed a crime such as assault, you can be separately charged with that). However, once you are given the order, it is a crime to break it. Police can arrest and charge you. Penalties can include fines and/or gaol.

WHAT IF THE OTHER PERSON CHANGES THEIR MIND AND WANTS TO SEE ME?

Even if the other person wants to contact you, the restraining order is still law and still applies to you both. You must not break it, or you could be charged with a crime. The fact that the other person agreed to the breach does not matter. This means that if the other person comes to your home, telephones you, invites you around or does anything else that encourages you to break the order, you must refuse to speak to them and keep away. If you do break the order, both of you may be guilty of a crime and the police can charge you both. If the other person wants to resume a relationship with you, or be able to see you for certain purposes, they can apply to the court to change or remove the order. They can ask the police to help with this. The court decides whether to change the order based on all the evidence.

This information is a guide to the law and is not a substitute for legal advice. It is not intended that any person should prefer to rely on the law as stated in this guide rather than choose to consult a lawyer. While care has been taken to ensure the accuracy of material contained in this publication, no responsibility will be accepted for any errors or omissions.



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