The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

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By email

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

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law and two of our solicitors are accredited specialists in the field. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

Although we have significant expertise in children's matters, most of our clients are young adults aged 18 to 25. We therefore have an extensive working knowledge of AVO proceedings in the Local Court as well as the Children's Court.

This submission will draw on comments we have made in previous submissions. We attach copies of the following:

- Young people with cognitive and mental health impairments in the criminal Justice System – submission to NSWLRC, March 2011
- Inquiry Into Domestic Violence Trends and Issues – submission to Standing Committee on Social Issues, NSW Parliament, 23 September 2011
- Statutory Review of the *Crimes (Domestic and Personal Violence) Act* – submission to DAGJ, 18 November 2011

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at jane.sanders@freehills.com.

Yours faithfully

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army

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

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

The Shopfront has had extensive experience acting for young adults who are respondents to AVO applications. A significant proportion of these people have cognitive and/or mental health impairments, and in most cases the application results in an order being made against them.

We would imagine that the incidence of AVOs being made against people with cognitive and mental health impairments in the general community is similarly high.

Unfortunately these orders are often breached due to factors that will be discussed further below, including difficulty understanding the conditions, inability to comply, and lack of appropriate therapeutic intervention.

The case studies of "Kurt", "Ivan" and "Eddie" in our submission to the statutory review of the *Crimes (Domestic and Personal Violence) Act* provide examples of AVOs being taken out against young adults with cognitive and mental health impairments.

Question 2: Difficulty understanding an AVO:

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.

Yes, in our experience many adults with cognitive and mental health impairments have problems understanding AVOs. In some cases, the person may appear to understand the conditions at first but may soon forget or become confused by the conditions. It must be remembered that, even though a respondent will usually receive a copy of the order, people with cognitive and mental health impairments often have problems with literacy and with understanding the language in which AVO conditions are expressed.

In our experience, our clients have particular difficulties understanding the fact that consent is not a defence to a breach. Please see our comments in Section 9.5 of our submission to the statutory review of the *Crimes (Domestic and Personal Violence) Act,* and the case study of "Kurt".

The case study of "Ivan", also in our submission to the statutory review, illustrates the problems that can arise when AVOs are taken out against, and served on, people who are acutely mentally ill or suicidal.

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?

We have not observed any change to the practice of the courts since *Farthing v Phipps*, at least in relation to our clients' matters.

We believe the decision in *Farthing v Phipps* should be given legislative force so that an AVO may only be made if it is appropriate in all the circumstances. This would include a consideration of the respondent's capacity to understand and comply with an order.

Please see our discussion in Sections 9.1 and 9.3 of our submission to the statutory review of the *Crimes (Domestic and Personal Violence) Act*. The case study of "Danny" in that submission concerns a 12-year-old child, but similar issues would also arise in the case of an adult with a significant intellectual disability. In Danny's case, the only way we could prevent an AVO being made was to persuade the Prosecution to withdraw the application.

We note with approval that, in its recent report on *Domestic violence trends and issues in NSW*, the NSW Legislative Council Standing Committee on Social Issues has recognised the difficulties

inherent in making AVOs against people who do not really understand the conditions or the implications of a breach. This was discussed by the Committee in the context of its comments about young people (see Chapter 16 of the Report) and we refer in particular to the following comments in the Executive Summary (replicated in similar terms at Paragraphs 16.48 and 16.49 of the full report):

> "The Committee accepts that there are real concerns about the extent to which ADVO conditions and the implications of breaching an order are understood by young people, especially where they have a cognitive impairment or mental illness. Indeed it is questionable whether an application for an ADVO is an appropriate course of action in such circumstances. Features of the Children's Court such as the prevalence of legal representation and the training that magistrates undergo ameliorate this concern but do not extinguish it. We have not received enough evidence to reach a conclusion here, but our preliminary view is that the suggestion that legislation should require decision-makers to consider the age and cognitive capacity of the young offender to determine whether the AVO is justified in the circumstances, it is a good starting point for appropriate reforms."

Although we take issue with the use of the word "offender" in this context, we otherwise agree with the comments. We suggest they are equally applicable to adults who have cognitive or mental health impairments. Moreover, in the Local Courts, there is currently no comprehensive system of legal representation for respondents to AVO applications, which makes respondents with cognitive and mental health impairments all the more vulnerable. We also note the Committee has recommended the provision of more comprehensive legal assistance and court support for respondents.

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)?

In many cases, the best possible protection against violence, harassment or threats from a person with a cognitive or mental health impairment is appropriate therapeutic intervention and social support, primarily for the alleged perpetrator but also for the person in need of protection.

Depending on the nature of the person's mental health problem or cognitive impairment, and the nature of the relationship between the parties, this could include hospital treatment, medication, cognitive behavioural therapy, and family or relationship counselling. Many people would also benefit from social work interventions to deal with stressors such as homelessness, overcrowding and poverty.

Question 3: Difficulty complying with an AVO

1 In your experience do adults with cognitive and mental health impairments have difficulties complying with AVOs because of their impairments? Please give examples

Yes, partly because their impairments may prevent them from understanding or remembering the conditions, and also because their impairments (particularly mental illnesses of a psychotic nature) make them unable to control their behaviour.

The case study of "Brad" below illustrates some of these difficulties.

Mental health and cognitive impairments also have an impact on people's ability to obtain and maintain an education, employment, housing and functional relationships. These factors in turn make breaches of AVOs more likely.

The case study of "Kurt" in our submission to the statutory review is an illustration of how homelessness can contribute to a breach of an AVO.

We would also comment that inadequate housing, or the threat of homelessness, often contributes to behaviour that leads to AVO applications as well as breaches. Many times we have seen family members with dysfunctional relationships forced to live together at close quarters, when it would be better (and safer) for all concerned if they lived separately.

Case Study – Brad

Brad has a mild intellectual disability and a psychotic illness (which has caused him to be hospitalised in a mental health unit on several occasions) in addition to cerebral palsy and epilepsy. Further, he has been diagnosed as suffering from post traumatic stress disorder, severe depression and moderate anxiety disorder.

An APVO application was made against Brad by police in relation to stalking his counsellor, Sarah. Brad believed that Sarah was his girlfriend and told police that he had been following her to protect her. When the Sarah confirmed to police that she was no longer Brad's therapist and that the relationship had always been a professional one, the police took out an APVO against Brad.

One of the conditions of the final order was that he was not to go within 50 metres of the youth heath centre where Sarah worked, and where Brad attended for counselling and other services. He was also prohibited from going within 50 metres of another local mental health service where Sarah now worked.

The negative effect on Brad of this condition in the APVO was twofold:

Firstly, he was deprived of access to a number of necessary services including counselling. This caused him to become anxious and upset.

Secondly, Brad had difficulty understanding and complying with the order. Within a week of the final order being made, he was arrested for breaching the 50-metre condition. It was alleged that he was seen walking past the youth health centre one day, and sitting on a bus bench across the road on another occasion.

It is clear that Brad, because of his disability and the delusional aspects of his mental illness, initially misunderstood the client-counsellor relationship. In addition, he did not understand the conditions imposed upon him, as he had very little concept of the meaning of 50 metres.

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

In our opinion, criminal justice intervention is often inappropriate for these situations.

The primary purpose of an AVO is to protect people from violence, threats, harassment and similar conduct, not to punish people for such conduct. If an AVO is unlikely to afford protection for a person who needs it (for example, because the respondent is incapable of understanding or complying with its terms) then an AVO is probably not an appropriate intervention and should not be made.

The threat of criminal sanctions is of course intended to protect victims by deterring respondents from breaching the terms of an AVO. However, the threat of criminal sanctions is rarely a deterrent for someone with mental health or cognitive impairment.

If an AVO is made, and a person breaches it for reasons that are largely beyond their understanding or control, they should not be criminalised for such conduct.

We support the use of section 32 applications to deal with people who are prosecuted for breaches of AVOs and are otherwise unable to have the charges withdrawn or dismissed. There is, among some magistrates, a reluctance to apply section 32 to matters involving violence or breaches of AVOs. In our view, this reluctance is often misplaced. Case plans associated with section 32 orders could include family or relationship counselling or other specific interventions aimed at dealing with the problematic behaviour. These would be more effective if backed by adequately- funded programs to which courts could refer defendants.

Question 4: Police as applicants

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?

Yes, we believe there should be an exception to this requirement, and we believe it would be relatively easy to frame.

We note that subsection 49(4) gives police the discretion not to apply for an AVO if they believe there is good reason not to make an application. The section could be amended to add a presumption that there is good reason not to make the application where the person in need of protection is a paid carer and they do not wish an application to be made.

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

We are of the view that the current definition of "domestic relationship" is too broad, and the obligation for police to make an application for an AVO under section 49 of the *Crimes (Domestic and Personal Violence) Act* does not allow for sufficient flexibility.

We refer to Section 2 of our submission to the statutory review of the *Crimes (Domestic and Personal Violence) Act,* in which we expressed the view that the definition of "domestic relationship" was too broad and gave examples of some of the unintended consequences.

Question 5: Carers and health care providers as applicants

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?

Anecdotal evidence suggests that such applications are being made frequently against children in group homes. In this regard we refer to our submission on *Young people with cognitive and mental health impairments in the criminal justice system* (particularly in the answer to Question 11.10, where we refer to the criminalisation of young people in out of home care) and Question 11.11 (in which we discuss AVOs).

Such applications do not seem to be as prevalent in the Local Court, at least not among our client group. However, there have been some applications of this type made against our clients, not by residential carers but by other professionals such as counsellors.

In the case study of "Brad" above, we concede that the order was effective to some extent, in that it (eventually) communicated a message to Brad that his counsellor did not wish to pursue a relationship with him. However, it was still problematic in that Brad had difficulty understanding and complying with some of the conditions, and it did not address the root causes of Brad's behaviour.

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?

We are not aware of a significant number of cases in which AVOs have been used in a way that unreasonably limits access to healthcare.

Certainly the AVO in Brad's case denied him access to the counselling service he formerly attended. However, regardless of the AVO taken out on behalf of Sarah, the service would probably have banned him from accessing the service in any event.

In our experience, arbitrary denial or withdrawal of services (often placing clients with complex needs in the "too hard basket") is more of a practical barrier than AVOs.

Question 6: Parents as applicants

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?

In our submission on *Young people with cognitive and mental health impairments in the criminal justice system* and our submission to the statutory review of the *Crimes (Domestic and Personal Violence) Act,* we discuss the (often inappropriate) use of AVOs by parents against their children.

In our experience this is not confined to children under 18, but extends to adult children. The case study of "Ivan" in our submission to the statutory review is a classic example of such a situation. In Ivan's situation, however, it is difficult to discern whether the AVO was actually sought by the parents or simply applied for by the police who had formed the view that a domestic violence offence had been committed.

It is often the case that parents call the police and/or a mental health crisis team in the hope of receiving some mental health intervention for an adolescent or adult child who is exhibiting symptoms of a serious mental illness. Instead of, or in addition to, mental health intervention, it is not uncommon for police to take out an AVO, having formed the view that a domestic violence offence has been committed. Often this is not the sort of intervention that parents want, and indeed it is often inappropriate in the circumstances.

Case study – Carlos

Carlos is aged in his early twenties and a few years ago he was diagnosed with schizoaffective disorder. One night his father, who had become concerned about increasingly bizarre and difficult behaviour, called the local mental health crisis team for assistance. It appeared that Carlos was acutely psychotic, and his father believed he needed to be taken to hospital.

The response of the crisis team was that even if Carlos was psychotic, they could not "schedule" him unless he was threatening to seriously harm himself or another person. Carlos' father then disclosed that Carlos had made some verbal threats towards him.

The mental health crisis team attended the house, accompanied by the police, who discovered that Carlos had an outstanding warrant for breaching a good behaviour bond. Carlos was arrested on the warrant and taken to the police station. He was not taken to hospital but was kept in custody overnight and taken to court the following morning. We believe an AVO application was also made for the protection of his father, even though he did not ask for this.

At court, Carlos saw the mental health court liaison worker, who had no hesitation in recommending that Carlos be taken to hospital under section 33 of the *Mental Health (Forensic Provisions) Act*. The magistrate made a section 33 order and Carlos was taken to hospital and detained as an involuntary patient. He remained in hospital for several weeks, suggesting that he was indeed acutely unwell.

Question 7: Alternatives to AVOs

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

If a person is suffering from an acute phase of a mental illness, particularly a psychotic illness such as schizophrenia, their behaviour may be intimidating although the person has no intent (and may be incapable of forming an intent) to intimidate. As discussed above, timely and appropriate mental health interventions would assist in dealing with such behaviour. Training or support for parents and others in dealing with such behaviour would also assist in some cases. In saying this we do not intend to trivialise behaviour that is seriously violent or intentionally intimidating.

Behaviour may be intimidating because it involves very strong language, often with violent imagery and threats. It is often the case that people with cognitive and mental health impairments use such language when extremely frustrated or frightened, even though they do not follow up their threats with physical violence and have no intention of doing so. This sort of language is often used when a person under arrest or in situations of conflict with the police, sometimes leading to charges of intimidating police in the execution of their duty. Again, we support the wider availability of therapeutic intervention to assist people with mental health and cognitive impairments to modify their behaviour and to cope with anger, frustration or fear. We also support enhanced training for police, carers and others in dealing with such behaviour, including de-escalation techniques.

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

The use of alternatives to AVOs can be encouraged by the wider provision of therapeutic and support services, as well as mediation services in appropriate cases. Whether it is the role of the criminal justice system to provide these is open to question.

Raising the threshold for the making of an AVO, and requiring the court to make a finding that an AVO is appropriate in all the circumstances, may encourage the use of alternatives before resorting to AVO applications.

Question 8: Additional issues?

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

We refer to our previous submissions, in particular our recommendation that respondents to AVOs be provided with legal representation and court support to help safeguard against inappropriate, unworkable, or poorly-understood AVOs.

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