



THE LAW SOCIETY
OF NEW SOUTH WALES

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The Hon James Wood AO QC
Chairperson
New South Wales Law Reform Commission
DX 1227 Sydney

By email: nsw_lrc@agd.nsw.gov.au

Dear Mr Wood,

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

The Law Society's Criminal Law Committee (Committee) has reviewed the Question Paper seeking comments on apprehended violence orders against people with cognitive and mental health impairments.

The Committee's responses to the Question Paper are set out in the attached submission.

Yours sincerely,

Justin Dowd
President

Question 1

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

It is common for people with cognitive or mental health impairments to have AVOs taken out against them. The legislation does not specifically take into account whether or not the defendant has a cognitive or mental health impairment.

The Committee is aware that breaches occur regularly. People with cognitive and mental health impairments often lack the capacity to understand the conditions attached to AVOs.

Breaches can result in criminal charges and the possibility of imprisonment. While those charges can be defended on the basis that the person with a cognitive or mental health impairment did not “knowingly” contravene the order (section 14 *Crimes (Domestic Violence) Act 2007*), in many cases these matters should not be before a court.

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.

People with cognitive and mental health impairments frequently have little or no understanding of the court process or the explanation of AVOs given by a Magistrate.

The wording of an AVO can be extremely difficult for a person with a cognitive or mental health impairment to understand e.g. the prohibition on assaulting, threatening, intimidating or stalking a protected person.

It is therefore the view of the Committee that AVOs should not be able to be taken out against a person with cognitive and mental health impairments if the person does not have the capacity to understand or comply with it.

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?

Committee members have not experienced any change to the practice of the courts since *Farthing v Phipps*. The Committee therefore submits that the *Crimes (Domestic Violence) Act 2007* should be amended to provide that the inability to understand and comply with an AVO due to an impairment is a reason why it should not be made.

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 Committee suggests that the *Crimes (Domestic Violence) Act 2007* be amended to contain a specific provision, applicable only to AVO/PVO applications against people with cognitive and mental health impairments, that would allow the Court to have the person comply with a treatment plan (not dissimilar to section 32) and at the same time provide comfort to the person in need of protection. This would mean that the person with the cognitive or mental health impairment would receive treatment and at the

same time possibly avoid the problems and difficulties that go with making orders against such persons.

It would still be necessary for the defendant to demonstrate that a treatment plan was needed so the requirement that the defendant be diagnosed and the appropriate medical evidence in support be presented would remain.

In addition because it relates to an AVO, the test for the specific provision to apply would not necessarily have to be as strict. This makes it clear that it is something that is being done specific to the AVO application.

Such a provision may also avoid the numerous section 32 applications that flow when persons with cognitive or mental health impairments are charged with a breach offence.

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.

As noted above, adults with cognitive and mental health impairments often have difficulty complying with AVOs because it is hard for them to understand and remember the conditions of the order. Adults with cognitive and mental health impairments may be unable to control their behaviour and often do not appreciate the consequences of failing to comply with an order.

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

See Question 2(3) above.

Question 4

1. Should there be an exception to the requirement for police to apply for an AVO in situations involving residential care of a person with a cognitive or mental health impairment? How should such an exception be framed?

The Committee supports 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. Police should have a discretion to seek an order without an obligation to do so.

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

The Committee is of the view that the definition of "domestic relationship" is too broad. The Committee submits that sections 5(d), (e) and (f) of the *Crimes (Domestic Violence) Act 2007* which cover flatmates; persons living long-term in the same residential facility; and carer type relationships, should be deleted.

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?

The result of well-intentioned changes to the *Crimes (Domestic Violence) Act 2007* has been an increase in orders taken out against vulnerable people in care. The intent of the legislation was for orders to be taken out to protect the vulnerable person from

carers, however it is often the carers who have taken out an AVO against a person with a mental health or cognitive impairment.

Carers need to be better trained at identifying and responding to difficult behaviour displayed by people with cognitive and mental health impairments, rather than criminalising it. Police require the same awareness and training to respond appropriately.

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?

Committee Members have not raised the use of AVOs by health care providers in a way that unreasonably limits access to health care as an issue.

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?

Parents of a child with a cognitive or mental health impairment may call the police for assistance when the child's behaviour becomes violent or problematic. This can result in the police taking out an AVO, which is often not the outcome the parents had anticipated or desired.

The legislation should be varied so that, if the defendant is a young person with a cognitive or mental health impairment, it is a mandatory requirement to move the matter out of the criminal justice system and into mediation, counselling or behaviour management therapy.

Question 7

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

Health-based and therapeutic approaches and services should be considered as a more appropriate alternative to AVOs for people with cognitive or mental health impairments.

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

The use of alternatives can be encouraged by the wider availability of health-based and therapeutic support services.