



**New South Wales  
Law Reform Commission**

**People with cognitive  
and mental health  
impairments in the  
criminal justice system  
Question Paper 1**

**Apprehended violence  
orders**

August 2012  
[www.lawlink.nsw.gov.au/lrc](http://www.lawlink.nsw.gov.au/lrc)

## Make a submission

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We seek your responses to Question Paper 1 in the Commission's reference on people with cognitive and mental health impairments in the criminal justice system. To tell us your views you can send your submission by:

**Post:** GPO Box 5199, Sydney NSW 2001

**DX:** DX 1227 Sydney

**Email:** nsw\_lrc@agd.nsw.gov.au

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email or call (02) 8061 9270.

**The closing date for submissions on this paper is 31 August 2012.**

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Please let us know if you do not want us to publish your submission, or if you want us to treat all or part of it as confidential.

We will endeavour to respect your request, but the law provides some cases where we are required or authorised to disclose information. In particular we may be required to disclose your information under the *Government Information (Public Access) Act 2009* (NSW).

In other words, we will do our best to keep your information confidential if you ask us to do so, but we cannot promise to do so, and sometimes the law or the public interest says we must disclose your information to someone else.

### About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:

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# Question Paper 1: Apprehended Violence Orders

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- 1.1 In our Consultation Paper 11 (CP 11), we sought views on the use of apprehended violence orders (AVOs) against young people with cognitive or mental health impairments. We received written submissions and also conducted face to face consultations. We are now seeking further comment to:
- ensure our recommendations are based on up to date information
  - inform our consideration of the use of AVOs against adults with cognitive and mental health impairments, and
  - assist in developing responses to the problems identified from the first round of submissions and consultations.

## What is an AVO?

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- 1.2 An AVO is a court order designed to protect a person (the protected person) from violence, intimidation and stalking by the person against whom the AVO is made (the defendant).<sup>1</sup> The order always provides that the defendant must not assault, molest, harass, threaten or otherwise interfere with, intimidate or stalk the protected person.<sup>2</sup> The court may impose other restrictions on the defendant if they appear “necessary or desirable”, including that he or she not approach or contact the protected person, and not reside with or enter the home of the protected person.<sup>3</sup>
- 1.3 A knowing breach of an AVO is a criminal offence, and the defendant is liable for a maximum penalty of two years imprisonment or a fine of \$5500 or both. Unless the court orders otherwise, a person who breaches an AVO with an act of violence must be sentenced to a term of imprisonment.<sup>4</sup>
- 1.4 Apprehended Domestic Violence Orders (ADVO) can be made against a person who is in a domestic relationship with the protected person. These include family

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1. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(2)(a), s 10(2)(a).  
2. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.  
3. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2).  
4. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

members, residents of the same residential care facility, and paid and unpaid carers.<sup>5</sup> Apprehended Personal Violence Orders (APVO) can be made against any other person. The orders are similar in their effect, but there are differences in the obligations of police officers and the court, the availability of alternative dispute resolution mechanisms and costs.<sup>6</sup>

- 1.5 An application for an AVO can be made by the person in need of protection, if that person is over 16, or by the police.<sup>7</sup> The police must apply for an ADVO if they suspect or believe that a domestic violence offence, stalking or intimidation with intention to cause fear of physical or mental harm or a child abuse offence has been committed or is likely (unless there is a good reason not to).<sup>8</sup> The legislation also specifically states that reluctance on the part of the person in need of protection does not itself constitute a good reason for the police to not apply for an AVO, if that person is a victim of or threatened with violence, or if the person has an intellectual disability and does not have a guardian.<sup>9</sup>
- 1.6 We note that the person in need of protection may, in some cases, also be a person with a cognitive or mental health impairment. For example he or she may be another resident in a group home.

## Possible issues

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### Incidence of AVOs

- 1.7 While the number of APVOs granted has remained relatively steady, the number of ADVOS made in the last 10 years has risen from 18,853 in 2001 to 24,903 in 2011.<sup>10</sup> However, data in relation to the number of orders made against, and breaches by, people with cognitive or mental health impairments is not available. Yet submissions to CP 11 suggested that orders against young people with cognitive and mental health impairments, and breaches by them are common.<sup>11</sup>

#### Question 1

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

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5. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.
6. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21, 39, 43, 49, 53, 99.
7. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48(2)(a), 48(3).
8. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49(1), 49(4)(b).
9. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49(6).
10. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2001*, 7; NSW Bureau of Crime Statistics and Research, "NSW Local Courts 2011, Apprehended Violence Orders Granted: Statistical Division of Residence of Person of Interest" <[www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_court\\_stats](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_court_stats)>.
11. Law Society of NSW, *Submission MH36*, 8-9; Legal Aid NSW, *Submission MH38*, 6.

## Difficulty understanding an AVO

- 1.8 In submissions to CP 11 stakeholders agreed that young people with cognitive or mental health impairments have difficulties understanding the complex language used in AVOs and remembering the conditions imposed.
- 1.9 This issue of comprehension was explored in the 2010 case of *Farthing v Phipps*, an appeal against the making of an AVO. There was expert evidence that the defendant had “no conception of the meaning of the AVO and no capacity to meaningfully comply with this”. The District Court noted that when making an AVO, the Court is to consider “any other relevant matter” and concluded that the fact that the defendant cannot comprehend the terms of the order, and is therefore unable to comply with it, is a sufficient reason why an order should not be made.<sup>12</sup>

### 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.
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?
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)?

## Difficulty complying with an AVO

- 1.10 Even when a person with a cognitive or mental health impairment is able to understand an AVO, his or her impairment may make compliance difficult. Submissions report that the impulsivity associated with some impairments means that breaches can occur more frequently,<sup>13</sup> and suggest that alternative responses need to be found outside the criminal justice system.<sup>14</sup>

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

<sup>12</sup> *Farthing v Phipps* [2010] NSWDC 317 [33].

<sup>13</sup> Department of Human Services (Juvenile Justice), *Submission MH35*, 14.

<sup>14</sup> Legal Aid NSW, *Submission MH38*, 6.

## Police as applicants

- 1.11 A person may call police in the expectation that they will intervene in a violent incident. However in certain circumstances police must apply for an AVO, even if the protected person does not wish the application to be made. This is intended to prevent undue pressure being put on victims of domestic violence. Submissions and consultations have indicated that this lack of discretion can be problematic in the case of people with cognitive or mental health impairments, particularly in relation to paid carers.<sup>15</sup>
- 1.12 Paid carers are included in the wide definition of a domestic relationship<sup>16</sup> and therefore caught by the mandatory provisions. According to Ageing, Disability and Home Care, an AVO against a patient “compromises the worker’s ability to maintain rapport and continue in a supportive relationship with the person.”<sup>17</sup> In consultation it was also suggested that an AVO can create problems for a young person in residential care, as it is the policy of some homes that patients subject to an AVO granted to a carer cannot continue to reside in the home.

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

## Carers and health care providers as applicants

- 1.13 A carer may apply for an AVO against a young person or adult with a cognitive or mental health impairment. Submissions suggested that the use of AVOs against young people in this context is inappropriate. As the Shopfront Youth Legal Centre explained:

While we do not condone violence, and we do not suggest that...carers should have to accept it on a daily basis, we do not believe that criminal justice interventions or AVOs are always an appropriate response.<sup>18</sup>

- 1.14 One submission also raised concerns about the possibility of health care providers applying for AVOs against patients, noting that in remote areas or where the defendant does not have access to private transport, the result could be a serious restriction on access to health care.<sup>19</sup>

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15. Department of Human Services (Ageing, Disability and Home Care), *Submission MH35*, 47; Law Society of NSW, *Submission MH36*, 8-9.

16. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

17. Department of Human Services (Ageing, Disability and Home Care), *Submission MH35*, 47.

18. Shopfront Youth Legal Centre, *Submission MH41*, 8.

19. Public Interest Advocacy Centre, *Submission MH40*, 32.

**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?
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?

**Parents as applicants**

- 1.15 Parents may apply for AVOs against their children, including adult children. According to Legal Aid NSW “parents of young people with cognitive or mental health impairments are...using AVOs to discipline children who they cannot control”.<sup>20</sup> In consultation it was suggested that parents may also make these applications when they are unable to access treatment or services for their children or support for themselves. Presently, the Local Court can divert a person into treatment when they are charged with a breach, but not when an application for an AVO is made against them.

**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?

**Alternatives to AVOs**

- 1.16 While a criminal justice response is sometimes necessary, it is not the only or the best response to the challenging behaviour sometimes exhibited by people with cognitive or mental health impairments. Alternative responses include mediation, group work, counselling, training and support for parents and carers, medical treatment and behaviour change programs for people with cognitive or mental health impairments.

**Question 7**

1. Which alternative responses are useful responses to intimidating behaviour? In what circumstances?
2. How can the use of alternatives to AVOs be encouraged by the criminal justice system?

20. Legal Aid NSW, *Submission MH38*, 6.

## Additional issues?

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- 1.17 We invite stakeholders to advise us whether any other issues arise in relation to people with cognitive and mental health impairments as respondents to AVOs.

### **Question 8**

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





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