People with Cognitive and Mental Health Impairments in the Criminal Justice System Question Paper 1

Apprehended Violence Orders

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Level 2, 164 – 170 Hunter Street
NEWCASTLE NSW 2300
PO Box 84
NEWCASTLE NSW 2300

Tel: 02 4040 9122
Fax: 02 4929 7996
Web: www.hunterclc.org.au

The Hunter Community Legal Centre

The Hunter Community Legal Centre ("HCLC") provides free legal advice, both in person and over the telephone, to people located within the Hunter Valley, Newcastle, Lake Macquarie, Port Stephens and Great Lakes regions. HCLC also provides limited ongoing legal advice, assistance and court representation to disadvantaged people in those areas. The Hunter Community Legal Centre undertakes law reform submissions of various issues as they arise.

HCLC's AVO Duty Service and AVO Client's

This submission is based on the HCLC AVO Duty Service operating at Newcastle Local Court. The AVO Duty Service was established in response to a continuing legal need expressed by HCLC clients who had AVO matters at Court and were unable to obtain private representation.

In addition to those clients whom the HCLC assists as part of its AVO Duty Service at Newcastle Local Court the HCLC provides legal advice and representation to clients throughout the region who are referred to the HCLC by the Intellectual Disability Rights Service.

In the twelve months to 1 September 2012 the HCLC provided advice and assistance to 5,300 clients in AVO matters, of which 673 had a disability.

Written Responses to the Question Paper

This submission is prepared in response to the release of a question paper by the NSW Law Reform Commission relating to its review of the criminal law and procedure applying to people with cognitive and mental health impairments.

Question 1

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

In the experience of the HCLC, AVOs are frequently made against adults with cognitive or mental health impairments and those AVOs are frequently breached.

<u>Case Study</u>

HCLC has provided legal advice and representation to Ian*. Ian is a 48 year old male who has been diagnosed with Asperger's Syndrome and a mild intellectual disability. Ian experiences difficulties in exercising impulse control and controlling feelings such as anger, depression and anxiety.

Two of Ian's neighbours applied for separate AVOs against Ian. The Local Court granted each neighbour a final AVO against Ian in standard terms of 1, 7 and 11.

Ian has subsequently been charged with breaching the AVOs on multiple occasions. The alleged breaches relate to Ian approaching his neighbours. Due to the nature of the alleged breaches i.e. approaching his neighbours, Ian was subject to very strict bail conditions which prevented him from living at home with his mother whilst the charge matters were on foot.

Whilst the HCLC represented Ian in the Local Court and the charge matters were discharged pursuant to Section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) Ian is still subject to the AVOs.

Case Study

The Intellectual Disability Rights Service referred Adam* to the HCLC for legal advice and representation. Adam was the defendant in an AVO application by his neighbour Tom*. Adam was diagnosed with a moderate intellectual disability. Adam has significant difficulties with everyday life.

The Local Court granted an interim AVO against Adam in standard terms of 1, 7, 11.

Tom has subsequently made reports to the police that Adam has been threatening him and Adam has now been charged with breaching the 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**

The HCLC has identified that adults with cognitive and mental health impairments do have difficulties complying with AVOs because of their impairments.

Case Study

The HCLC has provided legal advice and representation to Tammy* who has an acquired brain injury. Tammy is cared for by her partner Doug* who has applied for an AVO against Tammy. Doug alleges that Tammy becomes violent towards him after drinking alcohol.

An interim AVO is in place in standard terms of 1 and 10.

Notwithstanding the terms of the AVO Doug will often invite Tammy to share a bottle of wine with him over dinner and subsequently call the police to report that Tammy has breached the AVO.

Submission

It is our submission that the impulsivity and socially and emotionally inappropriate behaviour of adults suffering from cognitive or mental health impairments makes it difficult for them to comply with AVO orders.

In Tammy's case whilst she understands that she cannot drink alcohol when Doug is there she is unable to make the connection that sharing a bottle of wine with Doug over dinner will cause her to breach the AVO.

In Ian's case referred to above, his inability to exercise impulse control and controlling feelings such as anger, depression and anxiety sees Ian reacting in an inappropriate manner in situations involving his neighbours and subsequently breaching the AVOs.

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

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (the "Act") requires a Court to take certain matters into account when deciding whether or not to make an AVO.[1]

Furthermore the Act requires that a Court that makes an interim or final AVO must explain to the defendant and the protected person the effect of that order.[2]

His Honour Lakatos DCJ held in *Farthing v Phipps*[3] that:

> *"Once again in my view that underscores that it is not only some empty token that the Court mouths what an order means, but the object of the exercise is that the person who must abide by the responsibilities, must be a taken to know and understand what he or she is required to do."*

His Honour at paragraph 27 stated:

> *"Section 77(4) says that 'in so far as it is reasonably practicable to do so, an explanation under the section is to be given in language that is likely to be readily understood by the person given the explanation'. Once again the object of the subsection in my view is clear, namely that the person who is bound by the order must as best a court can achieve it understand what he or she must comply with."*

<u>Submission</u>

It is our submission that the Act imposes an obligation on the Court when making an AVO that the defendant fully understands the nature and effect of the AVO. It is not enough in our submission that the Court simply state the terms of the AVO to the defendant and ask whether the defendant understands as this does not guarantee that a person with a cognitive or mental health impairment has understood the nature and effect of the AVO.

It is our submission that where the Court suspects that the defendant does not understand the nature and effect of the AVO then the Court should consider the defendants lack of understanding as a relevant matter under Section 17(2)(d) or Section 20(2)(d) and refuse to make the AVO until such time as the Court can be satisfied that the defendant does understand the nature and effect of the AVO.

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[1] *Crimes (Domestic and Personal) Violence Act 2007* Section 17 and Section 20
[2] *Crimes (Domestic and Personal) Violence Act 2007* section 76(1)
[3] [2012] NSWDC 317 (18 October 2010) at paragraph 26

This may necessitate the Court requiring evidence as to the defendant's understanding of the AVO or their capacity generally. If the defendant cannot understand the nature and effect of the AVO than there should be provision to allow the Court to deal with the AVO pursuant to Section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

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?**

Yes, there should be an exemption 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.

Currently the circumstances in which police must apply for an AVO are prescribed by the Act.[4] Essentially a police officer must apply for an AVO if the police officer believes that a domestic violence offence has taken place or will take place.[5]

The only circumstances where a police officer does not need to apply for an AVO is:

- where there is an AVO already in place[6]; or
- where the person in need of protection is already 16 years of age and either intends on making an AVO application themselves[7]; or
- there is good reason not to make the AVO application[8].

The Act does not address what a good reason is other than to say at Section 49(6):

> *"(6) For the purposes of subsection (4), the reluctance of the person to make an application does not, on its own, constitute a good reason for a police officer not to make an application if the police officer reasonably believes that:*
> *(a) the person has been the victim of violence or there is a significant threat of violence to the person, or*
> *(b) the person has an intellectual disability and has no guardian.*"

Case Study

Sam*, aged 23 years, suffers from major depression, Asperger's disorder and ADHD. Sam lives at home with his mother and stepfather who are his carers.

Earlier this year Sam had a disagreement with his stepfather and damaged an internal door before attempting to leave the home. Sam's stepfather attempted to prevent Sam from leaving and during a scuffle between Sam and his stepfather the police were called.

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[4] *Crimes (Domestic and Personal) Violence Act 2007* Section 49
[5] *Crimes (Domestic and Personal) Violence Act 2007* Section 49(1)(a)
[6] *Crimes (Domestic and Personal) Violence Act 2007* Section 49(3)
[7] *Crimes (Domestic and Personal) Violence Act 2007* Section 49(4)(a)
[8] *Crimes (Domestic and Personal) Violence Act 2007* Section 49(4)(b)

The police charged Sam with malicious damage and applied for an AVO against Sam on behalf of his mother and stepfather. Neither Sam's mother nor stepfather wanted police to apply for the AVO.

Sam subsequently repaired the damage to the internal door.

Submission

It is our submission that there should be an exemption 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.

The police, when considering whether or not there is a good reason not to make an AVO application should be required to consider:

- The cognitive or mental health impairment of the defendant;
- The relationship between the person in need of protection and the defendant;
- Whether the person in need of protection desires the making of an application for an AVO; and
- Support and treatment available for the person in need of protection and defendant whether that is education, counselling, medical treatment, drug and alcohol rehabilitation, adjustments to living situations and/or improved social engagement .

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 alternatives could or should carers have in this situation?**

The HCLC has identified that where a carer seeks an AVO against a person with cognitive or mental health impairments it is ineffective in the circumstances. The case study of Tammy referred to above highlights how ineffective AVOs in these circumstances are.

Submission

It is our submission that where a person has cognitive or mental health impairments, an AVO does not effectively prevent challenging behaviour. Such challenging behaviour is more likely to be effectively addressed, and protection of others is more likely to be achieved, by the development and implementation of appropriate support and/or treatment plans. These supports and/or treatment plans may involve education, counselling, medical treatment, drug and alcohol rehabilitation, adjustments to living situations and/or improved social engagement.

As an alternative for carers seeking AVOs against people with cognitive or mental health impairments, carers should be provided with training and/or counselling at the same time that the defendant is provided with referrals for medical treatment, drug and alcohol

rehabilitation, adjustments to living situations and/or improved social engagement as necessary.

This would enable the carer to receive appropriate supports, the defendant to receive appropriate referrals and would prevent the introduction of people with cognitive or mental health impairments into the criminal justice system.

Question 7

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

Submission

It is our submission that where there is an application for an AVO under Section 18 of the Act, that is an application for an apprehended personal violence order, the applicant must demonstrate that they have attempted to resolve the problem with the defendant when applying for the AVO. For example, that the applicant has genuinely attempted mediation at a Community Justice Centre.

Mediation provides a safe forum where parties can discuss their issues in the presence of an impartial mediator and try to find a resolution to the problem.

This could be modelled on the current requirement under the *Family Law Act 1975* (Cth)[9] for an applicant to participate in mediation prior to commencing proceedings in the Federal Magistrates Court or Family Court.

In the case of an application under Section 15 of the Act, that is an application for an apprehended domestic violence order, where the defendant has a cognitive or mental health impairment the parties are referred to training and/or counselling, medical treatment, drug and alcohol rehabilitation, adjustments to living situations and/or improved social engagement as necessary and that should these referrals be unsuccessful then an application for an AVO proceed.

[9] *Family Law Act 1975* (Cth) Section 60I