

RESTRAINT ORDERS: Information Sheet

Each year, the North West Community Legal Centre is approached to advise when people are involved in disputes / harassment either directly or through indirect methods such as social media. This guide is intended to provide practical advice to assist those either considering pursuing or responding to a Restraint Order Application.

Please note that this fact sheet covers the law as it stands in Tasmania (which is outlined in Part XA of the *Justices Act 1959 (Tas)*) at the time of publication. The law in each state of Australia varies considerably and so you should obtain specific advice relevant to your state from a lawyer before making application.

Should I Seek a Restraint Order?

As a first step, you should consider whether seeking a Restraint Order is the right step to be taking. Initially, you may wish to take the following steps before applying for a Restraint Order:-

1. Ask the person (preferably in writing) to stop the behaviour that concerns you (and retain evidence of this occurring) and/or consider blocking the person if their behaviour is by electronic means.
2. Consult with Tasmania Police to report an offence if appropriate. For example, it is a criminal offence to use a “carriage service” (such as a mobile telephone) to menace, harass or cause offence. It is also an offence to be assaulted. Tasmania Police may seek a Restraint Order for you in these circumstances, or if charged, bail a person with ‘Restraint Order like’ conditions protecting you.
3. Seek legal advice and arrange (either yourself or through a lawyer) for a “Letter of Demand” to be sent requesting that the conduct stop, failing which you will file an Application for a Restraint Order against them.

There is nothing stopping you from first filing a Restraint Order Application against someone rather than doing the above (provided there is a valid legal basis for seeking a Restraint Order). However, a Restraint Order Application can incur a time, stress and financial cost to you. Court action should always be considered to be a last resort after exhausting all alternative options. However, Restraint Orders exist for a legitimate purpose, namely to ensure individuals comfort and safety.

Who Can Apply for a Restraint Order?

An Application for a Restraint Order may be made by: -

1. An Officer of Tasmania Police (usually this occurs as a result of charged offending conduct);
2. The person to whom the conduct justifying the Application is directed at;
3. A parent or legal guardian of a child (for the child’s benefit) if under the age of 18;
4. By a Guardian or Administrator pursuant to the *Guardianship and Administration Act 1995 (Tas)*; or

5. By any other person provided permission is sought and granted by the Court. Practically speaking, that person would need to have strong reasons justifying their intervention (i.e., being a carer of a person with a disability).

If you are applying for a Restraint Order, you are known as the Applicant. The other party will be known as the Respondent.

An Application for Restraint Order cannot be made by a person generally for the benefit of another adult. This commonly arises when a person applies for the benefit of their partner or adult child. Each adult individual would need a separate Application with their own independent supporting evidence as the cases are treated separately and a filing fee is applicable for each Application. A parent may apply for a Restraint Order including their child provided there is evidence justifying their inclusion.

Note- if you have been in a “significant relationship” with the other party, it may be preferable to seek either a Police Family Violence Order or Family Violence Order against the other party pursuant to the *Family Violence Act 2004* (Tas). You should obtain legal advice if this is an issue for you or you are unsure. You may contact our organisation for that advice or we can refer you to other available services which are best placed to assist you.

If you file a Restraint Order application but the Court considers you should have sought a Family Violence Order, your Application will not be rejected and the Court has the power under section 106BA of the *Justices Act 1959* (Tas) to proceed as if the Application were for a Family Violence Order.

How do I seek a Restraint Order?

The process for seeking a Restraint Order is generally as follows:-

1. An Application must be drafted and filed with the Magistrates Court. It is preferable to download the form from the Magistrates Court website and type your Application rather than filling it out by hand. You should ensure you include numbered short paragraphs in your application. If your application is particularly urgent, you may request an urgent listing;
2. The Application must be served personally on the Respondent to the Application and a Memorandum of Service filed with the Magistrates Court. This should ideally occur before the matter is listed for the first Court date. While you may request Police serve the Application, you must outline a good reason in your Application as to why you cannot have the application served by an independent person or a process server. You should avoid serving your application yourself. The Court will consider your request for Police to serve an Application on the first return date, but this may cause delay in your matter progressing while service occurs.
3. At the first mention, there are three issues that need to be addressed: -
 - (a) Whether the Respondent agrees to or opposes the making of a Final Order as sought. If not opposed, a Final Order can be made in terms at the discretion of the Magistrate;
 - (b) If opposed, whether an Interim (temporary) Restraint Order ought be made until the case reaches an end. If you want an Interim Order, you must request this in your Application and outline why an urgent Interim Order is needed in your case; and

- (c) If opposed, whether the matter ought to proceed to mediation or otherwise if mediation is not appropriate, directly to a hearing.
4. If the matter proceeds to mediation, the Court will provide the parties with a date to attend the Court for a private mediation in the presence of a Court appointed mediator. At mediation the Applicant and Respondent can discuss whether the matter may be resolved in some way. This may include the Respondent providing a promise (undertaking) not to engage in certain behaviour for a defined period, as an alternative to a Restraint Order. If the matter does not resolve at mediation, the matter will return to Court for the Magistrate to make certain orders (such as the filing of responding evidence in the form of Affidavits) and set the matter down for hearing. All discussions that occur at a mediation are on a without prejudice basis, meaning nothing you say at mediation can be used in evidence in a later hearing without your consent.
 5. Final Hearing will then occur- usually 2-8 months after the filing of an Application. At a final Hearing, you will need to have your witnesses present and be prepared to conduct your case. If you are out of your depth, you may instruct a lawyer to conduct your case on your behalf at any stage but you should not leave this to the last minute. If you need guidance as to what to expect at Court, you should speak to a lawyer regarding the process involved.

You must be aware that unless the Respondent is present when an Interim or Final Restraint Order is made, it does not take effect until it is served on the Respondent. If you have a Restraint Order protecting you in place, it is important that you report any breach of the Restraint Order to Tasmania Police. If you are not willing to report breaches, the utility in having a Restraint Order in place is undermined.

What must be proven to obtain a Restraint Order?

A Magistrate will only make a Restraint Order if satisfied on the balance of probabilities (more likely than not) that the Respondent has:-

1. Engaged in one or more of the following against the Applicant:-
 - a. Caused or threatened to do personal injury or damage to property;
 - b. Behaved in a provocative or offensive manner likely to lead to a breach of the peace;
or
 - c. Stalking; **and**
2. Unless restrained, the Respondent is likely to continue to do at least one of the above.

You should be aware that: -

1. Your Application should include in specific detail the conduct you allege warrants the making of a Restraint Order in short numbered paragraphs with reference to dates, times and locations;
2. You will need to pay a filing fee to the Court (or seek an exemption for the fee if appropriate) and you will need to serve your Application on the Respondent. It should be served by an

independent person and you may wish to pay for a Process Server to ensure the document is served. We can provide a list of local process servers on request;

3. It is difficult to prove that third parties engaged in an action at the Respondent's request and ideally there should be evidence as to this (e.g., a statement that "the Respondent told me to do it" if that is what is said). You need to be careful not to make assumptions that a third party must have told them to do it; and
4. The Rules of Evidence apply to Restraint Order Applications. A good practical measure to ensure you comply is to only include evidence of things that you saw, heard or otherwise perceived. If there are other people you want to give evidence, they will need to be prepared at some point to make a separate Affidavit as to what they saw, heard or otherwise perceived and be prepared to give evidence in Court should the Application be opposed and proceed to Hearing.

You should always first obtain legal advice prior to filing an Application with the Court. It is much easier to fix errors with an Application or strengthen your case prior to it being filed, as opposed to involving a lawyer once you have filed and have found yourself in trouble. The Court has a discretion to award costs in Restraining Order cases and so if either party has engaged a lawyer, there is a risk of having to pay some (or all) of the successful party's legal costs.

What are my options if I have been served with a Restraint Order Application?

If you have been served with a Restraint Order Application naming you as the Respondent, your options on the first Court date are: -

1. If you do not attend Court, a Final Restraining Order will be made against you and likely served on you by Tasmania Police. A Magistrate will only make an Order on such terms considered appropriate taking into account the evidence contained in the Application;
2. You may agree to a Final Restraint Order being made against you on a "without admissions" basis. This means that an Order would be made against you but you do not admit the content of the Application. This will end the case on the first Court date although you will be bound by the Restraining Order. It is recommended that if you agree to an Order, it is made "without admission" to the content of the application to avoid it being able to be used in other Court proceedings (i.e., criminal charges that may follow);
3. You may oppose the making of a final Restraint Order - in which case the matter will likely be sent to mediation and/or Hearing; or
4. You may apply to adjourn your matter to seek legal advice. The Court will then consider whether an Interim Order is made while the case adjourns (this is an Order granting certain protections to the Applicant that will likely last until the end of the case or the Court revokes the Interim Order).

If you do not want certain aspects of a Restraining Order to be made, it is easier to negotiate these issues proactively before a Final Order is made. It is much harder to change an Order once it has been made as you will have to prove why the Restraint Order should be changed and file an Application to

Vary/Revoke the Restraint Order with the Magistrates Court.

A Restraint Order may impact your employment depending on your employer's policies and the legal requirements of your role. For example, a Restraining Order may be relevant to whether you retain a Working With Vulnerable People card, Security Licence, or a Firearms Licence. You should seek specific advice from a lawyer as soon as possible after being served if this is a concern for you.

If you do not want to have a Restraining Order made against you, you may offer to the Applicant that you will enter into an Undertaking (being a promise) not to do certain conduct (e.g., contact or approach them) for a defined period (usually 6 – 12 months).

An Undertaking is a promise to the Court and to the Applicant. If you breach your Undertaking, the case can be brought back to Court by the Applicant and continued.

If an Interim or Final Restraint Order is made against you, you must ensure you comply with it as if you do not, you may be charged with a criminal offence, prosecuted, and punished if you plead guilty or are found guilty. If you develop a significant history for breaching Restraint Orders, this may be relevant as to whether Police and/or a Court grant you bail in relation to other offending at a later stage.

What should you do if you need help with a Restraint Order Application?

1. Go to the Magistrates Court website (https://www.magistratescourt.tas.gov.au/going_to_court/restraint_orders) to consider the information contained in their guide and to obtain the forms required; and
2. Contact the North West Community Legal Centre Inc. for help.

How can the North West Community Legal Centre help?

We can assess the circumstances of your individual matter and provide you with your legal options. Depending on your personal circumstances, you may be eligible for ongoing legal assistance whereby we can assist you through the process involved including completing the necessary documents and Application to the Court if required. If you have any queries, please make an appointment to speak with one of our lawyers free of charge.

Other Helpful Resources

Magistrates Court of Tasmania:-

1. Guide- https://www.magistratescourt.tas.gov.au/going_to_court/restraint_orders

2. Forms: -

Magistrates Court Applications:

https://www.magistratescourt.tas.gov.au/going_to_court/restraint_orders/application_forms_restraint_order

Tasmania Legal Aid Fact Sheet: <https://www.legalaid.tas.gov.au/factsheets/fact-sheet-restraint-orders/>

Women's Legal Service Fact Sheet: https://www.womenslegaltas.org.au/uploads/factsheets/Restraint_Orders.pdf

Hobart Community Legal Service website: <https://www.hobartlegal.org.au/handbook/crime-and-punishment/sentencing/restraint-or-restraining-orders/>

Published: October 2023

North West Community Legal Centre Inc.

56 Formby Road

DEVONPORT, TAS, 7310

Ph: (03) 6424 8720

Email: office@nwclc.org.au

Website: www.nwclc.org.au

Disclaimer: *This document is provided for informational purposes only. The information contained in this document may not be appropriate to your specific circumstances and whilst all endeavours have been made to ensure its accuracy at the time of publication, it may not be accurate at the time of reading. You should seek independent legal advice with respect to your individual circumstances.*

The financial assistance provided to the NWCLC from both the State and Commonwealth Governments via the National Legal Assistance Partnership (NLAP) is gratefully acknowledged.