The Shopfront

YOUTH LEGAL CENTRE

The Director
Standing Committee on Social Issues
NSW Parliament
Macquarie Street
SYDNEY NSW 2000

23 September 2011

Dear Sir/Madam

Inquiry into domestic violence trends and issues in NSW - submission from the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this enquiry.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under.

Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront employs 4 solicitors (3.1 full-time equivalent), 2 legal assistants, a paralegal (0.4 full-time equivalent) and a social worker. We are also assisted by a number of volunteers. Two of our solicitors are accredited specialists in criminal law; one is also a specialist accredited in children's law.

The Shopfront represents young people in criminal matters, mainly in the Local, Children's and District Courts. We prioritise those young people who are the most vulnerable, including those in need of more intensive support and continuity of representation than the Legal Aid system can provide.

The Shopfront also assists clients to pursue victims' compensation claims and deal with unpaid fines. We also provide advice and referrals on range of legal issues including family law, child welfare, administrative and civil matters.

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

Issues covered in this submission

The Shopfront Youth Legal Centre has worked with numerous young people who are victims of domestic violence, some of whom seek protection through apprehended violence orders. We also act for young people who are respondents to AVO applications or who are charged with breaching AVOs.

Over the years we have observed a number of problems with the way AVOs are used against young people, particularly for the "protection" of their parents. We are concerned

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about the criminalisation of young people for what is essentially normal adolescent behaviour, often in the context of a dysfunctional family relationship and sometimes in response to violence or mistreatment by their parents.

Our experience suggests that there is no "typical" domestic violence situation and that there is no "one size fits all" approach to protecting people from domestic and personal violence.

Our response to the specific terms of reference is attached to this letter.

We also attach an extract from our recent submission to the NSW Law Reform Commission on *Young People With Cognitive and Mental Health Impairments in the Criminal Justice System*. Many of our comments in that submission relate to young people generally, and not just those with cognitive and mental health impairments.

Further comment

We would welcome the opportunity to make further comments or to give evidence if the Committee considers this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at jane.sanders@freehills.com.

Yours sincerely

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1. Strategies to reduce breaches and improve compliance with Apprehended Domestic Violence Orders (ADVOs), including:

a) The use of GPS bracelets

We are strongly opposed to the use of GPS bracelets or similar devices for young people under the age of 18.

More generally, we do not believe that the use of GPS bracelets is necessary or justified to improve compliance with ADVOs, except perhaps in a small minority of cases involving serious and repeat offenders. We note that not all ADVOs involve a total prohibition on approaching the protected person or attending certain premises; a significant proportion do not contain such conditions.

If GPS bracelets or similar devices were to be used, we suggest they should only be used for offenders who have a substantiated history of "stalking" type behaviour and at least one prior conviction for breaching a relevant ADVO. To require a person to wear such a device as a condition of an ADVO, without the person having been convicted of a relevant offence, is an unwarranted incursion on the person's civil liberties and may also be an inappropriate allocation of resources.

GPS bracelets have been utilised by criminal justice systems since the 1980s[1]. Their use has been limited, however, predominantly to sex offenders, domestic violence offenders and as a means of integrating back into the community people incarcerated for non-violent offences, or as an alternative to incarceration[2]. In relation to domestic violence offenders, it is worth noting that use of GPS bracelets has largely been limited to "high risk" offenders, namely those that have been convicted of a domestic violence offence or have previously breached an AVO[3].

In NSW, the use of such technology is currently restricted to adult offenders who have been sentenced to home detention or an intensive correction order, both of which are alternatives to full-time custody.

Academics such as Scholl and Saxer have noted that a consequence of using GPS bracelets is that it reduces reliance upon victims to report breaches of orders[4]. The use of GPS bracelets may ensure that breaches of AVOs are brought to the attention of the police and that offenders are made accountable for their actions. As a corollary, this may deter offenders breaching an AVO in the first place when there is certainty that a breach will not go undetected, ultimately bolstering the support provided to victims[5].

A major concern with the use of GPS bracelets however, is the erosion of civil liberties of the person being tracked, or what has been described as a movement towards an "Orwellian like society" [6]. A suggested means to curtail this erosion is to limit the use of the surveillance. As Satine states, '[t]he only information the GPS system [sh]ould recognise...[is] information necessary to effectuate the protective order, namely geographic information related to the zones from which the

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[1] Mary Ann Scholl, 'GPS Monitoring May Cause Orwell to Turn in his grave, but will it escape constitutional challenges? A look at GPS Monitoring of Domestic Violence Offenders in Illinois' (2010) *The John Marshall Law Review*, 845, 851

[2] Stephen Shute, 'Research Summary: Satellite Tracking of Offenders: A Study of the Pilots in England and Wales' (2007) *Ministry of Justice*, 5; 7; Matthew Kucharson, 'GPS Monitoring: A viable alternative to the incarceration of nonviolent criminals in the State of Ohio' (2006) 54 *Cleveland State Law Review*, 639, 660; Pamela Foohey, 'Applying the Lessons of GPS Monitoring of Batterers to Sex Offenders' (2008) 43 *Harvard Civil Rights-Civil Liberties Law Review*, 281; Scholl, above n 1, 845

[3] Zoila Hinson, 'GPS Monitoring and Constitutional Rights' (2008) 43 *Harvard Civil Rights-Civil Liberties Law Review,* 285

[4] Scholl, above n 1, 850; Shelley Saxer, 'Banishment of Sex Offenders: Liberty, Protectionism, Justice and Alternatives' (2008-2009) 86 *Washington University Law Review*, 1447, 1449

[5] Shute, above n 2

[6] Scholl, above n 1, 855

[person] is excluded.'[7] A further safeguard would be the use of a third party to transmit the GPS information to law enforcement agencies only when there is a violation, rather than the law enforcement agencies handling the data internally[8]. This would ensure that the data is '[n]ot...utilised for constant surveillance, but only to serve as watchdogs of court-ordered boundaries.'[9]

Another related issue is the widespread acknowledgement that the physical appearance of a wrist or ankle device on an offender can be degrading to human dignity. Not only can the bracelet be oppressive, but it can be embarrassing and humiliating for an offender to wear in public[10]. Critics have contended that such problems are minimal when compared to the negative effects that can follow from incarceration and that the bracelet can be hidden underneath clothing[11]. All this being said, however, the social stigma associated with GPS bracelets would be particularly detrimental for young people who are at a crucial stage of developing their identity and self-esteem. It may also contribute to their propensity to remove such a device, thus rendering the use of GPS bracelets unworkable.

A further issue associated with the use of GPS bracelets is, that although it enables breaches of AVOs to be detected, apprehension of the offender is still required[12]. A UK study acknowledged that when a breach occurred, the protection provided by the monitoring was lost when the offender removed the bracelet or the battery was not charged[13]. Apprehension may be particularly problematic in isolated or rural areas where there are limited law enforcement resources and response times may be impeded by distance. Apprehension may also be affected by technological problems[14]. This is important in light of the fact that in NSW, the top five local government areas (LGAs) for the highest rate per capita of domestic assaults in 2010, occurred in remote or very remote areas[15]. It is of course possible that GPS monitors would serve as a reminder to potential offenders that they are constantly being watched, thus deterring a breach and rendering the need for apprehension unnecessary[16].

Technological problems have also been identified by many jurisdictions that utilise GPS bracelets. A pilot program undertaken in the UK revealed that the technology proved to be very costly, reporting of breaches was often out-dated, and the quality and reliability of data was affected by signal interference[17]. The study also highlighted that offenders did not often follow instructions given to them upon installation of the device, or they damaged or tampered with the equipment[18]. Where offenders were determined to commit crimes, they would forcibly remove their ankle tags. The devices themselves were found to be inherently troublesome, as they had a limited battery life

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[7] Leah Satine, 'Maximal Safety, Minimal Intrusion: Monitoring Civil Protective Orders Without Implicating Privacy' (2008) 43 *Harvard Civil Rights-Civil Liberties Law Review*, 267, 267

[8] Scholl, above n 1, 858

[9] Satine, above n 7, 270

[10] Kucharson, above n 2, 654; Scholl, above n 1, 862

[11] *Ibid*

[12] Shute, above n 2, 11

[13] *Ibid*

[14] Satine, above n 7, 269

[15] Katrina Grech and Melissa Burgess, 'Trends and patterns in domestic violence assaults: 2001 to 2010' (2011) 61 New South Wales Bureau of Crime Statistics and Research, Bureau Brief, pp4-5

[16] Foohey, above n 2, 284; Satine, above n 9, 269

[17] Shute, above n 2, 4-5; 9

[18] Stephen Shute, 'Research Summary: Satellite Tracking of Offenders: A Study of the Pilots in England and Wales' (2007) Ministry of Justice, 10

and needed frequent replacement[19]. This being said, however, there was acknowledgement that such impediments are likely to be overcome in time by technological advancements.

As noted briefly above, the financial cost associated with GPS tracking has been a contentious issue[20]. A means of alleviating the burden on state budgets that has been implemented in the US is to require offenders to pay all or part of the costs of supervision[21]. However, this is overtly discriminatory, and it is inappropriate to disqualify a person from use of GPS tracking based on their inability to pay the fees[22]. It would be necessary for the government to consider the fiscal impact of GPS bracelets, taking into consideration that it is a may be a more economically feasible option than incarceration and that the costs associated with GPS tracking will continue to decline over time[23].

In light of the above discussion, if GPS bracelets are to be used in NSW at all, they would only be appropriate for adults in very limited circumstances – namely for very "high risk" offenders. It would be necessary to undertake an assessment of whether an offender is "high risk", and to determine whether the use of a GPS bracelet was appropriate in light of the aforementioned risks and benefits[24]. Although GPS monitoring has been heralded as a more rehabilitative solution, it does little to rehabilitate the offender[25]. This is because, although it may create some protection for the victim, it does little to alleviate the underlying issues contributing to domestic violence. With this is mind, GPS tracking should be viewed as one tool available to the criminal justice system and should be used in culmination with other strategies to improve compliance with AVOs and reduce domestic violence[26].

b) Whether existing penalties for domestic violence are adequate

In our view, the existing *maximum* penalties are more than adequate to deal with the criminality associated with breaches of ADVOs.

Knowingly breaching an AVO is a summary offence with a maximum penalty of two years' imprisonment. Unless otherwise ordered by the court, the offender (if over the age of 18) must be sentenced to a term of imprisonment if the contravention involved an act of violence against the protected person, and the court must provide reasons if it decides not to impose a sentence of imprisonment[27]. This emphasises that a conscious breach of an ADVO through an act of violence warrants serious punishment.

This strong stance has been echoed by the judiciary when domestic violence offences, including breaches of ADVOs, have come before the courts. [28] The relevant case law in NSW establishes that domestic violence offences should be treated with real seriousness[29] and that general deterrence, personal deterrence and denunciation are of particular importance[30].

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[19] *Ibid*

[20] Saxer, above n 4, 1449

[21] *Ibid,*, 652

[22] Scholl, above n 1, 858-859; Kucharson, above n 2, 652

[23] *Ibid*, 658

[24] Hinson, above n 3, 286

[25] Kucharson, above n 2, 664

[26] Saxer, above n 4

[27] *Crimes (Domestic and Personal Violence) Act* 2007 (NSW), s 14

[28] Heather Douglas, 'Not a crime like any other: sentencing breaches of domestic violence protection orders' (2007) 31 Criminal Law Journal, 220, 224

[29] See *Hiron v R* [2007] NSWCCA 336

[30] see *Vragovic v R* [2007] NSWCCA 46, *R v Hamid* (2006) 164 A Crim R 179, *R v Dunn* (2004) 144 A Crim R 180, *R v Edigarov* (2001) 125 A Crim R 551).

No doubt some would say that the maximum penalty does not reflect the seriousness of the conduct that may constitute a breach of an ADVO. However, it is important to remember that, where a breach of an AVO involves stalking, intimidation or actual violence, the offender will be guilty of an additional offence carrying a greater maximum penalty. There are a range of relevant indictable offences with maximum penalties ranging from five years' imprisonment (in the case of common assault or stalking/intimidation) to 25 years' imprisonment (in the case of wounding or inflicting grievous bodily harm with intent to inflict grievous bodily harm). These offences are all capable of being dealt with by the District Court should the prosecution make an election. Even in the Local Court, when multiple offences are involved the magistrate may impose cumulative sentences of up to five years' imprisonment.

In relation to the *range* of sentencing options available, we believe there is room for improvement. The NSW criminal justice system has a number of diversionary and rehabilitation focused programs; unfortunately, not all of these are available to people who have committed domestic and personal violence offences.

- ***Youth Justice Conferencing*** (YJC) involves a meeting between a juvenile offender and a victim, enabling the offender to understand how their behaviour had harmed the victim and to take responsibility for their actions. There is a blanket prohibition on the referral to conferencing for offences under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)[31]. Nonetheless, other offences with a domestic violence element, such as common assault or damage to property under the *Crimes Act 1900* (NSW), may still be referred to conferencing. Hence, there is an overt and unwarranted inconsistency in access to this diversionary option.
- ***Forum Sentencing*** is similar to Youth Justice Conferencing, however it is only available to adult offenders who are likely to receive a prison sentence. An offender is not eligible for forum sentencing for a domestic violence offence committed in the context of an intimate domestic relationship.[32] This limitation is appropriate where such a relationship is characterised by entrenched violence and a power imbalance. Forum Sentencing could, however, be utilised for other domestic relationships that do not fit the aforementioned description. This option is particularly relevant in light of the fact that just over half of all domestic violence assaults in NSW from 2001- 2010 did not involve a female victim and a male offender who were in a partner relationship[33]. Further, forum sentencing could be effective in rehabilitating an offender.[34]
- An ***Intensive Correction Order*** (ICO) is a direct alternative to full-time imprisonment and involves participation in community work and programs, drug testing, intensive supervision and (in limited circumstances) electronic monitoring. When making an assessment report as to the suitability of an offender for an ICO, the report must address whether there is a 'likelihood that the offender will commit a domestic violence offence.'[35]
- ***Home detention*** is a sentencing option that is currently available in limited instances of breaching an AVO. Although it is a potentially useful direct alternative to full-time imprisonment, it is rarely used and is not available for various types of domestic and personal violence offences. Home detention may not be imposed for offences of stalking or intimidation, assault occasioning actual bodily harm or any more serious assault offence. Further, home detention cannot be imposed where a domestic violence offence was

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[31] *Young Offenders Act* 1997 (NSW) s8(2)(e)

[32] Criminal Procedure Regulation 2010, clause 55

[33] Grech and Burgess, above n15, p7

[34] Craig Jones, 'Does Forum Sentencing reduce re-offending?' (2009) 129 New South Wales Bureau of Crime Statistics and Research, Crime and Justice Bulletin

[35] *Crimes (Sentencing Procedure) Regulation 2010* (NSW), s 14(1)(c)

committed against a person with whom the offender is likely to reside or continue a relationship[36].

- Finally, the ***Drug Court*** program may be particularly effective in recognition of the role that drug use has in contributing to and perpetuating domestic violence.[37] As Drug Courts are specialist courts that deal with offenders who are dependent on drugs, they can effectively rehabilitate offenders[38]. While the Youth Drug and Alcohol Court has broad eligibility criteria, the Adult Drug Court is limited by geographic region.[39] Importantly, persons primarily dependent on alcohol and those convicted of an 'offence involving violent conduct' are not eligible for the program.[40]

While the power dynamics of violent relationships may make some options inappropriate (eg conferences and forums) we emphasise that there is no "one size fits all" approach.

We have been involved in a number of domestic violence cases where, in our view, a restorative justice or diversionary approach would have been of great benefit, not only to the offender but also to the victim and to the justice process generally.

c) Other strategies

Realistic and appropriate conditions

We are of the view that many breaches could be avoided if more care was taken to impose conditions that are realistic and appropriate in the circumstances. Some possible strategies to achieve this include legal representation, court support workers, and greater access to mediation.

Many people, particularly young people or those suffering from a mental illness or cognitive impairment, find it difficult to understand the conditions that are imposed upon them by an AVO, and thus there is a higher propensity for them to breach a condition, onerous or otherwise. In order to ensure compliance and reduce instances of breach, the court should be required to be satisfied as to the appropriateness of each individual condition.

Technical breaches

While we are not aware of any relevant statistics, we are of the view that many breaches of ADVOs that come before the courts are minor or technical breaches. For example, the Shopfront has worked with numerous clients who have ADVOs made against them in the context of an ongoing relationship, where the conditions of the order are not flexible enough to accommodate the evolving nature of the relationship.

A common scenario is where a parent calls the police to have their teenage or young adult child removed from the home following an argument or altercation. It is common for an ADVO to be taken out against the young person, often with a condition prohibiting the young person from residing at or attending the family home. Typically the parents and child reconcile some weeks or months later, after a final ADVO is made. The parent invites the child home without taking steps to have the ADVO revoked or varied. In many cases, neither the parent nor the child understands that the acceptance of such an invitation constitutes a breach, nor do they know how to get the order varied.

Another example is where the respondent is prohibited from contacting the protected person, but is (often repeatedly) contacted by the protected person and breaches the order simply by returning a call or SMS message.

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[36] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 76

[37] Douglas, above n 28, 229

[38] Attorney General's Department, New South Wales Government, About the Drug Court of New South Wales, (2009) <http://www.lawlink.nsw.gov.au/Lawlink/drug_court/ll_drugcourt.nsf/pages/adrgcrt_aboutus> at 10 September 2011

[39] *Drug Court Regulation 2010* (NSW), clause 4

[40] *Drug Court Act 1998* (NSW), s 5

In many of these cases the protected person has incited or contributed to the breach, but without any consequences to themselves, as the Act provides that consent is not a defence to a charge of breaching an AVO, and specifically prohibits a protected person from being charged with aiding, abetting or inciting a breach. Problems have been exacerbated by the police not exercising discretion in dealing with technical breaches of this nature.

Although the courts usually deal with such "technical" breaches with appropriate leniency, we suggest that the impact on the respondent is still unfair in many cases, and a significant amount of police and court time is wasted in dealing with such matters.

We support a review of the relevant legislative provisions, and consideration being given to making consent an available defence to certain types of breach.

Legal representation

We believe that the incidence of breaches could be reduced if more respondents were legally represented in ADVO application proceedings.

Currently, Legal Aid is not available for respondents in ADVO applications unless there are related criminal charges which are legally aided, there are exceptional circumstances or the matter is in the Children's Court.

Our experience suggests that in the specialist Children's Courts, where ADVO respondents are legally represented as a matter of course, the court is more likely to make AVOs which are realistic and appropriate, with conditions that young people are capable of understanding and complying with.

Conversely, in the Local Courts, where Legal Aid is not routinely available, it is not uncommon for AVOs to be made with little or no input from the respondent. Regrettably, many respondents in ADVO applications are socially and economically disadvantaged, and may also be affected by mental illness or cognitive impairment. Although an unrepresented respondent usually receives a basic explanation as to their options, without legal representation they are often unable to properly defend matters or to engage in negotiations with the applicant (usually the police) as to the terms of the order. As a consequence, it appears that many people consent without admissions to ADVOs in the terms sought by the applicant, without any real scrutiny of the appropriateness of these conditions or the respondent's ability to comply.

Although expanding the provision of Legal Aid would be costly, in our view it would lead to cost savings "down the line", as fewer people are likely to require Legal Aid to deal with charges of breaching AVOs. We would also expect there to be savings in court time, as magistrates often find it very time-consuming to deal with unrepresented litigants, particularly in emotionally-charged matters such as these.

We are aware that Legal Aid NSW has started to provide information sessions for respondents appearing at court on ADVO applications. While this is very helpful, and a good use of Legal Aid NSW's limited resources, it still does not allow for individual representation and advocacy.

Court support workers

Another means to enhance compliance would be the introduction of a "Court Support Worker", similar to those currently utilised in specialist Children's Courts. While not a substitute for legal representation, they can still play a useful role, particularly if legal representation is not available.

This Court Support Worker could either be a lawyer or a trained professional in social work or a similar field. They would be responsible for meeting with all respondents, adequately and fully explaining what it means to have an AVO, how the AVO could be breached (providing examples of such) and the consequences of a breach.

It may also be appropriate for this Court Support Worker to ask the person against whom an AVO has been made, with their consent, to nominate a person who they could contact to discuss the matter in order for that person to become responsible for reminding the person of the AVO conditions and its duration etc. A nominated person may, for example, be a youth worker or guardian. Furthermore, it may be appropriate for the Court Support Worker to refer the person to counselling and other services, particularly where the respondent is a young person or has an intellectual disability, mental health problems or alcohol and other drug dependency issues.

2. Early intervention strategies to prevent domestic violence

There are a number of strategies that could be employed to prevent domestic violence. As our expertise does not lie in this area, we will comment only briefly.

It is a well-known fact that domestic violence is often interwoven with drug and alcohol abuse problems and mental health problems. As a consequence, it is imperative that more drug and/or alcohol rehabilitation programs are made available. Such problems are often inextricably linked to overcrowding, unemployment, lack of engagement in educational opportunities and dislocation from culture. The top five LGAs for domestic assaults in NSW, noted previously, is indicative of this trend. As a result, there needs to be a concentrated provision of services and infrastructure such as housing, sport and recreational facilities and educational programs in targeted areas. This will provide a holistic approach to preventing domestic violence.

3. The increase in women being proceeded against by police for domestic violence related assault

The increase in women being proceeded against for domestic violence related assault highlights that domestic violence does not necessarily always fit the traditional pattern of a female victim and male perpetrator.

This finding may be part of a wider trend, which emphasises that, although women commit fewer offences than their male counterparts, they are committing more violent offences than they did a decade ago.[41]

Interestingly, just under half of all personal violence offences committed in NSW in 2010 involved the "classic" pattern of male offender and female victim in a partner relationship.[42]

As the picture of domestic violence becomes increasingly complex, there is a corresponding need to ensure that a "one size fits all" approach is not applied. Rather, programs will be needed to target the underlying factors causing domestic violence. Legislation, court procedures and sentencing options must also be flexible enough to address this multifaceted issue.

4. Any other relevant matter

We would be interested in commenting on any other relevant matter, especially about the impact of domestic violence and ADVOs on young people, should we be invited to do give evidence at the Inquiry.

The Shopfront Youth Legal Centre
September 2011

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[41] Jessie Holmes, 'Female Offending: Has there been an increase?' (2010) 46 New South Wales Bureau of Crime Statistics and Research, Bureau Brief; Talina Drabsch, A Statistical Snapshot of Crime and Justice in New South Wales, (2010) New South Wales Parliamentary Library Research Service, 4-5

[42] Grech and Burgess, above n15, p7

Appendix

Extract from *Young people with cognitive and mental health impairments in the criminal justice system*: submission to NSW Law Reform Commission on Consultation Paper 11, prepared by the Shopfront Youth Legal Centre, March 2011

Chapter 3: Apprehended Violence Orders

Question 11.11

Is it common for young people with cognitive and mental health impairments to have AVOs taken out against them?

In our experience it is common for young people, including those with cognitive and mental health impairments, to have AVOs taken out against them. In many cases these AVOs are inappropriate and difficult for the young person to comply with.

If so:

a) who applies for the AVO and what is the relationship between the young person and the protected person?

AVOs are often applied for by police and in many cases it is mandatory for them to do so (e.g. under s49 of *The Crimes (Domestic and Personal Violence) Act,* if a person has been charged with a domestic violence offence).

We suggest that *The Crimes (Domestic and Personal Violence) Act* is in need of review, particularly when it comes to mandatory provisions requiring AVOs to be sought or made against children and/ or people with cognitive and mental health impairments.

AVOs are often taken out for the protection of parents against alleged violence by their teenage children. In some cases there are legitimate fears about such violence. However, in our experience, the alleged violence by the young person is often a response to a long-standing pattern of violence and abuse by the parent.

Sometimes parents make private AVO applications against their children. In some cases this appears to be more of a behavioural management tool rather than due to any real need for protection from violence.

AVOs are sometimes also taken out by, or on behalf of, classmates, ex-boyfriend/girlfriends and friends who have fallen out. While some of these applications are appropriate, the conditions imposed can often set a young person up for a breach by prohibiting contact in circumstances where the parties attend the same school, are part of the same circle of friends, or frequent the same places.

b) What conditions are normally attached to these AVOs?

Conditions vary, and may include prohibitions on approaching or contacting the protected person or going to their home, school or workplace. Sometimes these conditions can be problematic from the outset – for example, if the parties live in the same area, attend the same school, or frequent the same locations.

Sometimes the conditions may be reasonable at first but become unworkable due to changes in circumstances. A common problem is where an AVO is taken out for the protection of a parent and the order includes a condition that the young person not attend a family home. The parents and child later reconcile and the parents invite the child home without taking steps to have the AVO varied or revoked. Consent is no defence to a breach, and a protected person cannot be found guilty of inciting a breach, and therefore it is the young person who suffers,

with no consequence to the parents. Young people, especially those with cognitive or mental health problems, often have great difficulty comprehending that, even if the protected person is not seeking to enforce the AVO (or, indeed, did not want an AVO in the first place) the young person can still be guilty of a breach.

To their credit, most Children's Court magistrates have adopted a careful approach when dealing with AVO applications involving young people. The Children's Court tends to make interim orders for up to six months, allowing them to lapse if there is no further incident rather than making final orders of long duration. Most Children's Court magistrates also take care to avoid imposing conditions which may be inadvertently breached, such as prohibiting the young person from having contact with a classmate.

However, even a cautious approach by the court does not always prevent inappropriate conditions from being imposed, as the Act does not impose a requirement that the conditions must be reasonable having regard to the defendant's ability to comprehend and/or comply with them.

c) How often do breaches occur?

This varies from case to case. We have worked with a few clients who are repeatedly charged with breaching AVOs; this is nearly always in the context of an ongoing relationship where the protected person has in some way incited or contributed to the breach.

d) Is the behaviour that attracts the AVO or subsequent breach related to the young person's age and/or impairment?

In our view, much of the behaviour that is sought to be prevented by AVOs is "normal" adolescent behaviour, or predictably difficult behaviour arising from a mental illness or cognitive impairment, that would be more appropriately dealt with in other ways.

For young people, particularly those with cognitive and mental health impairments, breaches are often strongly linked with their age and/or impairment. For example, they may have difficulty understanding the conditions, and have particular difficulty with the concept that consent is no defence to a breach. Young people usually have limited control over their personal circumstances, such as where they reside or attend school, and may therefore have difficulty staying away from protected persons.

e) How is a young offender with a cognitive or mental health impairment dealt with after a breach occurs?

This depends on the circumstances of the individual case. As with other criminal charges, a breach of an AVO may be dealt with under s32 of the *Mental Health (Forensic Provisions) Act.* However, if there are repeated breaches (even if this is due to the defendant's inability to understand or comply with the conditions) there is often some reluctance on the part of the magistrate to continue applying s32.

It is a matter of some concern that there is no presumption in favour of bail for a charge of breach AVO where the alleged breach involves violence. Children may end up being detained on remand for breaches that are in fact relatively minor.

f) What alternatives are available to deal with the issue of adolescent violence against guardians or cares where violence is related to a cognitive or mental health impairment?

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

As previously stated, where a young person is in out-of-home care, better staff training and appropriate behaviour management policies are likely to assist in preventing violence (for example, by training staff to de-escalate potentially violent situations) and in responding appropriately when violence does occur.

We acknowledge there may be some cases where an AVO application is warranted. However, we would support these matters being referred to mediation with the aim of resolving the matter without the need for a continuing AVO.

g) Are there particular problems of understanding or compliance with conditions of AVOs for young people with cognitive and mental health impairments?

As mentioned above, young people in general have problems understanding and complying with particular types of conditions. These problems are exacerbated if a young person has a cognitive or mental health impairment.

h) What changes to law or procedure are required to meet the legitimate interests of young people with cognitive and mental health impairments as respondents to AVOs?

We support an amendment to the *Crimes (Domestic and Personal Violence) Act* to the effect that an AVO may not be made unless the court is satisfied that the respondent has the capacity to understand the effect of the order. This would mean amendments to sections 39 and 40 so that AVOs are not always mandatory upon charge or conviction for certain offences.

Further, if the court is minded to make an order, we would like to see a requirement that the court be satisfied as to the appropriateness of each individual condition, including the defendant's ability to understand and comply.

We currently have the anomalous situation where a person who could not be found guilty of a criminal offence (e.g. because of doli incapax or a defence of mental impairment) can have an enforceable AVO against them.

Question 11.12

(1) How are AVOs used for the protection of young people with cognitive and mental health impairments?

We do not have much experience of AVOs being used for the protection of young people with cognitive and mental health impairments.

(2) What issues arise?

The main issue arising is that AVOs are perhaps under-utilised when it comes to protecting young people with cognitive and mental health impairments.

(3) Are any changes to the law required to improve such protections?

It is worth considering amending the *Crimes (Domestic and Personal Violence) Act* to allow a carer to apply for an AVO on behalf of a young person with a cognitive or mental health impairment.

Currently the only person who can apply for an order on behalf of a young person is a police officer, a parent who is a protected person under an AVO and seeks to have the child included, or (if the young person is aged 16 or over) the young person in his/her own right.

Unfortunately, police may not always be proactive in making applications, or a young person may be reluctant to involve the police, particularly if the young person has had negative experiences with police in the past. Young people over 16, particularly if they have a cognitive or mental health impairment, may find it very difficult to apply for an AVO in their own right.