



7 September 2012

Mr Paul McKnight
Executive Officer
NSW Law Reform Commission
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Sydney NSW 2001

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Dear Mr McKnight,

Apprehended Violence Orders and People with Cognitive and Mental Health Impairments in the Criminal Justice System

1. Women's Legal Services NSW (WLSNSW) thanks the NSW Law Reform Commission for the opportunity to comment on Apprehended Violence Orders and People with Cognitive and Mental Health Impairments in the Criminal Justice System.
2. WLSNSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. WLSNSW provides a range of free and confidential legal services including advice through our dedicated Domestic Violence Legal Advice Line, weekly and fortnightly attendance at Blacktown and Penrith Local Courts respectively to provide representation for ADVO matters, and education and training on domestic violence.
4. In the 2011-2012 financial year, 64 per cent of all of our clients indicated that they had experienced domestic violence.
5. Our experience informs us that women are frequently exposed to violent, harassing and intimidating behaviour by their partner or children who have mental health issues and who fail to take their medication or undergo other relevant treatment. It is also important to acknowledge that mental illness is a significant factor in the assessment of risk of



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domestic violence including its lethality.¹ Below, we raise the importance of not conflating mental illness and cognitive impairment and express our concern at the introduction of legislation and / or policies which may purport to deal with both issues as though they are one and the same. Finally, we also wish to stress that people with mental illness or cognitive impairment should be accorded appropriate and sufficient safeguards in the criminal justice process. These tensions must be taken into account in the policy development process.

¹ See the literature including 'Intimate partner homicide and familicide in Western Australia'

Johnson, Carolyn Harris (2009) Online at: http://www.aic.gov.au/documents/C/C/3/%7BCC334155-D9E6-4635-84FB-32A81C3A3C69%7Drpp104_001.pdf

Eke, Angela W.; Hilton, N. Zoe; Harris, Grant T.; Rice, Marnie E.; Houghton, Ruth E. 'Intimate partner homicide: risk assessment and prospects for prediction' in Journal of family violence, Vol. 26 , No. 3, April 2011 , pp. 211-216.

Summary of Recommendations

Recommendation 1: In considering the issues in this review, consideration also be given to the findings of the 2011 statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*.

Recommendation 2: That consideration is given to the different nature, degrees of severity and treatment options between cognitive and mental health impairments and that a "one size fits all" approach is avoided.

Recommendation 3: That the Act retains the provision in section 16 which dispenses with the requirement that the Court be satisfied that the person fears an offence will be committed before granting an AVO where the person is suffering from an intellectual impairment.

Recommendation 4: That consideration be given to research in other Australian and overseas jurisdictions as to whether protections such as those in section 16 of the Act should extend to people suffering from mental health impairments.

Recommendation 5: That the current definition of 'domestic relationship' is retained.

Recommendation 6: That there is no blanket exemption in the Act to the making of an AVO in matters where the respondent has a cognitive or mental health impairment.

Recommendation 7: Consideration must be given by the Court prior to the making of an AVO as to whether an AVO is the most appropriate measure and if there are other alternatives available.

Recommendation 8: Where an AVO is to be made against a person with an intellectual or mental health impairment, consideration be given to the Court obtaining an expert report to assess the capacity of the respondent to understand the AVO, the AVO orders are in plain and simple language and a person with expertise in working with people with cognitive or mental health impairments is appointed to work with the respondent to explain the AVO.

Recommendation 9: Consideration be given to amendment of the Act to provide for diversion to treatment programs upon application for an AVO rather than just upon a breach.

Recommendation 10: Consideration be given to researching other Australian and overseas jurisdictions to assess whether extra protections or a different approach is required to deal with respondents who suffer from cognitive impairments or mental health impairments, in particular those with mental health impairments at the more severe end of the spectrum.

Recommendation 11: Applications and Orders are redrafted so that they are in simple, plain and easy to understand language.

Recommendation 12: That the current provisions of sections 5 and 16 are retained.

Recommendation 13: Consideration should be given to the wishes of carers and guardians where police have applied for an AVO for their protection

Recommendation 14: There must be appropriate services available to support people with cognitive and mental health impairments and their families.

Recommendation 15: Consideration should be given to amendment of the Act to provide for diversion to alternative services upon application for an AVO

Statutory Review of the *Crimes (Domestic and Personal Violence) Act 2007*

6. We refer to the 2011 statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* (the Act) and confirm that WLSNSW made a submission to the Review. We note that the report of that Review is yet to be released. We recommend that the Committee refer to submissions made to and findings of that Review in considering the issues which arise in relation to Apprehended Violence Orders (AVOs) and people with cognitive and mental health impairments in the criminal justice system.

Recommendation 1

In considering the issues in this review, consideration also be given to the findings of the 2011 statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*.

Conflation of the terms cognitive impairments and mental health impairments

7. Concepts such as “mental illness” and “cognitive impairment” are multi-faceted and, for each, cover a wide range of conditions and degrees of severity. An important difference is that intellectual disability or impairment is not an illness, is not episodic and is not usually treated by medication. Conversely, a mental health impairment is an illness, may be chronic or episodic and is usually treated with medication, with varying degrees of success.
8. We are concerned that consideration is given as to the very different nature, degrees of severity and treatment options both between and within cognitive and mental health impairments and that it is not assumed that the issues can be addressed by way of a criminal justice response as though they are one and the same.

Recommendation 2

That consideration is given to the different nature, degrees of severity and treatment options between cognitive and mental health impairments and that a “one size fits all” approach is avoided.

AVOs for the protection of people with cognitive and mental health impairments

9. AVOs are relevant to people with cognitive and mental health impairments in two ways. In some cases, they may require protection from violence and in other cases they may be the respondent in an application for an order.
10. We note that the Question Paper seeks comments on the use of AVOs against adults with cognitive and mental health impairments. WLSNSW submits that consideration also

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needs to be given to the issues which arise with respect to the protection of people with cognitive or mental health impairments.

11. AVOs are directed at protecting a person by prohibiting or restricting another person from engaging in specified conduct. The Act contains a number of objectives such as reducing and preventing violence by a person against another person where a domestic relationship exists and ensuring the safety and protection of people who experience personal violence outside a domestic relationship.
12. WLSNSW strongly supports and recognises the role of AVOs in protecting a person from unwanted behaviour.
13. The Act includes protections where an AVO is required for the protection of a person with an intellectual disability. Specifically, the Act encourages police to apply for an AVO on behalf of a person with an intellectual disability where the person with an intellectual disability is exhibiting reluctance to make an application. The Act also dispenses with the requirement that the court be satisfied that the person fears an offence will be committed before granting an AVO where the person is "suffering from below average general intelligence function." WLSNSW supports the retention of these provisions.
14. We note that the Act does not contain similar protections where a person has a mental illness. WLSNSW recommends research into other Australian and overseas jurisdictions to consider whether such protections should exist for people suffering mental health impairments at the more severe end of the scale.
15. WLSNSW does not support a narrowing of the current definition of 'domestic relationship' in the Act to exclude those living in supported accommodation or other residential facility and those in a carer / dependent relationship (whether paid or unpaid). The inclusion of these relationships covered by sections 5(d), 5(e) and 5(f) of the Act was considered in detail at the time they were introduced in 1999 in the now repealed section 562A(3) of the *Crimes Act 1900* and the policy rationale for including these relationships remains the same. That is, women with disabilities are particularly vulnerable to abuse, especially within residential facilities, group homes, institutions and boarding houses. These relationships are characterised by living together in confined spaces with nightly proximity that cannot be avoided and dependency.
16. Flatmates and residents in the same facility share common areas of accommodation with other people. They may share a lounge room, kitchen, bathroom and bedroom. They may also have some financial inter-dependence. This makes it easy for intimidation or control by one person over another to become an issue. People may be dependent upon the facility in which they live. In the case of nursing homes or residential facilities for the elderly, it may be difficult to find alternative accommodation, or the person being threatened may not have the capacity or support to move. In the case of shared accommodation, issues of tenancy arise and people may also be unable to leave for financial reasons. The reality of their home life can differ from traditional family settings but, nonetheless, a power imbalance can exist between carers and residents, and between residents themselves, and violence occurs in the context of power and control that makes it a form of domestic violence.
17. Removing these relationships from the definition of domestic relationship would reduce access to justice for women who are already disenfranchised and marginalised because they would need to seek protection under an apprehended personal violence order

(APVO). This is of concern for a number of reasons:

- police are less likely to apply for an APVO. This will mean these women will need to navigate the legal system themselves in order to seek protection from abuse;
 - a police initiated application is more likely to result in an interim or provisional AVO than a private application, so a woman trying to obtain a private APVO would be less likely to obtain interim protection from a person who continues to live in their home;
 - eligibility for legal aid is much more limited for those seeking APVOs than it is for ADVOs;
 - the applicant risks a costs order in the case of an unsuccessful application; and
 - Classifying the relationship as 'personal' rather than 'domestic' may also result in the woman being unable to access community and government services established to assist victims of domestic violence.
18. For all of the above reasons, WLSNSW submits that viewing domestic violence within the context of an abuse of power and control within a relationship justifies the broad definition and the continued protection of people in relationships that currently fall within the definition.

Recommendation 3

That the Act retains the provision in section 16 which dispenses with the requirement that the Court be satisfied that the person fears an offence will be committed before granting an AVO where the person is suffering from an intellectual impairment.

Recommendation 4

That consideration be given to research in other Australian and overseas jurisdictions as to whether protections such as those in section 16 of the Act should extend to people suffering from mental health impairments.

Recommendation 5

That the current definition of 'domestic relationship' is retained.

AVOs against a person with a cognitive or mental health impairment

19. WLSNSW acknowledges the tension which may lie in the need to protect a person from behaviour which is perpetrated by a person with a cognitive or mental health impairment. In particular where the respondent (or potential respondent) may not understand the consequences of their actions, be able to control their actions and behaviour, understand the terms of an AVO or the implications of breaching the AVO. WLSNSW also acknowledges the very real possibility of criminalisation of a person with cognitive or mental health impairments in the case of a breach and the undesirability of that criminalisation.

20. Despite this, WLSNSW does not support a blanket exemption to the making of AVOs in cases where the respondent has a cognitive or mental health impairment.

Case study

Edna is 78 years old and lives in her own home in suburban Sydney. Her home is near a residential facility for people with intellectual impairments. Terry lives in the residential facility and has a cognitive impairment. At first Terry and Edna used to chat in the street but over time, Edna became increasingly intimidated by Terry's behaviour as he began to turn up at her house constantly and refuse to leave and follow her from her home to the shops and local public transport. Edna raised her concerns with the manager of the residential facility but Terry's behavior didn't change. In the end, Edna contacted WLSNSW for advice about her legal options. Edna felt she had no option but to apply for an APVO for her protection. She felt this was the only way she was going to feel safe.

Unfortunately Terry would not or could not abide by the terms of the APVO and in the end the organisation moved Terry to another facility so as to limit the risk of Terry breaching the APVO and ending up in the criminal justice system.

WLSNSW submits that the above case study illustrates the importance of maintaining the option of AVOs for the protection of a person, even where the respondent has a cognitive or mental health impairment, but also the challenges of ensuring protection under an AVO and the difficulties with enforcement of the orders.

21. Our experience informs us that women are frequently exposed to violent, harassing and intimidating behaviour by their partner or children who have mental health issues and who fail to take their medication or undergo other relevant treatment. It is imperative that under such circumstances, women are not denied the legal protection of an AVO.
22. Our experience also informs us that AVOs are being taken out for the protection of one resident in a facility against another resident of the facility. It is our submission that there are times when this is the most appropriate way to address the issues and provide protection to the person in need of it.
23. Notwithstanding the above, it is our submission that before making an AVO in matters where the respondent has a cognitive or severe mental health impairment (ic excluding illnesses such as depression and mood disorders), full consideration needs to be given by a Court as to whether an AVO is the most appropriate mechanism for the protection of a person including considering:
- what steps have already been taken to try to address the issue including where relevant mediation, conciliation, group work, counselling, training and support for parents and carers, medical treatment and behaviour change programs or attempts to relocate one resident (where the parties live in the same residential facility);
 - whether there are alternative options still available for dealing with the issue; and
 - whether the respondent has or is likely to have any understanding of the orders and the implication of a breach.

24. Where the Court determines an AVO is the most appropriate mechanism for dealing with the issue, consideration could be given to enabling the court to:
- obtain an expert report on the cognitive capacity of the respondent to ensure that as much as possible, the wording of the orders and explanation of the AVO is appropriate; and
 - appoint a person with expertise working with people with mental health and / or cognitive impairments to assist the respondent to understand the terms of the AVO and ways to avoid breaching
25. As a minimum improvement, the language of the AVO must be as simple as possible. In our experience, many people have difficulty understanding the terms of both an Application and an Order. Such difficulties are not just limited to those with cognitive and mental health impairments and this is a reform which should occur for the benefit of all people affected by an AVO.

Recommendation 6

That there is no blanket exemption in the Act to the making of an AVO in matters where the respondent has a cognitive or mental health impairment.

Recommendation 7

Consideration must be given by the Court prior to the making of an AVO as to whether an AVO is the most appropriate measure and if there are other alternatives available.

Recommendation 8

Where an AVO is to be made against a person with an intellectual or mental health impairment, consideration be given to the Court obtaining an expert report to assess the capacity of the respondent to understand the AVO, the AVO orders are in plain and simple language and a person with expertise in working with people with cognitive or mental health impairments is appointed to work with the respondent to explain the AVO.

Recommendation 9

Consideration be given to amendment of the Act to provide for diversion to treatment programs upon application for an AVO rather than just upon a breach.

Recommendation 10

Consideration be given to researching other Australian and overseas jurisdictions to assess whether extra protections or a different approach is required to deal with respondents who suffer from cognitive impairments or mental health impairments, in particular those with mental health impairments at the more severe end of the spectrum.

Recommendation 11

Applications and Orders are redrafted so that they are in simple, plain and easy to understand language.

Police as applicants against persons with cognitive or mental health impairments who live in residential facilities

26. WLSNSW does not support an exemption to the current legislative provision which requires police to apply for an AVO in situations involving residential care of a person with a cognitive impairment (this obligation arises by virtue of the definition of 'domestic relationship').
27. Whilst we acknowledge that this lack of discretion can be problematic in matters involving people with cognitive and mental health impairments and their paid carers, WLSNSW submits that it is the responsibility of the Court (having had the benefit of the expert opinion of someone with appropriate medical expertise) rather than police to determine whether or not the AVO is the appropriate measure to address the safety needs of the resident.

Recommendation 12

That the current provisions of sections 5 and 16 are retained.

Carers and health care providers seeking protection of an AVO against a person with cognitive or mental health impairments who lives in a residential facility

28. WLSNSW acknowledges the difficulties that carers (paid and unpaid) and health care providers may face with clients who exhibit unwanted behaviours.
29. WLSNSW submits that under certain circumstances it will be appropriate that an AVO is made for the protection of a carer or health care provider and that carers and health care providers should not be exempt from the protection of an appropriately made AVO. We caution however that an AVO should be used as a last resort after all other options are exhausted.
30. WLS also submits that consideration should be given to the wishes of guardians and carers where an AVO is taken out for their protection by police, particularly where the respondent is a person under the age of 16.

Recommendation 13

Consideration should be given to the wishes of carers and guardians where police have applied for an AVO for their protection

Parents seeking the protection of an AVO against a person with cognitive or mental health impairments

31. In some circumstances, it will be the most appropriate measure to make an AVO for the protection of a parent against their child, notwithstanding the child may have a cognitive or mental health impairment.
32. However, WLSNSW submits that such AVOs should only be made as a last resort and not because it is the only way a parent is able to access the necessary support and treatment services for their child.
33. It is imperative that appropriate services and supports are made available for people with cognitive and mental health impairments and their family members. This is particularly crucial for those living in rural, regional and remote areas.
34. As stated above, consideration should be given to legislative amendment to provide for treatment diversion upon the making of an application for an AVO rather than just at a breach. It is imperative that any such legislative amendment respects and acknowledges a person's autonomy and right to freedom from direct or indirect discrimination.
35. WLSNSW also submits that consideration should also be given to the wishes of guardians and carers where an AVO is taken out for their protection by police (including where a child is under 16 years of age where police must apply).

Recommendation 14

There must be appropriate services available to support people with cognitive and mental health impairments and their families.

Recommendation 15

Consideration should be given to amendment of the Act to provide for diversion to alternative services upon application for an AVO

36. If you would like to discuss any aspect of this submission, please contact Philippa Davis, Assistant Principal Solicitor on 02 8745 6900.

Yours sincerely,

Women's Legal Services NSW



Janet Loughman
Principal Solicitor