

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into Access to and Interaction with the Justice System By People with an Intellectual Disability and Their Families and Carers

Melbourne— 24 October 2011

Members

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Dr C. Atmore, Policy Officer, Federation of Community Legal Centres;
Ms J. Phillips, Manager, Disability Discrimination Legal Service.

The CHAIR — Thank you very much for coming in today. My name is Clem Newton-Brown, I'm the Chair of the Law Reform Committee. We are a Committee which is constituted by Parliament to look into specific inquiries, this being one of three that we're looking at at the moment. On the Committee is Jane Garrett as Deputy Chair and Russell Northe. Anthony Carbines and Donna Petrovich are apologies for this afternoon. We will be considering all the submissions and asking people to come in to give some oral evidence, for us to be able to ask questions as well, and then at the end of that process we will provide a report which will make recommendations to Parliament, which may or may not be accepted. Thanks for coming in. You're covered by Parliamentary privilege in this room but not outside. If you could start, for the purpose of the transcript, by giving us your names and professional addresses, please.

Dr ATMORE — My name is Chris Atmore, I'm the Policy Officer with the Federation of Community Legal Centres.

Ms PHILLIPS — Julie Phillips, Disability Discrimination Legal Service, I'm the Manager there. Did you want the address?

The CHAIR — Yes, please.

Ms PHILLIPS — Level 2, 247-251 Flinders Lane, Melbourne.

Dr ATMORE — Federation of Community Legal Centres is Level 3, 225 Bourke Street, Melbourne, 3000.

The CHAIR — Could you talk us through your submission, please.

Dr ATMORE — First off, thanks for the opportunity to contribute to the inquiry, which we're pleased to see is very broad ranging and, in our mind, long overdue. We basically will be saying that the test of justice for people with cognitive disabilities, that they have sufficient access to the legal system, that test has basically been failed at the moment so we will cover a number of different themes around that argument.

First off, I thought it might be useful to just say a little bit about the Federation of Community Legal Centres and how Julie's centre fits into that, and then we had a comment and a question about the inquiry process itself — not sure whether anyone will be able to answer that for us but we'd certainly be keen to find out. Then we would like to talk a little bit, in a broad fashion, about the profound lack of access to justice that we see for people with cognitive disabilities and then, finally, some specific comments.

The Federation is the peak body for 49 community legal centres across Victoria, probably about two thirds of those are generalist centres, which means that they basically have a geographical catchment area and they assist people with a whole range of legal issues. The other third or so are specialist community legal centres that generally either focus on a particular community group or a particular kind of set of legal issues and Julie's centre — Disability Discrimination Legal Service — falls into that second category. We have three other specialist legal centres that specifically assist people with disabilities and I think at least one of those has made a separate submission, or is in the process of making an oral submission to this inquiry.

The CHAIR — They're centres that only deal with people with disabilities?

Dr ATMORE — Yes, that's right. Our clients in general are predominantly low income, often multi disadvantaged, so, as you might expect, that means we have a fairly broad gamut of clients — young people; elderly people; Aboriginal people; people from culturally and linguistically diverse backgrounds; recent migrants; refugees and asylum seekers; women of course, we have a specific women's legal service. Just under nine per cent of all our clients have some kind of disability. We see

something like 100,000 clients in a year across the state, so nine per cent of that is a fairly large chunk. We can't actually say definitively how much of that nine per cent specifically have cognitive disabilities but I would imagine that that's fairly sizeable.

The other thing just to note about terminology, we talk about cognitive disability rather than intellectual disability, addressing that last term of reference which asks for comment more broadly. We think that a lot of those access to justice issues also apply to, for example, people with acquired brain injury and, in our view, pretty much all of the issues that we will be discussing this afternoon apply on that broader label.

We had a bit of a comment based on our experience in preparing this submission and also engaging with other communities and organisations and individuals who are also in the process of making some kind of submission. As I said before, while we appreciate that the Terms of Reference are broad for this inquiry, it's our experience that it's created some degree of difficulty that there hasn't been any issues paper or discussion paper associated with the inquiry. Certainly at least some of the previous inquiries where we've made submissions and/or presented there's been a paper to sort of bounce our ideas off and also to give us some sense of where the inquiry might be heading in terms of ultimate policy and possibly also law reform recommendations. This is by way of noting some concern on our part that it seems to have actually increased the resource burden for a number of community organisations because they're such broad terms of reference and there's no discussion paper; people have been probably spending more time and energy in trying to get a submission together in the time line than normally they would and it's an unfortunate reality in this area particularly, that a lot of the organisations who are interested in these terms of reference, and that's actually not particularly my organisation but a lot of other smaller organisations, are pretty strapped for time and resources and it's meant that they've had to work extremely hard to try and sort of work out exactly how they might encompass all of the relevant issues in an appropriate format for this inquiry. So I guess our related question is whether there's a particular policy around when a discussion paper might be produced for inquiries and that informed the decision not to have one in this particular case, or that's likely to be an ongoing policy in these types of future inquiries?

The CHAIR — That's something we will discuss as a Committee and take note of your comments, thank you.

Dr ATMORE — That will be great. As I said, it doesn't so much apply to us because we do this sort of work all the time but we've certainly probably assisted individuals and organisations more than we normally would in relation to an inquiry of this nature simply because they were uncertain as to how to proceed because they didn't have questions to answer.

Mr NORTHE — I think in the context of the conversation of directly noting that you put to us there should be a discussion paper, you're absolutely within your rights to suggest that to the Committee.

Dr ATMORE — We would be happy to put that.

Mr NORTHE — There you have it. Done.

Dr ATMORE — Moving onto the issues that we cover, and in a reasonably detailed form in the submission, because our mandate as community legal centres is basically to provide a bridge to the justice system so that it's accessible to everyone in Victoria. Part of providing that bridge for us means that all members of the community must be able to gain some sort of basic understanding of the legal system and what their rights are and what their options are if they have some kind of legal issue. All of those things, from our perspective, are highly problematic when it comes to people with cognitive disabilities. They face barriers at all stages and all aspects of the justice system and, as even us in this room would know, even if you have a high level of education and privilege you can sometimes find

the current justice system difficult to understand and to navigate. So basically that means for many people with cognitive disabilities the barriers are just insurmountable, so even getting in the door is sometimes a huge ask, let alone knowing what to do once you're in there and actually coming out with some fair and just result.

Mr NORTHE — Could I interrupt there, Mr Chairman. Chris, on that point, we've already heard evidence today about training and making sure that those in the judicial system and police are adequately trained to understand people who might come through the door and what support services are available. How do you see that playing out in a practical viewpoint, do you have any idea how the training should be, should it be refreshed every 12 months, because we can all receive information saying here is a training course available and it might be minimal and therefore you're addressing that particular issue. Do you have any thoughts or ideas around that?

Dr ATMORE — Yes, I think for a start the training has to be mandated so that it's not just the people who already have a bit of an interest because often they're the ones who actually are a little more clued up about the issues. For us it's really important that all aspects of the justice system have particularly tailored types of training because clearly not all issues are relevant across the board, but some basic understanding of different types of disability and how they might manifest for people who are struggling. Whether that's registrars at court, police, people in the prison system, people who issue fines because, as we've said in our submission, one of the big areas for us is infringements and sometimes we think with the infringement system if the authority was the first point of contact for an offence being registered and then a fine issued, if they were actually better trained to recognise that the person had a cognitive disability maybe they might use their statutory discretion not to issue the fine in the first place, so that ends up actually using an awful lot of resources and energy because that first gate isn't appropriately manned. That's part of it.

The other part of it, and I think this links in with — we came in on the tail end of what the Office of the Public Advocate was talking about, which is the need for people really to have two different kinds of assistance when they're in the justice system, whether that's criminal, civil or family, whatever it might be, and, where appropriate, they have some kind of access to specialist disability support to ensure really basic things like wheelchair accessibility but, of course, a whole lot of other disability related issues that often are not properly catered for in the justice system. Whether that's AUSLAN interpreters, whether that's, as I think OPA touched on, issues of communication for people who don't communicate orally and use a picture board or some other kind of device. Quite often those are just not made available, or it's not kind of picked up that the person actually needs that sort of assistance. So the sort of tailored disability support, some sort of specialist support worker in the different justice systems, we think is really important.

Then the other type of assistance, which I think OPA also may have touched on, is the need for specialist advocates. Often, in our view, they need to be legal advocates. For example, access to legal representation, which Julie will talk about more in relation to discrimination, is very sorely under-available at the moment and again those legal representatives need to be skilled around specific disability needs and legal issues so that they can take effective instructions from a client, so you've sort of got the two lots of support systems. We're not, in this submission, specifically addressing victims of crime who have cognitive disabilities, and that's because the Federation has also combined with Women With Disabilities Victoria and a number of others on a separate submission to this inquiry specifically around women with cognitive disabilities who experience violence. We're, I guess, trying to get more of a general map of all the different aspects of the justice system other than victims and also we're not saying too much about the criminal justice system because some of our member centres are going into considerably more detail so that's the reason in the submission why we talk more about infringements, about family violence intervention orders from a perspective of the respondent and about discrimination.

Ms GARRETT — Just on the issue of infringements and the point you made before about getting to people at the gate, the first gate, before you're in that sausage machine. How big a problem do you think that is in terms of your experience and what difference would it make if there was more work done at the front end?

Dr ATMORE — In our experience that's huge. I am speaking not just as a person who works in policy law reform and our peak body but also earlier in the year I was seconded as a practitioner to Legal Aid in their Civil Justice division and a considerable proportion of my clients had cognitive disabilities or mental illness and almost all of them had infringement issues. Not only did they not get treated appropriately at that first gate but it just kept happening again and again. I had one client, for example, who had a number of issues — drug and alcohol issues as well as a cognitive disability — who had racked up something like \$20,000 worth of fines for not using a ticket on public transport. This was a situation in which he was a repeat offender, if you want to use that word, I don't think he would ever have actually appreciated what was happening when he didn't buy a ticket, and the fines would sort of keep mounting up. I don't know what would even happen to those pieces of paper, a lot of the time he probably wouldn't even open the mail, and then myself, his support worker and the agencies involved in issuing the fines and proceeding to court would be spending hours and hours and hours of their time repeatedly processing and then trying to get him through the Special Circumstances list so that he didn't have to pay them, and the whole thing just sort of seemed like a complete waste of time and resources when he wasn't really able to appreciate the consequences of his conduct. That's one example but we have many.

Ms GARRETT — One more question through you, Chair. With your experience with clients like that and they're in that system, does that lead or have negative impacts — does it lead to other things on their part and in what way?

Dr ATMORE — Yes. One of the points that we make in our submission is, though we're not specifically talking in that submission about victims of crime, but it's often the case that people with cognitive disabilities are both victims of crime and involved in offences in some sort of way, even if it's on a very minor scale like an infringement, but they are all interlocking because it's not just the justice system that's not providing the appropriate avenues and supports, it's also the broader social support system is often lacking so the needs of many people with cognitive disabilities who end up in the justice system for other reasons are not being met and therefore other problems develop because they have no money or because they end up homeless or they're Aboriginal as well as having a cognitive disability and it just compounds.

One of the suggestions that we make in the submission is that if it isn't clear — and we think it is very clear — but if it isn't clear to policy makers that it would be cost efficient to actually action some of these recommendations that OPA and organisations like ourselves are making, it might be worth thinking about commissioning some sort of study like the KPMG study that was done in relation to family violence to actually cost out how much money would we save if we spent more at the early intervention, at the first gate stage, how much would we save in terms of prisons and the courts and general administration.

Mr NORTHE — Chris, on that basis would you attest that there's not enough information data around at the moment to actually paint that clear picture?

Dr ATMORE — I think we have enough to say there is definitely a major problem with lack of access to justice, but I think it's important to have more data and evaluation to actually indicate the most appropriate ways to go to fix it. One of the key areas, one illustration, is the need to disaggregate what data is available so that disability isn't just all lumped in as one when there's such a huge spectrum of experience of people. Cognitive disability isn't one experience either, that's a spectrum in itself. Gender and disability interact in complicated ways so women with cognitive disabilities in some circumstances, like violence for instance, have specific needs around being women, they're more

likely to be victims of violence, although men with cognitive disabilities also have quite high victimisation rates. Those kind of things need to be unpacked so that policy is actually based on evidence. Julie, did you want to talk a bit about discrimination?

Ms PHILLIPS — Sure. It's a slightly different tack, of course, because it's not to do with criminal justice. The clients that we're involved with have different issues. I should say that I also work in the disability area generally so it's not just DDLS. The first problem is even getting to court if they want to, which is extremely difficult, for the reasons I've outlined in the report, but is usually just simply to do with money and access to lawyers.

I also work with a lot of children and so does DDLS, and they've got parents who often own houses, perhaps not all of it, but that usually knocks them out for any assistance from Legal Aid as well because I think the means test there is about \$300,000 equity in your house which, because of house prices at the moment, is very easily had. So you've either got parents who can't qualify for Legal Aid and, as I mentioned, organisations like ours, we're 2.6 staff and that includes administration and myself, non legal staff, so we can do quite a bit but if someone wants us to put on a trial that's extremely difficult, we usually have to refer out. And there's no long list of law firms who are wanting to take these matters on when there are lengthy trials, and I've outlined education and employment being often typically lengthy. Firstly, you're lucky if you can actually get any legal assistance at all to get an entree into the courts, there's nothing magical about that, I think I've set that out clearly. But then once you get into the court, if you're lucky enough to find someone who will work on a speculative basis, that's the no win, no fee, you've then got two more problems and I just thought of some more things today.

One is the continuation of the expenses problem and that is you've still got to meet these costs in a whole lot of different areas. For people with disabilities you often need, in a discrimination case, medical reports and while it's probably easy to just go to a GP, if you want a specific medical report you're often looking at hundreds of dollars there. Then you may want a medical expert to give evidence at a trial, and these costs are exorbitant, and you're often against respondents who are very cashed up so you've got to try and find people, if you can, who are eminent in their field but will agree to read lots of papers and come and spend a day for nothing. It's very, very difficult. That's one thing. Secondly, just the cost of subpoenas. Until August 2009, under the Disability Discrimination Act, the onus was on the complainant to prove their case so you had to make sure that you had all the relevant people there at the court, so if it's a lengthy employment or education case you may need to subpoena every teacher from every year because those people haven't been offered to you. Then you've got conduct money to pay for every person and that person may take a taxi. In a case that I was recently assisting it was from Eltham to Melbourne and back again. It's hundreds of dollars. People with disabilities, and sometimes their parents, cannot afford it, they simply can't afford it.

Also if you look at the stats, kids with disabilities often come from broken families so you've often got a single parent and if they're staying at home they're a parent who is getting some sort of family allowance. So basically access to the law costs lots of money and most people don't have it, but particularly this group is a low socioeconomic group and they're going to be the least able to afford it, and really some of them just don't go ahead because of that. Even if the law itself you thought was really good, and I'm not saying it is, you can't afford to use it so it's actually quite useless sometimes because if you can't afford to use the law because of the structure that's required for you to use it, then there's no point.

I think it was 2000 where disability discrimination complaints changed from being heard at the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) to the Federal Court. While there were good reasons for doing that, that all of a sudden it meant lawyers' costs and all of those sorts of expenses that people just can't afford. Therefore, if you have a go at it, if you try and get together your legal team, you're so ill prepared because you simply can't afford the

same sorts of things as your opponent can, that you're liable to lose anyway and that's a pretty dreadful experience. So the money aspect is very clear and simple: you can't access justice unless you've got a lot of money and people in this group haven't.

The second problem once you get in the door is this attitudinal thing, which we've talked about, and you talked about training. I agree with Chris, I think it's got to be mandatory, I think it should involve, as much as possible, people with disabilities who are able to more eloquently often talk about what life is like. There's really two parallel educative processes with that, one is literally what do these disabilities mean and how do they affect people, because often people with a cognitive disability or an intellectual disability don't just have one disability, they often have a few, that's just the way it is. Sometimes there's a brain dysfunction where you might have a language disorder, you might have autism spectrum disorder and a severe intellectual disability, so you need to have an understanding of how all those play out in a person.

One thing which I'm not quite sure what the answer to is, is the ability to have insight and empathise with those things, because I've been in court observing and I've seen two different judges respond completely differently to almost exactly the same circumstances. It's really — pardon the pun — judgmental attitudes about what is normal behaviour, if you like, or what is socially acceptable behaviour? Even some of the examples in the decision in Walker was of a boy with a social communication disorder and yet he's been criticised because of his social and communication inappropriateness. Well, of course. You might find one judge being very empathetic and saying: yes, of course Frank acted like that because of A, B, C and D. And in exactly the same situation you have another judge looking down his nose and shaking his head and tsk, tsk, tsking at about how terrible it is that a child of 13 used the "F" word when someone didn't do the right thing by him.

Those things matter because in discrimination law there's the test about reasonableness, which is a terribly fluid and subjective word, and when you've got subjective decisions to make about what's reasonable or not, if you think that someone's behaviour is absolutely appalling and there's no excuse for it, you might come to a view that therefore the treatment, the harsh treatment they received, was absolutely reasonable. If you've got someone who is a bit more empathetic and insightful and has a bit of a knowledge of the disability, they might say of course this was going to be the consequence of the environment and therefore find it was reasonable. That can be the difference between you winning and losing a discrimination complaint so it's really quite important. I don't know exactly what the answer is to teaching people empathy and insight, I really don't know about that, but I guess what you can start with is literally educating people about what this disability is and the disabilities associated with it, what it means, what you can expect in that environment and all that sort of thing because unless you understand that, you're going to make decisions in ignorance and it's just not going to help.

Because our area is quite specialised, it's disability discrimination, those understandings about disabilities and their effect and how the environment plays out on those people and how other people play out on those people is terribly important. Simply things like people with autism and their requirement for stability and routine and what happens when they don't get it. What happens to a person who has a particular frame of mind when you're in their face berating them? It's all terribly important and until we get that under control, access to the legal system is not going to be fixed just with money. They are, I guess, the two things. One is simply, I hate to say, money, resources, services, legal services, resources for people to afford subpoenas, to afford medical reports, to afford to have experts, because they're not on a level playing field, they come in against government departments, very large companies, and they've got their huge private legal team, in-house legal team, a QC and a barrister, and these other people, if they're very, very lucky have a junior barrister and some people working for free and they can't afford all the other things. So what we're hoping for, I guess, is the education and then to be able to have some sort of level playing field in having all the things that support a legal case that the other side have access to. Until those things change, the laws

themselves aren't really going to help this group of people at all, or very marginally, and that's a big problem.

The CHAIR — Thank you very much for that; that was very helpful. Any further queries? Thank you.

Committee Adjourned.