

**PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENTS
IN THE CRIMINAL JUSTICE SYSTEM**

**QUESTION PAPER 1 –
APPREHENDED VIOLENCE ORDERS**

**Legal Aid NSW Submission to the
New South Wales Law Reform Commission**

August 2012

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The interaction between people with cognitive and mental health impairments and the criminal justice system is an area of particular significance to Legal Aid NSW. The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Court and Children's Court, committals, indictable sentences and trials, and appeals. Our specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

The Legal Aid NSW Mental Health Advocacy Service provides and coordinates duty representation in metropolitan and regional NSW for people who are subject to involuntary treatment or detention under the *Mental Health Act 2007* and represents forensic patients under the *Mental Health (Forensic Provisions) Act 1990* (MHFPA).

Legal Aid NSW welcomes the opportunity to make a submission to the New South Wales Law Reform Commission's reference on people with cognitive and mental health impairments in the criminal justice system, Question Paper 1 – Apprehended Violence Orders (AVOs).

Should you require any further information, please contact Joshua Kulawiec, Solicitor, Legal & Policy Branch at joshua.kulawiec@legalaid.nsw.gov.au or Annmarie Lumsden, Executive Director, Strategic Policy Planning and Management Reporting Division at annmarie.lumsden@legalaid.nsw.gov.au.

Background

Section 9(1)(a) provides that the primary objective of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ("the Act") is "to ensure the safety and protection of all persons, including children, who experience or witness domestic violence."

This objective is not met where defendants with cognitive and mental health impairment (impairment) do not have capacity to understand or comply with AVOs.

While the MHFPA sets out a clear procedure for dealing with adults with impairment who are charged with a criminal offence, there is no similar procedure in the Act for defendants to AVOs.

Criminal charges frequently have an associated AVO. It is often the case that while a defendant may be dealt with for a criminal charge under section 32 of the MHFPA, a court will still make an AVO for the person in need of protection (PINOP) due to some or all of the following factors:

- it acknowledges harm done to the PINOP
- it protects the PINOP from further harm, and
- under the Act if a person pleads guilty to, or is found guilty, of a domestic violence offence (excluding murder or manslaughter), the court hearing the proceedings must make an AVO for the protection of the person against whom the offence was committed whether or not an application for such an order has been made, unless the court is satisfied that it is not required.

In light of these issues Legal Aid NSW believes this reference provides an opportunity to better meet the primary objective of the Act by:

- identifying the difficulties faced by people with impairment in relation to AVOs made against them and their families and carers
- adopting alternative methods to respond to intimidating behaviour that provide a more effective solution for people with impairment, and
- amending the Act so that the court is not required to make an AVO where the defendant does not have capacity to understand or comply with it.

In the submission to the Statutory Review of the *Crimes (Domestic and Personal Violence) Act 2007*,¹ Legal Aid NSW stated:

Legal Aid NSW is of the view that the current definition of 'domestic relationship' in section 5 of the Act is too broad and should be limited to relationships between intimate partners or family members where violence in those relationships reflects the complex dynamics of power and control and shared emotional history.

The current definition includes relationships between people who live in refuges, group homes, residential care facilities and NSW Department of Community Services placements.

¹ Submission on behalf of Legal Aid NSW to the Criminal Law Review, Department of Attorney General and Justice, 18 November 2011.

Legal Aid NSW is particularly concerned that professional care workers are increasingly using ADVOs to control the behaviour of vulnerable people, including young people, who they are caring for. These ADVOs often include conditions relating to alcohol and property, and at times are also being used to exclude vulnerable people from residences.

This change in definition would impact on the AVO response to people with impairment, depending on the nature of the relationship with the PINOP.

INCIDENCE OF AVOs

Question 1

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

It is the experience of Legal Aid NSW that AVOs are frequently made against adults with impairment.

Defendants in these matters are both male and female, and the most common circumstances in which AVOs are made are where the impaired person is engaging in either:

- aggressive behaviour in a family, carer or group home setting that is not being managed appropriately, or
- stalking or harassment of a person in pursuit of a relationship with them.

In cases where the protected person is a family member or partner, they commonly resist seeking an AVO and just want help for the person such as appropriate healthcare. Unfortunately being convicted of a criminal charge for breaching an AVO is often the only way a defendant can be directed to take their medication and maintain contact with healthcare services.

Impaired people often breach AVOs because they either do not understand the order or disregard it because of their impairment or related issues such as alcohol or drug use. Breaches may also occur where the impaired person understands and acknowledges the AVO, but does not have capacity to adhere to it because their decision-making is dominated by their impairment.

Legal Aid NSW Case Study 1

A Legal Aid NSW client had obtained multiple mental health diagnoses from different professionals. He was wanted by police across two states for breaching bail and AVO's, and not appearing in court.

While the client may have understood he had an AVO in place, the conditions of that AVO were not his primary guiding force. Rather, his decision-making and reactivity were driven by his mental state and his inability to function and respond appropriately to "normal" situations or conflict as a result of inconsistent treatment of his mental health condition.

DIFFICULTY UNDERSTANDING AN AVO

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.

Depending on the severity of their impairment, impaired people often struggle to understand the nature of AVOs and to give instructions in relation to the conditions of an AVO. As a consequence AVOs are regularly breached by people with impairment. The experience of Legal Aid NSW is that the likelihood of breaches is reduced where the implications of the AVO are clearly explained and where health and legal services are linked. This is demonstrated in the case studies below.

Legal Aid NSW Case Study 2

A WDV CAS client was the mother of both a 22-year-old son with autism and other mental health issues, and an 18-year-old son. The 22-year-old was violent to his mother and brother. The mother had to leave her job and stay at home to make sure the 22-year-old did not attack his brother. The son, who was the defendant in his mother's AVO application, could not understand what he was consenting to. He had no ability to understand the repercussions of breaching an AVO. An interim AVO for three months was granted by the Court.

Legal Aid NSW Case Study 3

A woman with impairment was a WDV CAS client. She was a defendant in an AVO matter due to her harassment of a young man. She was very unwell when the AVO was made and could not understand that she was not allowed to contact the young man she was harassing. It was explained to her many times at Court on the day of the mention, but she was unable to comprehend the "no contact" clause. As a result, the woman breached the AVO on a number of occasions.

The woman was then hospitalised for some months and had her medication changed. To the knowledge of WDV CAS the client has not breached her AVO since. She became healthier and as a result developed a clearer understanding of the implications of the AVO.

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?

It is the experience of Legal Aid NSW that the practice of the courts has not changed significantly following *Farthing v Phipps*,² as Legal Aid NSW clients with impairment continue to have AVOs made against them.

² [2010] NSWDC 317.

Legal Aid NSW is therefore of the view that the construction of the Act as held in *Farthing v Phipps*, namely that inability to understand and comply with an AVO due to impairment is a reason why it should not be made,³ should be expressly stated in the Act.

As discussed throughout the submission, an AVO made against an impaired person is often futile or even counter-productive as it can exacerbate the level of inappropriate behaviour. Further, breaching such orders can lead to conviction and the possibility of incarceration.

Criminalisation of young people's problematic behaviour is of particular concern to Legal Aid NSW. Research reveals that a high proportion of children and young people making their first appearance before a court continue their offending into adulthood, particularly if their first court appearance occurred when they were young.⁴

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)?

A treatment plan similar to that required by section 32 of the MHFPA would provide some measure of security for a PINOP. Alternatively, Legal Aid NSW suggests a regime which would require the person with impairment to check in with a carer or healthcare professional on a regular basis.

DIFFICULTY COMPLYING WITH AN AVO

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.

As noted above it is the experience of Legal Aid NSW that adults with impairment have difficulties complying with AVOs. The extent of such difficulties depends on the:

- severity of the impairment
- amount of time taken to explain the concept of the AVO to the person
- level of access to ongoing support, and
- context in which the AVO has arisen and how the offending behaviour may be triggered.

It is the view of Legal Aid NSW that adults with impairment often find it challenging to regulate their emotions and impulsivity, in the context of interpersonal conflict and court proceedings. This compromises their self-control, decision-making abilities and higher order reasoning, thereby making it difficult for them to recognise the importance of complying with the AVO.

³ Id at [33].

⁴ Shuling Chen, Tania Matruglio, Don Weatherburn and Jiuzhao Hua, *The transition from juvenile to adult criminal careers*, Crime and Justice Bulletin, Contemporary Issues in Crime and Justice, Number 86, May 2005, 1.

Legal Aid NSW Case Study 4

A Legal Aid NSW client developed a fixation on his female neighbour. The neighbour had been friendly to him in the past and in his mind he considered her to be his girlfriend, despite the fact that the neighbour was already in a relationship.

The client relentlessly pursued the neighbour and pleaded with her to go out with him. He would regularly wait for her to arrive or leave home and then approach her, make phone calls, berate her when he saw her with her boyfriend, grab her arm, and stand in front of her car so she could not drive away.

The neighbour and her family obtained an AVO against the client. He continually breached the order and assaulted the neighbour's boyfriend and other family members. The client's family refused intervention of professionals, in part because they did not completely accept their son had an intellectual disability.

The Legal Aid NSW Client Assessment and Referral Service (CARS) have also seen adult clients with cognitive impairment who have breached an AVO as a result of meeting with the person in need of protection at the PINOPs request. Situations involving partners where the couple remain living together seem to be at higher risk of breaches, especially where one or both people have an untreated mental illness.

Appreciating the consequences of not complying with an order is often further compromised when clients self medicate untreated mental illness with alcohol or illicit substances.

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

Legal Aid NSW suggests that people with impairment who do not have capacity to understand or comply with an AVO be excluded from the Act. Rather, it is recommended that these people are subject to a treatment plan similar to that under section 32 of the MHFPA.

Alternatively, Legal Aid NSW suggests that where the defendant in an AVO matter has impairment, the proceedings be adjourned to enable assessment of the defendant's capacity to comply with an AVO and, if it is determined that the defendant has capacity, the development of behaviour management plans to assist the defendant to comply with the order.

POLICE AS APPLICANTS

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?

AVOs in situations involving residential care of a person compromise the carer's relationship with the person, and may also cause the person to be ejected from the residence.

In the event that the Act is not amended to exclude people with impairment, Legal Aid NSW supports an exception to the requirement for police to apply for an AVO in situations involving residential care of a person with impairment.

Legal Aid NSW suggests that instead police should have discretion. Police could be assisted in responding to intimidating behaviour by people with impairment through the appointment of specialised officers similar to domestic violence liaison officers (DVLOs). Police should be required to seek advice from these specialist officers in deciding whether to apply for an AVO against a person with impairment.

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

See above.

CARERS AND HEALTH CARE PROVIDERS AS APPLICANTS

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?

It is the experience of Legal Aid NSW that many residential services and health care providers have a policy of dealing with violence by calling the police and applying for an AVO rather than focussing on behavioural management practices. This occurs both in the context of children in out of home care, and to adults who have a carer and may be in residential care as a result of their impairment.

Many people who live in care placements have traumatic backgrounds, and multiple diagnoses of intellectual disability, mental illness and other psychological or behavioural disorders. As a result they do not have the ability to regulate their emotions or develop positive conflict resolution strategies.

Anecdotal evidence suggests that care workers often use occupational health and safety mandates to apply for AVOs against people with impairment as a way of dealing with their behaviour.

The making of AVOs is not always the most effective way to deal with conflict involving people who by virtue of their impairment lack conflict resolution skills. Breaches are common because young people and adults with impairment often lack the capacity to understand the conditions attached to AVOs. Breaching such orders can lead to conviction and the possibility of incarceration.

Legal Aid NSW is of the view that alternatives should be explored within the Disability and Community Services system to deal with the issue of violence against carers. As discussed above, AVO legislation is ill-suited to these types of matters. It is more appropriate that such behaviour be treated as a health and welfare issue and not a legal issue.

Rather than seeking an AVO against a person with impairment, a carer should consider referring the person to a behaviour management program and utilising other health and welfare support services.

Legal Aid NSW is aware of courses for people with impairment that do not include large amounts of written education, but instead use visual prompts and appropriate teachings.

If available it may also be appropriate to transfer the person with impairment to another carer.

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 breach of an AVO has serious consequences for people living in residential care settings. Many programs exclude people with a history of violent offences. This can result in homelessness which in itself limits access to health care, and consequently a worsening of their impairment. Please see below for alternatives to AVOs.

Legal Aid NSW is of the view that a more appropriate response to the problematic behaviour of an impaired person is the implementation of a behaviour management strategy.

PARENTS AS APPLICANTS

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?

It is the experience of Legal Aid NSW that it is increasingly common for young people with impairment to have AVOs taken out against them by their parents.

However, as noted above, AVOs in these circumstances are often sought reluctantly in an effort to obtain assistance from healthcare services. Commonly these AVOs are sought in situations where children have become non-compliant with medication and an aggressive or violent incident has occurred.

In other cases the parent will contact police to assist in a situation that has got out of hand. Often the parents do not want the police to apply for an AVO, and are unaware that this is required under the Act.

An AVO may result in a child (including an adult child) becoming isolated from their family, which is often one of their few avenues of support.

Parents in these circumstances are often distressed by both the AVO and the lack of adequate support for the defendant their child.

In other circumstances where children are defendants to AVOs, there is serious dysfunction in their family, with domestic violence a prevalent factor. Parents in these circumstances often refuse referrals for support services for themselves and their child. In many instances parents struggle with their own issues and are unable to remind or take the child to appointments to address their impairment.

The Legal Aid NSW Disability Casework Project recently provided case work coordination and referrals for young offenders who were granted a section 32 Order under the MHFPA. Violence by the child against a family member was a feature for 36% of cases. In these cases the family member contacted the police and proceeded with an AVO and/or breach of AVO.

Legal Aid NSW suggests that where a person is aged less than 18 years the family could be directed to attend family therapy or other type of family intervention which focuses on communication, conflict resolution, parenting and behaviour management strategies.

Legal Aid NSW is aware of programs that teach parenting skills to people with impairment such as "Healthy Start", and other programs that teach healthy relationships, and explain concepts of violence and AVOs to impaired defendants.

Legal Aid NSW Case Study 5

A Legal Aid NSW client was a teenager with cognitive impairment. He had a mental age of four or five, and was often violent towards his parents. He lived in supported housing, but regularly ran away and returned home.

In an attempt to stop the child from coming home, his parents were granted an AVO against him that included the condition that he could not come within five metres of their house. Every time he breached that condition, he would spend some days on remand.

ALTERNATIVES TO AVOs

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

As discussed above, Legal Aid NSW suggests that the NSW Police create positions similar to DVLOs that specialise in responding to intimidating behaviour by people with impairment. This would be a valuable resource for operational police to advise on matters such as whether it is appropriate to take out an AVO against a person with impairment.

Another useful response would be to divert people with impairment to behaviour management programs. They could attend the course with their carers, and where they are still in a relationship with the PINOP, all parties could attend.

The course should be broader than just anger management, and address both the cause and effect of the person's intimidating behaviour with a view to eradicating such behaviour. The course should be evidence based and could be jointly developed and delivered by Ageing, Disability & Home Care (ADHC) and the Department of Corrective Services.

It is important that there be greater coordination between health and law enforcement, so that people with impairment are properly diagnosed and treated.

Mediation may also be a suitable option in certain circumstances. It is noted that mediation is available in situations where an Apprehended Personal Violence Order is sought, but is not available in situations where an Apprehended Domestic Violence Order is sought.

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

The use of alternatives to AVOs such as those discussed above can be encouraged by the criminal justice system by offering diversionary options, and promoting access to health and personal development services.

ADDITIONAL ISSUES

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

Local Court Practice Note 2 of 2012

Local Court practice in relation to AVOs is now governed by Practice Note 2 of 2012, which came into force on 1 May 2012 (and was amended on 30 July 2012). Part 6 of this practice note provides that in situations where an application for an AVO is made and there are no associated criminal charges, and the making of the AVO is contested, the parties are required to file written statements of their evidence prior to a date being set for the hearing of the AVO application. Because Legal Aid NSW provides representation for defendants in AVO matters (ie where there are no criminal charges) only in exceptional circumstances, the majority of such defendants are likely to be unrepresented. The obligation on these defendants to draft and file written statements of their evidence is likely to be very onerous, particularly in cases where the defendant suffers from cognitive or mental health impairment (and often associated difficulties with literacy etc). In addition, such defendants are unlikely to know about, comprehend, or exercise, the protections against self-incrimination contained in s 87 of the *Civil Procedure Act 2005*.

Consent

Unrepresented defendants with impairment are more likely to consent to AVOs because they do not understand the nature of the proceedings or are not able to understand or participate effectively in the court system. This may cause particular problems where children are separately listed on AVOs as unlike AVOs that list only adults as protected persons, an AVO that separately lists children as protected persons can only be varied by the police (see s 72(3)). Depending on the nature of the conditions contained in the AVO, this may mean that an impaired person who suffers a psychotic episode as a result of which an AVO is made, may be effectively prevented from having contact with children for a significant period of time, despite receiving treatment and being compliant with medication, and despite there being little or no risk of further violence.