

AVOs and Capacity



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Ali Craig, Solicitor, Intellectual Disability Rights Service on 3 February 2015. This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- Who are IDRS
- What is intellectual disability?
- Can an AVO be made against a person with impaired capacity?

Intellectual Disability Rights Service (IDRS)

- IDRS is a specialist community legal centre working with and for people with intellectual disability in NSW. They provide:
 - Legal advice, casework and referral
 - Community legal education
 - Law reform and policy Work
 - Parents Project
 - Criminal Justice Support Network (CJSN): support at Court and Police stations for victims, defendants and witnesses.
- IDRS can assist people with a intellectual disability in the following matters:
 - Care and protection
 - Consumer rights
 - Fines
 - Complaints about services
 - AVOs
 - Guardianship and financial management
 - Discrimination
 - Criminal matters
 - Credit and debt
 - Employment

What Is Intellectual Disability?

A disability that affects the way a person learns, understands and undertakes activities of everyday living. It is characterised by:

- IQ of 70 or below
- Limitations in at least 2 areas of 'adaptive functioning' including:
 - Communication
 - Self-care
 - Home living
 - Social skills
 - Self direction
 - Use of community resources
 - Functional academic skills
 - Health and safety
- Arises during the developmental period (under age 18)
- Lifelong, permanent condition; not treatable

Mental Illness v Intellectual Disability

Intellectual disability

- Thoughts are limited by cognitive understanding
- Is life long
- Onset occurs before age 18
- Medication cannot restore cognitive ability
- Assessed by a psychologist

Mental illness

- Disturbances in thought processes and perception. May experience hallucinations and delusions
- May be temporary, cyclical or episodic
- Onset may occur at any stage of life
- Medication can be prescribed to control the symptoms.
- Diagnosed by a Psychiatrist



Common effects of intellectual disability

- Communication
- Reading
- Understanding
- Concrete thinking
- Sequencing
- Behaviour
- Difficulties problem solving
- 'Yes' bias
- Compliance
- Peer group pressure

Tips for working with clients with intellectual disability

- Minimise distractions
- Take extra time
- Keep it simple
- Use short sentences
- Avoid abstract concepts
- Raise only one topic at a time
- Ask your client to repeat back to you what you have told them
- Identify appropriate support person for them

Legal issues

- Intellectual disability and domestic violence
 - * Note definitions of "domestic relationship" extends to clients in group homes
- History of institutionalisation
- Intellectual disability and sexual assault
- Intellectual disability and the criminal justice system

Capacity

- There are no set rules for assessing a person's capacity
- A person may have capacity to make some decisions but not others
- Capacity will often depend on how complex the decision is
- Often a person can increase their capacity by having appropriate support to help them
- A useful resource is the *Capacity Toolkit* AGD, 2008

Case Study: Jessica

Jessica was a 19-year-old girl who moved into a group home. She was diagnosed with a mild-moderate intellectual disability and had a history of developmental delay due to trauma and child sexual assault. Jessica struggled to regulate her emotions and manage interpersonal relationships. Psychological assessments showed her disability made it very difficult for her to learn tasks, including controlling anger and impulses. Jessica's history of trauma made it difficult for her to form relationships, particularly with staff members and other people living in the group home. Jessica didn't get along with a resident called April, who harassed Jessica making her upset and angry. Jessica became upset when she thought a particular staff member was spending too much time with April. Jessica yelled at the staff member and used her body to stop them from exiting the room. When the staff member threatened to call the police Jessica broke down crying. The police were called. They determined that the situation was a domestic violence related offence and charged her with common assault and with breaching an ADVO, which was issued a few days earlier as the result of a similar incident. Jessica didn't know or remember what the ADVO was about. The staff member didn't want the police to take out an ADVO or to charge Jessica but as the matter was classified as a domestic violence the police felt that they had an obligation to do so

Can an AVO be made against someone with impaired capacity?

- Unfortunately AVOs have often been made against people with impaired capacity to understand them
- AVOs can have devastating consequences and often lead to incarceration of people with disability



- Also problematic as victim is not protected if the defendant can not understand or comply with an order

Farthing v Phipps [2010] NSWDC 317

- There are no strict legislative requirements to take into account a defendant's ability to understand AVO proceedings
- It was however successfully argued in *Farthing v Phipps* that when a court is deciding whether to make an AVO it can take into account a person's ability to understand an AVO within "any relevant matter"

Case Study: Celia

Celia was a young woman with an intellectual disability who lived with her elderly parents. Celia's father was very strict and would not let her have much say in her life. Celia had no friends and no one to help her. Celia's father brought home a man and told Celia she had to marry him and share a bedroom with him. Celia was made to buy a wedding dress and a ring for herself. This man took advantage of Celia and it was then revealed that he was actually already married to someone else. He left Celia after taking all of her money. She was very upset so she tried to call the man and ask for her money back. Celia tried to talk to the police but when she called them she didn't know what to say and instead remained silent. As a result of the calls to the man, Celia was issued with an ADVO protecting the man that took her money. Celia did not understand the conditions of the ADVO so she kept on calling him. This led the police charging her with 20 counts of breach ADVO. Celia went to prison and could not get bail because she had nowhere to live, as her father was angry with her. Celia was kept in jail for 6 months before she was linked up to IDRS.

How can you support your client if they do get an AVO against them?

- Advocate for appropriate conditions
- Help explain orders
- Use pictures
- Clients may need help problem solving, eg, help plan different routes where there are distance restrictions on an AVO

What happens when your client is charged with breaching an AVO?

- Very serious offence! Maximum 2 year jail sentence
- At the Police Station your client has:
 - Right to a support person
 - Right to silence
 - Right to legal advice
 - Should call Criminal Justice Support Network (CJSN) 1300 665 908 (9am- 10pm 7 days a week)
- If the matter goes to court, your client should get legal advice. Their options could include:
 - a. Trying to get a 'section 32' (see below); or
 - b. Trying to defend the matter

Section 32 Mental Health (Forensic Provisions) Act 1990

- Usually when a person goes to court for a criminal matter it will be dealt with by a person pleading "guilty" or "not guilty." A section 32 is alternative way of dealing with a person with a cognitive or mental impairment. They do not plead "guilty" or "not guilty" but instead agree to a treatment plan
- Section 32 gives Magistrates discretion in the LOCAL COURTS to DIVERT any criminal matter from being dealt with in the criminal justice system. This allows the magistrate to deal with an offender with impaired capacity in a therapeutic way rather than punishing them
- Under section 32 a Magistrate can deal with the matter in a diversionary manner if the offender can show (on balance of probabilities) that:
 1. He/ She has a "developmental disability", "mental illness" or "mental condition for which treatment is available"



- Usually shown by a psychological or psychiatric report
- 2. The matter is one where the Magistrate believes that it is more appropriate to deal with the matter via section 32 rather than at law
- 3. There is an appropriate treatment/support plan

What is a Treatment Plan?

- A Treatment Plan aims to link a client with services that will assist them in reducing offending behaviour – it should correlate with the offence itself
- The better the Treatment Plan the greater the chance that the Magistrate will use their discretion to divert the offender under section 32
- Of most importance is that the Treatment Plan needs to be APPROPRIATE and effectively implemented in order to prevent recidivism
- **Examples of Treatment Plans:**
 - Case management
 - Anger management
 - Behaviour management
 - Drug and alcohol treatment
 - Training in financial management
 - Training in travel skills
 - Housing/ supported living arrangements
 - Involvements in social activities and day time supports
 - Mental health treatment/ medication

How can you help a client?

- Many lawyers, Magistrates and Prosecutors have very poor understanding of disability
- It is *essential* that an advocate/ disability worker/ case manager alert any lawyer or police officer to the fact that the client has a disability
- For any section 32 to be effective it is necessary that the client be linked up to the most appropriate support services and that the Court is provided with good information about the client, their disability, their behaviours and their current support
- Some lawyers would probably benefit from being alerted to what support a client might need but is currently missing out on

Can a client knowingly breach an AVO if they didn't have capacity to understand?

- If your client did not understand the AVO they may have a defence to breaching the order
- BUT
- There are many barriers for people with intellectual disabilities in the court process, for example, it is very difficult to understand complex legal jargon and historically, there have been many unjust outcomes

What happens if the client is at risk from a carer?

- Important to try to get them an independent advocate
- There a number of disability advocacy services that may be able to assist, eg, People With Disability Australia, National Abuse and Neglect Hotline, NSW Ombudsman

Referrals

- Intellectual Disability Rights Service (IDRS) (02) 9318 0144
- Aging Disability and Homecare (ADHC) www.adhc.nsw.gov.au
- NSW Council for Intellectual Disability (CID) (02) 9211 1611
- People With Disability Australia (PWD) (02) 9370 3100
- Indigenous Disability Advocacy Service (IDAS) (02) 47223524

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