

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

Mr A. Carbines
Ms J. Garrett
Mr C. Newton-Brown

Mr R. Northe
Mrs D. Petrovich

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Ms C. Pearce, Public Advocate,
Dr J. Chesterman, Manager of Policy and Education, and
Ms L. Bedson, Policy and Research Officer, Office of the Public Advocate.

The CHAIR — Thank you very much for coming today. My name is Clem Newton-Brown, I'm the Chair of the Law Reform Committee; Jane Garrett is the Deputy Chair and Russell Northe. And two members who aren't here today are Anthony Carbines and Donna Petrovich. This is a cross-party Committee. The Parliament gives us Terms of Reference to inquire about and once we've done a series of public hearings and receive submissions we write a report which offers recommendations to Parliament, which may or may not be accepted, so that's the process we're in. When you give evidence at a Committee you're protected by Parliamentary privilege but not outside the room.

If you could start just with your names and professional addresses for the purpose of the transcript and then if you could talk us through your submission.

Ms PEARCE — Colleen Pearce, Public Advocate. Level 5, 436 Lonsdale Street.

Dr CHESTERMAN — John Chesterman, Manager of Policy and Education. Same address.

Ms BEDSON — Lois Bedson, Policy and Research Officer. The same address.

Dr CHESTERMAN — I could take you through our introductory comments, if that's okay?

The CHAIR — Yes.

Dr CHESTERMAN — I will begin by thanking you for giving us this opportunity to address members of the Committee. By way of brief introduction, as members know, the Office of the Public Advocate is an independent statutory authority with a number of distinct roles that give us some detailed knowledge about the subject matter of this inquiry. We are the guardian of last resort for people with decision-making incapacity.

In the last financial year we exercised this role in 1,730 cases. We've provided investigations at the behest of VCAT in relation to guardianship and other applications, we did that in over 500 matters in the last financial year. We coordinate the Community Visitors program, which sees over 300 volunteers conduct over 5,000 visits each year to supported accommodation settings and mental health facilities. We coordinate the Independent Third Person program, which in the last financial year saw over 200 volunteers provide assistance to just under 2,000 people in police interviews, and those are interviews of people with apparent cognitive impairments. Those people can be alleged suspects, they can be victims, they can be witnesses.

We have a limited involvement with Victoria's prison population through our Corrections Independent Support Officers, who accompany intellectually disabled prisoners at internal disciplinary hearings. This program is run in all Victorian prisons and involved over 100 hearings in the last financial year. We also provide community education and a telephone advice service, which is heavily utilised, and we receive over 13,000 calls a year through that advice service.

The CHAIR — With the assistance you give individuals, whether it's in prisons or police interviews, do you tend to get contacted by the authorities that are interviewing the individual or is it the individual knowing that they can contact you?

Dr CHESTERMAN — With the Independent Third Person program, it's in their manuals that where they come across a person with an apparent cognitive impairment they call one of our volunteers and they are increasingly aware of our program — which partly explains the rising of our numbers — but it's very much a telephone call.

Ms PEARCE — In relation to the prison disciplinary hearings we're contacted by the prisons themselves, where they have a prisoner who has an intellectual disability, and we provide a similar role to the Independent Third Person program who is sitting on the disciplinary hearings.

Dr CHESTERMAN — The person's role there is to support the person being interviewed and to facilitate the exchange of information, not as a legal representative.

The CHAIR — Presumably people with an intellectual disability may in some cases have difficulty explaining that to people. Could you perhaps give us some information as to your experiences with that and whether there could be some benefit in a system whereby there's a register or an identity card, or something like that, that somebody with a disability could give to someone in authority so it flags that potentially they need to call your office?

Dr CHESTERMAN — There is some debate about just that in terms of privacy. We do know of instances, for instance, of people going to the police and talking about a child of theirs, an adult child, who has an intellectual disability and to flag with the police that they have an intellectual disability. There are some concerns about whether that's going to lead to inappropriate police attention on that person, whether that person might attract more attention than they might otherwise get, so there are some issues there. Why police do this is because they're in danger of having evidence that's produced at an interview thrown out for not following due process, so it's very much in their interests to call our volunteers and they're very supportive of the program.

Ms PEARCE — I think there's two sides to the coin. If you've got somebody with an intellectual disability there's the issue of stigmatisation; if they had a card they may not be prepared to use it.

The CHAIR — Is there such a thing as a card?

Ms PEARCE — No. We have some cards that we do give out to people so that they can hand that over but it's not widely used so I think the education is twofold: one is to get people with an intellectual disability to have the program more widely known but, secondly, it's apparent to us that while it's part of police standing orders for police to call an ITP where there is an apparent cognitive impairment, that isn't always the case and we certainly know police stations where we know that people are going to those police stations and where routinely an ITP isn't called. As John said, increasingly we are seeing ITPs called but they could be called more broadly and 2000 people, we think, is just really in some ways the tip of the iceberg.

Mr NORTHE — Is that why you made the point that you would like to see that legislatively articulated, for that reason?

Dr CHESTERMAN — Yes.

Ms GARRETT — Noting it can be an individual thing between police stations, do you think it's worth, given there's the new regional system for police regions along local council boundaries, is that something that may be of assistance in terms of filtering through? What do you think the problems have been in getting it down?

Ms PEARCE — The ITP program is a very, very small program based largely around volunteers. If you think nearly 2,000 interviews, that's 2,000 people who have got out of their bed generally, they're available 24 hours, seven days a week, and we pay them an almost nominal honorarium, we don't reimburse them for out-of-pocket expenses, shamefully, because we don't have the funding to do that. Part of what we think the work needs to do is to get that information to police, to do more visits to the police stations, bring them up to date, but that's very difficult on the very limited resources the program runs on.

Dr CHESTERMAN — Training police is another key thing. We've been involved in police training and that's really in terms of alerting police to what they might find in the field and increasing their knowledge that they need to involve one of our volunteers where a person does have an apparent cognitive impairment.

Ms PEARCE — At the moment there's some changes into what's happening at the Police Academy and we're not sure that our addressing of the new recruits will in fact continue so there is this whole process that needs to occur with police. Education, certainly as we've been doing at the Police Academy, but also, as our recommendation says, we would like it in legislation rather than just in police standing orders.

Dr CHESTERMAN — Shall I continue?

The CHAIR — Yes.

Dr CHESTERMAN — I wanted in those introductory comments also to provide some background comments concerning this inquiry, as well as a snapshot of the key points we make in our written submission. One of the triggers for the establishment of this inquiry was our public release earlier this year of a report on disability and violence and that report I'm sure members have seen — Violence against People with Cognitive Impairments. That report examined disclosures of violence against 86 of our clients of our Advocate/Guardian program, and the report pointed out the routine systemic failures that can accompany such disclosures.

Typically in those cases there will be no witnesses other than the victim, making extended police involvement unlikely. Even when police attend and take time to collect evidence, their concerns about the ability of the person to testify compellingly in court will often deter the police from taking the matter further. In that report, of the 86 individuals, 32 had experienced sexual violence and yet in only one of those instances of sexual violence was a perpetrator jailed at the time of writing our report.

In our submission, we've included a number of case studies that consider the difficulties faced by people with disabilities when they're involved with the justice system. I won't go through any of those case studies now. Our office does routinely become aware that one of our clients, or a person whom we visit, has been the victim of a crime and while we ensure the police have been notified where this is appropriate, our office is also aware that oftentimes police are unwilling or unable to prosecute in such matters — sometimes for very good reasons.

I want to briefly reflect here on what then happens in those matters where police involvement is relatively minimal. In addition to ensuring police involvement where this is appropriate, any concerns that come to us are also pursued through internal mechanisms. We will often raise matters directly with the relevant department or other body, such as an accommodation provider. Our primary concern is the safety of the person, and that has always guided our individual and systemic advocacy in this field. One of the significant limitations in this approach is that it doesn't carry with it the standard setting function that comes with criminal prosecution or other disciplinary measures.

One option that is available to us when a disclosure of violence is made and when criminal justice approaches do not seem to be adequate is referral to regulatory agencies, such as the Health Services Commissioner, Victorian Ombudsman or the Disability Services Commissioner. Members may recall that one matter we referred to the Ombudsman from our Community Visitors program was the subject of a high profile Ombudsman's report in March this year concerning a resident of a disability accommodation who had been dragged along the floor and who sustained significant injuries. While that was an important report whose repercussions are still playing out, referral to the Ombudsman is clearly not always going to be the best, or the quickest, way to resolve serious concerns that we might have.

I might mention here in parentheses that the Office of the Public Advocate would like to possess clearer and broader investigative powers and responsibilities in relation to the position of people with disabilities who are subject to abuse, exploitation or neglect. We've made this point to the Victorian Law Reform Commission in the context of its ongoing inquiry into Victoria's guardianship laws.

To reiterate, our principal concern in this field has been that criminal justice responses to disclosures of violence have been limited, and that other responses of the service system are capable of improvement. What we've sought in our advocacy on this topic is better support for people with disabilities to bring their claims through the criminal justice system — I can say more about that in a second — and better emergency responses to disclosure or suspicions of violence and better preventative measures. Of course, this Inquiry's Terms of Reference extend beyond the topic of disability and violence, but I wanted to provide those background comments because our advocacy on this topic in part led to the establishment of this Inquiry.

As members know, we've produced a written submission and I'm not going to read through that now, I'll just flag the very major contentions and recommendations. In doing this I'm conscious that many of the concerns we've raised and that exist in this field are complex and interrelated. We would encourage the Committee to consider making, as I'm sure it will, some quite concrete reform recommendations, so we have some suggestions along this line.

Our written submission examines two distinct groups of people with cognitive disabilities in relation to whom the justice system is presently, in our view, less than adequate. Firstly, there are those people who are on the margins and who are at risk of involvement in the justice system because of a combination of factors, which often includes inadequate housing and social support. We make the perhaps obvious point that appropriate housing and social support are the most important preventive measures that our society can take to stop people with disabilities from becoming involved in the justice system in the first place, either as victims or as perpetrators. This on-the-margins group includes people whose disclosures of violence against them, for instance, are not pursued for a range of reasons. Also in this on-the-margins group are people with disabilities who are unable to access the civil justice system, either for financial reasons — an inability to pay legal fees — or because they are unaware that they potentially have recourse through our courts and tribunals for a wrong that has been done to them.

The second group of people are those who are in the system and who find it a harrowing experience, or a more harrowing experience than it needs to be. This group of people in the system includes people who aren't properly supported in court and tribunal processes. This group also includes people who commit minor offences which begin to increase in severity in part because support, including diversionary programs, are not provided. I note here that we are currently completing a study of our Independent Third Person program and how it might be improved to provide better and earlier advocacy and referrals for people at risk.

The key recommendations in this report, which is looking at repeat users of our program, the key recommendations that will come through will be we should appoint, seek funding to support, an Independent Third Person Advocate so this person would work on those cases that are referred to him or her and seek appropriate service provision for that person rather than just having them continually churning through the system.

Ms PEARCE — If I could just interrupt there and say what happens at the moment is that the ITP sees somebody, they're there as the support person assisting them to understand their rights and what the situation is. We may see them as repeat offenders or repeat victims but we do nothing with that information because we just have no capacity, whereas we think that is where you are seeing people who are repeat users of the justice system this is the front end, when they first appear before the police, we think that's an early warning system, we think there's an opportunity to try at that point to get them in touch with services or a case manager or provide some assistance so they don't either become a repeat victim or engage in further criminal activity.

Dr CHESTERMAN — We are talking about one in four people who use our Independent Third Person program.

Ms PEARCE — So that's quite a lot out of 2,000 people and there's nothing we do with that information. We talk a lot about early intervention and we think there's clearly an opportunity there to intervene early to do something with that information.

Mr NORTHE — We heard earlier today, 58 per cent recidivism. Quite alarming, of course.

Ms PEARCE — As John said, for us in the Independent Third Person program it's one in four. A bit lower figures than that but still high.

Dr CHESTERMAN — And we would be very happy to give you a copy of the report. Earlier I mentioned the hope that the Committee will be making some concrete recommendations, which I'm sure it will. I point here to four of our concrete recommendations, one has already been referred to, the right of people with cognitive disabilities to use an Independent Third Person in police interviews should be legislatively articulated. That's quite important. Another one is that routine assessments of cognitive disability be conducted for all people entering the prison system, including juvenile facilities. The third one would be our Recommendation 21, that the Department of Human Services provide improved disability-appropriate emergency accommodation for victims of crime. The fourth one is that the Department of Justice establish a witness support service for people with cognitive disability to enable people to bring their claims through the justice system. We think that's quite important too. It would be quite novel if we had a range of witness programs — at the moment there's the child witness one and there's also a program run through the Office of Public Prosecutions to assist vulnerable people to bring their claims but that's more about getting prosecutions than it is about supporting someone through the process. So we favour one that perhaps is modelled a bit on the child witness service but that obviously is set up for people with cognitive disabilities.

There are a range of other things that we would like to see. Obviously if we had better disability assessments of our prison population, then a flow-on from that is appropriate service provision to prisoners to stop recidivism. We would like to see more risk averse residential decisions made when people with cognitive disabilities or mental illness are placed together in supported accommodation — that often can be a recipe for disaster. We are concerned that inappropriate co-residency of particular people can lead easily to violence, which introduces new perpetrators and new victims into the system. We'd like to see the question of how compatible are the residents to be given greater focus in the making of residential accommodation decisions. Relatedly, we would ask the Committee to consider the efficacy of Intervention Orders, especially when used in relation to cohabitants.

Finally, by way of suggestion, we ask the Committee to give some thought to this: should the government be looking to introduce a failure to protect crime where a person with a profound disability who lives in supported accommodation is harmed, and where obvious warning signals or dangers have been ignored by someone in a position of responsibility? We just suggest that for your consideration. They're the key matters we would like to raise and we're more than happy to take questions or comments.

The CHAIR — Just on that last point there, it's civil claims made for those sort of circumstances that have been successful?

Dr CHESTERMAN — Not that I know of. Technically, of course, that could be access to information with access to funds to support that sort of case. I could imagine someone taking a pro bono case but I'm not aware of that happening.

Ms GARRETT — Through you, Chair. Thank you, the submission has been very, very helpful and I appreciate the time it has taken. I just wanted to ask a couple more questions around the responding to cognitive disabilities, Section 4.8, about limited understanding of cognitive disability and some of its behaviour manifestations may impact on police interviews, and I'm assuming on

witness evidence given in courts; is that your understanding? How do these issues get addressed if you actually get into the court system?

Dr CHESTERMAN — Our involvement, as Colleen said, particularly with the Independent Third Person program, will rarely extend into court so we're talking a bit outside our program area of expertise but my understanding is the situation where people with profound cognitive impairments give evidence in court are so few and far between it's hard to paint a picture of that.

Ms PEARCE — We do document one case in here where we did assist a person with a cognitive impairment and that resulted in the father of the individual being charged with incest and rape but in that case there was DNA evidence, and really if you haven't got something like that then it is very difficult to get past the police because you find that they're considered to be unreliable, partly because of their difficulty in expressing themselves — they may be non-verbal, or they're unable to give consistently what's considered reliable information, so there's a whole raft of reasons why it doesn't quite get to court. I'm not being necessarily critical of the police in that case but what you find is it's going to be very, very difficult to get a prosecution where the person is a victim. It's different, I think, if we're talking about a criminal matter but certainly for a victim it's very, very difficult.

Ms GARRETT — It certainly was a theme of earlier evidence as well from a few people who spoke about the concern for people with cognitive impairment and their carers and families and friends about if they tried to start the justice process, that their view is not to be believed, that there's all of those impediments, so it seems completely critical we're addressing this issue.

Dr CHESTERMAN — Our support service is where that comes in and where the focus isn't necessarily just on prosecution but about supporting the person through that so the families aren't subjected to that.

Ms PEARCE — And that's why we think there's an opportunity for early intervention and it's really critical, we don't want to be intervening right down the end particularly where you're talking about people who are repeat offenders or repeat victims.

Ms GARRETT — It really is important that this issue is absolutely clear, that failure to make eye contact or defensiveness or rudeness or however a cognitive impairment may manifest does not mean the person isn't truthful.

Ms PEARCE — We made a DVD for police on the Independent Third Person program, we circulated that to every police station throughout the state. As you know, they probably get large volumes of material that might just go in the drawer but if you're interested we could give you a copy of that; we do go through a raft of issues there. So there's certainly been some attempts to try and educate the police, both at the Police Academy and through the DVD, but it's very hard to break through. As you know, police have a lot of issues on their plate on any given day, it's just a question of saying: what's the priority? Particularly when this group, we know, is an increasing cohort in the police system.

Ms BEDSON — One thing we did mention in the report is the culture of failure in the police force, it's been identified by other research, and our concern there is because it's so difficult to get cases through courts the police kind of see a case and think: oh, well, it's probably not going to go anywhere, maybe we'll just not try as hard. They're maybe not even intentionally thinking that. But we're concerned that the investigation be as thorough as possible in the early stages because that's when key evidence can be collected that could then proceed to more successful prosecutions.

Ms GARRETT — It's the chicken and the egg too because the police need to have confidence that the court system will be approaching these issues in a similar way, for that very reason, so that prosecutions they bring have a chance to succeed.

Dr CHESTERMAN — But realistically many of these cases are never going to get to court, for a whole raft of reasons, even when the police are very sympathetic and are aware that something has occurred, that it's just not going to get to court so what does justice look like for them if it's not going to be through the court system? We certainly don't want a lesser burden of proof or evidence — we can't have something like that — but then, for all the reasons we've outlined, if it's not going to get to the court where is the justice for these individuals, what does it look like and what do we need to be putting in early on to support them?

Mr NORTHE — Can I just ask a question about Recommendation 11, about the Assessment and Referral Court, just to extrapolate on that a little bit?

Dr CHESTERMAN — I think in a general sense in that last comment we're very supportive of the development that is the Assessment and Referral Court. I'm aware the numbers of cases is quite —

Mr NORTHE — Maybe just for the Committee's sake describe how it works, just an overview quickly.

Dr CHESTERMAN — Sure. We've got a section on this that sets up what the court is. Page 31, 4.28. A person can have their matter heard by the Assessment and Referral Court, which is based on the therapeutic jurisprudence model where the person is provided with services where appropriate so it's not just a matter of the matter being heard against them and some punishment being inflicted if they're found guilty but matters being adjourned, for instance, while the person gets access to services, then being heard so the person has had an opportunity to get appropriate services and that may influence the Magistrate in determining an outcome for that matter but it's very much a therapeutic jurisprudence model. The early indications are that it's been very successful. It is costly, though. I think we are still waiting for a full evaluation.

Mr NORTHE — Have you guys had much involvement in it yourself?

Dr CHESTERMAN — Some tangential involvement from some of our people.

Ms PEARCE — People under guardianship, so on occasion, yes.

Ms BEDSON — I think there's only 300 cases allowed per year in the pilot period, and we're still in the pilot period, it's a three year pilot period.

Mr NORTHE — Just a comment really. Great submissions and really good recommendations for the Committee to consider. Already there are some trends coming through similar in nature. Thank you very much.

The CHAIR — You mentioned, Colleen, that you had a card?

Ms PEARCE — Yes.

The CHAIR — Would you be able to make available a copy?

Ms PEARCE — Yes. Would you like some of the brochures, some of the information on the Independent Third Person program? The DVD is only 10 minutes but it's what is shown to police, so we could put together a package of material.

The CHAIR — Yes, thank you

Dr CHESTERMAN — I can also hand to you some generalised statistics from our Independent Third Person program for the last five years, which details the number of matters seen by our volunteers. Perhaps I might get that sent to you.

Ms PEARCE — Just for the record it might be worth reading out.

Dr CHESTERMAN — I'll just read out some statistics, probably an easier way to do it. For the five years to the end of June this year, Independent Third Persons attended interviews of seven victims of abduction and kidnap; 370 cases where a person was a victim of assault; 421 where a person was a victim of rape. In total, 1,319 interviews of victims. The total number of interviews — about 80 per cent of our interviews are of alleged offenders — the total number of interviews over five years is 7,755 so it's a significant number of people.

Ms PEARCE — I just want to emphasise that they were done by volunteers, 24 hours, seven days a week. Some of them travel long distances, particularly those that are in rural areas. Where we have an alleged rape or sexual assault we try to get a female volunteer so they may travel from one country town to another and very rarely do we provide any reimbursement and, as I say, that's very shameful — the program just simply doesn't have the resources to do that — so people are bearing the out-of-pocket expenses for that. They get an honorarium of — at the maximum it's \$150 a year. That's a lot of good folk out there. I keep emphasising there's a lot of information we know about the front end of the justice system and the potential of that early warning system is very great.

The CHAIR — Thank you very much.

Witnesses withdrew.