



public interest
ADVOCACY CENTRE LTD

**Treatment and care rather than crime and
punishment – Apprehended Violence Orders**

**Submission to the NSW Law Reform Commission Inquiry -
People with cognitive and mental health impairments in the
criminal justice system**

30 August 2012

Tami Sokol, Solicitor

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

The current inquiry and this submission

PIAC welcomes the opportunity to respond to the NSW Law Reform Commission's inquiry into the use of apprehended violence orders (AVOs) against adults with cognitive and mental health impairments. This submission is based on PIAC's diverse experience working with people with mental illness and cognitive impairment through its core program, the Homeless Persons' Legal Service (**HPLS**).

PIAC's submission forms part of a suite of submissions to the NSW Law Reform Commission on the key focus areas of the inquiry into people with cognitive and mental impairments in the criminal justice system. These include PIAC's 2010 submission, *Treatment and care rather than crime and punishment*, and PIAC's 2011 submission, *Treatment and care over punishment and detention – even more critical for young people*.

PIAC's work in the criminal justice system

PIAC has significant experience in representing those with cognitive and mental impairments through its work with HPLS, a joint initiative between PIAC and the Public Interest Law Clearing House (PILCH) NSW. The HPLS Solicitor Advocate provides representation for people who are homeless and charged with minor criminal offences. The role was established in 2008 to overcome some of the barriers homeless people face accessing legal services, including: a lack of knowledge about how to navigate the legal system; the need for longer appointment times to obtain instructions; and, the need for greater capacity to address multiple and complex interrelated legal and non-legal problems.

Since commencing in 2008, the HPLS Solicitor Advocate has provided court representation to 329 individual clients in a range of matters including AVO proceedings.

Question 3 – Difficulty complying with an AVO

PIAC submits that law and policy reform in this area of the criminal justice system should be driven by an understanding of the capacity of people with mental illness and/or some other form of cognitive impairments to address antisocial and difficult behaviour and, accordingly, to comply with an AVO.

This is illustrated by the following case studies from the work of the HPLS Solicitor Advocate.

Case Study 1

In late 2011, JMT approached a young woman and her mother at a café in Paddington in an excited manner, causing them to leave the café. Subsequently, JMT approached the young woman on a number of occasions when she got off the bus and would follow her to the area where she resided. The victim alleged that this occurred on 20 occasions and police took out an APVO.

It was clear to police and the victim that JMT was mentally disturbed and that what he said when he approached the victim on many occasions was not rational. JMT disputed the APVO and represented himself in Court. Orders were made that JMT not approach, molest or harass the victim and that he be restrained from going within the Paddington area where the victim resided.

HPLS represented JMT in his appeal to the District Court but the appeal failed. JMT continued to attend the area and the victim reported this to police although no action was taken.

JMT's mental health was such that he refused to accept that he could not go to the area where he was restricted. He continues to expose himself to the danger of being charged for breach of the orders.

Case Study 2

LGW is a homeless man in his sixties who has been living on the streets for a number of years in the Paddington area. He has a history of mental health issues and suffers from schizophrenia. LGW had a habit of feeding bread to the pigeons near Paddington Church. The

manager responsible for the area requested that he desist from feeding the pigeons and LGW refused.

The manager asked the local police to move LGW on and when LGW continued to attend the property the manager took out an APVO against LGW, claiming harassment and intimidation.

LGW disputed the application. At the hearing LGW was obviously mentally unwell, having absconded from hospital after being scheduled by order of the Mental Health Tribunal. The matter could not proceed to hearing on that occasion as LGW was returned to hospital.

Interim orders were made which barred LGW from entering the Paddington area. In spite of this order, LGW went back to the area because it was where he had lived for 30 years. LGW was charged with contravening the APVO. It was clear that LGW's mental health affected his ability to abide by the orders.

At the hearing, the manager's application was dismissed on the basis that the matters complained of did not amount to intimidation and harassment. The breach of the APVO was dealt with under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) where the offence was proved but no conviction was recorded.

These cases demonstrate that, in some circumstances, adults with cognitive and mental impairments may not have the capacity to comply with AVO conditions on account of impulsivity or other impairments associated with their condition. If the defendant is unable or has difficulty complying with an AVO against them, the complainant will not get the protection they seek and the defendant will be exposed to hefty penalties and criminal convictions.

As is demonstrated in Case Study 2, s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides an opportunity for defendants to be dealt with without a conviction being recorded and allows the magistrate to divert a defendant to treatment or rehabilitation. Section 10(3)(a) specifically refers to the defendant's 'mental condition' as a factor that a court can take into account in not recording a conviction under the section. PIAC believes that s 10 could and should be used more frequently to divert people from the criminal justice system for offences where there is no public risk of harm resulting from a discharge under the section.

The existence of mental health issues or cognitive impairment should be a key factor in the discretion exercised by the police on whether or not to apply for an APVO.

This principle not only recognises the need to address the over-representation of people with mental illness and cognitive impairments in the criminal justice system, it also reflects the need to recognise that subjecting many people with mental illness or cognitive impairment to the processes of the criminal justice system is generally counterproductive.

Weighing the diminished efficacy of principles of specific deterrence applying to people with cognitive impairment against the trauma and humiliation that people with mental illness experience in the criminal justice system, promoting greater use of discretion to utilise alternatives to AVO proceedings is in the public interest.

Greater use of discretion could be complemented by informal and voluntary diversion/referral of suspected offenders to sources of community treatment and/or care.

PIAC supports the extension of the diversionary options available in NSW. This support is, however, conditional on the adequate resourcing of the community services that inevitably must form the core service providers of such programs, as well as the adequate resourcing of organisations and authorities that provide the reports and assessments to the Courts that are necessary so that Courts can make appropriately informed decisions.

There must be resources provided either to community organisations or to appropriate government agencies to properly co-ordinate diversionary programs, and if necessary, provide assistance to the individuals involved through case management. Otherwise it could be said that people with severe cognitive impairment or acute mental illness that are put on such programs, are set up to fail.

Question 5 – Carers and Health Care Providers

PIAC submits that AVOs are generally an inappropriate mechanism to safeguard a carer or health care provider from a young person or adult with cognitive or mental health impairment. This is because such people very often have difficulty in understanding and complying with AVO conditions.

Case Study 3

PX has AIDS and attends a support organisation that provides lunch for AIDS sufferers. PX has cognitive problems as a consequence of his condition and is subject to bursts of aggression or irascibility on occasion but is not violent. These symptoms are a well-known feature of the disease and this is understood by the support organisation whose lunches PX attended.

A number of incidents arose between PX and a particular member of the staff of the support organisation. The incidents clearly arose as a consequence of PX's condition.

PX appeared to have had a number of disputes with the management of the organisation to the extent that the management issued PX with a banning notice. The member of staff eventually went to police who took out an APVO on her behalf against PX. The management of the organisation supported the staff member.

The application was disputed and went to hearing. At the hearing, the staff member conceded in cross-examination that aggression and abrasive behaviour was a known symptom of AIDS. She was then asked whether allowance was given to other clients at the organisation displaying the same symptoms – i.e. not taking action such as issuing banning notices or APVOs. The staff member asserted that such allowance was given only in some circumstances, which raised the inference that PX was being treated differently to others.

Despite this, the Court found that PX was intimidating and made the order for an APVO.

PIAC believes that alternate measures could have been implemented by the organisation, either by accepting the client's attitude as part of his condition or by enforcing the banning notices by calling police and having the client charged with criminal trespass, the penalties for which are less severe than for a breach of APVO.

In this case, the consequences of issuing an APVO were severe. The APVO prevented PX from getting the special food that AIDS sufferers require, which was provided by the support organisation. It also prevented PX from going in the building where his support services were.

PIAC believes that carers and health care providers are often more vulnerable due to their proximity and close relationship with the person suffering mental or cognitive impairment and are a special category who must be safeguarded against violence and threats of violence. However, due to limitations in comprehension and compliance with AVOs by some people with mental illness, AVOs can be an ineffective mechanism to ensure carers and health care providers are protected.

PIAC supports a holistic approach to protect both the carer or health care provider and the person suffering mental or cognitive impairment in potential AVO proceedings. As such, diversion and engagement with social services support are crucial to ensure that episodes of concern are managed while protecting the rights of all parties and the relationships of care. To achieve this goal, mediation by an experienced mediator should be more readily relied upon to come to a mutually agreeable outcome. However, currently referral to mediation is only available for non-police initiated proceedings. By expanding the categories for which mediation is prescribed, the interests and needs of both parties can be ventilated and addressed. In the case of PX, a request by the organisation to attend mediation rather than filing for an AVO may have provided a more meaningful and sustainable outcome and allowed the needs of both parties to be addressed more comprehensively.