

# 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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#### Witnesses

Ms P. Malowney, Acting Chair,  
Ms L. A. Basser,  
Ms J. Saxton-Barney, Victorian Disability Advisory Council;  
Ms A. Stringer, Senior Policy Officer, Office for Disability.

#### AUSLAN Interpreters

Ms B. Bawden.  
Mr R. Gook.

**The CHAIR** — Thanks everybody for coming today and for your submission to the Inquiry. My name is Clem Newton-Brown, I'm the Law Reform Committee Chairman and with me today is Anthony Carbines and Russell Northe. Jane Garrett, who is the Deputy Chair, will be here a bit later and Donna Petrovich is unable to attend today.

This is a Committee which the Parliament gives us inquiries to investigate and we call for submissions from the community and we'll end up doing some recommendations to the Parliament about potential changes that would be desirable, which may or may not be accepted, and the evidence you give us today will assist us in that process. You are protected by Parliamentary privilege in this room but outside the room you're not so just be aware of that whenever you're making comments outside the room. Thank you for your submission. Would you like to talk us through the submission.

**Ms MALOWNEY** — Certainly. I would like to introduce ourselves for a start. I'm Tricia Malowney, this is Jody Saxton-Barney and Lee Ann Basser, we are members of the Victorian Disability Advisory Council, and Annie Stringer, who is from the Office for Disability, and provides support.

**The CHAIR** — For the transcript could you give us the address of the organisation.

**Ms MALOWNEY** — 1 Spring Street, Melbourne. The Victorian Disability Advisory Council would like to thank you for providing us with the opportunity to speak to you today. We have provided a submission and just to let you know that we reflect the diversity of disability in Victoria, including cultural and Indigenous background, and all of the members of VDAC have a personal experience of disability, whether as a person with a disability or as the parent of a person with a disability.

**The CHAIR** — Can I get you to clarify cultural and Indigenous diversity?

**Ms MALOWNEY** — People who have a disability who may be from a multicultural background or from an Indigenous community so we reflect the diversity within the Victorian community. We were established under the Disability Act 2006, we're an independent advisory body to the Minister for Community Services and we provide advice in respect of the whole of government body and strategic planning; barriers to full inclusion for people with a disability and matters relating to disability referred to VDAC by the Minister.

We have other functions which include to communicate with people with a disability, government and the community; raise community awareness of the rights of persons with a disability and the role of government, the business sector and the community and monitor the implementation of strategies for promoting inclusion and participation in the community and the removal of barriers.

Our submission has alignment to key conventions and strategies, and it's in line with Australia's commitment to human rights as outlined in the United Nations Convention on the Rights of Persons with Disabilities and with the Victorian Charter of Human Rights and Responsibilities. It's also in line with the National Disability Strategy 2011 which states:

*"Effective access to justice for people with disability on an equal basis with others requires appropriate strategies, including aids and equipment, to facilitate their effective participation in all legal proceedings. Greater awareness is needed by the judiciary, legal professionals and court staff of disability issues."*

In addition, under Section 5 under the principles of the Disability Act 2005, persons with a disability have the same rights and responsibilities as other members of the community and should be empowered to exercise those rights and responsibilities. I suppose that's the basis under which our submission has been made. I'm going to hand it over to Jody now.

**Ms SAXTON-BARNEY** — Good afternoon. My name is Jody Saxton-Barney and my role on VDAC is to represent the Aboriginal deaf community throughout Victoria and the advice that I also provide to the Minister through that representation to ensure that any decisions that are made for that community is aligned with the expectations from that community.

I want to talk a little bit about the submission and the background regarding some of the barriers that are encountered by the community.

**The CHAIR** — Could I just clarify, you are representing only the Aboriginal deaf community, not the deaf community as a whole?

**Ms SAXTON-BARNEY** — Well, I'm an Aboriginal deaf woman myself so I'm here talking about the barriers that are encountered by Aboriginal deaf people, yes. However, those barriers that are experienced by those communities are also experienced Australia-wide as well so it translates to all deaf people, not only to Aboriginal deaf people. Let me just say this: I guess if we could rectify the issues that the deaf Aboriginal people experience, you would also rectify the issues that the deaf community experience throughout Australia.

There's a variety of issues that we found that we've included in the submission and we consider it important for the Parliament to be aware of the diversity of disabilities with people. Some of them might be age and gender, lesbian or gay, to name a few. We're also looking at race and ethnicity and the equality within those minority groups to ensure that we are able to provide access to the criminal justice system.

Our view is to focus on both the criminal and civil areas to ensure that the systems that are currently in place are monitored and reviewed to ensure that the barriers are removed. It's also important that we make people aware of the barriers that are experienced by these people and to ensure that the policies and procedures and the systems that are set up in place are catered to ensure access for all people.

If people in the community don't know what their rights are, we need to ensure that there is a preventative and also a post procedure in place to ensure that they are aware of their legal rights and also what the outcomes that are decided throughout the court system mean. People who have intellectual disability in the community, there are various challenges that these people encounter. We need to identify the challenges that these people experience and also do some forward planning to ensure that the systems that we then create are culturally sensitive for these communities and far better accessible.

We also need to examine the stereotypes that the courts often label people who are part of these minority groups, and we need to ensure that the courts recognise that there is a due process that should be applied to all people. Also the capacity of the person who has the intellectual disability, we need to ensure that the support that's provided to them is appropriate and not assumed, but we also need to concentrate on the disadvantaged groups. We also need to be able to show that there are individual groups with cultural backgrounds, linguistic backgrounds and diversities — Indigenous, deaf and so forth — to ensure that any person who has a cognitive impairment or an intellectual disability has access to all communication.

That's critically important for those people who have cognitive impairments or intellectual disabilities, that the communication historically that these people have access to is very limited, especially people who are living in remote and rural communities. In Victoria it is seen as rural rather than remote and there are indications for that. We need to ensure that there is access to the people who are living in rural and remote areas that they are able to be provided access to all of the things that they are currently experiencing a lack of. It would be advantageous for you to examine that process and then to implement some improvements to ensure that the access that they get is granted.

People who have cognitive impairments who are living in the community, we need to focus holistically on the person rather than the label that might be applied to that person. We need to understand that they have an age, that there is a gender, they have a socioeconomic background, they also have a cultural need — there needs to be some cultural sensitivity toward that person — they also have an identity, they have education levels, they have a geographic identity, they may have an isolated disability or they may have multiple disabilities. All of these factors need to be considered to ensure that when we are looking at the access for that person in court they aren't just seen as a person who has a cognitive impairment but rather understand the person holistically. Over to Lee Ann.

**Ms BASSER** — Thank you. I am Lee Ann Basser, I sit on VDAC as a parent of a young woman with a profound disability, and I'm also an Associate Professor in the Law School at Latrobe University, with an interest and expertise in disability law and policy. I want to address the Committee directly in relation to access to the courts and the justice system. We've made a number of points in our submission, one of which is about the importance of access to information, which my two colleagues have already made that point to some extent, but one of the things that we want to bring to this Committee is the fact that a lot of information about court processes, civil or criminal, are not available in multiple formats that are accessible to people with intellectual disability, or to people with other disabilities. Where there is some accessible information, for example at VCAT for applications under the Disability Act, there is not accessible information in other areas of VCAT's operation.

We also want to bring to your attention and make the point that Legal Aid and legal advice services funded by government to assist people with disabilities to access the justice system are very limited and the resources that are provided for them are quite under-funded so people don't have ready access to legal advice. There are a number of measures that have been taken in the last few years in Victoria to improve access to the Court system for people with cognitive impairments. There are amendments to the Evidence Act and the Civil Procedure Act, amongst others, and there's a recognition within the Evidence Act now, which is excellent, that people with cognitive impairments do have legal capacity but those special measures are ad hoc, they apply to limited areas of court jurisdiction. For example, the provisions to video tape evidence for victims with cognitive impairment, there are provisions that say that evidence of victims with cognitive impairment should be video recorded and that they cannot be cross-examined on that evidence because of the trauma of cross-examination, but that's limited to sexual offences. Witnesses with cognitive impairments who give evidence in such cases may have their evidence recorded, but they may not. In the case of witnesses, it's not just limited to sexual offences; it also incorporates assault. But we would submit to the Committee that these sort of measures need to be broadened in the sense that they should apply in civil and criminal matters to enhance the access of people with disabilities to the court system and within the criminal justice system they should apply more broadly than they currently do.

We would also submit to the Committee that — —

**The CHAIR** — Can I just clarify, specifically you're speaking about cross-examination?

**Ms BASSER** — No, there are a range of measures in the Criminal Procedure Act, it's not just about cross-examination; in relation to sexual offences it's about evidence in chief, currently it has to be recorded if the victims have a cognitive impairment. Prerecorded evidence can be used where the witnesses have a cognitive impairment in both sexual and violent offences. Cross-examination is not permitted where the victim has a cognitive impairment and has given their evidence prerecorded. Our submission applies more generally to the issue of witnesses with intellectual and other cognitive disabilities, communication disabilities, being able to present evidence within the court system not just in those serious criminal justice cases.

**The CHAIR** — So the differences which are current for sexual offences, are you suggesting that they should be broadened to all — —

**Ms BASSER** — The suggestion is not necessarily absolutely identical across all judicial matters, but that the adaptations that have been made be introduced in some format, that adaptations be made to the way in which evidence is presented in court to accommodate and facilitate people with intellectual disabilities with communication difficulties and with cognitive impairments and sensory impairments being able to access the justice system and give evidence.

**The CHAIR** — Just to clarify, are you saying that there needs to be a regime to cover all dealings in court or should it be a regime for specific types of offences?

**Ms BASSER** — I would submit that the ability of a victim to give evidence in court, where the victim has a cognitive impairment, including intellectual disability, to be prerecorded should be extended to other criminal offences. But we're also submitting that in the civil jurisdiction, adaptations in the way people give evidence, there should be provisions allowing for people to give evidence with support people in closed court, if necessary, using communication devices, apart from giving oral evidence.

**The CHAIR** — What I'm getting at is if we're to make suggestions and recommendations should those adaptations be just a blanket — this will apply to all — or are you suggesting that we should have different adaptations for different types of offences or different types of civil matters?

**Ms BASSER** — I think you need provisions which are broad enough to allow evidence in a variety of different formats; it wouldn't be a one-size-fits-all.

**Ms MALOWNEY** — I was just going to say that we also need to make sure that we take into account the needs of individual victims or witnesses, that with people with disabilities it's not one-size-fits-all but I think if we had a range of opportunities that you wouldn't say: this is what happens in this case. We need to have the wider range of opportunities available to enable people to participate in the justice system.

**The CHAIR** — So would it be on a case by case basis?

**Ms BASSER** — I think you would have to draft the legislation in a way that there were options. You could have a list of the kinds of adaptations that are made to enable a person to give evidence — we have that now in interpreters for sign language for people who are hearing impaired, you could have a list and then some kind of generic statement at the end that allowed the legislation to be flexible enough to deal with new mechanisms. The way technology changes, some people who don't speak would use a communication board which would just have a series of words that they can move around on the board or some symbols. Other people might be using very complex little talking devices, like a Lightwriter, where they can key in words and it has a voice. You would need, I think, to list off a variety of things and then have a generic term rather than having a single method. I do think it would be different, that there could be differences between criminal and civil cases. Victoria in many ways is quite advanced in the amendments that have been made to the Evidence Act and to the Criminal Procedure Act in the last number of years, but there is more room for improvement.

**The CHAIR** — There was an article in the paper last week about evidence being given in court using a board.

**Ms BASSER** — I didn't see it, there could have been.

**Ms MALOWNEY** — They often come up.

**Ms BASSER** — There was two points, one was this one that we've made about widening out the offences in criminal matters where adaptations can be made and extending adaptations more clearly to civil matters. The other one relates to number (c) in your reference, because your reference is, of course, specific to the interaction with people with intellectual disability but (c) asks for a

consideration as to whether the findings of the inquiry have broader application to people with disabilities, and we would very strongly — as you will have gathered already — want to draw to your attention that consideration should be given more broadly because intellectual disability is just one label for disability where access to justice is impinged upon, but sensory disabilities, people who have communication disabilities, people with other cognitive impairments, for all of these people there are issues around access to justice.

The last point I will make before handing back to Jody relates to alternate dispute resolution, which we have mentioned in our submission, and I think it's very important to recognise that access to justice in our system now isn't really just about access to the courts or access to the criminal justice system. In every area of the law now alternate dispute resolution has taken a very important place in resolving disputes and it's really important that resources are put into supporting people with intellectual disabilities, communication disabilities, cognitive impairments, sensory disabilities, to actively and fully participate in alternate dispute resolution and I think that's not something that we've been really talking about up until now but wanted to draw to your attention.

**Ms SAXTON-BARNEY** — Thanks, Lee Ann. In relation to access to communication and the needs of the variety of people within the community, Lee Ann's been talking about one modification as an example, such as AUSLAN interpreters in the court system, but regrettably AUSLAN interpreters being able to understand a lot of the information and then relay it to a person who has a cognitive impairment or an intellectual disability, there's challenges associated with that pathway so in addition to an AUSLAN interpreter who is able to interpret the information, they also need a relay interpreter and they work in conjunction with the AUSLAN interpreter. The relay interpreter is there as a cultural mediator for the person who might have a disability, such as a cognitive impairment and maybe another cultural background, and so what the relay interpreter would do is then transfer the information they have received from the AUSLAN interpreter and then synthesise that in a way so it is understood by the client, and that means that that person then has the clearest access to communication that's being imparted to them from a member of the criminal justice service.

In court, for example, or the process that is within, AUSLAN interpreters are booked in advance and are booked on a regular basis. What often happens is that we have the same interpreter working with the same client to ensure that there are no barriers that are encountered that might occur if there was a different interpreter used the following day, for example, who wouldn't be familiar with the content. This is critical. The process in a court system, for example, can be quite intimidating and overwhelming for a person who is able to understand all the information that's being given to them by an AUSLAN interpreter, so in many ways I guess a relay interpreter can then ensure that any of those added burdens upon them to understand the information is eliminated and then by virtue of having a relay interpreter they can make sure the person understands and can respond accurately.

We also need to ensure that their cultural identity is supported and it might be Indigenous, it could be a person who is an immigrant, or it could be a religious background, and it's important that this is also supported throughout the process in addition to the language access that we've also been talking about.

The area that I work in specifically is Indigenous people who have disabilities in a court system and my experience in a Koori court has been considerable; there's various examples in those courts where there is quite limited information available to the person, the client, who is in that situation. What I found often is that these people are very much restricted in the information that should be made available to them.

Many people who are indigenous and Torres Strait Islander individuals who might have a cognitive impairment, they may be deaf, they have a hearing loss, may have a speech impairment, whatever the case might be, there is very limited understanding by these people regarding their rights and as a consequence are less likely to ask for advice because they may feel ashamed to ask for information. Rather, they may have someone who is able to represent them from the community to ensure that they

are more comfortable and they can represent themselves best. In Koori courts it's a wonderful idea in principle but, unfortunately, I have seen too many people who are Indigenous with disabilities suffer. The Koori court staff are unfamiliar, or unaware, of the needs of people, particularly people who might have a disability, and therefore their due process is not recognised. People might not understand some of the terminology that might be used or for witnesses who might be — —

**The CHAIR** — Jody, are you referring to intellectual disability only in that comment or are you referring to other forms of cultural impediments or other impediments such as deafness?

**Ms SAXTON-BARNEY** — For this submission it's focussing only on people who have cognitive impairment; however, I guess more broadly the limitations also apply to people who have other disabilities too. As generally is seen, if there is a person or an organisation that might be providing a service for the court. I'm seeing that there is limited recognition or understanding about the disability needs of people who are in those communities.

For example, I live in Shepparton, I'm a deaf woman that lives in Shepparton. If I go to the Magistrates' Court or to a Koori court, for example, I as a person that might advocate or represent people see too often the barriers that are experienced by many people. The court process needs to ensure that the staff who are working in the room understand what the needs of a client, who may be providing evidence for example, who may be a witness or whatever role they may have in that setting. Unfortunately, it's not happening.

**The CHAIR** — If I could just make a comment. This is a very big topic, a very big inquiry that we're investigating, and we had a number of discussions before we commenced the inquiry about the breadth of the inquiry. While certainly there's a very broad range of problems and there are problems in other areas but this inquiry will only focus on the intellectual disability.

**Ms SAXTON-BARNEY** — Yes, I understand.

**The CHAIR** — Thank you for the extra information that you've given us today but that wouldn't form part of our recommendations because we have had to focus just on this particular inquiry reference that we've been given.

**Ms MALOWNEY** — Can I just talk a little bit about the issues that are brought to my attention. I call myself a systemic advocate, so I'm trying to change things from a higher level. I'm not in paid work so what I do is I travel around Victoria talking to people with disabilities. The people who come to me will tell me their stories on trains, they will tell me their stories in coffee shops, they will tell me their stories when I meet them at various events that I go to.

Last week I was in Gippsland and I was speaking about family violence and women with disabilities and the lack of access to services, and the people who come to me are mainly women with cognitive impairments. A woman that I spoke to last week told me that she'd had her three children removed from her care because her partner has been found to be a sex offender. She had no idea and as soon as she found out she left. She still had her children taken from her care. She's got two of the children back but she's still struggling to get the third one back. What I always do is ask what supports have you got and help her to find the supports.

The other problem I have is that when a woman has a disability, even a cognitive disability, they're finding it very hard to get into refuges as we have very few accessible refuges around. We actually had a woman who was refused access to a refuge because she was deaf. It's not about the deafness, it's about access to refuges. So we've actually got women with cognitive impairments who are being forced to go back to the perpetrator because we don't have the supports in place to assist them.

Last week I was working up in Swan Hill — sorry, the week before I was in Gippsland, last week I was in Swan Hill — and a woman there came to me and spoke to me about the problems in her community with a woman who has a cognitive impairment who was allegedly raped in her community by a member of the community who is still there. It was taken to police and she wasn't believed because of the assumptions made about people with cognitive impairments who make up issues; they just made it up. The police are happy to support this woman but the other people in the town haven't. I hear these stories time and time again. I hear stories about women who have been sexually assaulted by the carer. In our society we paint carers as saints and people with disabilities as burdens on society, and so often they have no way of escaping the violence that they're undergoing because, a, we don't believe them and, b, there's nowhere that we can support them.

We have some really great services that are doing that, I've been working with police around family violence, we've got great legislation now in place which recognises that the perpetrator can be the carer in some instances, but we really do need to ensure that people with cognitive disabilities are supported to have the stories heard, that are supported to have their stories believed. So these are the stories that I hear all the time going around the state.

**Ms BASSER** — Chair, if I might just respond. I perfectly understand that this is a very broad inquiry, but I would make the point that people with intellectual disability are also people with sensory impairments, are also people with communication difficulties, are also people with mental illness. One of the very significant issues for people with intellectual disability in the justice system has been the limited recognition that's been given to dual and multiple factors in their disabilities. Many of the submissions that we've made to you, although we haven't limited our comments to intellectual disability, we've wanted to use (c) and broaden the inquiry.

**Ms GARRETT** — I just had a question following on from your statements before. What do you think the most harmful and prevalent stereotype issues — I note you mentioned not to be believed but what do you think people are butting up against?

**Ms MALOWNEY** — Assumptions that women with disabilities in particular — because my particular area of expertise is on women with disabilities — the assumption is that women with disabilities are unbelievable, that they make stories up, that they're unloved and unlovable, so that they're outside of the rest of society. I think too one of the biggest assumptions we have is that we're not able to know what happens to us, and I think this is particularly true for women with cognitive impairments and particularly around the area of child services, child protection, that it's assumed that a woman with a cognitive impairment will be a worse parent than other women, so it's not based on evidence necessarily, it's based on assumptions around what they need, so with appropriate support women with disabilities may be able to successfully raise children.

I'll just give you an example of that. A friend of mine was assumed to have a cognitive impairment because she has physical disabilities. I retired from Victoria Police 10 years ago, where I was in a middle management position, and I had worked with the Sergeant in Police for some time and had a really good relationship with her. It was only after I left work and started working in the disability field that I met this woman at a function and I met her daughter, and her daughter was that Sergeant. That woman had to fight to keep her children. She had successfully raised two children to adulthood despite the assumptions made about her capacity and her abilities. I always come back to that. If we have appropriate supports in place, women with disabilities — and men with disabilities — can be the successful parents everybody else can be. Women without disabilities will say: yes, we need to protect the children. But are we protecting the children or are we just lumping women with disabilities into this category of unloved, unlovable, incapable, unbelievable and not reliable?

**Ms SAXTON-BARNEY** — Can I just add quickly, in relation to Indigenous people who have a cognitive impairment — this is really just an extension of what Patricia was just saying then — there is a serious impact on the systematic oppression of those people, and it's happening in the communities

too often. Indigenous people who have cognitive impairment will take the blame for themselves rather than share the story with another person so that they can be represented. What happens is the system, because of the limitations that are in place, are really oppressing these people, Indigenous people who have a cognitive impairment, and that applies to really all tiers within the system and as a consequence of that there are no effective outcomes.

**The CHAIR** — We've got a couple of minutes left. Any other questions?

**Mr NORTHE** — Maybe Patricia or whoever might want to answer the question, but I notice in your submission about recidivism, somewhere around 58 per cent of people who might have an intellectual disability or cognitive impairment, do you relate that at all to the lack of support initially in the judicial system and maybe you can talk a little bit more on that?

**Ms MALOWNEY** — I'm not even sure whether it's supported in the judicial system, I think it's actually a lack of community support, so supporting people to have healthy living training, for example. But we have made some suggestions in here about the type of supports that have worked for people with cognitive impairments to take them out of recidivism, but I really do think that often we don't provide information to people about their rights and responsibilities in formats that people with cognitive impairments can understand.

Another key issue is the lack of data collection and data analysis. In Australia, we have a very narrow view of data collection so there are no really good research studies around what affects the lives of people with disabilities generally, but I think it would be really, really helpful if we did some solid research about recidivism and what does work, what do people need to enable them to get out of the system?

**Mr NORTHE** — So do you have a view about who might collect that data and I guess a terms of reference around the data that you require?

**Ms MALOWNEY** — We do some really solid research around recidivism anyway. I think one of the problems is, and you might agree with me here, Lee Ann, for disability it's often overlooked. I'll just give you an example of this. There was major research funded by the Federal Government around family violence. An organisation of which I'm a Chair, which is Women With Disabilities Victoria, had to find separate funding to include women with disabilities within that research. This is what happens. It's like people with disabilities are a separate section of the community, instead of including us in at the start. I can give you an example of the census data: I wasn't able to be counted in the Australian Census as a person with a disability because I don't have a carer, and I don't need help to talk, or I don't need help to eat, so we're excluded. With the Common Risk Assessment Framework for Family Violence we now collect the data on that but that took six years of solid work by Women With Disabilities Victoria and the family violence sector to get the legislation changed, to get the Common Risk Assessment Framework changed so that we could be counted, but that's the only place we're counted. You would agree, wouldn't you, Lee Ann?

**Ms BASSER** — Very few places where the data is disaggregated for disabilities.

**Ms MALOWNEY** — So we really need to come back to basics and start again with when you're doing any studies, when you're doing any research, factor it in at the very start. And place a particular emphasis on the needs of people with cognitive impairments and why are they connected with the community? One quick statement about sterilisation. Women with disabilities are sterilised as a preventative measure. Men with disabilities are sterilised for a punitive, as a responsive behaviour. So there's a really interesting question to be raised there but there has been very little research done outside Women with Disabilities Australia and Women with Disabilities Victoria as to why that happens. Often we're told — and this is interesting too — that women are sterilised to prevent them

from getting pregnant, and often the only way we find out about the sexual abuse is when they get pregnant because sometimes the perpetrator is the carer.

**The CHAIR** — Thank you very much for coming today; that was very helpful.

**Ms MALOWNEY** — And thank you for giving us the opportunity.

**Witnesses withdrew.**