NSW GOVERNMENT | NSW Trustee & Guardian
Attorney General & Justice

13 September 2012

Our ref: **Steve Commins a/PLO**

Mr Paul McKnight
The Executive Director
The Law Reform Commission
DX 1227
SYDNEY

Dear Mr McKnight

RESPONSE TO CONSULTATION PAPER – PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENT IN THE CRIMINAL JUSTICE SYSTEM – Apprehended Violence Orders

Thank you for the opportunity to provide further comment to the Commissions current consultation process. NSW Trustee and Guardian (NSWTG) provided a submission outlining our general experience in relation to our clients' involvement in the Criminal Justice System. We are pleased to see the release of Report 135 on Diversion.

As you know NSWTG manages the financial affairs of people with cognitive and mental health impairments who are considered by an appropriate jurisdiction to require a substitute decision maker to deal with their financial affairs. We also provide Will and Power of Attorney making, trustee and executorial services.

Please see the Appendix attached to this paper that discusses in some detail the development of the Protective jurisdiction and the basis of NSWTG's contemporary trustee and financial management services.

NSWTG's involvement in a client's life flows from our role in the management of their financial affairs. Many NSWTG's clients do not readily distinguish between our services and those of conventional case management providers or other support facilities within the community. So much of a person's lifestyle is interrelated to their finances, such that we do find that we become involved in aspects of their lifestyles that fall outside the ambit of our authorities. For example we might be asked to assist and support a client experiencing a divorce or a parenting dispute with a former partner. We also see clients who come into contact with the criminal justice system and those involved in proceedings related to AVO applications.

We have no capacity to make substitute decisions on behalf of a managed person involved in an AVO application or related proceedings. For this reason we are not normally privy to the circumstances by which NSWTG clients become party to AVO matters but rather merely the fact of the application and the proceedings. In that context we are only sometimes made aware of other factors in relation to proceedings.

Our role in these situations is limited to one where we ensure our clients are introduced to the appropriate support structures and the payment of any associated expenses. These services can include case management services or the retainer of solicitors and/or barristers.

We offer the following comments in response to the specific questions raised in your Consultation Paper.

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

Unfortunately we are not in a position to comment factually.

We note the comment in your preamble that data in relation to the number of orders made against, and breaches by, people with cognitive and mental health impairments is not available.

We would anticipate that any data available in this matter would serve a valuable purpose in future deliberations of the Commission and would commend a proposal that the courts compile such records that they are able to maintain in this respect.

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.
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?
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)?

Case Study

Mrs. R is diagnosed with a psychiatric illness. She is aged in her late 70's and resides independently in her own home. Mrs. R's immediate neighbours recently obtained an AVO restricting her access onto the applicants' property. The Court also ordered that Mrs. R pay the applicants' costs incurred in the application.

Mrs. R has now filed an application to the Local Court seeking an AVO against those same neighbours and has also filed an appeal with the District Court against the AVO in which she is named defendant.

Mrs. R has an extensive history as an unrepresented litigant and has demonstrated very limited insight into the potential adverse consequences of litigation.
Mrs. R herself has very limited insight into her condition and is not likely to raise the fact of her disability in any representations she makes to a Court.

Mrs. R's manner will often belie the fact of her illness and a person dealing with Mrs. R who is not familiar with her history may not become aware of her condition.

At the time of writing Mrs. R's application to the Local Court and appeal to the District Court are listed for preliminary hearings.

Where a defendant has impaired capacity and thus does not comprehend the AVO it would not be expected that the AVO will influence the behaviour of the defendant.

We are not able to comment whether the practice of the Courts has changed since Farthings v Phipps.

We submit with respect to:

Provisional Orders and section 27 of the Crimes (Domestic and Personal Violence) Act (the Act), that a police officer investigating an incident not be compelled to apply for a provisional order in circumstances where a defendant will clearly not understand the nature and effect of an AVO. The legislation should factor in guidelines to assist in the Police's consideration of whether or not to apply for an AVO.

Impaired capacity should be expressly referred to in section 27 (4)(b) of the Act as a good reason not to make an application.

Final Orders and sections 17 and 20, that the Act be amended so that a Court will be required to consider any cognitive impairment of a defendant in determining an application for an AVO.

Government funding might be extended to community based organisations and government agencies to support and assist defendants with cognitive impairments during the legal process of the application and making of an AVO.

As an alternative to the making of an AVO the Court might be given the authority to require the defendant to participate in a support and counselling program or any other community support/rehabilitation services that a Court identifies that will contribute to improving the victims' and the community's safety.
Legislation might also require that if a person with a cognitive impairment or mental health issues breaches the terms of an AVO that the matter be dealt with, at least in the first instance by mediation and counselling rather than in the criminal justice system.

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

Case study

Ms. A is aged in her early 40's. She is diagnosed with chronic schizophrenia which is complicated by poly-substance abuse and non-compliance with prescribed medication.

She resided with her parents until approx. 12 years ago when her mother obtained an AVO which excluded Ms. A from residing in her parents' home.

Ms. R relocated to Housing NSW accommodation and was evicted from that residence in 2002, she was relocated by the Department but eventually evicted again from her second placed residence in 2006. In 2008 Ms. R assumed residence in a property managed by a community housing group but again, was evicted in 2011. Ms. R has since lived an itinerant lifestyle moving between shelters and hostels many of which have terminated her tenure and will not allow her return access.

Each eviction was a consequence of aggressive and intimidating behaviour against neighbours, co-tenants and facility staff. Ms. A has been the defendant named in numerous concurrent AVOs over this long period.

Ms. A's continuous recidivism supports a view that she has no insight into her behaviours that motivate the applicants to obtain AVOs against her nor her behaviour that ultimately gave rise to the breach of the terms of such AVOs.

It is apparent that the demonstrated behaviours that give rise to the Courts making AVOs against people with cognitive and mental impairments are the same behaviours that result in the breach of the terms of such AVOs. We see amongst our clients a prevalence of schizophrenia sufferers whose condition is compounded by poly substance abuse being identified as defendants in applications for AVOs. A defendant's impaired capacity will affect their ability to:

1. Participate in the application process and subsequent proceedings
2. Understand the nature, effect and terms of an AVO.
3. And equally reduce their capacity to anticipate an action that will breach the terms of an AVO and the potential consequences of such breaches.

The making of AVOs in these circumstances does little to prevent the continuation of the inappropriate behaviour.

We would anticipate that a person who does not understand an AVO nor the obligations imposed by such an order is more likely to breach the terms of that order.

A significant issue is the transitory nature of many mental illnesses. A person's level of cognitive functioning can deteriorate over a period of time. These fluctuations might be attributable to non-compliance with prescribed medication, substance abuse, aggravating factors, inherent instabilities etc. There are any number of matters within and outside the control of a person suffering from a mental illness that might exacerbate their condition.

A defendant named in an AVO might, at the time of the making of such orders be fully cognizant of the orders and the conditions imposed upon them. The defendant might show active compliance of the orders over an extended period but upon an occasion or occurrence inciting the deterioration of their condition, breach the terms of the orders. Such breaches might happen unwittingly or upon compulsion with awareness but with little or no control by the defendant of their own actions.

It is uncertain that legislative reform will assist in the better understanding and compliance of AVOs by people with cognitive and mental health impairments.
A better response and greater protection for the community might be achieved by a review of drug and alcohol treatment, community education, counselling and other community support structures.

Police as applicants
Question 4
In consultation it was also suggested that an AVO can create problems for a young person in residential care, as it is the policy of some homes that patients subject to an AVO granted to a carer cannot continue to reside in the home.
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?
2. Should any other changes be made to address this issue?

We refer to previous recommendations and restate them as they apply to this question.

A police officer investigating an incident of domestic violence should not be compelled to apply for a provisional order pursuant to s.27 of the Act in circumstances where a defendant will clearly not understand the nature and effect of an AVO.
The legislation should factor in guidelines to assist in the Police's consideration of whether or not to apply for an AVO.

Impaired capacity should be expressly referred to in section 27 (4)(b) of the Act as a good reason not to make an application.

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?
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?

While we are not on notice of any occasion whereby a paid carer has applied for an AVO against the care recipient with cognitive and mental health impairments, we are anecdotally aware of this issue.

We do receive advice of instances where threats and minor assaults have been made by patients upon carers but in the absence of any proceeding application for an AVO we assume the nature of the incidents do not give rise to a sufficient apprehension of violence to justify an application for an AVO.

We acknowledge the tension which exists whereby providers of care in a professional environment, whether the care be provided in or by an institution, or in the recipient's home, are obliged to conform with legislative requirements governing workers' compensation and workplace health and safety standards.

Violence upon an employee will likely infringe these standards and require redress by the carer's employer. While the most practical response is to remove the employed carer from the risk and thus limit, if not obviate the likelihood of continuing acts or threats of violence the reality is far more complex.
In circumstances where the carer provides support to multiple people in a single environment it maybe necessary to relocate the party demonstrating the offensive behaviour. This could see that person excluded from all services provided by carer.

Balancing all legislative responsibility in the provision of a service to a person who lacks capacity with responsibility as an employer is complex and we regret that we do not see any easy solution. We note that the advent of the NDIS and client directed funding packages will further this complexity in years to come.

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?

Case Study

S is a young adult who is diagnosed with a mild intellectual disability and a psychiatric illness.

S has been estranged from his parents for some time. S previously lived with his parents in the family residence but after a series of episodes involving personal violence and property damage S was removed from the home and assumed residence in a supported environment.

Notwithstanding S's relocation he would return to his parent's home at irregular hours and demand money. Any refusal was responded by aggressive and violent behaviour.

The parents have filed an application for an ADVO. An interim order has been made in protection of the parents.

S has been instructed by the court to undergo a psychiatric assessment prior to the final hearing.

S has not complied with the Court's direction to date and has indicated to 3rd parties that he has no intention of undergoing the assessment.

We do not know whether S has complied with the terms of the AVO.
The matter remains listed before the Court.

We have limited notice of AVOs being applied for in such circumstances but do comment that of those that we see, such orders would seem to have a limited effect. Many people suffering from cognitive impairments and other mental disabilities will lead tumultuous lifestyles often including itinerancy and vagrancy. A family home and a person's parents will often represent the only factor of stability in their lifestyle. The fact that they are excluded from accessing both or either will not always be a matter readily comprehended.

An AVO would serve little or no purpose in protecting parents and others in such circumstances.

While we are not in a position to comment about alternatives to AVOs that parents might look to we do note the demands on current service delivery support systems are significant thereby potentially reducing families' access to alternatives.

Alternatives to AVOs
Question 7
1. Which alternative responses are useful responses to intimidating behaviour? In what circumstances?
2. How can the use of alternatives to AVOs be encouraged by the criminal justice system?

We are not able to comment on alternatives to AVOs beyond those limited comments made previously.

Question 8
Additional Issues?
1. Are there any outstanding issues in relation to AVOs granted against people with a cognitive or mental health impairment?

People with cognitive impairments and mental health will have a limited ability to independently understand the court processes and the nature and consequences of an AVO. The legislation has no regard for these factors and should be amended so that the police and the Court system are compelled to have regard to such matters.

A more effective method to deal with violence being perpetrated by people with cognitive impairments and mental health issues would see a regime of health based initiatives including counselling, support structures, rehabilitation services general heath services and the like being made available to applicants and defendants.

We appreciate the opportunity to respond and look forward to the outcome of your deliberations in the review of this area of the law.

Yours faithfully

Imelda Dodds
Chief Executive Officer
NSW Trustee and Guardian

APPENDIX

In the context of our response, we feel that it would be of assistance for the Commission to have some understanding of the NSW Trustee & Guardian and our involvement in the financial management of people with cognitive and mental health impairment.

NSW Trustee & Guardian ("NSWTG") was established on 1 July 2009 by the NSW Trustee and Guardian Act 2009 merging the former offices of the Protective Commissioner and the Public Trustee NSW. NSWTG is a NSW Government agency within the Department of Justice and Attorney General.

Under section 11 of its governing legislation the NSWTG may act in any of the following capacities:

Financial manager of the estate of a managed person
Agent or attorney
Executor or administrator
Trustee
Collector of estates
Guardian or receiver of the estate of a minor
Receiver of other property

Currently, NSWTG has in excess of 6,000 deceased estates under administration and over 9,500 clients under direct financial management. A further 2,950 clients have a private financial manager appointed, whose management is overseen by NSWTG. NSWTG also holds about 17,000 powers of attorney most of which are dormant, but which may become active if the principal loses capacity or seeks assistance in managing their financial affairs. Consequently, NSWTG is very actively involved in, or has the potential to become involved in, the day to day management of the affairs of a large proportion of the community, who may be at risk due to mental illness, intellectual disability or other cognitive impairment.

Financial Management

All NSWTG clients under financial management have a disability that affects their capacity to make financial decisions. Usually this is due to mental illness, brain injury, intellectual disability, psychiatric disability or dementia. The person cannot manage their financial affairs on their own, has no suitable informal arrangement in place to help them meet all their financial needs and has no other suitable person willing to be legally appointed as their private financial manager.

NSWTG provides a wide range of legal, technical, financial, disability and other services such as: protecting assets and legal rights, facilitating the buying and selling of a home, organising an adequate cash flow to pay bills, liaising with financial and legal institutions, managing a business and making investments.

An understanding of the history of the origins and development of the Protective Jurisdiction in New South Wales may assist in considering the extent to which (if any) financial managers may become involved in court proceedings involving the managed person.

On the inception of the Supreme Court of NSW in 1823, the Court derived its' jurisdiction from the UK Charter of Justice, which itself was a reflection of the prevailing English law. At that time, English law had determined that the "Royal Prerogative" to deal with the estates of the mentally incompetent extended to the body as well as to the real and personal estate of the subject: Beverley's Case (1603) 4 Co Rep 123; 76 ER. 1119.

In R.H. v C.A.H. [1984] 1 NSWLR 694 the Supreme Court held that the jurisdiction given by the Charter of Justice was to exercise that part of the Royal Prerogative which related to persons of unsound mind as in force in England in 1823 and that such inherent jurisdiction still remained available to the Court.
In that case, Powell J stated that "the Royal Prerogative extended to the body, as well as to the estate, of the subject, and, as it was a general inherent prerogative, its limits have never been defined".

To a large extent, the statutory enactments have removed the uncertainty surrounding the extent of the protective jurisdiction. There is an argument that circumstances not within the statutory provisions may still be within the inherent jurisdiction of the Court.

The statutory powers of a financial manager are defined by the NSW Trustee & Guardian Act 2009 and previously under the Protected Estates Act 1983, shaped by specific orders and authorities bestowed by the Court or Tribunal. The role of a financial manager was stated succinctly by McColl JA in the Protective Commissioner v 'D' and ors [2004] NSWCA 216:
"The manager stands in the shoes of a person who is unable to manage his/her affairs by virtue of circumstances beyond his/her control. The manager exercises a protective and benevolent function, protective in the sense that the manager's task is to ensure the estate is managed in a manner to secure the protected person's estate for that person's continued maintenance. In this respect the 1983 Act and its predecessors reflected the "parental and protective" jurisdiction historically exercised by the Crown."

It is apparent from the provisions of sections 32, 33 and 24 of the Protected Estates Act 1983 that a manager's powers were envisaged as purely financial in nature, the focus being the management and protection of the person's financial property. This reflects the historical origins of the powers.

Indeed, the practice of the Court recognises that the person retains the right to make personal decisions. One of the general principles for the management of the affairs of a protected person is that "the freedom of decision and freedom of action of such persons should be restricted as little as possible". Thus a protected person may retain capacity to marry, if they understand the nature of the marriage contract. Similarly, the protected person may have sufficient testamentary capacity to enable them to make a will, if they are able in general terms to understand the nature and extent of their property and the persons with a claim on their bounty: Crago v McIntyre [1976] 1 NSWLR 729.

Difficulties arise when the protected person becomes enmeshed in the legal system and decisions have to be made as to the course of the proceedings. It is well accepted that a financial manager may make decisions on behalf of a protected person for the purpose of litigation: R v P [2001] NSWCA 473. Such litigation is generally required to have the potential to affect the person's financial position.

Substitute decision-making cannot be applied to criminal proceedings in which an offender is required to choose whether to plead guilt or innocence. Such a decision, by its very nature, must always be a personal one.

Generally, the law recognises that either the defendant is fit to be tried, and so capable of making their own decision, or unfit to plead, the consequence of which is commonly retention in strict custody for an indefinite period.

Consequently, a financial manager usually has little involvement in decisions concerning criminal proceedings involving the person under their protection beyond securing legal representation.

NSWTG clients in the criminal justice system

It is an unfortunate and common occurrence for financially managed persons to come into contact with the criminal justice system. Research has shown that offenders have higher rates of mental illness than the general community. Rates of the major mental illnesses, such as schizophrenia and depression, are between three and five times higher in offender populations than those expected in the general community.

Often offenders are not recognised as suffering a mental illness until they enter the justice system, if at all. If the offender is not identified as mentally impaired the resources aimed at providing treatment and reducing the cycle of reoffending will not be made available. It is not feasible to conduct a comprehensive mental health assessment of every person who comes into contact with the police and the courts. Consequently a great deal of the burden of initial identification and screening for mental illness falls on police at the time of arrest and prior to any court appearances.

It has been estimated that approximately 2-3% of the New South Wales population has an intellectual disability. By contrast, the most recent New South Wales prisons study suggests that people with an intellectual disability comprise at least 12-13% of the New South Wales prison population; that is, approximately four to five times that of the general population. Where a person has a "dual diagnosis", that is, both an intellectual disability and a mental illness, they may find themselves falling between services designed for either group and thus be more difficult to identify.

Attempts to gain a more accurate picture of the numbers of people with an intellectual disability involved in the criminal justice system are affected by a number of factors, such as:
Lack of data: Statistics about offenders with an intellectual disability are often not available. It is often the case that offenders with an intellectual disability have had no contact with support services other than going to a special class or school, and at the time of entering prison are not receiving social security benefits on the basis of their intellectual disability.

Non-identification: People with an intellectual disability may not be identified by police, lawyers, courts or custodial personnel. Some people are particularly skilled at concealing their disability; they may become "street wise" and appear quite competent after a number of contacts with the law. The fact that a person may not ever have been formally diagnosed means that there may be no records to alert criminal justice system personnel to the problem.

Use of different definitions of intellectual disability and different methods of data collection: The definition used for a particular diagnosis will affect the numbers. Some assessment classifications include "borderline" intellectual disability while others do not; some only measure IQ (intelligence quotient) scores, while other definitions include adaptive deficits. Different figures are also obtained depending on the choice of sampling and assessment techniques.

Inter-jurisdictional variations: Statistics obtained from different jurisdictions necessarily differ owing to the variations in sentencing, custodial or non-custodial options, parole practices and availability of community services.