Children's Court of New South Wales

5 September 2012

Mr Paul McKnight
Law Reform Commission
GPO Box 5199,
SYDNEY NSW 2001

Dear Mr McKnight,

Re: People with cognitive and mental health impairments in the criminal justice system
Question Paper 1 – Apprehended violence orders (AVO)

Thank you for the opportunity to comment on the operation of AVOs where people with a cognitive or mental health impairment are defendants. The Court will limit its comments to matters relevant to young people.

The Court recognises the importance of the protection of any person whose safety may be placed at risk due to the conduct of a young person. This purpose however, cannot be achieved if the defendant in the AVO is "*incapable*" of understanding and complying with the order.

Young people with cognitive and mental health impairment are particularly vulnerable as defendants in AVOs. Some of these young people, particularly where *doli incapax* is applicable, may not be convicted of a criminal offence yet may have an AVO issued against them.

Question 1
Are AVOs frequently made against adults with cognitive or mental health impairments? Are those AVOs frequently breached?

Not applicable.

Question 2
1. *In your experience do adults with cognitive and mental health impairments also have problems understanding AVOs? Please provide examples of successful and/or unsuccessful uses of AVOs against people with cognitive and mental health impairments.*

Not applicable.

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2. *Has the practice of the courts changed since Farthing v Phipps? Should the Crimes (Domestic and Personal Violence) Act 2007 (NSW) provide that an AVO may not be made against a person who does not have the capacity to understand or comply with it?*

The Court is of the view that the principles articulated in *Farthing v Phipps*[1] should be enshrined in legislation.

Lakatos DCJ articulates three relevant principles in *Farthing v Phipps* at paragraph 33:

1. "The Act proceeds on the basis that an order …would be understood by that defendant, and acted upon"
2. "…if the court concludes that the making of an order will not have the desired primary effect, then that will be a substantial reason in accordance with s 17 not to make the order."
3. "If the court concludes that a person against whom the order is made cannot properly comprehend the terms of its order, so that the effect might be that he or she unwittingly breaches the order and therefore exposes him or herself to imprisonment, that in my view would also be a sufficient other reason why an order should not be made."

The Children's Court proposes that, when a provisional order is made, the court attendance date should be set for a much shorter period of time, preferably within 7 days of its making. For a young person with a cognitive and mental health impairment this shorter time frame is particularly important to minimise any risk of breaching the order.

Enshrinement of *Farthing v Phipps* in legislation will provide a protection for young people who may be at risk of breaching an AVO due to their cognitive and mental health impairment. Where the test in *Farthing v Phipps* is not satisfied, yet evidence of cognitive and mental impairment exists, any conditions attached to an AVO should be reasonable, having regard to the ability of the young person to comply with those conditions.

After being advised of the Court Orders by the magistrate or registrar it is recommended that the defendant young person be asked to indicate their understanding of the nature of the Orders. This measure provides an additional layer of protection for young people who suffer from a cognitive or mental health impairment.

Young people, by nature of their immaturity and impulsivity, are already vulnerable to breaches of AVOs. The Court introduced Practice Note 8 as a rehabilitative measure to assist young people to reconcile with the persons/s in need of protection, usually family members, through counselling and intervention while subject to an interim AVO. If there is no further offending following participation in programs during a 3 month adjournment the Court typically will not make any further orders. This procedure provides some assistance to young people with a cognitive or mental health impairment who may not meet the test in *Farthing v Phipps.*

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[1] [2010] NSWDC 317.

In the event of a breach, the Court is of the view that a youth justice conference under the *Young Offenders Act 1997* should be an available option in appropriate cases where a young person does not satisfy the test under *Farthing v Phipps*, but does suffer with a less pervasive cognitive or mental health impairment.

In the case of young people, an AVO should only be sought if it is justified in all of the circumstances, with relevant considerations being age and cognitive and mental health impairment. Where an application for an AVO is deemed appropriate for a young person a presumption should exist that an interim order only is made. As well, the process may be assisted if s 39(2) of the legislation made it clearer that a judicial officer has a discretion *not* to make an AVO where there is a plea of guilty or finding of guilt for an associated criminal offence.

A final AVO should only be imposed on young people on rare occasions, because of the potentially negative effects on their future employment prospects, particularly child-related employment, where the person in need of protection on the AVO is under 16.

3. *If the Crimes (Domestic and Personal Violence) Act 2007 (NSW) is so amended, what legal or practical steps should be taken for the protection of the person in need of protection (whether or not that person also has a cognitive or mental health impairment)?*

If an interim AVO is not made because the young person does not satisfy the test in *Farthing v Phipps* at paragraph 33, it is the view of the Court that an AVO should not be made and the young person should be diverted into appropriate programs involving therapeutic and educational alternatives, namely mediation, group work, counselling, training and support for parents and carers, medical treatment and behaviour change programs.

In its submission to the Law Reform Commission (LRC) on *People with cognitive and mental health impairment in the criminal justice system: Diversion,* the Children's Court voiced its support for the expansion of the Adolescent Court and Community Team (ACCT) to all courts sitting as Children's Courts, and for its services to be extended to include identification and preliminary assessment of young people as defendants in AVOs who may have cognitive or mental health impairment.

The Court also expressed its support to the LRC, for the introduction of a program, similar to the local court's Court Referral of Eligible Defendants into Treatment pilot program (CREDIT), but modified to suit the special needs of young people. It is proposed that this program should work closely with the ACCT and its function should also extend to assist young people with cognitive or mental health impairment as well as mental health issues.[2]

The ACCT and Juvenile CREDIT program may be suitable vehicles in which to develop procedures for diversion for young people with cognitive and mental health impairment when an AVO is deemed unsuitable. The nature and intensity of follow-up could be graded according to the perceived risk to the person in need of protection and

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[2] The Children's Court made a submission outlining the views articulated in this paragraph, to the NSW Law Reform Commission's Report 135 on "People with cognitive and mental health impairments in the criminal justice system" (2012).

any identified behavioural issues in the young person, in particular anger issues. Procedures for follow-up would further protect the person in need of protection.

Question 3

1. *In your experience do adults with cognitive and mental health impairments have difficulties complying with AVOs because of their impairments? Please give examples.*

Not applicable.

2. *If so, how do you think the criminal justice system should respond to this situation? What alternatives are or should be available?*

Not applicable.

Question 4

1. *Should there be an exception to the requirement for police to apply for an AVO in situations involving residential care of a person with a cognitive or mental health impairment? How should such an exception be framed?*

The Children's Court is aware of situations where carers in residential units in which young people with cognitive and mental health impairment reside, at times utilise AVOs as a behaviour management tool when there is disruptive or bad behaviour unable to be controlled by the carer. The Court should not be required to criminalise what is essentially problematic behaviour, by the imposition of an AVO to control a young person, rather than for the proper purpose intended by the AVO legislation.

The Court proposes that the institution of AVO proceedings is inappropriate as it may delay the identification and onset of relevant treatment, is not an efficient or appropriate use of court resources and places the young person at risk of entry into the criminal justice system for behaviours which should be dealt with therapeutically by way of an individualised behaviour management plan.

Policy guidelines should be firmly in place in residential units and carers should be given the relevant training and support to assist them in following the organisation's appropriate procedures in dealing with residents with challenging behaviours. A staged process should be in place which attempts to address challenging behaviour in its early stages and provide a graded series of responses. Where the challenging behaviour escalates, all processes have been exhausted and the carer is likely to be placed at risk, only then should consideration be given to commencing the AVO process.

Police have a discretion when deciding whether to make an application for a provisional AVO. Under s 26, they must have a "*reasonable belief*" that a provisional order needs to be made and under s 27 they may find that there are "*good reasons*" not to make an application. Police should be encouraged to exercise their discretion in relevant circumstances. If the legislation were to codify the applicable test in *Farthing v Phipps*, police would be prompted to exercise their discretion more appropriately in relation to young people with cognitive and mental health impairment. (This paragraph applies generally and not simply to situations involving residential units.)

2. *Should any other changes be made to address this issue?*

The residential unit should provide the police with evidence of a behavioural management plan, compliance by the organisation with the plan and evidence of the history of any challenging behaviours which had placed a residential carer at risk. This would assist the police in the exercise of their discretion. Where police did *not* form a view that the young person satisfied the criteria in *Farthing v Phipps* they would proceed by applying for a provisional order in the normal way and allow the Court to make further enquiry.

Question 5

1. *Are carers seeking AVOs against people with cognitive or mental health impairments? In what circumstances? When is this effective or ineffective? What alternative could or should carers have in this situation?*

See response to question 6 below.

2. *In your experience are AVOs being used by health care providers in a way that unreasonably limits access to health care? How can this be avoided?*

The Children's Court is not aware of this problem but is concerned if it were to occur, particularly in rural and remote areas where services are already limited.

Question 6

Are parents seeking AVOs against children (including adult children) with cognitive or mental health impairments? In what circumstances? When is this effective or ineffective? What alternatives could or should parents have in this situation?

Dealing with young people who have cognitive and mental health issues is challenging for all parents and carers, especially if they have not had any targeted training, where siblings or other children are involved or where parents/carers have poor parenting skills. In the Court's experience, some parents/carers do seek to commence the AVO process against the children in their care to assist them in dealing with the child's behavioural problems.

Services should be available to these parents and carers where they can access training and assistance in the community to deal with these challenging behaviours. A holistic approach should be taken where parents, carers, services and schools work together to address the young person's needs consistently and, where challenging behaviour escalates, more intensive treatment and intervention should be imposed. Where the young person is diverted at Court, the ACCT or other designated agency should engage with existing and relevant service providers to offer the appropriate support and training to parents/carers.

Question 7

1. *Which alternative responses are useful responses to intimidating behaviour? In what circumstances?*

See questions 2.3 and 6.

2. *How can the use of alternatives to AVOs be encouraged by the criminal justice system?*

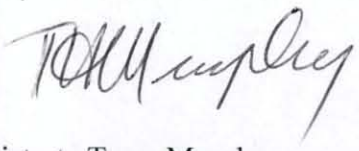
See questions 2.3 and 6.

Question 8

1. *Are there any outstanding issues in relation to AVOs granted against people with a cognitive or mental health impairment?*

In a domestic violence situation involving a young person it is typically the parent who calls the police. Police should be required to make relevant enquiries from all parties and witnesses to confirm the identity of the primary aggressor as there may be occasions when children are defending themselves against violent parents or where there is systemic violence in the family. The acts of the young person may be incidental to, or a consequence of, that violence and the entire family situation would benefit from a more holistic approach than just the institution of AVO proceedings.

Yours sincerely



Magistrate Terry Murphy
Acting President