

**NSW Law Reform Commission**

***Review of the Criminal Law and Procedure Applying to People with Cognitive and Mental Health Impairments***

**Question Paper 1 - Apprehended Violence Orders**

**Background:**

This response has been prepared from comments provided by the Department of Family and Community Services (“FACS”).

FACS delivers services to some of the most disadvantaged individuals, families and communities in NSW.

Our aim is to enable vulnerable people to participate fully in NSW social and economic life and build stronger, more sustainable and inclusive communities.

Ageing, Disability and Home Care (ADHC) is part of the Department of Family and Community Services and has a specific focus on people with a disability, their families and carers. The following information is drawn from ADHC experience in working with people with a disability involved in the AVO process.

Consistent with the Question Paper, FACS response focuses on the use of AVOs against FACS clients who have cognitive and mental health impairments. However, comment is also made on the use of AVOs to protect FACS clients experiencing violence.

ADHC services

ADHC services to people with a disability include:

- early intervention programs for children and young people;
- supported accommodation in the community and in specialist centres;
- supporting people with a disability to live independently in the community;
- programs that develop independent living skills;
- helping people with a disability become active in their communities through social groups, work and other activities;
- advocacy and information; and
- case management and access to therapy services including occupational therapy, speech pathology and physiotherapy.

ADHC services are delivered to the community across six regions in NSW: Metro North, Metro South, Hunter, Northern, Southern and Western.

ADHC also provides specialist programs, such as the Criminal Justice Program (“CJP”), the aim of which is to reduce the incidence and impact of offending behaviour by people with an intellectual disability.

Through the CJP, clients exiting correctional centres undergo a comprehensive assessment to determine the level of support required by the person. Support may range from specific consultations or interventions to intensive accommodation

support. Specialist assessment and support is provided by clinical and case work staff. A range of accommodation options is available, from intensive group home support to drop-in models.

ADHC policy and service standards uphold the rights of people with a disability to be met as equal members of society. This includes their right to feel safe, to live in an environment where they are protected from assault, neglect, exploitation or any other form of abuse. This is reflected in ADHC's *"Abuse and Neglect: Policy and Procedures"* (April 2012).

ADHC acknowledges that prevention is the best protection from abuse. If, however, prevention strategies fail to afford protection, the *Abuse and Neglect Policy* provides guidance to paid or unpaid workers of ADHC operated or funded services on how to respond quickly and appropriately to allegations of abuse. This includes responding to abuse of a client by a member of staff and responding to abuse of a client by another client. Both situations require appropriate reporting to Police.

The following response includes input from ADHC regions as well as the CJP. Where ADHC is referring to its clients, the term "people with a disability" is used, otherwise the term "people with cognitive and mental health impairments" as adopted by the NSW LRC is used.

While the response refers to AVOs (consistent with the terminology used in the NSWLRC Question Paper), ADHC notes that the case examples provided involve both Apprehended Domestic Violence Orders ("ADVOs") and Apprehended Personal Violence Orders ("APVOs") and therefore involve situations where there is a domestic relationship between the client and the person in need of protection, and where there is no specific relationship.

It is further noted that while the two types of AVOs have the same legal effect and consequences, significant differences flow from the two categories in terms of police obligations to apply for an AVO and the way in which the matter can be dealt with by the court.

## **Question 1**

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

Yes. ADHC is involved with a number of clients who have had AVO applications made against them. Applications are most commonly initiated by Police on behalf of family members and carers, but also include ADHC staff, NGO service staff, supported clients and individuals in the community i.e. neighbours.

The Western Region, for example, identified 10 current clients who have had AVOs made against them in the past two years – 6 of these clients are Aboriginal, 4 are women – and all have either a mild or moderate intellectual disability.

A significant proportion of ADHC's clients have breached their order. This has led to charges for breach of the AVO, criminal charges, breaches of other orders, and increased stress on family, staff and client relationships.

*Example: An AVO was taken out against an individual with an intellectual disability by one of their residential support workers (at an NGO). The worker continued to*

*be rostered on shifts in the home, thereby heightening the risk of the AVO being breached.*

## Question 2

**1. 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?**

Yes. ADHC's experience is that the purpose and conditions of an AVO are often not well understood.

For example, the language in an AVO can be difficult for people with an intellectual disability to understand.

*Example: ADHC is in contact with a married couple who both have an intellectual disability. The Police applied for an AVO on behalf of one partner. The couple continued living in the same house. This put the defendant at high risk of the breaching the AVO. It became apparent that neither partner was aware of the conditions of the AVO, or understood the consequences. In this instance, the Police did not identify that both parties were 'vulnerable persons'.*

For a person with a disability, their ability to understand their obligations under an AVO is dependant on accessible information formats being available to them, simple language, immediate support to help them understand what is happening, and community or informal networks to assist them to comply with the order.

In some cases, Police Liaison Officers and officers from ADHC's State-wide Behaviour Intervention Service have assisted clients to understand the order by providing them with a simple explanation.

Currently, the judicial system does not have suitable or appropriate mechanisms for people with a disability, such as accessible formats or support staff to explain what an AVO is, the conditions of the AVO and the consequences of not complying with an AVO.

However, not all individuals with a disability require or want community support. If they are not supported this may increase the likelihood of them not understanding the order and of the order being breached.

ADHC's view is that in some cases an AVO can be effective, particularly when the conditions are simple and can be easily followed, such as a condition not to enter specific premises, (for example, where a defendant stands outside certain premises (chemist, vet surgery) yelling abusive comments) and where the person in need of protection is neither a family member of carer.

- *A woman with a diagnosis of mild intellectual disability and borderline personality disorder had an AVO taken out against her by a shopping centre. She had previously accessed this centre in order to meet men for sexual activity and frequently engaged in aggressive behaviour towards other clients who also frequented the centre. Complaints were made to the centre management by shoppers and shop keepers regarding her behaviour and the impact on their trade. When the AVO was made, she understood that security at the centre would call Police and that other people would see her being asked to leave the shopping centre. The woman stopped her behaviour. The agency*

*supporting her requested assistance from the local Community Support Team. With case management and psychological assistance, a "whole of life" plan was put in place and as part of this, she made new relationships away from the centre. In this case the AVO triggered a request for professional assistance and enabled positive behaviour management strategies to be put in place.*

- *A client with a borderline level of intellectual disability formed a relationship with a woman which eventually ended at the request of the woman. The client would not leave her alone, made threats against her and wanted the relationship to continue. The woman's father took out an AVO against the client in order to stop him from harassing her. The client understood in very concrete terms that he was not allowed to talk with her or see her or the Police would be called. This client stopped his behaviour towards the woman.*

Sometimes, however, the imposition of an AVO can result in the problem just being transferred from one place to another e.g. the defendant goes to another location, (different chemist, different vet surgery) and engages in the same behaviour, resulting in further AVO applications being made against them.

ADHC staff cited the following examples of the inappropriate use of an AVO:

- *A client with a moderate intellectual disability was aggressive towards his parents in the family home. The mother took out an AVO against the client as a result of which he was unable to live in the family home. ADHC Community Support Team was involved and had to find immediate accommodation and care for this man. The mother had very mixed emotions about the action she had taken and the son was not able to understand that he could not see his mother or father. The mother eventually resumed contact with her son.*
- *An AVO was taken out by a client with a mild intellectual disability against another client with a mild intellectual disability. The clients used this strategy against one another and were boasting about it. They had previously been friends and part of the same social network. After a few weeks, they became friends again and the AVO was not considered necessary.*
- *An associate of a client with an intellectual disability made a complaint to Police about the client and his behaviour. The client was known to Police and had engaged in behaviour in the past which led the Police to believe the allegations against the client were true. The case manager involved believed that on this occasion, the allegations were vexatious. Despite this, an AVO was made against the client.*
- *A client was engaging in behaviour on the rail system which threatened the well being of passengers. An AVO was made against the client which prevented the client from accessing the rail system. This client then was not able to access this form of public transport which meant that access to positive activities in his life was also disrupted. As a result the client became further reliant on others for assistance and less independent.*

In some cases, AVOs are seen as an easy way by the person in need of protection to restrict a client's movements, rather than address issues contributing to the defendant's behaviour, especially when opportunities for dealing with the situation in a more positive way have not been explored first.

Often a request from a family member or service provider for ADHC assistance is not put in early enough to enable preventative work to be undertaken and is made only after an AVO is in place.

**2. Has the practice of 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?**

No. The practice since *Farthing v Phipps* [2010] NSWDC, has remained consistent in relation to ADHC clients. Clients have continued to have AVOs made against them with Police being the predominant applicants.

In one instance the ability for the person to comprehend the order, given their disability, was acknowledged by the Magistrate, however, the order was still made.

In another case, a service provider and the police discussed whether the defendant would have the capacity to understand an order taken out against them. It appears that a formal assessment of the person's capacity to understand an order by a skilled professional was not undertaken.

In some cases, officers from the Intellectual Disability Rights Service, Legal Aid NSW and Aboriginal Legal Service (NSW/ACT) Ltd have assisted defendants with an intellectual disability to ensure that the order is relevant and appropriate for the defendant.

Consideration should be given to amending the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* as proposed by the NSWLRC, as this may help draw the court's attention to the need to consider the defendant's capacity to understand the order and comply with it, prior to an order being made.

Where the court is considering making an AVO against a person with a cognitive or mental health impairment, a formal assessment of the person, with recommendations to the Magistrate about the individual's capacity to understand and comply with the AVO, should be undertaken.

**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?)**

The steps that can be taken will depend upon whether or not an order is made, and the relationship between the defendant and the person in need of protection. In either case, collaborative work between Police, ADHC and other supporting agencies (government and non-government) to help prevent the occurrence of further incidents, would be most useful.

Where the court is of the view that the defendant does not have the required level of understanding to enable them to properly comply with an order, an AVO should not be made as this will serve no purpose in protecting the person in need of protection.

Where an AVO is still being considered, orders should stipulate simple and concrete examples, without jargon, of the changes in behaviour expected of the defendant.

Where an order is made, the court should consider whether the full range of available behaviour support/psychology services have been accessed by the

defendant and, where appropriate, be able to make an order requiring the defendant to access these services.

ADHC policy provides that where the abuse occurs in a residential setting, the line manager and staff must assess the risk of further incidents and update any risk management plans relating to the event. They must also review the client risk profile of any clients involved to assess and manage the risk of further incidents of abuse.

Where the person in need of protection wishes to maintain contact with the defendant, steps could include (in appropriate cases) mediation, family counselling, behaviour support and appropriate intervention strategies which are developed in consultation with the person in need of protection.

It would be preferable if people with cognitive and mental health impairments who are considered at risk of entering the criminal justice system be identified prior to an AVO being initiated and provided with specialist support, to address issues before they escalate to orders.

Ideally, the person in need of protection (or their representative) should be encouraged to engage services as soon as they become aware of a problem.

### Question 3

#### 1. Do adults with cognitive and mental health impairments have difficulties complying with AVOs because of their impairments? Example.

Yes.

*Example: The CJP has a young female client currently residing in a unit in the Sydney metropolitan area with a diagnosis of borderline personality disorder, self-harming and offending behaviours including assaults, use of a weapon (not towards community members but towards herself to self-harm) and calling emergency services. She resides in this unit with two other female clients with similar behaviours and issues.*

*Due to the frequency and intensity of incidents, AVOs have been made against the client for aggressive, intimidating and physically violent behaviour towards staff at her residential unit. Her intellectual disability and diagnoses affect her ability to effectively regulate her emotions and incidents which have resulted in AVOs have usually increased from challenging non-compliant interactions to assaults.*

*A number of stakeholders are involved in the support of this client and as a result a care plan to guide the client's interactions and involvement has been developed. At times it is difficult implementing the plan due to policies, procedures and legislation which may preclude other sentencing options. This unfortunately has increased her involvement with the criminal justice system which has included periods of incarceration.*

*AVOs should only be made against a person if they are able to understand the conditions set in them. In this example, the complexity of the client's diagnoses was known and the person was unlikely to be able to conform to the conditions set.*

*Compliance could be improved if agencies collaborated in the establishment of the care plan and then followed up its recommended actions (similar to the use of Community Treatment Orders in the Mental Health Act).*

Issues that can make it difficult for a person with an intellectual disability to comply with an order include:

- Clients often lack an understanding of the purpose and duration of the AVO – while the person may initially understand that they are being prevented from accessing the person in need of protection or a particular place because of their behaviour, when their behaviour improves, they may not understand why they are not allowed to reinstate the relationship, as it was before the AVO.
- They can also have difficulty understanding distance requirements and remembering the conditions of the AVO. People with an intellectual disability may find it difficult to generalise the intent of the order across different situations and environments and scan ahead to avoid contact with the person in need of protection. This is a significant issue, especially in small communities, where avoiding contact at public facilities and events such as the local swimming pool or day program, can be a problem.
- People with an intellectual disability often have unstable relationships which are characterised by rapid periods of conflict, followed by periods of harmony. In the time it takes for a matter to go to court, the relationship between the defendant and the person in need of protection may have moved from one of intense conflict to one of peace. In one example a boyfriend/girlfriend broke up, the break-up became violent and an AVO was taken out by the female against the male. The matter took two weeks to get to court. During that time, the couple reunited.
- A person with an intellectual disability may be impulsive and unable to engage in “higher order thinking” to gain emotional control and think ahead to the consequences of their actions. They may find that they breach an AVO without really thinking about it.
- A person with an intellectual disability usually relies on significant others to help them to carry out activities of daily living. They may need help with shopping, using money, accessing health care, places of interest etc. If it is a “significant other” who has taken out an AVO, then the person with the intellectual disability cannot function in the usual way.
- If the person also has mental health problems or autism, they may become fixated on the person in need of protection and find it impossible to stay away from them. This can worsen their obsession. In one example, a client who was prevented by an AVO from catching trains, became more obsessed with some of the passengers who were catching the train.
- People with an intellectual disability often live in housing in close proximity to one another. Accommodation providers are often unable to relocate people who have taken AVOs out against each other e.g. a client took out an AVO against another client who lived around the corner to him in social housing. These clients caught the same bus, shopped at the same shop and accessed the same venues.
- Difficulty resisting peer pressure is also a factor. A person with an intellectual disability may be vulnerable to encouragement by others to act in a way that is not in their own best interests.

- A person's inability to comply can also increase their risk of recidivism by promoting feelings of rejection by their family and the removal of their only source of perceived support.
- Alternatively, the other party in the order may be a friend or family member – in wanting to help the person with a disability, they may maintain contact, and both parties may 'fall back into old patterns'. Where these patterns of behaviour/interaction are long standing, it may be difficult for a person with a cognitive disability to develop other strategies to change their behaviour.

The conditions imposed by an AVO may also have a negative impact upon the carer/family of a person with an intellectual disability, for example, conditions such as a curfew may, in effect, place a whole family under a curfew – where the family is responsible for their family member's compliance.

If an individual is not identified as having a disability, or does not have support during the AVO process, an order may be imposed with unrealistic expectations, increasing the likelihood of a breach.

ADHC notes, however, that in some cases the reasons for breaches being committed by people with a disability do not arise from their disability. Most people have difficulty understanding the legal system (although people with a disability are at a further disadvantage); while Aboriginal and CALD communities may have cultural, as well as language needs that should be considered.

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

Inappropriate behaviour by people with a disability should be addressed in a holistic manner – investigating what is occurring in the person's life and their supports.

What is the function of the person's behaviour? Is the person feeling valued, respected? Do they have a social role? What is their community membership? What are their vulnerabilities? Their learning needs? These things are important, as the person will most likely will be returning to the same environment and the same triggers. AVOs, in themselves, do not address these issues and may have a limited impact in further preventing or reducing their behaviour.

Police and courts need to ask more questions about what else can be done. By not offering AVOs as an easy option, services supporting the client would be encouraged to work with the client and their care team to respond in a more positive and appropriate way with people with a disability exhibiting offending behaviour.

### Education and support

Education and early intervention services are considered effective alternatives. Education for people with an intellectual disability – about orders and the legal system is important.

Orders should be provided in an accessible format, including simple English and visual formats – to assist the defendant to understand what it means and what the consequences of an order are.



Permission should also be sought from the defendant for the order to be provided to relevant support people, who could help reinforce the conditions of the order in their contact with the defendant.

Support services such as mental health services and specialist early intervention should also be considered. Care Plans, similar in function to Community Treatment Orders under the *Mental Health Act 2007*, and consisting of treatment, counselling, support, management or other strategies aimed at addressing the defendant's behaviour could include:

- follow up to ensure strategies continue to be appropriate; and
- follow up to explore other options where clinical and mentoring support is ineffective.

The Community Justice Program could also assist in reporting back to the court on the defendant's progress in meeting the goals of the Care Plan.

#### Collaboration between services

Collaboration should occur between the Police, justice system and services. When services work collaboratively, inappropriate use of an AVO can often be avoided. Police, magistrates and legal aid solicitors are often the people who can take a lead role in bringing people together.

Often the Police are in the best position to commence the negotiations between services because they have the knowledge in relation to incidents, the people involved, and if there are high risk places etc.

*Example: Police contacted the Community Support Team in Newcastle to let them know that a client with an intellectual disability was causing trouble at a local shopping centre. The number of reported incidents that this client had been involved in had increased and the shopping centre had wanted an AVO taken out against the client. The client had a mild intellectual disability and a personality disorder. The Police recognised that the shopping centre formed a large part of the social network of this client. They also recognised that she was unlikely to comply with an AVO and would become very angry and most likely become aggressive to staff and shoppers at the centre in response to an AVO. So, the Police called a meeting with all services. A plan was put in place to manage incidents with all services and to talk with the client about her behaviour and what would be the consequences of further incidents in the shopping centre. Since that time, incidents have decreased and the shopping centre and Police have not talked about an AVO.*

*Example: In another example, an AVO was going to be placed on a client who was engaging in violent behaviour on public buses. If he had been prevented from travelling on buses, he would have been unable to access his social networks and day time activities. Police, ADHC and non-government services worked together to develop a travel plan for the client. His was taught strategies to manage his emotions whilst on buses. Police determined that an AVO was not needed.*

Police in these examples were proactive in getting services to work together to develop a collaborative response to addressing the client's behaviour that did not involve the imposition of an AVO.

In relation to Aboriginal offenders, the involvement of Aboriginal Elders can help determine what is culturally appropriate and what may work. A similar approach is recommended for defendants from CALD communities.

#### Utilisation of NSW Health Court Liaison Service officers

The role of officers from the NSW Health Court Liaison Service in assessing and supporting this client group could be further explored.

Court Liaison Service officers could help explain the order to the defendant.

They could also assist in the ongoing monitoring and reporting of the defendant's compliance with the order back to the court.

#### Referral of appropriate matters to mediation

In appropriate matters, greater use could be made of mediation, as provided for under s.21 of the *Crimes (Domestic and Personal Violence) Act 2007*. This would be preferable to repeated AVOs being made.

*Example: A person with an intellectual disability was advised by police to take out an AVO against their neighbour, following a neighbourhood dispute. This resulted in the neighbour also taking out an AVO and repeated visits to court. The person with an intellectual disability breached the order on a number of occasions and also failed to attend court hearings, as a result of their lack of understanding of the order and the process. The situation was successfully resolved following Community Justice Centre Mediation which helped the parties address the issues in dispute.*

Where criminal charges have been laid and where the client has the capacity to meaningfully participate, diversionary options such as restorative justice processes should be considered - especially if repeated AVOs have been made against the person for the same or similar reasons and towards the same protected person.

#### Breaches

The consistent monitoring of an AVO by Police and/or with the support of a service is important as a means of ensuring that conditions are being met and understood by the defendant. This would assist the protected person to be confident in the effectiveness of the AVO.

An important issue at times, especially with family or system involvement can be a reluctance to enforce the AVO. Mediation and the implementation of therapeutic conditions whereby the defendant can access suitable programs or receive appropriate treatment may encourage the protected person to be more consistent in enforcing the order.

In relation to breaches it is important that the criminal justice system be prepared to consider mitigating circumstances, i.e. that a person with a cognitive impairment may not necessarily be breaching an order intentionally. The court should also take into account the context in which the behaviour is occurring, for example, whether there is an underlying problem that needs to be addressed and whether an AVO is the most appropriate option.

#### 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 cognitive or mental health impairment? How should such an exception be framed?

No. However, ADHC acknowledges that different considerations apply when the person in need of protection is a carer as opposed to a person/resident with a disability.

##### Where the person in need of protection is a carer

The residential setting is the person with a disability's home and staff are coming into that person's home.

There are usually options which can be put in place to allow for appropriate rostering, staffing to be changed, implementation of counselling/mediation options, behaviour support intervention, staff training, clients moved to a more appropriate place within the care setting. Behaviour support can be offered within these settings and the environment managed in such a way to make the AVO unnecessary.

Work health and safety options also need to be discussed between employers and staff. Employees need to feel that the organisation will respond quickly and adequately to protect them against clients who display aggressive behaviour.

Where Police have attended an incident, they could request the advice (or Care Plan) of a stakeholders' meeting with the defendant's residential staff, case managers, clinical staff and treating professionals so that responsibilities and treating strategies/interventions can be discussed.

##### Where the person in need of protection is another resident

ADHC is concerned to ensure that there is no derogation of the current protections available to people with a disability who are experiencing violence.

The inclusion in the Act, of people living in institutions or group homes (such as people with a disability or in aged care facilities) and carers *within the definition of "domestic relationship"* was included over a decade ago in recognition of the range of domestic contexts in which people live and similarities in the dynamics of abuse experienced by these groups. People with a disability were included within the definition to make the process of obtaining protection more accessible.

Unlike APVOs, which rely on the victim making an application through the court, often with very little assistance, the provisions relating to ADVOs provide police with increased powers, and indeed, obligations, to intervene on behalf of a victim.

For people who are isolated as a result of a disability and are dependent on a carer (who may be the abuser), getting to a court to make an application can be a significant, if not impossible barrier to obtaining protection.

This is all the more concerning given the high rates of abuse experienced by people with disabilities<sup>1</sup>. Women and girls with disabilities are at even greater risk.<sup>2</sup>

According to Women with Disabilities Australia, violence against women with disabilities is a problem of epidemic proportions. Their report also notes that women with a disability living in institutional or residential settings are particularly vulnerable to the entrenched subculture of violence and abuse found in institutions as well as the removal from public scrutiny in these settings. Women with a disability also face significant physical and social barriers that compound the already significant barriers experienced by non-disabled women when seeking to escape violence.

In its 2003 *Report - Apprehended violence orders*, the NSW Law Reform Commission, which heard detailed submissions on the definition of “domestic relationship”, took the view that the NSW definition should remain inclusive of people such as those in group homes and aged care facilities, and should be retained.

The removal of the requirement for police to apply for an order for people in residential care could further marginalise people with a disability and delegitimise their experiences of violence.

In terms of its potential impact on people with a disability, it may also be contrary to the United Nations *Convention on the Rights of Persons with Disabilities* (“CRPD”), ratified by Australia in July 2008, in particular, Article 12 which articulates the principle of equal recognition and access to the law for people with disabilities. Clause 3 of Article 12 and Article 16 provide that:

“12(3). States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

16. State parties shall take all appropriate legislative, administrative, social, educational and other measure to protect persons with disabilities ... from all forms of exploitation, violence and abuse, including their gender-based aspects”.

It is important that any practical action taken by staff responsible for the care of the person in need of protection not result in the victim being moved from their home or suffering further negative consequences, as a result of the defendant’s behaviour.

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

See comments, above.

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<sup>1</sup> Women with Disabilities Australia, *Forgotten Sisters: A Global Review of Violence Against Women with Disabilities*, (2007) at p.21; *Violence through our eyes : improving access to services for women from non-English speaking background with disability and carers experiencing violence project report*, Multicultural Disability Advocacy Association of NSW (MDAA), 2010., Harris Park, N.S.W.: Multicultural Disability Advocacy Association of NSW (MDAA) , Plummer, Sara-Beth; Findley, Patricia A. (2012)

<sup>2</sup> CEDAW Concluding Comments February 2006: 3, 5.

## 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?

Yes. This often occurs where the carer is finding it difficult to manage the person's behaviour and an AVO is being used as a behaviour management strategy. AVOs and the use of Police to prevent challenging behaviour is not an effective or appropriate form of behaviour support. Behaviour has a function and this needs to be understood by the carer. If used for such a purpose, it will only offer a short term solution and do nothing to bring about lasting change in the person's behaviour.

*Example: A father took out an AVO against his 15 year old son, who resided in the house with him during school holidays. The father found it difficult to manage his son's behaviour. A more appropriate option would have been to refer the family to family mediation, counselling, behaviour support or case management services.*

*Example: A teacher took an AVO against a student with a moderate intellectual disability. The student did not understand that this required them to be in certain parts of the school ground. Once the school established boundary areas to assist the defendant to comply with the AVO, the AVO became more effective.*

The *NSW Carers (Recognition) Act 2010* defines a carer as a person who provides ongoing personal care, support and assistance to any other individual who needs it because they have:

- a disability, or
- a medical condition (including a terminal or chronic illness), or
- a mental illness, or
- are frail aged.

Significantly, a survey undertaken in 2010 by the Mental Health Council of Australia involving 756 carers caring for people with a mental health impairment (<http://www.mhca.org.au/>) found that carers:

- often feel alone and isolated when dealing with the complex issues of living with people who have complex health problems, including mental health;
- would like to be included in treatment planning and work in partnership with mental health service providers;
- reported a lack of coordinated, collaborative and consistently reliable recovery-based services - leading to stress;
- identified a need for more and better trained staff across the mental health service system (including police officers) and improved knowledge about the role of carers;
- experience difficulty in accessing information and acquiring the information they need to successfully fulfil their caring role; and

- identified gaps in supports and service provisions for carers, including difficulty in accessing early intervention services and acute crisis care.

These findings are consistent with other surveys that have been undertaken with carers.

Clearly, there will be circumstances where carers feel that they have no other alternative than to seek an AVO against the person they care for, both for their own protection and the person they care for. However, taking into account the voices of carers, a more coordinated and integrated service system, adequately trained professionals, including within the criminal justice system and a partnership approach to case planning may help to militate against the need for them to apply for an AVO in the first place.

It should be noted that carers (staff) within services have a responsibility to, and should be accountable for, applying early intervention approaches. Monitoring to ensure this is being done and to protect the rights of consumers, is considered important.

Professional carers within organisations should be supported by their organisation to have access to a range of case management and behaviour support services that allow for the challenging behaviour of clients to be dealt with in a positive and proactive way.

The *NSW Carers (Recognition) Act 2010* also places a number of obligations on NSW public sector agencies, including the need for agencies to consult with relevant and appropriate bodies representing carers when developing policies that impact on carers.

In some cases an AVO is taken out as the carer has been physically or verbally abused/assaulted, and is fearful for their own or others safety in their own homes.

While an AVO may be effective when the person in need of protection is a member of the general public, they tend to be ineffective when applied for by individuals or paid staff that are assigned to support clients. In such cases the making of an AVO can have a negative impact upon the caring relationship and is 'traumatic' for carers.

Relationships are a significant aspect of therapeutic intervention and family members may not want an AVO to be in place as they have a greater understanding of the defendant's behaviours and may be concerned that this may take away any positive supports that are in place.

An alternative is greater utilisation of diversionary options in appropriate cases such as mediation and restorative justice, as discussed above.

Ideally, carers and family members should be encouraged to seek help from support services earlier so that they can prevent the need for an AVO. Families who seek help in relation to behaviour support, respite and linking to other support services in the community are usually able to meet their needs without resorting to an AVO.

*Example: A parent was desperate for permanent ADHC accommodation, and took out an AVO which meant that ADHC had to place her (adult) son in emergency accommodation as he was not allowed to return home. The son has not returned to live at the family home.*

**2. Are AVOs being used by health care providers in a way that unreasonably limits access to health care? How can this be avoided?**

Yes. ADHC is aware of occasions where this has occurred resulting in the availability of health care being limited, in particular for people in rural areas where there are no or limited alternative services.

*Example: An individual who has a history of aggressive behaviours and has been diagnosed with paranoid schizophrenia has been refused medical treatment at times as a result of these behaviours. The client is dependant on this psychiatric medication to assist with his paranoid thoughts and aggression, however, as a result of his behaviour he has, at times, been restricted from accessing health care services for a few days. This cycle results in him becoming more aggressive and paranoid in his interactions with support staff and in the community.*

It is recommended that AVO conditions not be made where they may impact on the person's access to critical services.

**Question 6**

**Are parents seeking AVOs against children (including adult children) with cognitive or mental health impairments? In what circumstances? When is it effective or ineffective? What alternatives could or should parents have in this situation?**

Yes. Generally these are being applied for where the child has behavioural issues or compounding factors such as mental health and/or alcohol and drug use which may exacerbate their propensity towards violence and aggression and the family member is concerned for their own safety, or the safety of others.

Parents report that they find it 'traumatic' to take out an AVO against a loved one in such situations.

In some cases an AVO is reported to by a parent in order to get access to services that they have been waiting for.

AVOs can at times be considered helpful, insofar as they can make a family feel safe, in the belief that the defendant will adhere to the order. This, in turn, can make parents and carers feel more confident in implementing positive programs. However, if the order is then breached, families may feel that this strategy has failed.

As a behaviour management strategy, AVOs can be ineffective where the enforcement of the order by family members, and/or police is inconsistent.

*Example: A male client who lives independently in the community with limited supports attends his mother's residence on a daily basis (minimum) to request money. The client's mother is an elderly widow who lives on her own. On most occasions his requests are met and there are positive interactions. However at times when there is a conflict in meeting his request for money, his aggressive behaviour escalates towards his mother, sister and Police. A number of AVOs have been made against him. Unfortunately his behaviour is exacerbated by inconsistent responses from his family. Police have therefore been reluctant to act on breaches of AVOs.*

Possible alternatives to the use of AVOs in these situations would focus on increased support family members such as through:

- parental support groups;
- family services which may include family therapy;
- psychological support for children;
- parental programs i.e. Triple P; Positive Parenting Program.

### Question 7

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

Prevention and early intervention are the best forms of protection from abuse. Services recommended by ADHC include: mediation, counselling, behaviour support, psychology services, respite, carer training and education.

Clinical responses which are supported through care plans may be useful:

- to assist the individual to understand the consequences of their behaviour. Preventative strategies can then be utilised to prevent further incidents of violence and aggression occurring;
- if the defendant is an ADHC client, as ADHC can assess the function of the person's behaviour, which can provide greater understanding of the level of risk. Clinical plans could then be developed for any stakeholder working with the person to help them to understand the importance of preventative strategies and general skills in managing their behaviour.

Service provider organisations can also assist by instilling in their workers a feeling of care and support for them as professionals dealing with difficult clients.

It is also important to note that the *NSW Carers (Recognition) Act 2010* creates obligations for public sector agencies and a NSW Carers Charter.

Under the Act, NSW public sector agencies have the following obligations:

1. Take all reasonable steps to ensure staff (and agents of the agency) are aware of and understand the NSW Carers Charter.
2. Consult with relevant and appropriate bodies representing carers when developing policies that impact on carers.
3. Ensure human resource policies consider the needs of staff who are carers and have due regard to the NSW Carers Charter.

Human service agencies (public sector agencies that provide services directed at carers or the persons being cared for by carers) have two additional obligations:

- they must ensure that their agency and staff **reflect** the principles of the NSW Carers Charter; and
- they must report their compliance with the Act in their annual report.



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

The appropriateness of an AVO, based on the person's capacity to properly understand and comply with an AVO, should be considered on a case by case basis.

Information/education should be provided to the courts and police to assist them to identify an individual with a disability. This could be provided by the Intellectual Disability Rights Service.

Magistrates need to be made aware of the range of specialist additional supports and services that people with a disability can be referred to help them address their offending behaviour.

This could be done through judicial education, education of police prosecutors and legal representatives, judicial directions and promotional materials.

Should the final recommendations of the NSWLRC be implemented, at the policy development phase, public sector agencies should consider whether their policies are likely to impact on carers and where appropriate consult with bodies representing carers (eg Carers NSW and Mental Health Carers Arafmi NSW).

Developing policies within the criminal justice system in consultation with carers will ensure that the justice system is responsive to their needs and supports alternative pathways to seeking AVOs against the person for whom they are caring.

The NSW Carers Charter contains 13 principles to guide agencies' interactions with carers and outlines how carers in NSW should be treated.

The Office for Carers strongly encourages all NSW public sector agencies to become familiar with the Act and NSW Carers Charter. Implementation of the Act and Charter is likely to contribute to improved outcomes for carers and the people they care for and may go some way to addressing the need for alternative responses to managing the challenging behaviour sometimes exhibited by people with cognitive or mental health impairments.

### **Question 8**

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

AVOs may have a limited impact in addressing threatening or violent behaviours committed by people with cognitive and mental health disorders, as outlined in the examples provided, particularly where they are not seen as resulting in any immediate consequences and/or when enforcement is inconsistent.

In making orders concerning AVO proceedings courts should also take into account the health of the person with a disability. Individuals with a disability may have limited coping skills and experience considerable stress when having to reappear at AVO hearings.

