NEW SOUTH WALES

The Chief Magistrate of the Local Court

30 August 2012

Hon James Wood AO QC
Chairperson
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Chairperson

People with cognitive and mental health impairments in the criminal justice system, Question Paper 1 – Apprehended violence orders

I write in response to Question Paper 1 – Apprehended Violence Orders, recently released in the course of the Commission's reference on people with cognitive and mental health impairments in the criminal justice system.

A number of the questions raised about the use of AVOs concern issues that I am not in a position to assess. My comments are limited to matters within the Local Court's involvement and experience.

Question 2

The decision in *Farthing v Phipps* [2010] NSWDC 317 has not had any noticeable impact in the Local Court. I am not aware of any instances in which the decision has been raised in court. I can only speculate that it has not been widely known of to date, or is regarded as being confined to its own facts. Indeed, as a decision of the District Court, it is not binding in the Local Court.

In practice, the issue of a defendant's capacity to understand and comply with an AVO is not raised in the vast majority of application proceedings. Empirically, this has not changed since *Farthing v Phipps*. There does not seem to have been an increase in matters where evidence, including expert evidence, is led in relation to an issue of capacity.

In proceedings where an issue of capacity is raised, this will undoubtedly be a relevant consideration within the circumstances of the matter as a whole. However, the material before the court may be far from consistent or conclusive in enabling an assessment of the defendant's ability to understand an order and/or a prediction of the likelihood of compliance with an order as a result.

In that regard, with respect, the reasoning in *Farthing v Phipps* is not without difficulty. It is said at [33]:

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> ...the object of the [*Crimes (Domestic and Personal Violence) Act 2007*] is the protection of persons from domestic violence, intimidation and stalking. The Act proceeds on the basis that an order by the Court directed to the defendant would be understood by that defendant and acted upon.... As a matter of principle it follows that 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. Furthermore, 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.

An AVO is protective in nature. Provisions in the legislation such as the obligation of the court to explain the order to the defendant in language he or she is likely to understand are directed towards furthering that protective purpose. A decision that an order should not be made because it seems that for whatever reason a defendant may not comply with it does not appear to fit within the ethos of the Act. Instead, the possibility of non-compliance is dealt with by the inclusion of sanctions for the offence of breaching an AVO. At that stage, the defendant's ability to understand the order may well be relevant to whether it can be established that he or she "knowingly" committed a breach, as required by s 14.

I appreciate the undesirability of a defendant with a cognitive or mental health impairment becoming involved in the criminal justice process in such instances (though other options for diversion prior to charging or otherwise upon the commencement of court proceedings may then be appropriate). However, in the absence of any other measure, it seems equally undesirable for a person in need of protection to have no recourse to the protective capacity of the Act in circumstances where he or she harbours genuine and reasonable fears. It would likewise be problematic if, on the same reasoning, the police were not able to apply for an AVO on behalf of a person in need of protection who, by reason of a cognitive or mental health impairment, was not able to properly comprehend the terms of the order.

As a result, I do not think the Act should be amended to provide that an AVO must not be made against a person who appears unlikely to have the capacity to understand or comply with it, without some other recourse being available for a person in need of protection. I do not have any suggestions as to what other options might be desirable but do query whether the court system is best placed to most effectively address this issue, especially in instances where defendants and/or protected persons have an involvement with other departments or agencies such as Community Services or Health.

Question 4

The paper raises difficulties that may arise for people with cognitive or mental health impairments due to the current legislative requirement that a police officer apply for an AVO on behalf of a protected person where the officer suspects the commission of a domestic violence offence, including where the order is sought on behalf of a paid carer.

Rather than creating an exception to the requirement that police must apply for an order in such circumstances, it may be more appropriate to address the underlying issue of what is classified as a 'domestic relationship'. The present definition in section 5 of the Act has been raised as an issue in the current statutory review of the Act. In the course

of that review, I indicated many magistrates share the concern that the definition is too broad, including insofar as it encompasses persons living (or who have lived) in residential facilities and paid carer relationships.

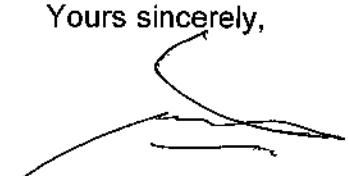
Question 6

It is not uncommon for magistrates to have applications come before them in which a parent seeks an AVO against their child, whether an adult or a minor, in circumstances where the child has a cognitive or mental health impairment. Often the impairment is not an isolated issue but is associated with drug or alcohol misuse and/or the child engaging in unlawful conduct. I am not placed to comment on the extent to which orders in these circumstances tend to be effective beyond observing that overall, the Court deals with several thousand charges for breaches of ADVOs per year, some of which could reasonably be expected to relate to parent-child relationships.

The issue of the availability of treatment options to address factors underlying the behaviour giving rise to an AVO is not, under the current legislative regime, a matter for the Court. As observed in the paper, court-based options for diversion into programs such as MERIT or CREDIT are not available at the stage of an application for an AVO. This is reflective of the fact that application proceedings under the Act are characterised as civil in nature, having regard to the standard of proof that applies and other procedural aspects. Unless concurrent criminal proceedings are on foot, the criminal jurisdiction of the Court is not engaged and the powers utilised to allow participation in a diversionary program, such as section 36A of the *Bail Act 1978* or section 11 of the *Crimes (Sentencing Procedure) Act 1999*, are not available. This is in my view entirely appropriate given the protective nature of an AVO, notwithstanding that in many cases it may well be desirable for a defendant to access treatment or services independently of the court proceedings.

Thank you for the opportunity to make a submission in response to this Question Paper. Please do not hesitate to contact my office should you wish to discuss the above comments or any other aspect arising in the course of the Commission's reference on people with cognitive and mental health impairments in the criminal justice system.

Yours sincerely,



Judge Graeme Henson
Chief Magistrate