

DEFENDANT INCAPACITY AND AVOS

ISSUES PAPER

Intellectual Disability Rights Service (IDRS)

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1. Executive summary

- 1.1. This paper examines issues, legal and social, arising for defendants in apprehended domestic violence order (ADVO) and apprehended personal violence order (APVO) matters who, due to their cognitive disability lack capacity to understand and/or comply with such orders.
- 1.2. This paper focuses on people who have intellectual disability, however concerns and issues raised in this paper are also relevant to people who lack capacity due to other cognitive disabilities, such as acquired brain injuries, dementia and autism.
- 1.3. The two key issues identified in this paper are:
 - 1.3.1. making apprehended violence orders (AVOs) against people with impaired capacity exposes them to high risk of coming into contact with the criminal justice system; and
 - 1.3.2. AVOs made against people with impaired capacity may not serve the intended purpose of protecting the person/s named as the person/s in need of protection (PINOP/s) on the AVO. PINOPs may believe they have a level of protection from a defendant that they do not really have and feel a false sense of security. (In some matters, for example, PINOPS would be more likely to be protected if alternative accommodation, and/or other services were available).
- 1.4. These key issues are caused by a number of factors:
 - 1.4.1. inadequate legislative, common law and procedural frameworks to satisfactorily accommodate people with impaired capacity in AVO proceedings;
 - 1.4.2. limited understanding of impaired capacity by professionals and workers involved in the justice system; and
 - 1.4.3. inadequate services available to people with impaired capacity in the community and in the justice system. This is particularly the case for people with intellectual disability and borderline intellectual disability.
- 1.5. The paper poses some questions to stimulate thoughts about some possible areas for reform. The Appendix sets out relevant recommendations for reform made by some key reports and IDRS submissions.

2. The Project

- 2.1. IDRS and Criminal Justice Support Network (CJSN) have identified serious problems arising from the making and enforcement of apprehended violence orders (AVOs) against people with impaired capacity.
- 2.2. Concerned about the consequences of the making of AVOs against people with impaired capacity, IDRS successfully sought funding from CLCNSW to:

- 2.2.1. research issues, legal and social, arising for defendants in ADVO and APVO matters who, due to their cognitive disability, lack capacity to understand and/or comply with such orders;
- 2.2.2. draft an issues paper setting out the research;
- 2.2.3. convene a workshop with relevant government and non-government stakeholders, including community legal centres (CLCs), to discuss the issues identified and discuss recommendations to address the issues; and
- 2.2.4. deliver a presentation about the project at a CLC conference.

Intellectual Disability Rights Service

- 2.3. IDRS is a specialist disability advocacy service and community legal centre for people with intellectual disability. We work with and for people with intellectual disability to exercise and advance their rights.
- 2.4. IDRS provides legal advice and legal casework for people with intellectual disability in legal or rights matters. The Criminal Justice Support Network of IDRS provides advocacy and support persons at the police station and at court for victims and defendants with intellectual disability throughout NSW in relation to criminal and AVO matters. IDRS also advocates for improvements to laws and policies affecting people with intellectual disability; provides assistance to legal and other professions working with people with intellectual disability; educates people with disability about their rights and provides information to carers, service providers and the community about the rights and needs of people with intellectual disability.

Context of the project

- 2.5. The AVO framework was first introduced in NSW in 1982 in response to recognition of domestic violence as a social and legal issue. Its focus, at the time, was on violence within a “traditional domestic setting”, for example, when a man assaults the woman with whom he lives. Since that time, the legislation has been expanded to include a wider range of domestic and non-domestic relationships, as well as a wider range of threatening behaviours. For example the legislation provides for an ADVO to be taken out by a carer against a person with impaired capacity in their care. It also provides for an ADVO to be made between residents of a group home with impaired capacity, and for APVOs to be taken out by neighbours, friends, or strangers against persons with impaired capacity.
- 2.6. The legislation does not recognize that people with impaired capacity may not intend to harm the PINOP, or that the person’s disability may mean that they are incapable of understanding or complying with an AVO. Also, the legislation does not recognize that the PINOPs in these situations may actually be in a position of power, whereas the person with impaired capacity may be the person in a position of vulnerability. This is the reverse of the power imbalance that occurs in a traditional domestic violence situation.
- 2.7. In the experience of IDRS, AVOs are frequently made against people with intellectual disability who lack capacity to understand the legal process, the order itself, or the consequences of breaching the order, and often against people who have little or no capacity to comply with the order due to the effects of their disability.

- 2.8. These people are at high risk of breaching an AVO and therefore at high risk of incurring penalties including imprisonment. There is a need to consider how people with impaired capacity due to disability can be protected from being dealt with unfairly by the AVO framework.
- 2.9. The aim of the project is to explore how defendants with impaired capacity can be better protected in relation to AVOs, including examining how these defendants come to be before the court.
- 2.10. The paper provides case studies that show that the current law and in some instances the actions of disability services and police has had, and continues to have, catastrophic consequences for people with impaired capacity. This project acknowledges and aims to build on following reports:
 - 2.10.1. *People with an Intellectual Disability and the Criminal Justice System* (1996) by the NSW Law Reform Commission (NSWLRC);
 - 2.10.2. *The Framework Report* (2001) commissioned by the IDRS and the NSW Council for Intellectual Disability (NSW CID);
 - 2.10.3. *Enabling Justice* (2008) by IDRS, NSW CID and the Coalition on Intellectual Disability and Criminal Justice;
 - 2.10.4. *People with cognitive and mental health impairments in the criminal justice system: Diversion* (2012) by the NSWLRC; and
 - 2.10.5. *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences* (2013) by the NSWLRC; and
 - 2.10.6. *Value of a justice reinvestment approach to criminal justice in Australia* (2013) by the Commonwealth Senate Legal and Constitutional Affairs References Committee.
- 2.11. There are a number of reviews, yet to be finalised, which may also be relevant to this project:
 - 2.11.1. the statutory review of the *Crimes (Domestic and Personal) Violence Act 2007* (NSW) by the NSW Department of Attorney General and Justice; and
 - 2.11.2. the inquiry into legal barriers for people with disabilities by the Australian Law Reform Commission. and
 - 2.11.3. The *Crimes (Domestic and Personal Violence) Amendment (Information Sharing) Bill 2013* will be proclaimed in September 2014. Pursuant to that Act protocols have been developed for information to be shared to protect and support PINOPs. It includes sharing information about support services, welfare, health, housing, counselling, legal matters, etc. Usually the PINOPs consent is required to share information, however if there is a serious domestic violence threat, the information can be shared without the PINOPs consent.

3. Key Issues

- 3.1. A person who lacks capacity may not understand the nature and the effect of an AVO and simply may not be capable of complying with the AVO due to aspects of their disability.
- 3.2. The two key issues are:
 - 3.2.1. making AVOs against people with impaired capacity exposes them to high risk of coming into contact with the criminal justice system; and
 - 3.2.2. AVOs made against people with impaired capacity may not serve the intended purpose of protecting the person/s named as the PINOP/s on the AVO. PINOPs may believe they have a level of protection from a defendant that they do not really have and feel a false sense of security.

Case study 1

A person with impaired capacity, in supported accommodation, is put in prison for three months for breaching a provisional APVO that he did not understand.

A man assessed as having a moderate intellectual disability and intermittent explosive disorder was living in a supported accommodation unit. He had severe deficits in communication and very limited understanding of relationships with women.

Over time he had formed a relationship with a female neighbour, but unfortunately it turned sour. He followed his neighbour and asked her why she did not want to be friends with him. He allegedly threw an empty bottle towards her. Police successfully applied for a provisional APVO against him to protect his neighbour from him.

He did not understand what the provisional APVO meant and believed he and his neighbour were boyfriend and girlfriend. He continued to approach his neighbour in the street and yelled at her when she refused to talk to him. Police arrested him for breaching the provisional APVO.

When he appeared before the Local Court the Magistrate would not grant bail because he lived too close to the protected person.

He had been in prison on remand for three months when his guardian sought help from IDRS. In prison he had become very disoriented and confused. He did not know why he was in custody and it appeared he had not been able to shower properly or brush his teeth – tasks that support staff had usually helped him with.

IDRS persistently advocated for alternate accommodation to be found away from the PINOP. The criminal charges were dismissed under section 32 of the MHFPA and ultimately the police withdrew the application for the AVO on the grounds that an expert report indicated that he did not understand the AVO. However, he had already spent months in prison.

There has been no further trouble since his change in accommodation.

Case Study 2

A person with impaired capacity, living with his parent, has a provisional ADVO made against him by police, against the PINOPs wishes. The PINOP is discouraged from seeking police help in future.

A man with an intellectual disability and autism was living with his elderly father who had a heart condition.

One day the man gave his father a very tight bear hug, which caused his father to collapse. Police and ambulance were called and the man was asked to attend the police station.

A CJSN support person attended the police station with the man. The police officer was very uncomfortable about taking out an AVO against the man who clearly had limited capacity to understand or comply with it.

The police did apply for an ADVO. However, at court police withdrew their application after the man's father signed a form to state that he did not want the AVO in place and that his son now had support services.

The man's father told the CJSN support worker that he feared his son would go to prison if there were further incidents in the future, and that if his son assaulted him again he would not call police.

Case study 3

A person with impaired capacity, is living in a group home. A provisional ADVO is made by the police against the wishes of the carer. The person goes to prison for two months, before the matter is heard by the court, because there is no other accommodation.

A young woman in her 20s with intellectual disability, personality disorder and associated behaviour problems lived in a group home in a country town. She had a history of neglect and abuse as a child.

Police were called to the home following an altercation involving the young woman and a residential support worker. No one was significantly injured or charged, however, police were called and applied for a provisional ADVO on behalf of the residential support worker. The residential care worker did not ask the police to take out an ADVO.

The disability organization continued to roster the same worker to care for the young woman. Predictably, the young woman again pushed the worker, police were called and she was arrested for breaching the provisional ADVO a few days later.

The solicitor for the young woman argued strenuously for bail but the accommodation service provider informed the court that the young woman could not return to her group home and that no alternate accommodation was available. The young woman was denied bail and was transported to prison in Sydney until her matter was relisted at court a month later.

At the next court date, the court was advised that although alternate accommodation had been located, it was not available for another six weeks. ADHC claimed that no other temporary accommodation was possible in the meantime. The magistrate very reluctantly remanded the young woman who was returned to prison in Sydney for another month.

- 3.3. As the case studies demonstrate, there are many issues associated with the making and enforcement of AVOs against people with impaired capacity.
- 3.4. These key issues are caused by a number of factors:
 - 3.4.1. inadequate legislative, common law and procedural frameworks to satisfactorily accommodate people with impaired capacity in AVO proceedings;
 - 3.4.2. limited understanding of impaired capacity, and the sometimes direct relationship between the person's disability and behavioural issues, by professionals and workers involved in the justice system; and
 - 3.4.3. inadequate services available to people with impaired capacity due to cognitive disability in the disability, community and in the justice sectors and inadequate action by services to prevent issues escalating to the point of an AVO application
- 3.5. The paper poses some questions to stimulate thoughts about some possible areas for reform. The Appendix sets out relevant recommendations for reform made by some of the key reports listed above and IDRS.

4. Impaired capacity

- 4.1. For the purposes of this paper, people with 'impaired capacity' refers to people who, due to their cognitive disability, have difficulty understanding the legal system, particularly AVO proceedings and conditions and those who due to the effects of their disability are incapable of complying with such an order.
- 4.2. This paper will focus on people who have intellectual disability. However the concerns and issues raised in this paper are equally relevant to people who lack capacity due to other cognitive disabilities, such as acquired brain injury, dementia and autism.
- 4.3. The clinical definition of intellectual disability consists of three elements:
 - 4.3.1. an IQ below 70;
 - 4.3.2. deficits in adaptive functioning; and
 - 4.3.3. disability acquired of the disability before age 18.¹
- 4.4. Intellectual disability is more broadly defined as a form of cognitive impairment that affects the way a person learns.² A person with an intellectual disability may experience significant deficits in her or his ability to reason, plan, solve problems, think abstractly, understand complex ideas, comprehend information, learn quickly, learn from experience, predict consequences of an action. For example they may:

¹ Intellectual Disability Rights Service Inc, Coalition on Intellectual Disability and Criminal Justice, NSW Council for Intellectual Disability; editor, Linda Steele, *Enabling justice: a report on the problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (May 2008), 12.

² New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion* Report 135 (June 2012), 123

- 4.4.1. take longer to learn things;
 - 4.4.2. have difficulty reading and writing;
 - 4.4.3. have difficulty in communicating;
 - 4.4.4. have difficulty in understanding things and the world around them;
 - 4.4.5. have difficulty understanding abstract concepts;
 - 4.4.6. have difficulty in planning and problem solving; and
 - 4.4.7. have difficulty adapting to new or unfamiliar situations.³
- 4.5. Intellectual disability is often mistakenly thought of as a type of mental illness however, it is quite distinct from mental illness. Some people with intellectual disability may also have a mental illness or mental disorder. It is important to make the distinction in the context of services and diversionary avenues available to people who have mental illness as opposed to people with intellectual disabilities.

5. **Apprehended Violence Orders**

- 5.1. The *Crimes (Domestic and Personal Violence) Act 2007* (CDPVA) is the primary legislative instrument guiding the making and enforcement of AVOs in NSW. The CDPVA aims to ensure the safety and protection of all persons who experience domestic and personal violence by empowering courts to make AVOs in a way that is safe, speedy, inexpensive and simple as is consistent with justice.⁴
- 5.2. An AVO is a civil order however it is a criminal offence to knowingly contravene an AVO and is punishable by a fine of up to \$5,500 and/or 2 years imprisonment.⁵
- 5.3. A police officer can apply for a provisional AVO (an interim AVO applied for by phone or fax prior to going to court) if they have good reason to believe a provisional order is needed immediately to ensure the safety and protection of a person or their property.⁶ Also after the 20 May 2014 amendments to the CDPVA allow a senior police officer to determine applications for provisional ADVOs, and give police greater powers to direct and detain defendants for the purposes of applying for and serving provisional ADVOs, (s 89A).
- 5.4. A police officer must apply for a provisional, interim or final ADVO, if they suspect or believe that a domestic violence offence has or is likely to be committed, unless:
 - 5.4.1. the person for whose protection an order would be made is at least 16 years of age at the time of the incident; and
 - 5.4.2. the police officer believes that the person intends to make an application for an AVO; or
 - 5.4.3. there is good reason not to make the application.⁷
- 5.5. A domestic violence offence is defined as a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship.⁸

³ B Fogarty, "Improving Legal Representation for People with Intellectual Disability" (2010) 96 *Precedent*, 31.

⁴ *Crimes (Domestic and Personal Violence) Act 2007* sections 9 and 10.

⁵ *Crimes (Domestic and Personal Violence) Act 2007* section 14(1).

⁶ *Crimes (Domestic and Personal Violence) Act 2007* sections 25 and 26.

⁷ *Crimes (Domestic and Personal Violence) Act 2007* sections 27 and 49.

⁸ *Crimes (Domestic and Personal Violence) Act 2007* section 11.

- 5.6. For the purposes of this CDPVA, a person has a domestic relationship with another person if the person:
- 5.6.1. is or has been married to the other person; or
 - 5.6.2. is or has been a de facto partner of that other person; or
 - 5.6.3. has or has had an intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature; or
 - 5.6.4. is living or has lived in the same household as the other person; or
 - 5.6.5. is living or has lived as a long-term resident in the same residential facility as the other person and at the same time as the other person (excluding correctional and detention centres); or
 - 5.6.6. has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person; or
 - 5.6.7. is or has been a relative of the other person; or
 - 5.6.8. in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person's culture.⁹
- 5.7. When deciding whether to make an AVO, the court must consider:
- 5.7.1. the safety and protection of the protected person and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order; and
 - 5.7.2. in the case of an order that would prohibit or restrict access to the defendant's residence – the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made; and
 - 5.7.3. any hardship that may be caused by making or not making the order, particularly to the protected person and any children; and
 - 5.7.4. the accommodation needs of all relevant parties, in particular the protected person and any children; and
 - 5.7.5. any other relevant matter.¹⁰
- 5.8. If a court makes or varies a final or interim AVO, the court must explain it to the protected person and the defendant (if they are present at court) and cause a written explanation to be given to them, regarding the effect of the order, the consequences of breaching the order and their rights, in a language that is likely to be readily understood by them.¹¹ However a failure to comply with these requirements does not affect the validity of the order.¹²
- 5.9. The court also has the power to stay any AVO application proceedings, and the enforcement of any order, either permanently or until a specific day.¹³

⁹ *Crimes (Domestic and Personal Violence) Act 2007* section 5.

¹⁰ *Crimes (Domestic and Personal Violence) Act 2007* sections 17 and 20.

¹¹ *Crimes (Domestic and Personal Violence) Act 2007* section 76.

¹² *Crimes (Domestic and Personal Violence) Act 2007* section 76.

¹³ *Crimes (Domestic and Personal Violence) Act 2007* section 68.

6. The Problem: (How to protect the PINOP and ensure justice for the alleged offender with impaired capacity).

- 6.1. As a party to the *Convention on the Rights of Persons with Disabilities* (CRPD), Australia is required to guarantee that people with disabilities have rights to:
 - 6.1.1. equality and freedom from discrimination, including access to reasonable accommodation to achieve equality (Article 5);
 - 6.1.2. effective access to justice on an equal basis with others (Article 13); and
 - 6.1.3. liberty and security of person, including the right not to be arbitrarily or unlawfully deprived of one's liberty, or deprived of it due to the existence of a person's disability (Article 14).
- 6.2. These provisions recognise that it may be necessary to provide adjustments for people with cognitive and mental health impairments in order to ensure that the rights in question are accessible (Article 14(2)).
- 6.3. As a party to the *International Convention on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CROC) and the *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW) Australia is required to ensure that Australian citizens are able to live free from violence.
- 6.4. AVOs are commonly taken out against people with impaired capacity to protect the following groups of people, with sometimes unjust and devastating consequences for defendants and people in need of protection (PINOP):
 - 6.4.1. Family members;

Case study 4

A person with impaired capacity, and lacking impulse control due to his disability, is put at high risk of breaching his ADVO.

A young man with moderate intellectual disability lacks impulse control and has difficulty empathising with others. He has a history of displaying behaviours that place him and others at risk. He lives in a group home.

He visits his family each fortnight. His grandfather lives with the family. On a visit he gets angry and wrestles with his grandfather and the family called the police. His grandfather is relatively uninjured. The grandfather does not want to any action taken.

The police take out a provisional ADVO. The order allows the young man to visit his family but he is at risk of breaching it because he cannot control his behaviour.

On the first court date IDRS represented the young man and asked for an adjournment to make representations to the police to withdraw the ADVO. The court made an interim ADVO. On the second court date the police said that they cannot withdraw the ADVO application. The case was set down for hearing and the interim order is continued.

At the hearing date the interim ADVO will have been in force for four months and the young man had been at risk of breaching it for all of that time. Ultimately an ADVO order was made, the magistrate decided there was continuing risk to the grandfather and did not accept that the young man's incapacity was sufficient to mean an order should not be made.

Luckily there have been no breaches. The man's family would be very reluctant to call police again because of the consequences for him.

6.4.2. Paid Carers in group homes;

Case study 5

A person with impaired capacity, is living in a group home. The staff contact the police instead of following the behaviour intervention strategy. The person is charged with assault and a provisional ADVO is made.

A young woman with a moderate intellectual disability, autism, ADHD, generalised anxiety disorder, post-traumatic stress disorder and chronic adjustment disorder lives in a group home with one other resident with intellectual disability. She also has a significant history of emotional and sexual abuse by her family.

One day the young woman became upset and started ripping her clothes off. As a result, staff decided that she would not be allowed to go out on her usual day trip. The young woman then became very upset and started yelling at staff and kicking cars in the driveway (there was no damage done to the cars). She tried to kick a staff member.

The staff that day were from an agency and had minimal experience working with this young woman. They did not follow the planned behaviour support strategies that had been developed for her. Instead, staff called the police, who charged this young woman with assault and applied for a provisional ADVO to protect staff.

IDRS appeared for this young woman and determined that she had no knowledge or understanding of the ADVO. She did not know that it would be a criminal offence to breach the order and that she might be sent to gaol for breaching the ADVO.

Case study 6

The person with impaired capacity and the PINOP are residents of the same group home. The police use their discretion and do not take out an ADVO.

A CJSN worker attended a police station to support a man accused of assaulting another resident in his group home. The man has autism spectrum disorder, and is aggressive at times.

The police officers who responded to the incident felt they were obliged under the relevant legislation to charge the man with assaulting the other resident, however, they really did not want to do this as they were aware that by imposing AVO conditions on this man they were going to expose him to the criminal justice system because he was likely to breach the AVO conditions due to his behavioural problems.

The investigating officer and the custody manager sought advice from the police legal service and advocated for the man not to be charged or cautioned on the grounds that they believed the man had the "mind of a 5-8 year old child" and that they would not put an AVO on someone of that age.

Thanks to the advocacy of the police officers, the man was neither cautioned nor charged and was able to return to his group home.

6.4.3. neighbours.

6.5. The making and enforcement of AVOs against people with impaired capacity can violate the human rights of people with impaired capacity guaranteed

under CRPD and may fail to protect the rights of people to live free from violence.

6.6. As the case studies demonstrate, there are many issues associated with the making and enforcement of AVOs against people with impaired capacity. However, the two key issues are:

6.6.1. making AVOs against people with impaired capacity exposes them to high risk of coming into contact with the criminal justice system; and

6.6.2. AVOs made against people with impaired capacity are unlikely to serve the intended purpose of protecting the person/s named as the PINOP/s on the AVO without some other strategies being put in place. PINOPs may therefore believe they have a level of protection from a defendant that they do not really have and feel a false sense of security.

7. Inadequate legislative, common law and procedural frameworks

7.1. The current legislative, common law and policy frameworks contribute to unjust and ineffective outcomes in AVO matters involving defendants with impaired capacity.

Legislative framework

7.2. The CDPVA is very important and valuable legislation, particularly so because it recognises domestic violence, which had been thought of as a private matter in the past. However, despite its aims, its provisions can result in unjust outcomes for people with impaired capacity and may not effectively protect applicants for AVOs.

7.3. It is very important that the definition of a domestic relationship include the relationships between people who are dependent on another person for their care, given the power imbalance and the vulnerability of the dependent person to abuse.

7.4. However, within the context of provisions in the CDPVA, which require police to apply for an AVO in certain circumstances¹⁴, police officers are often obliged and/or understand they are obliged to apply for AVOs to protect carers against people with impaired capacity. This can mean that people with impaired capacity are no longer able to be cared for by their carer, who may be a paid professional or family member. It may be difficult to find an alternate carer and imprisonment or homelessness may result

7.5. Most significantly, despite an obligation on courts to explain the effect of the order and consequences for breaching the order¹⁵, a person with impaired capacity may still not understand the conditions of an AVO and therefore be at a significant risk of breaching conditions of the order and entering the criminal justice system.

7.6. AVOs made against people with impaired capacity may not have the intended effect of protecting a PINOP from the defendant with impaired capacity, due to

¹⁴ *Crimes (Domestic and Personal Violence) Act 2007* sections 27 and 49.

¹⁵ *Crimes (Domestic and Personal Violence) Act 2007* section 76.

the defendant's inability to comply with orders (s)he does not understand.

- 7.7. If a provisional ADVO is in place, a person with impaired capacity may breach it even before the first court mention date and may be refused bail due to being thought to be an unacceptable risk of endangering the safety of the victim.¹⁶
- 7.8. Defendants with impaired capacity facing charges of contravening an AVO may seek to have their matter dismissed by way of section 32 of the MHFPA. Section 32 allows the court to dismiss the charge and discharge an eligible defendant unconditionally or subject to conditions. Such conditions can involve compliance with a plan for treatment or engagement with services.
- 7.9. It is also worth noting that if a person is found to be mentally ill under section 14 of the *Mental Health Act 2007* (NSW) (MHA), that is, there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection or for the protection of others, from serious harm, a magistrate can order, under section 33 of the MHFPA, that a defendant be detained in a mental health facility for assessment or discharged into the care of a responsible person.
- 7.10. Even if the charges for contravening an AVO are eventually dismissed, perhaps under section 32 or 33 of the MHFPA, a person with impaired capacity has had to go through a potentially very stressful ordeal, for reasons they may not comprehend, due to their failure to understand the conditions of an AVO when it was first made against them.
- 7.11. A court cannot choose to deal with AVO application proceedings under sections 32 or 33 of the MHFPA. Similarly defendants cannot be referred to programs such as CREDIT, MHCLS or Life on Track during AVO application proceedings.
- 7.12. If a person with impaired capacity does not breach a provisional AVO or an AVO is not sought before the matter is listed in court, the defendant with impaired capacity or their representative is limited to making arguments under sections 17(2) and 20(2) of the CDPVA, which sets out what the court should take into account when considering whether to make an AVO, regarding why an AVO should not be made. The court is not specifically required to consider the defendant's capacity to understand or comply with the AVO, when deciding whether or not to make the AVO.

¹⁶ The *Bail Act* 2013 (NSW) section 17(2)c .

Question 1: Should the CDPVA provide a pre-court diversion option for defendants with impaired capacity to enable the police to liaise with the court, ADHC and other service providers for the purpose of arranging support and services for the defendant?

Question 2: Should the definition of “domestic violence offence” and/or the definition of “domestic relationship” in the CDPVA be amended to remove the requirement that the police should apply for an ADVO on behalf of a paid or unpaid carer of a person with impaired capacity where the police suspect a domestic violence offence has been, or is likely to be committed by the person dependent on the carer?

Question 3: Should section 32 of the MH (FP) Act 1990 be available to defendants with impaired capacity in AVO proceedings?

Question 4: Should the standard AVO orders as well as other conditions, be drafted in plain language that can be more easily understood?

Legislation in other Australian States

ACT

7.13. The *Domestic Violence and Protection Orders Act 2008 (ACT) (DVPOA)* empowers courts to make final orders protecting aggrieved persons if it is satisfied that the respondent has engaged in domestic or personal violence against the aggrieved person.

7.13. A court may consider anything that is relevant before making a final order.

7.14. The DVPOA defines a person with a legal disability to include a mental disability, which is subsequently defined as a person who is not legally competent to be a party to the proceeding because of a mental or intellectual disability, and includes a person who has, and a person has not, been appointed a litigation guardian.¹⁷

7.15. The DVPOA states that if a court is considering making an interim order and considers that the respondent is or may have a legal disability, the court must tell the public advocate that the respondent may need a litigation guardian.¹⁸

7.16. The DVPOA states that if the court is considering making an order by consent and a person with a legal disability is not, and the court believes should be, separately represented by someone else, the court must not make the consent order and may adjourn the proceedings to allow the person to get a litigation guardian.¹⁹

7.17. The DVPOA requires that if a respondent to a non-emergency protection order is a person with a legal disability, the respondent must have a litigation

¹⁷ *Domestic Violence and Protection Orders Act 2008*, Dictionary.

¹⁸ *Domestic Violence and Protection Orders Act 2008* section 32.

¹⁹ *Domestic Violence and Protection Orders Act 2008* section 44.

guardian.²⁰

Question 5: Should the CDPVA be amended to incorporate any provisions similar to those in the DVPOA so that if the court believes that the defendant has impaired capacity it should appoint a litigation guardian for them?

Victoria

7.18. The purpose of the *Personal Safety Intervention Orders Act 2010* (Vic) (PSIOA) is to protect the safety of victims of assault, sexual assault, harassment, property damage or interference with property, stalking and serious threats.²¹

7.19. The PSIOA adopts the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) definition of cognitive impairment, which defines cognitive impairment to include impairment because of mental illness, intellectual disability, and dementia or brain injury.²²

7.20. Section 61(1) of the PSIOA empowers a court to make a final order protecting the affected person if they are satisfied that the respondent has:

7.20.1. committed prohibited behaviour against the affected person; and

7.20.1.1. is likely to continue to do so or do so again; and

7.20.1.2. the respondent's prohibited behaviour would cause a reasonable person to fear for his or her safety; or

7.20.2. stalked the affected person and is likely to continue to do so or do so again; and

7.20.2.1. the respondent and the affected person are not family members; and

7.20.2.2. it is appropriate in all the circumstances of the case to make a final order.

7.21. Section 61(2)(b) of the PSIOA states that in determining whether it is appropriate to make a final order the court may consider:

7.21.1. if the court is satisfied that the respondent has a cognitive impairment, the respondent's ability to do the following, taking into account his or her cognitive impairment:

7.21.1.1. understand the nature and effect of a final order; and

7.21.1.2. comply with the conditions of the final order.

7.22. When considering whether to make an interim order, section 35(4)(b) of the PSIOA states that court may take into account a respondents' ability to understand the nature and effect of an interim order and their ability to comply with an interim order if a respondent has a cognitive impairment.

Question 6: Should the CDPVA be amended to incorporate any provisions similar to those in the PSIOA? In particular, should sections 17 and 20 of the CDPVA be amended to specifically require a court to consider any impaired capacity of a defendant in deciding whether or not to make an AVO, such as their ability to

²⁰ *Domestic Violence and Protection Orders Act 2008* section 19.

²¹ *Personal Safety Intervention Orders Act 2010* section 1.

²² Section 4 of *Personal Safety Intervention Orders Act 2010* referring to section 3(1).

- **Understand the nature and effect of a final order, and**
- **Comply with the conditions of the final order?**

Common law

7.23. While there is no strict legislative requirement to take into consideration a defendant's ability to understand the AVO proceedings and the conditions of an AVO, it has been argued that there is room within the legislative framework to take into account impaired capacity in AVO proceedings.

7.24. It has been successfully argued in *Farthing v Phipps* [2010] NSWDC 317 (18 October 2010) (*Farthing*) that when the court is deciding whether to make an AVO it can take into account a person's ability to understand an AVO within "any other relevant matter"²³, with Lakatos SC DCJ holding at [33] that:

"Section 17, as I have said, allows a court, including this Court, to take into account any other relevant matter in determining whether or not to make an order. As I have said, the object of the Act is the protection of persons from domestic violence, intimidation and stalking. The Act proceeds on the basis that an order by the Court directed to the defendant would be understood by that defendant and acted upon, and I refer to my earlier references to the various sections of the Act. As a matter of principle it follows that if the Court concludes that the making of an order will not have the desired primary effect, then that will be a substantial reason in accordance with s 17 not to make the order. Furthermore, if the Court concludes that a person against whom the order is made cannot properly comprehend the terms of its order, so that the effect might be that he or she unwittingly breaches the order and therefore exposes him or herself to imprisonment, that in my view would also be a sufficient other reason why an order should not be made."

7.25. In that case, Ms Phipps and Mr Farthing were placed in shared accommodation, which led to Ms Phipps abusing and assaulting Mr Farthing. Mr Farthing sought an ADVO against Ms Phipps. It was successfully argued that Ms Phipps' conduct was attributable to her "psychological makeup".

7.26. It was also put to the court in *Farthing*, albeit unsuccessfully, that the *Presser* test should be applied to the defendant in AVO application proceedings. The *Presser* test was set out by Smith J in *R v Presser* [1958] VicRp 9 to assist judiciary decide whether a defendant is fit to plead. The *Presser* test requires judiciary to consider whether the defendant can:

- 7.26.1. understand the offence with which she or he is charged;
- 7.26.2. plead to the charge;
- 7.26.3. exercise the right to challenge jurors;
- 7.26.4. understand generally the nature of the proceeding as an inquiry into whether she or he committed the offences charged;
- 7.26.5. follow the course of proceedings so as to understand what is going on in a general sense;
- 7.26.6. understand the substantial effect of any evidence that may be given against her or him;

²³ *Crimes (Domestic and Personal Violence) Act 2007* sections 17(2)(d) and 20(2)(d).

- 7.26.7. make a defence or answer to the charge;
 - 7.26.8. where the accused is represented, give necessary instructions to counsel regarding the defence, and provide her or his version of the facts to counsel and, if necessary, the court; and
 - 7.26.9. have sufficient mental capacity to decide what defence he or she will rely on and to make that known to counsel and the court.²⁴
- 7.27. There has been much judicial debate regarding:
- 7.27.1. which courts have the jurisdiction to apply the *Presser* test;
 - 7.27.2. which courts have the jurisdiction to deal broadly with issues of fitness; and
 - 7.27.3. what action the court should take if there is a decision that a defendant is not fit for trial.
- 7.28. *Ebatarinja v Deland* (1998) 194 CLR 444 (*Ebatarinja*) found that it was necessary that the defendant understand the proceedings and the nature of the evidence called in High Court committal proceedings and that it would constitute a miscarriage of justice to continue with the proceedings. However, this requirement to understand proceedings is understood to be an essential element of criminal proceedings, not necessarily civil proceedings.²⁵
- 7.29. Acknowledging this gap in the legislative framework, *Police v AR Children's Court NSW* unreported 18 November 2009 (*AR*) decided that as there was expert evidence to suggest that the defendant was not fit to plead according to the *Presser* test, and it was not appropriate to deal with the defendant wholly under sections 32 or 33 of the MHFPA, the proceedings against the defendant should be dismissed and discharged.
- 7.30. The debate regarding determining fitness has primarily concerned criminal proceedings, however, returning to *Farthing*, it was asserted that the *Presser* test should apply in AVO proceedings, on the grounds that:
*"the imposition of an apprehended violence order are either criminal proceedings or are in the nature of criminal proceedings, and draws in aid reference to the title of the Act, the fact that an appeal in this Court is treated as a conviction appeal, and lastly, that any breach of the order results in prima facie a criminal conviction and a custodial term."*²⁶
- 7.31. While it was agreed that AVO proceedings have similarities to criminal proceedings, Lakatos SC DCJ determined it was inappropriate for him to extend the application of the *Presser* test to AVO application proceedings, instead believing that whether to do so should be determined by the legislature or higher courts.²⁷
- 7.32. While *Farthing* is an important case regarding the making and enforcement of AVOs against people with impaired capacity, it is not well known and has not been cited in any other reported cases.

²⁴ *R v Presser* [1958] VR at [48].

²⁵ *Kunath v The State* [1993] WLR 1315.

²⁶ *Farthing v Phipps* [2010] NSWDC 317 (18 October 2010) at [30].

²⁷ *Ibid* at [32].

Case study 7

A case showing how unfitness to be tried in relation to an ADVO was dealt with in the Local Court.

A man with intellectual disability had been living with his mother and stepfather. The man got into an argument with his parents and struck his mother across the face and threw a toy at his stepfather. His parents called the police, who arrested the man.

The police said that the man did not understand the caution and thought the police were taking him out as a friend. The custody officer commented that the man still believed in Santa Claus and that he did not understand his rights when the police tried to explain them.

The man was charged with assault and police obtained a provisional ADVO, which included a condition that he not go within 50 metres of his parents' home. His parents did not want him back in the home. The man was kept in custody until later that night and only released after respite accommodation was found for him by his caseworker.

On the first court date IDRS asked for an adjournment to prepare and make submissions. The court made an interim ADVO.

The medical reports said that their client had a mental age of 8 years. The man played with a toy for the 1.5 hours that he was at court. The man's speech was slow and he used very simple words. He could not recite information. He could only remember the names of four days of the week. He did not know how many days were in a week, nor in a year. He did not know his age, and did not know the address of his parent's house. He could not read, nor write. He could not count past "7".

Fortunately, his caseworker found a home for him to live in.

On the second court date IDRS asked the court to either stay the proceedings under section 68 of the CDPVA on the grounds of unfitness and the Presser test or not make a final ADVO for reasons set out in Farthing. The magistrate instead dealt with the assault and the ADVO under section 32 of the MHFPA and dismissed all matters including the ADVO on condition that our client follows the directions of his caseworker and the manager of his home.

The interim ADVO was in place for 10 weeks. Without the assistance of the caseworker and IDRS the man may not have been granted bail, may have breached the interim ADVO and may have had a final ADVO made against him.

7.33. It is also arguable that the reasoning in *Farthing* only applied because Ms Phipps and Mr Farthing were no longer sharing accommodation. There was the likelihood of their coming into contact in certain circumstances, and on those occasions their supervisors would take extra steps to ensure that there would be no abusive conduct by Ms Phipps.²⁸ Although the affidavit evidence of Mr Farthing suggested that he was still in fear of abuse and violence from Ms Phipps,²⁹ it appeared that the need for an ADVO had dissipated significantly. A different outcome may have been reached in that case had the defendant's behaviour continued to pose a real threat.³⁰

Question 7: Should the NSW Judicial Commission Local Court Bench Book be updated to include reference to Farthing and circumstances in which its principles should be applied?

²⁸ Ibid at [5].

²⁹ Ibid at [6].

³⁰ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences* Report 138 (May 2013), 379.

7.34. Finally, the High Court case of *Muldrock v The Queen* [2011] HCA 39 (5 October 2011) (*Muldrock*) found that it was not necessary to consider general deterrence when sentencing a person with a significant intellectual disability. In the joint judgment it was found that:

“The principle is well recognised [citation omitted]. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender’s mental illness and the commission of the offence [citation omitted]. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender’s moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community.”³¹

7.35. While common law provides some room to make arguments, it does not adequately protect defendants with impaired capacity and applicants in AVO proceedings from injustice.

Procedural framework

Court Procedures

7.36. Courts are required under legislation³² and practically to deal with applications for AVOs as quickly as possible. In 2012 NSW local courts granted 30,623 AVOs.³³ The large volume of AVO applications requires local courts to list many AVO matters on the same day and deal with them as quickly as possible. There is some evidence that interim AVOs are made by the court quickly, and as a matter of course, without adequate opportunity being given to defendants or their representatives to contest the making of interim AVOs.

7.37. As a result it may be difficult for defendants and their representatives to have the time to make complex legal arguments about why an interim AVO should not be made against a defendant with impaired capacity on an AVO list day.

7.38. There seems to be a view held by magistrates that consideration of the defendant’s capacity should be considered at the stage of determining whether a breach of the AVO has occurred, (see NSW Law Reform Commission Report 138 at para 13.83). This overlooks the fact that people with impaired capacity may have behavioural problems because of their disability and that people with impaired capacity may have no control over their living arrangements. It also fails to provide an opportunity to take account of the details of the incident, for example, that the PINOP may not have wanted the police to apply for an AVO or that the police are required to take out ADVOs against people with impaired capacity even though the incident may not have been serious. It unfairly exposes the defendant with impaired capacity to the risk of being arrested and refused bail.

³¹ *Muldrock v The Queen* [2011] HCA 39 (5 October 2011) at [54].

³² *Crimes (Domestic and Personal Violence) Act 2007* sections 9 and 10.

³³ NSW Bureau of Crime Statistics and Research, *Criminal Court Information: Apprehended Violence Orders* http://www.bocsar.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_court_stats viewed 17 July 2013.

CASE STUDY 8

A case showing that a final ADVO was not made for reasons similar to Farthing and Phipps, however an interim ADVO had been in place for three months.

Police applied for an ADVO against a man with an intellectual disability after his mother, who cares for his daughter, alleged that during a visit with his daughter he became angry and threatened her with an iron bar. He alleged that his mother had made it difficult for him to have contact with his daughter.

At first mention the IDRS solicitor asked the court for the opportunity to make written submissions arguing for a stay of proceedings under section 68 of the CDPVA on the grounds of unfitness to plead, or that the court not make an ADVO having regard to section 17(2)(d) of the CDPVA on the grounds that such an order would not be properly understood by the man due to his intellectual disability.

While the court allowed IDRS to make submissions regarding the above, an interim ADVO order was still made because it was the AVO list day and no time was allowed to argue that the interim orders should not be made. When considering IDRS's submissions the Magistrate stated that while he was familiar with the Presser test, he acknowledged that this area of law was very unclear. While the court was ultimately satisfied that a final ADVO should not be made for similar reasons cited in Farthing, the court dismissed the assault charge and the ADVO under section 32 of the MH(FP) Act 1990. By that time the interim ADVO had been in place for 3 months exposing the client to risk of breach.

Question 8: Should interim AVO application proceedings involving defendants with impaired capacity be dealt with differently by the court so that the circumstances can be properly considered before an interim order is made?

Question 9: How can the court identify if a person has impaired capacity?

Question 10: Should section 22 of the CDPVA be amended to require the court to consider the diversion of the defendant with impaired capacity to obtain support and services, before making interim AVO orders?

7.39. If an AVO application is defended, the Local Court Practice Note No 2 of 2012 requires parties in AVO matters to serve written statements on each other, and the court, prior to a hearing. The object of the Practice Note is to:

“promote consistency and efficiency in the determination of application proceedings and procedural fairness to all parties, having regard to the objects of the Act, and to facilitate the “just, quick and cheap” resolution of proceedings in accordance with the overriding purpose set out in s 56 of the Civil Procedure Act 2005.”³⁴

7.40. If a defendant fails to serve a written statement, the matter will proceed to hearing on the evidence of the applicant only. A defendant may be ordered to pay costs for failure to comply with a direction of the court.

7.41. It is important for defendants to comply with a direction to serve a written statement, however it may be difficult for a person with impaired capacity to write a statement. It is also not clear whether a defendant must write and serve a statement, regardless of whether the applicant writes a statement.

³⁴ Judicial Commission of New South Wales, *Local Court Bench Book* (September 2012) [25-080] 1160.

7.42. Defendants, particularly those with impaired capacity, are at risk of disclosing in a statement that they have committed a criminal offence, which could then be used against them in criminal proceedings and family law proceedings. A defendant in AVO proceedings can ask the court to direct her or him not to file a statement on the grounds of possible self-incrimination, however this may be particularly difficult for people with impaired capacity to do if they do not understand their rights or the proceedings.

Question 11: Should the Local Court Practice Note No 2 of 2012 be amended to give Magistrates the discretion not to require defendants with impaired capacity to provide written statements?

Police Procedures

7.43. Police can exercise their discretion when deciding whether to apply for an AVO on behalf of a person, even in situations of alleged domestic violence, a police officer does not need to apply for an AVO if the person seeking the AVO is over 16 years old and they believe there are good reasons not to.³⁵ However, the case studies and the experience of IDRS indicate that police are reluctant to exercise this discretion even where the person concerned has a significant disability and the PINOP is not seeking an order. It would seem that police are not provided with practical guidance as to the circumstances that should be considered in deciding whether to exercise discretion about whether it is appropriate to apply for an AVO against a person with impaired capacity.

7.44. Police and the Office of the Director of Public Prosecutions (ODPP) exercise discretion in deciding whether or not to charge or prosecute a defendant with impaired capacity accused of contravening an AVO.³⁶

7.45. Police have a common law and legislative right to exercise discretion when deciding whether to charge a person with an offence. Section 105 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA), empowers police to discontinue an arrest where:

7.45.1. the arrested person is no longer a suspect or the reason for arrest no longer exists for any other reason, or

7.45.2. it is more appropriate to deal with the matter in some other way, for example by way of warning or caution.

Question 12: Should LEPRA and / or the CDPVA be amended to provide greater guidance as to when it is appropriate or not appropriate for police to apply for an AVO? In particular, should sections 27(4)b and 49(4)b be amended to allow police officers to take into account matters such as the impaired capacity of the defendant, the accommodation requirements of the PINOP and the defendant, the wishes of the PINOP in not wanting an AVO, in exercising their discretion not to apply for a provisional or a final AVO?

³⁵ *Crimes (Domestic and Personal Violence) Act 2007*, sections 27 and 49.

³⁶ NSWLRC Report 135, above n 2, 220.

Question 13: Should the police have a similar discretion, under section 14(8), not to initiate criminal proceedings for breach of an AVO by a person with impaired capacity?

7.46. The ODPG guidelines for prosecution state that the paramount consideration is whether prosecution is in the public interest, which is guided by:

7.46.1. the availability of evidence that would provide prima facie proof of each element of the offence;

7.46.2. the existence of reasonable prospects of conviction upon weighing the evidence and strength of the case; and

7.46.3. reference to the following discretionary factors:

7.46.3.1. the seriousness or, conversely, the triviality of the alleged offence or that it is of a “technical” nature only;

7.46.3.2. the obsolescence or obscurity of the law;

7.46.3.3. whether or not the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;

7.46.3.4. special circumstances that would prevent a fair trial from being conducted;

7.46.3.5. whether or not the alleged offence is of considerable general public concern;

7.46.3.6. the necessity to maintain public confidence in such basic institutions as the Parliament and the courts;

7.46.3.7. the staleness of the alleged offence;

7.46.3.8. the prevalence of the alleged offence and any need for deterrence, both personal and general; the availability and efficacy of any alternatives to prosecution;

7.46.3.9. whether or not the alleged offence is triable only on indictment;

7.46.3.10. the likely length and expense of a trial;

7.46.3.11. whether or not any resulting conviction would necessarily be regarded as unsafe and unsatisfactory;

7.46.3.12. the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;

7.46.3.13. whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive;

7.46.3.14. the degree of culpability of the alleged offender in connection with the offence;

7.46.3.15. any mitigating or aggravating circumstances;

7.46.3.16. the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim;

7.46.3.17. the alleged offender's antecedents and background, including culture and language ability;

7.46.3.18. whether or not the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

7.46.3.19. the attitude of a victim or in some cases a material witness to a prosecution;

7.46.3.20. whether or not and in what circumstances it is likely that a confiscation order will be made against the offender's property;

7.46.3.21. any entitlement or liability of a victim or other person or body to

criminal compensation, reparation or forfeiture if prosecution action is taken; and/or

7.46.3.22. whether or not the Attorney General's or Director's consent is required to prosecute.³⁷

7.47. Case studies indicate that police and ODPP do not consistently apply these guidelines when considering whether to charge and/or prosecute a person with impaired capacity with contravening an AVO.

Question 14: Is section 105 of LEPRA and the prosecutorial guidelines sufficient to ensure that police and the ODPP consider whether to charge or prosecute people with impaired capacity?

Question 15: What can be done to improve compliance with ODPP prosecutorial guidelines?

8. Limited understanding of impaired capacity

8.1. It is essential that professionals and workers involved in the justice system have a sufficient understanding of how to identify and work appropriately with people with impaired capacity, in order to avoid injustice being done to defendants with impaired capacity in AVO matters.

Disability workers

8.2. ADHC has developed a policy, Abuse and Neglect Policy and Procedures that aims to provide ADHC operated and funded services with the means to respond quickly and appropriately to allegations of abuse.³⁸ Abuse is defined as sexual assault, physical, emotional, financial and systemic abuse, domestic violence, constraints and restrictive practices.³⁹

8.3. The ADHC Policy requires workers to contact NSW Police when a client or another person has been assaulted or in in immediate danger of an assault, except where:

8.3.1. an incident that would usually be classed as assault, is caused by a person with an intellectual disability who lacks understanding of the behaviour; and

8.3.2. physical contacts occurring between clients (eg pushing or striking) are appropriate for resolution using behaviour management strategies, and are reported internally.⁴⁰

8.4. The ADHC Policy also requires incidents of domestic violence, or abuse by neglect and restricted practices, and emotional, financial and systems abuse, to be reported to a manager as soon as possible and states that they may be reported to the NSW Police.⁴¹

³⁷ Office of the Director of Public Prosecutions for NSW, *Prosecution Guidelines* (2007) Guideline 4 (8-9)

³⁸ NSW Family and Community Services, Ageing, Disability and Home Care, *Abuse and Neglect Policy and Procedure* (updated April 2012) at [1.3].

³⁹ *Ibid*, p 4.

⁴⁰ *Ibid*, at [3.1] and [3.3].

⁴¹ *Ibid* at [3.2.3].

- 8.5. The ADHC Policy acknowledges that it may not be appropriate to contact police where the offending behaviour is the result of a person's disability, however the case studies and the experience of IDRS demonstrate that services appear to be involving police where, according to the policy, it may not be appropriate to do so.
- 8.6. Of course services may need to call the police on occasions essentially for safety reasons. It seems that when the police are called for safety purposes an ADVO against the service user with intellectual disability frequently results.
- 8.7. In the experience of IDRS the situations leading to the police being called are sometimes situations that have been have occurred previously, sometimes repeatedly, but the service has not identified or applied effective plans to prevent or manage the potentially aggressive behaviour. Disability service staff frequently express their frustration that the service has not responded adequately or quickly enough to conflict, incompatibility or aggressive behaviour or that staffing allocation is inadequate. The use of agency staff, unfamiliar with behavioural support and intervention plans for individual residents can also be a factor in failing to prevent incidents.
- 8.8. Insufficient training and expertise of ADHC and ADHC-funded service staff about how to deal with people with impaired capacity, through effective behaviour support and intervention as well as inadequate staffing and inadequate management response to problems may be resulting in ADVOs against people with impaired capacity exposing them to the criminal justice system.
- 8.9. An ADVO against a person with impaired capacity will rarely, of itself, improve or resolve issues of aggressive behaviour. Expert and effective behavioural support and intervention planning and considerations of compatibility of residents and of residents with staff are much more likely to resolve these issues. The AVO process and order is unlikely to make a difference and can be a distraction from services resolving the problem whilst exposing the person with impaired capacity to homelessness and criminal charges resulting from breaches of the AVO.
- 8.10. Staff in ADHC and ADHC funded services have little understanding of AVOs and the AVO process
- 8.11. Amendments to the Ombudsman's Act 1974 in keeping with the Disability Inclusion Act 2014 (NSW) require that certain incidents occurring in 'supported group accommodation', defined in the Act as 'reportable incidents' must be reported to the NSW Ombudsman. These include assaults in certain circumstances including 'an incident occurring in supported group accommodation and involving a contravention of an apprehended violence order made for the protection of a person with disability', Part 3 25P. Section 25Q (1) provides that ' the Ombudsman is to keep under scrutiny the systems of the Department and funded providers for preventing and for handling and responding to reportable incidents'

Question 16: Are police being called unnecessarily to incidents in residential services?

Question 17: Are services taking adequate action to prevent situations that may escalate to the point where police need to be called?

Question 18: Could the ADHC Abuse and Neglect policy be improved to reflect the complexity of these situations and provide disability services and staff with clearer guidelines?

Question 19: Should disability staff receive more training about AVOs?

Police

Case study 9

A case showing how the AVO framework led to a person with impaired capacity, who lived with his parent, becoming homeless, and spending eleven months in prison before the court heard his case.

A man with a moderate intellectual disability was living with his elderly mother. One afternoon he was walking outside his home when a neighbour's dog barked and ran at him. He was very scared by this and ran back into his home. The neighbour who owned the dog came to apologise to the man's mother, who told the neighbour an apology wasn't necessary. The man became upset at this and kicked out the back window of his home.

His mother called the police because she wanted the police to give her son a good talking to about his behaviour. However, despite his mother's objections, the police applied for a provisional ADVO, which prohibited the man coming within 200 metres of their home. Police dropped the man at Matthew Talbot Hostel, a homeless men's shelter which requires everyone leave at 7.30am the following morning. After leaving the hostel, the man wandered the streets for the following two days without food, water or shelter.

He eventually made it home, but was seen by the police and charged with breaching the provisional ADVO. He was processed and released the following day, once again homeless.

For some reason he went to his old school where he had experienced severe bullying as a child. No-one knew him and he was challenged about why he was there. He became distressed and smashed a glass panel in the front office of the school and assaulted a teacher. He was arrested and charged with malicious damage and assault.. He had not been known to display this sort of behaviour previously.

He was refused bail and spent the next 11 months in Silverwater prison. IDRS became involved, got him bail, linked him and his mother in with suitable support services and he returned home. Had the ADVO not led to him becoming homeless the subsequent charges and time in prison may have not have happened.

8.12. As the case studies and statistics demonstrate, police are often called to deal with people with impaired capacity. It is therefore crucial that front line police officers, especially those in key roles are adequately trained in how to identify and deal appropriately with people with impaired capacity.⁴²

8.13. According to the *NSW Police Force Handbook* (the Handbook) Police are not expected to diagnose a person with an intellectual disability or impaired intellectual functioning, however, they are responsible for ensuring that a person being interviewed understands the content of the interview.⁴³

⁴² NSWLRC Report 135, above n 2, 236.

⁴³ New South Wales Police Force, *NSW Police Force Handbook* (2011) 132.

8.14. The NSW Police Force Code of Practice for CRIME (CRIME) defines ‘impaired intellectual functioning’ as:

- 8.14.1. total or partial loss of a person’s mental functions;
- 8.14.2. a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction;
- 8.14.3. a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment, or that results in disturbed behaviour.⁴⁴

8.15. CRIME also sets out indicators to assist police determine whether a person may have impaired intellectual functioning. According to CRIME, a person may have impaired intellectual functioning if the person appears to:

- 8.15.1. have difficulty understanding questions and instructions;
- 8.15.2. respond inappropriately or inconsistently to questions;
- 8.15.3. have a short attention span;
- 8.15.4. receive a disability support pension;
- 8.15.5. reside at a group home or institution, or be employed at a sheltered workshop;
- 8.15.6. be undertaking education, or to have been educated at a special school or in special education classes at a mainstream school;
- 8.15.7. have an inability to understand the caution;
- 8.15.8. the person identifies themselves as someone with impaired intellectual functioning;
- 8.15.9. someone else (carer, family member or friend) tells you the person is or may be someone with impaired intellectual functioning;
- 8.15.10. the person exhibits inappropriate social distance, such as being overly friendly and anxious to please;
- 8.15.11. the person acts much younger than their age group;
- 8.15.12. the person is dressed inappropriately for the season or occasion;
- 8.15.13. the person has difficulty reading and writing;
- 8.15.14. the person has difficulty identifying money values or calculating change;
- 8.15.15. the person has difficulty finding their telephone number in a directory;
or
- 8.15.16. the person displays problems with memory or concentration.⁴⁵

8.16. When an officer knows that a person has an intellectual disability or impaired intellectual functioning, that person is considered to be a ‘vulnerable person’ under LEPPRA. This means there are a number of provisions that should be considered under LEPPRA.⁴⁶ The Handbook then provides guidance as to what should be done prior to and while interviewing a person with impaired intellectual functioning.⁴⁷

8.17. The Mental Health Intervention Team (MHIT) was established as a pilot program in 2007 to help the police in their interactions with members of the

⁴⁴ New South Wales Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (January 2012) 144.

⁴⁵ Ibid, 144 - 145

⁴⁶ NSWPF Handbook, above n 65, 132.

⁴⁷ Ibid, 132-133

public with mental health issues.⁴⁸ The 4-day training course is designed to engage police with a mix of clinical theory and relevant practical operational skills, which can be used in the field on a day-to-day basis.⁴⁹ The program seeks to educate police about identifying behaviours that are indicative of mental illness, communication strategies, risk assessment, de-escalation and crisis intervention techniques.⁵⁰

- 8.18. The MHIT program was made a permanent component of the NSW Police Force Policy and Programs Command.⁵¹ More than 1250 front-line police have undergone a four-day course in mental health intervention since 2007, and there are now 80 police inspectors across the state that are trained as a mental health contact officer.⁵²
- 8.19. On 1 August 2013 it was reported that the NSW Police Force plan to introduce a one-day specialised mental health training course to be delivered by a team of eight officers and nurses who will travel to every police local area command, as early as September 2013, and train every frontline police office in NSW.⁵³ The course will teach officers about common mental illnesses and ways to identify certain conditions.⁵⁴
- 8.20. It is not clear how much training, if any will be dedicated to teaching about cognitive disabilities, in addition to mental illness.
- 8.21. Even if police are able to identify a person with impaired capacity and believe it may be more appropriate to refer that person to a support service rather than apply for AVOs against them, it may be difficult for police to do so due to strict eligibility criteria for ADHC services and the overall lack of appropriate support services.

Question 20: Is the current training available to police sufficient in relation to:
* **Recognising Impaired capacity due to intellectual and other cognitive disability, and**
* **LEPRA and the prosecutorial guidelines, and**
* **The exercise of the police discretion under sections 27(4)b and 49(4)b, and**
* **When to use cautions and warnings?**

Question 21: Should the police develop guidelines in relation to the above that would constitute “good reasons” to not make an AVO application?

Solicitors

- 8.22. Some solicitors lack the skills and knowledge to deal appropriately with people with impaired capacity.
- 8.23. It is important that solicitors acting as advocates for defendants with impaired

⁴⁸ NSWLRC Report 135, above n 2, 237.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ NSW Police Force, *Annual Report 2008-2009*, 35; NSW Police Force, “Why MHIT?”, *Mental Health Intervention Team News* (March 2011) 1.

⁵² Partridge, above n 62.

⁵³ Ibid.

⁵⁴ Ibid.

capacity in AVO matters have the skills to identify people with impaired capacity. Without those skills they cannot make relevant arguments as to whether the AVO should be made and/or a contravention of an AVO should be dealt with under section 32 or 33 of the MHFPA.

- 8.24. IDRS experience, reported through the CJSN volunteers who accompany people with intellectual disability at court, is that it is common for solicitors to advise clients with impaired capacity to accept AVO orders and that it is rare that a solicitor raises or submits evidence about impaired capacity of a person with cognitive disability to the court in relation to an AVO application.

Question 22: What can be done to improve the skills of solicitors and the awareness of solicitors to raise impaired capacity to effectively advocate for defendants who lack capacity in AVO proceedings?

Question 23: Should solicitors be advocating for police to withdraw AVO applications, with supporting evidence of their clients disability and impaired capacity, more frequently.

Magistrates

- 8.25. It is important that before making AVOs, magistrates are provided with information about the effect of a defendant's impaired capacity, and that they understand that this is often accompanied by behavioural problems resulting from the defendant's disability, and that they are aware of their accommodation arrangements, and aware of their dependence on their carers. Unfortunately, at present, the orders that a magistrate can make in relation to AVOs are limited.

- 8.26. The Judicial Commission of NSW has published *Equality before the Law Bench Book*, which deals with people with disabilities in Section 5, which was updated in April 2011. The *Equality Before the Law Bench Book* sets out some examples of adjustments that can be made. For example, for people with cognitive impairments, it suggests using slow, simple and direct speech, using short sentences, and avoiding double negatives, hypothetical questions, abstract concepts and legal jargon.⁵⁵ The Bench Book also provides advice on working with people who are delusional, anxious, paranoid or aggressive because of mental health impairments.⁵⁶ The *Local Court Bench Book* deals with the making of AVOs⁵⁷, however neither bench book deals specifically with the issue of people with cognitive disabilities or impaired capacity involved in AVO proceedings.

Case study 10

A case showing the difficulty of arguing that the hearing of an ADVO should not proceed because of a person's impaired capacity.

A young man aged 19 was living with his parents. Since leaving school his parents had been struggling to manage their son who has autism and moderate intellectual disability. With the exception of attending a day program, his parents had little support.

⁵⁵ Judicial Commission of NSW, *Equality Before the Law Bench Book* (updated April 2011) [5.4.3.5] 5408.

⁵⁶ *Ibid*, [5.4.3.7] 5410.

⁵⁷ JCNSW Local Court Bench Book, above n 45, 1151 – 1171.

One day he came very upset and angry with his mother after she said he couldn't have fish and chips. His father had to restrain him in order to protect his mother. His father called the police who applied for an ADVO to protect his parents.

IDRS appeared for him at his first court date and determined that he did not understand why he was at court and did not have capacity to instruct them. IDRS had the matter adjourned and obtained a psychological report stating that the client had no understanding, or ability to comply with the order. IDRS linked the young man up with services to assist with management of his behaviour and provide additional activities. His behaviour improved and IDRS managed to persuade police to withdraw their application for an ADVO.

Before the ADVO was withdrawn, IDRS raised with the Magistrate that they intended to challenge the making of the ADVO on the basis of the client's incapacity. The Magistrate appeared to have not heard this argument before and there was some confusion as to how the court could hear these arguments, whether the matter should be listed for hearing, or whether the Court could hear oral submissions.

8.27. It is interesting, in the above case study, that there was no discussion about whether a tutor needed to be appointed because the proceedings were similar to civil proceedings.

Question 24: Should the Local Court Bench Book and / or the Equality Before the Law Handbook be updated to provide more information about how to deal appropriately with people with impaired capacity?

Question 25: Should the Local Court Bench Book be updated to provide greater guidance as to legal questions and processes relating to proceedings which are inherently unfair due to the defendant's lack of capacity to challenge the evidence of the PINOP?

9. Inadequate services

9.1. There are inadequate services available to people with impaired capacity in the community and in the justice system. This is contributing to the inappropriate making of AVOs against people with impaired capacity and is limiting how courts can deal with people with impaired capacity in AVO proceedings.

Disability Services funded and provided by Ageing, Disability and Home Care

9.2. ADHC provides several types of direct services and funds non-government organisations (NGOs) to support clients with cognitive impairments, including intellectual disability. ADHC is the major service provider to people with intellectual disability in NSW. ADHC provides behaviour support services through local community teams supported by the Statewide Behaviour Intervention Services. ADHC also has primary responsibility for providing information and referral to non-government services.⁵⁸ Non-government service providers are also able to offer behaviour support and a range of activities and services.

⁵⁸ Intellectual Disability Rights Service, *A Step-By-Step Guide to Section 32 Applications*, <http://www.s32.idrs.org.au/furtherReading/moreAboutADHC.php#UeaQJqncbZs> viewed 17 July 2013.

- 9.3. ADHC administers specialist services for people with particularly complex needs through the Office of the Senior Practitioner. These include the Integrated Services Program (ISP), in collaboration with NSW Health and Housing NSW, for clients with complex needs and challenging behaviour, including “assessment, behaviour support, supervision, case-coordination and accommodation”⁵⁹ and the Community Justice Program, which caters for people with an intellectual disability who are leaving custody and are at risk of reoffending.
- 9.4. Access to ADHC and other disability services is often slow particularly if a person has not previously been a client of ADHC. Disability services have limited scope to respond to urgent need for assistance which is often required of situations where an application for an AVO is prompted by incidents in family homes.
- 9.5. In order for a person with intellectual disability to be eligible for ADHC services they must have:
- 9.5.1. an IQ of two standard deviations below the mean (70 or below, but note that a confidence interval of plus or minus 5 applies, so effectively an IQ of 74 may be accepted); and
 - 9.5.2. significant deficits in adaptive behaviour functioning (in two or more areas); and
 - 9.5.3. evidence of onset of developmental delay or intellectual disability prior to the age of 18 years.⁶⁰

Evidence of meeting these criteria must be provided to ADHC.

- 9.6. Services are not available through ADHC for those people who do not fall within the scope of this definition, which means there may be no obvious service provider for a person who has, for example, an acquired brain injury or borderline intellectual functioning.⁶¹
- 9.7. There are no established links or agreements between ADHC and NSW Police that would facilitate alternatives to AVO applications being made by police in urgent situations where the person cannot remain in their current accommodation.

Question 26: Should ADHC change its’ eligibility criteria for people with impaired capacity wanting to access ADHC services?
Question 27: Should ADHC liaise with the police to provide pre-court diversion for people with impaired capacity facing AVOs, (this is a repeat of Question 1).

⁵⁹ Family and Community Services: Ageing, Disability and Home Care, *Office of the Senior Practitioner* (15 April 2011) www.adhc.nsw.gov.au/about_us/our_structure/office_of_the_senior_practitioner viewed 17 July 2013.

⁶⁰ Ibid.

⁶¹ NSWLRC Report 138, above n 41, 10.

Case Study 11

A case of the ADVO being breached because the person with impaired capacity was returned to the same temporary accommodation.

A young woman with an intellectual disability was living in temporary accommodation in a group home while she waited for ADHC to arrange other permanent accommodation for her. The accommodation was not suited to her needs but there was no alternative available

Police were called to attend the group home after she assaulted another resident. Police charged her with assault and applied for a provisional ADVO to protect the other resident. At court the assault charges were dismissed under section 32 of the MHFPA but a final ADVO was made because the Magistrate said that her impaired capacity was not a defence to the ADVO.

She continued to reside at the same group home because no alternative accommodation was available. Two months later she assaulted the same resident again and was charged with breaching the ADVO.

Case Study 12

A case showing that a person with impaired capacity was put in prison for 10 days, after the police made an assault charge and a provisional ADVO, because there was no emergency accommodation.

A mother contacted police via 000 after her son who has intellectual disability, severe communication impairment and autism assaulted her at home, injuring her head. The mother had been afraid for her safety. She spoke little English and had had no contact with services. The police did not feel it was safe to leave the man at home and took him to the police station. The police took the man to a mental health facility but admission was refused because the man was assessed not to have a mental illness.

A provisional AVO was made and he was charged with assault. At court the next day bail was denied as it was still unsafe for him to return home. IDRS tried every possible avenue to find emergency accommodation but there was no option that could cater to the man's high support needs.

After a day in the police cells he was transferred to Silverwater. Corrections officers were ill-equipped to deal with his support needs. The man himself was disoriented and withdrawn. He had not been away from his mother before.

After 10 days the man's uncle agreed to move in with the man and his mother and a few days later the court granted bail and the man returned. He was referred to ADHC for assessment, behavioural support, activities and respite care. The charges and ADVO were ultimately dismissed via an order under Section 32 MHFPA.

As the above case studies demonstrate, when behavioural issues arise which mean that people with intellectual disabilities cannot, or should not, continue to live where they are, they can end up breaching an ADVO, being denied bail, imprisoned, living in a homeless persons shelter or homeless.

By 2018 service provision and support for people with disability throughout NSW will be funded through the National Disability Insurance Scheme, via individual funding packages for eligible participants. The NDIS has been operating in Hunter region for one year. It is unclear whether the NDIS will be better able to cater to urgent needs of people with cognitive disability which come to light through ADVOs or contact with the criminal justice system.

Case Study 13

Another case showing that a person with impaired capacity went to prison for fourteen days, before his case was dealt with, because there was no emergency accommodation.

Mark has an intellectual disability. He was arrested, charged with assault and an ADVO made after an altercation at his family home. His family did not feel they could take him home unless they received some support services to help with him at home.

While still in police custody Mark was referred to mental health services but was determined not to have a mental illness and so no assistance could be provided. IDRS contacted ADHC seeking respite accommodation or support services but were referred to NDIS. Bail was denied as Mark's family were unable to take him home without some services. Mark was transferred to prison. He was very vulnerable and was held in segregation. He had never been away from home. He needed assistance with basic activities.

An application was made for Mark to be accepted as a participant in NDIS. IDRS explored NGO options for respite. The only options were at a cost of \$8,000 per week. ADHC would not fund this. NDIS planner visited Mark in prison after he had been there for 10 days. NDIA agreed to a funding package which included in home support services. IDRS assisted the family to locate an NGO service provider to provide support services to Mark in the family home.

A bail application was made a few days later and Mark was able to return home. He had spent 2 weeks in prison in segregation and very distressed because he had no crisis support. Ultimately the assault charge was dismissed under Section 32 and the police withdrew the ADVO application.

Question 28: Would the availability of emergency assistance or accommodation reduce the perceived need and making of AVOs against people with impaired capacity?

Question 29: How can emergency assistance or accommodation be provided for people with impaired capacity to help them avoid homelessness and imprisonment, where they are unable to remain where they are living due to violent incidents and/or ADVO conditions?

Question 30: Should an AVO against a person with impaired capacity, particularly someone living in a family home, be a trigger for quick and efficient access to ADHC or other assistance?

Question 31: Will the NDIS be able to respond better to these situations?

Question 32: Is there a need for justice agencies to provide bail houses for people with impaired capacity similar to those provided in Victoria?

Legal services

9.8. Given that people with intellectual or other cognitive disability may find it difficult to understand AVO proceedings, and the consequences that can flow from the making and enforcement of an AVO, it is important that people with cognitive disability have access to quality legal advice and representation in AVO matters.

9.9. Many people with cognitive disability are also socioeconomically disadvantaged, so, it is important that they have access to free or low cost legal services. Legal Aid NSW, the Aboriginal Legal Service (ALS) and community legal centres (CLCs) are the primary providers of free and low cost legal services in NSW.

9.10. Legal Aid is generally not available to defendants in AVO matters. Legal Aid may be available to defendants in AVO matters in 'exceptional circumstances' which includes if they have 'special disadvantage' in dealing with the legal system by reason of a psychiatric condition; a developmental disability; an intellectual impairment; or a physical disability.⁶² Despite these guidelines, it can still be difficult to obtain representation from Legal Aid for defendants with impaired capacity in AVO application proceedings.

9.11. It should be noted that these conditions do not include acquired brain damage which can equally disadvantage a person in dealing with the legal system. This seems to be an anomaly which could greatly disadvantage people with acquired brain injury.

9.12. IDRS receives regular calls from people with intellectual disability or carers seeking assistance in AVO matters because they have been told, often by Legal Aid, that Legal Aid is not available to them in an AVO matter. This may be because the disability has not been recognized by or raised with Legal Aid. CJSN staff and volunteers often find they need to advocate vigorously in order to achieve representation in AVO matters for people with intellectual disability.

⁶² Legal Aid Commission of New South Wales, *Guidelines: Criminal law matters - Apprehended Violence Orders* <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/guidelines/1.-criminal-law-matters/1.7.-apprehended-domestic-violence#1.7.3> viewed 31 July 2013.

We are concerned that people with intellectual and other disabilities may be appearing before the court in AVO matters unrepresented.

Case study 14

A case showing the difficulty of obtaining Legal Aid to defend an ADVO application.

A man with an intellectual disability assaulted a relative. His disability worker contacted Legal Aid to ask for representation at court and was told that if the man consented to the ADVO he would not need representation because he could just tell the court he was consenting.

The man's disability worker told CJSN that they believed that it was likely that the man would breach the ADVO if it were made. Fortunately a solicitor from IDRS was at court with another client and was able to represent the man.

9.13. The experience of IDRS also indicates that there appears to be some reluctance by Legal Aid and other solicitors to take the time to explore whether an AVO should be made in the circumstances and to defend AVO applications or to negotiate conditions that take into account the person's particular circumstances. This may be because AVOs are not perceived to be serious as they are only civil orders, not criminal charges. However, for this group simply accepting an AVO can be a slippery slide into the criminal justice system.

9.14. Legal Aid piloted an ADVO defendant service in Mount Druitt Local Court, which commenced in November 2011 and provided minor assistance and duty representation to defendants in AVO matters.⁶³ The pilot concluded on 31 December 2012 and has been reviewed.⁶⁴

9.15. On 9 August 2013 the NSW Government announced it would fund Legal Aid NSW to run a second similar pilot at Burwood Local Court for approximately 12 weeks.⁶⁵ The aim of this pilot is to reduce breaches of ADVOs:

"In the past, defendants in ADVO proceedings have not been represented and may have consented to ADVOs without understanding the arrangements. This project will examine whether providing specialist family and criminal legal assistance to defendants in ADVO matters reduces future breaches of ADVOs."⁶⁶

9.16. CLCs that auspice a Women's Domestic Violence Court Advocacy Scheme (WDVCAS) may also be reluctant to advise or represent male defendants in AVO matters, concerned they may conflict out female victims of violence. CLCs in rural, regional and remote (RRR) areas also have the general problem of

⁶³ Legal Aid Commission of New South Wales, edited by Erin Gough, *ADVO Defendant Pilot Mount Druitt Local Court: Final Review Report* (June 2013) 3.

⁶⁴ *Ibid.*, 23.

⁶⁵ NSW Family and Community Services, Women NSW, 'Pilot program to reduce apprehended domestic violence order breaches', http://www.women.nsw.gov.au/news/items/pilot_program_to_reduce_apprehended_domestic_violence_order_breaches [viewed 14 August 2013.]

⁶⁶ *Ibid.*

having conflicted out many members of their catchment area, having already advised one party to a dispute.

Question 33: What can be done to improve access to quality legal advice and representation for defendants with impaired capacity in AVO proceedings?

Court services

9.17. Some local courts have assessment and support services specifically aimed at assisting the court to deal appropriately with defendants with impaired capacity. The main services are the:

9.17.1. Court Referral of Eligible Defendants into Treatment (CREDIT) pilot program; and

9.17.2. Life on Track and Youth on Track

9.17.3. Mental Health Court Liaison Service (MHCLS).

9.18. CREDIT provides support services to people with complex needs including psychiatric and mental health impairments, intellectual disability and other cognitive impairments, including acquired brain injuries.

9.19. The CREDIT pilot program has run in Burwood and Tamworth Local Courts and aims to:

9.19.1. reduce re-offending by encouraging and assisting defendants appearing at local courts to engage in education, treatment or rehabilitation programs and by assisting them to receive social welfare support; and

9.19.2. contribute to the quality of decision-making in the local court by helping ensure that information on defendants' needs and rehabilitation efforts is put before the court.⁶⁷

9.20. Defendants must meet a number of criteria in order to be eligible for CREDIT:

9.20.1. Be at least 18 years old;

9.20.2. have an identifiable problem related to their offending behaviour, for example, substance abuse, other addictions, mental health problems, unstable housing, poor employment history/prospects;

9.20.3. be motivated to address the problems related to their offending behaviour; and

9.20.4. reside within areas where they are able to participate in treatment and other services.⁶⁸

9.21. The MHCLS provides mental health consultation and services in 20 NSW Local

⁶⁷ NSW Bureau of Crime and Statistics and Research, edited by Neil Donnelly, Lily Trimboli and Suzanne Poynton 'Does CREDIT reduce the risk of re-offending?' Crime and Justice Bulletin (Number 169 May 2013), 1

⁶⁸ Ibid, 4.

Courts.⁶⁹ They provide comprehensive assessments and where appropriate provide recommendations to the magistrate for diversion to appropriate treatment. They do not routinely deal with people with cognitive disability and are not specifically equipped to deal with this group effectively.

- 9.22. The defendant, her/his representative or the magistrate can refer eligible defendants to CREDIT and MHCLS, however that requires some understanding of what it means to have impaired capacity, which can be problematic, as discussed below.
- 9.23. On 15 June 2013 the NSW Attorney General announced the introduction of a new case management service called Life on Track, aimed at reducing adult reoffending by addressing the root causes of behaviour that leads to crime such as drug and alcohol dependency, mental illness and financial problems.⁷⁰
- 9.24. Defendants will not need to have entered a guilty plea to be considered for the service, however it will not be available to anyone charged with a sex offence or who has been refused bail.⁷¹
- 9.25. Life on Track began operating in Bankstown, Sutherland, Kogarah, Lismore, Ballina, Casino and Kyogle local courts in July 2013.⁷²
- 9.26. As referral to CREDIT, MHCLS and Life on Track is only available to defendants in criminal proceedings, these services do not assist defendants with cognitive disability or magistrates dealing with defendants with impaired capacity, in AVO application proceedings.
- 9.27. The lack of court services available to people with impaired capacity in AVO application proceedings contributes to unjust outcomes for people with impaired capacity.
- 9.28. If people with impaired capacity do enter the justice system, courts should have assessment and support services to assist in ensuring better, more just outcomes for defendants with impaired capacity.

Question 34: How can the court be aware that a person has impaired capacity?
Question 35: How can a person with impaired capacity get a psychologist's or psychiatrist's report?
Question 36: Are any of the above services being used to achieve good outcomes for defendants with impaired capacity charged with breaching AVOs?
Question 37: Should the court be able to refer defendants with impaired capacity in AVO proceedings to MHCLS, CREDIT, Life on Track or other programs and services available to defendants?

⁶⁹ NSW Government, Justice Health & Forensic Mental Health Network <http://www.justicehealth.nsw.gov.au/about-us/health-care-locations/courts> accessed on 19 November 2013.

⁷⁰ NSW Attorney General, 'New service to get offender's lives back on track' Media Release (15 June 2013).

⁷¹ Ibid.

⁷² Ibid.

10. Conclusion

- 10.1. Inadequate legislative, common law and procedural frameworks to satisfactorily accommodate people with impaired capacity, limited understanding of impaired capacity by professionals and workers involved in the justice system and inadequate services available to people with impaired capacity contribute to the making of AVOs against people with impaired capacity with often disastrous consequence
- 10.2. Making AVOs against people with impaired capacity operates as a gateway to the criminal justice system.
- 10.3. Making AVOs against people with impaired capacity may not serve the intended purpose of protecting the person/s named as the PINOP/s in the AVO.
- 10.4. It is hoped that by exploring issues associated with AVOs and defendant incapacity, that recommendations can be developed to address these issues and ensure better justice is afforded to people with impaired capacity and people who experience violence.

Appendix

Table of relevant recommendations made by key reports and IDRS submissions

OPTIONS FOR REFORM	REPORT	RECOMMENDATION IDENTIFIER
Legislative framework		
<p>The CDPVA should include the following definitions of “cognitive impairment” and “mental health impairment”:</p>	<p>NSW Law Reform Commission <i>People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences</i> (Report 138 May 2013) (NSWLRC Report 138)</p>	<p>Rec 13.1(8) p 404</p>
<p>Cognitive impairment is an ongoing impairment in comprehension, reason, adaptive functioning, judgment, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind. Such cognitive impairment may arise from, but is not limited to, the following:</p> <ul style="list-style-type: none"> - intellectual disability; - borderline intellectual functioning; - dementias; - acquired brain injury; - drug or alcohol related brain damage; - autism spectrum disorders. 	<p>NSW Law Reform Commission <i>People with cognitive and mental health impairments in the criminal justice system: Diversion</i> (Report 135 June 2012) (NSWLRC Report 135)</p>	<p>Rec 5.1 p 136</p>
<p>Mental health impairment means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.</p> <p>Such mental health impairment may arise from but is not limited to the following:</p> <ul style="list-style-type: none"> - anxiety disorders; - affective disorders; - psychoses; - severe personality disorders; - substance induced mental disorders. <p>“Substance induced mental disorders” should include ongoing mental health impairments such</p>	<p>NSWLRC Report 135</p>	<p>Rec 5.2 p 138</p>

<p>as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances.</p>		
<p>If the statutory review of the CDPVA recommends that paid care be retained within the definition of “domestic relationship” in s 5(f) of the CDPVA, the NSW Department of Attorney General and Justice should give further consideration to whether s 5(f) should be amended to clarify that a paid carer and client relationship will only qualify as a “domestic relationship” where the client is seeking an apprehended violence order against a paid carer.</p>	<p>NSWLRC Report 138</p>	<p>Rec 13.3 p 411</p>
<p>Amend the definition of ‘domestic violence offence’ and / or the definition of ‘domestic relationship’ in the CDVPA to remove the requirement that police to apply for an AVO on behalf of a paid or unpaid carer of a person where police suspect a domestic violence offence has been, or is likely to be committed by the person dependent on the carer.</p>	<p>IDRS submission to the statutory review of the CDPVA (2011)</p>	<p>Page 3</p>
<p>Amend section 27 of the CDPVA to provide that an application for a provisional AVO need not be made if the person against whom the order would be made has impaired capacity. Impaired capacity may involve the inability to:</p> <ul style="list-style-type: none"> - understand the nature, terms or effect of an order; - understand the potential consequences of breaching an order; - understand, or be able to participate in, the process involved in the making of an order; and/or - effectively comply with an order. <p>A police officer investigating an incident should have discretion as to whether to make an application for a provisional order in such circumstances.</p>	<p>IDRS submission to the statutory review of the CDPVA (2011)</p>	<p>Page 3 – 4</p>
<p>Amend section 22 of the CDPVA to explicitly provide that circumstances in which it may be inappropriate to make an interim AVO include those where a defendant has impaired capacity in the sense outlined above.</p> <p>It is particularly important that the court is required to consider the impact of a defendant’s impaired capacity on the likely effectiveness of any interim AVO, as a significant number of defendants are unrepresented in interlocutory proceedings and will not raise issues of capacity themselves.</p>	<p>IDRS submission to the statutory review of the CDPVA (2011)</p>	<p>Page 4</p>
<p>Legislation should provide for a pre-court</p>	<p>NSWLRC Report</p>	<p>Rec 8.3 p 232</p>

<p>diversion option as follows:</p> <ul style="list-style-type: none"> - where a person appears to have a cognitive impairment or mental health impairment as defined above, a police officer may decline to charge or may withdraw a charge; - in making a decision under the above, the police officer should take into account: <ul style="list-style-type: none"> o the apparent nature of the person's cognitive or mental health impairment the nature, seriousness and circumstances of the alleged offence; o the nature, seriousness and circumstances of the person's history of offending, if any; and o any information available concerning the availability of treatment, intervention or support in the community. - this option should: <ul style="list-style-type: none"> o be available in relation to summary offences and indictable offences that are capable of being dealt with summarily; o be available both pre and post charge; o not require an admission of guilt; and o not preclude a person from being diverted merely because that person has previously committed offences or been dealt with under this option' - this option should only be used where it is not appropriate to deal informally with the person, such as by warning or caution; - this option does not preclude a police officer from exercising his or her powers under s 22 of the Mental Health Act 2007 (NSW); - a police officer should make a record where a person has been dealt with under this option. 	135	
<p>Amend sections 17 and 20 of the CDPVA to specifically require a court to consider any impaired capacity of a defendant in deciding whether or not to make an AVO.</p>	<p>IDRS submission to the statutory review of the CDPVA (2011)</p>	<p>Page 7</p>
<p>Sections 17 and 20 of the CDPVA should be</p>	<p>NSWLRC Report</p>	<p>Rec 13.1(1) p 404</p>

<p>amended to provide that an additional relevant matter to be considered by the court when deciding whether or not to make an AVO is the defendant's capacity to understand and comply with the terms of an order, where that capacity is significantly affected by a cognitive or mental health impairment.</p>	<p>138</p>	
<p>The CDPVA should be amended to provide that, in making an AVO against a defendant whose capacity to understand and comply with the terms of an order is significantly affected by a cognitive or mental health impairment, the court must consider:</p> <ul style="list-style-type: none"> - whether the order can be drafted using language that the defendant can understand; and - whether the conditions contained in the order can be modified, without compromising the protections afforded to the protected person, to enable the defendant to understand and comply with those conditions. 	<p>NSWLRC Report 138</p>	<p>Rec 13.1(2) p 404</p>
<p>Where a defendant with a cognitive or mental health impairment is charged with contravening an AVO, the court should be required to consider whether it should make an order under s 32 of the MHFPA for diversion of the defendant to services that will deal the causes of the offending.</p>	<p>NSWLRC Report 138</p>	<p>Rec 13.1 (7) p 404</p>
<p>Legislature should provide minimum standards of intellectual capacity for the defendant in order for proceedings to continue. Where that minimum standard is not reached, proceedings should be permanently stayed.</p>	<p>IDRS submission to the statutory review of the CDPVA (2011)</p>	<p>Page 5</p>
<p>The MHFPA should be amended so that Part 2 of the Act, dealing with fitness to be tried, applies in the Local Court.</p> <p>The MHFPA should be amended to provide that, if the question of fitness is raised in the Local Court under Part 2 of the Act, the court must first consider whether it should make an order under s 32 or s 33 of the Act.</p>	<p>NSWLRC Report 138</p>	<p>Rec 12.1 p 352</p>
Procedural framework		
<p>The NSW Police Force should develop guidelines for determining the circumstances in which a defendant's cognitive or mental health impairment will constitute "good reason" for a police officer not to make an AVO application, within the meaning of s 27(4)(b) and s 49(4)(b) of the CDPVA.</p> <p>Relevant considerations in the exercise of the</p>	<p>NSWLRC Report 138</p>	<p>Rec 13.2 p 409</p>

<p>discretion could include:</p> <ul style="list-style-type: none"> - the circumstances in which the police officer was called to attend the scene; - the likelihood that an AVO will provide effective protection for the person in need of protection; - the defendant's capacity to understand and comply with the terms of an AVO (as far as it can be ascertained by the police officer); - the wishes of the person in need of protection; and - the availability of other resources to protect the person in need of protection. 		
<p>Police and ADHC should develop effective policies and procedures to enable police to divert people with intellectual disability from the criminal justice system.</p>	<p>IDRS submission to the NSWLRC inquiry into people with cognitive and mental health impairments in the criminal justice system (2010)</p>	<p>Page 6</p>
<p>The NSW Police Force should develop procedures to support the operation of pre-court diversion of people with cognitive and mental health impairments in consultation with the Courts, relevant government agencies (such as NSW Health and the Department of Attorney General and Justice) and community stakeholders.</p>	<p>NSWLRC Report 135</p>	<p>Rec 8.4 p 233</p>
<p>The Apprehended Violence Legal Issues Coordinating Committee (AVLICC) should convene a working group to revise the standard and common additional conditions for an apprehended violence order and redraft them in plain English.</p>	<p>NSWLRC Report 138</p>	<p>Rec 13.1(3) p 404</p>
<p>Where an AVO application is made and the defendant appears to the court to have a cognitive or mental health impairment:</p> <ul style="list-style-type: none"> - the court may refer the defendant to the Statewide Community and Court Liaison Service (now MHCLS) for assessment, and adjourn the proceedings pending the outcome of the assessment; - the Statewide Community and Court Liaison Service (now MHCLS) should provide a report to the court which 	<p>NSWLRC Report 138</p>	<p>Rec 13.1(5) p 404</p>

<p>addresses:</p> <ul style="list-style-type: none"> ○ the nature and extent of the defendant's cognitive or mental health impairment (if any); and ○ as far as can be ascertained, the consequences of that impairment for the application before the court. 		
<p>The above should also apply where the defendant consents to the making of the AVO.</p>	<p>NSWLRC Report 138</p>	<p>Rec 13.1 (6) p 404</p>
Police training		
<p>Improve training of all police officers, including police prosecutors about intellectual disability.</p>	<p>IDRS submission to the NSWLRC inquiry into people with cognitive and mental health impairments in the criminal justice system (2010)</p>	<p>Pages 4, 5 and 8</p>
<p>Police should spend some time at a service for people with intellectual disability as part of their training.</p>	<p>IDRS submission to the NSWLRC inquiry into people with cognitive and mental health impairments in the criminal justice system (2010)</p>	<p>Page 8</p>
<p>The NSW Police Force should review its current approach to training front line officers in relation to people with a cognitive and mental health impairment to:</p> <ul style="list-style-type: none"> - enhance the resourcing of the Mental Health Intervention Team program to enable a critical mass of officers to be trained in each local area command, including key roles such as custody managers; - ensure that all police officers have received training that covers: <ul style="list-style-type: none"> ○ people with cognitive and mental health impairments; and ○ opportunities for diversion; - partner with community stakeholders. 	<p>NSWLRC Report 135</p>	<p>Rec 8.6 p 244</p>
Solicitor training		
<p>The Legal Aid Commission of NSW should provide training and support to Legal Aid</p>	<p>NSWLRC Report 135</p>	<p>Rec 7.3 p 200</p>

lawyers to allow them to identify clients with signs of cognitive and mental health impairments and make appropriate referrals for assessment.		
Magistrate training		
The Department of Attorney General and Justice, in consultation with Justice Health, should develop and distribute information that supports the early identification of people with cognitive and mental health impairments in the criminal justice system and supports appropriate responses, including referral where necessary.	NSWLRC Report 135	Rec 7.2 p 199
Services funded and provided by ADHC		
Emergency community based accommodation options should be available for adults with intellectual disability who require short-term accommodation support. ADHC should provide and / or fund a specialist disability advice and information service and make it available to police on a 24-hour basis.	IDRS submission to the NSWLRC inquiry into people with cognitive and mental health impairments in the criminal justice system (2010)	Page 6
Legal services		
Legal Aid NSW should extend provision of legal representation to defendants to AVO applications who have a cognitive or mental health impairment.	NSWLRC Report 138	Rec 13.1(9) p 404
Court services		
Services for identification, assessment and advice concerning defendants with mental health impairments and cognitive impairments should be made available to all Local Court locations, through the expansion of the Statewide Community and Court Liaison Service (now MHCLS) or, where appropriate, through other local arrangements.	NSWLRC Report 135	Rec 7.1 p 198
The expansion of the Statewide Community and Court Liaison Service (now MHCLS) should include provision for identification and assessment services for defendants to apprehended violence order applications.	NSWLRC Report 138	Rec 13.1(4) p 404
The CREDIT program should be expanded to cover all Local Court locations.	NSWLRC Report 135	Rec 7.4 p 201
Expansion of the Statewide Community and Court Liaison Service (now MHCLS) and CREDIT should be accompanied by independent process, outcome and economic evaluation which is supported by adequate data	NSWLRC Report 135	Rec 7.7 p 206

<p>collection from the outset of these expanded services.</p>		
<p>The Statewide Community and Court Liaison Service (now MHCLS) should be expanded to provide assessment, referral and advice to police officers to assist in making decisions in relation to diversion of people with cognitive and mental health impairments.</p> <p>The CREDIT program should be extended to provide services and advice to police to assist them in making decisions in relation to the diversion of people with cognitive and mental health impairments.</p>	<p>NSWLRC Report 135</p>	<p>Rec 8.5 p 236</p>

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