

# 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— 7 November 2011

#### Members

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

Mr R. Northe  
Mrs D. Petrovich

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#### Witness

Ms K. Hilton, Director of Civil Justice Access and Equity, Victoria Legal Aid;  
Ms C. O’Shea, Senior Criminal Lawyer, Criminal Law Directorate, Victoria Legal Aid.

**The CHAIR** — Welcome. My name is Clem Newton-Brown, I'm the Chair of the Law Reform Committee, and Jane Garrett is the Deputy. Also on the Committee is Russell Northe and Donna Petrovich, and Anthony Carbines is also on the Committee but not available today. We get given terms of reference from Parliament to investigate, this Inquiry being one of them, and we get evidence from people and then prepare a report at the end and make recommendations to Parliament so your evidence will assist us in coming up with views on things that need to be changed or improved. Thank you very much for putting in your submission and for coming in today.

You are protected by parliamentary privilege in this room but not outside the room. We will record everything so if you could start with your name and professional address and who you represent and then launch into perhaps detailing some of the things you want to highlight in your submission.

**Ms HILTON** — My name is Kristen Hilton, I'm the Director of Civil Justice Access and Equity at Victoria Legal Aid, and I'm joined today by my colleague, Carrie O'Shea, who is a senior criminal lawyer within our Criminal Law Directorate. We would like to — —

**The CHAIR** — And your address?

**Ms HILTON** — Sorry. Victoria Legal Aid, which is 350 Queen Street, Melbourne. We would like to thank the Committee for giving us the opportunity to make a public comment about this issue. We thought we might, just by way of background, give you a very brief overview of our position. Last year Victoria Legal Aid assisted more than 85,000 clients, and our most recent stats show more than one in five of those people had some form of a disability, intellectual disability or mental health issue. We think that's probably an under reporting because that's obviously people who identify with those sorts of conditions. We assist these people in a range of areas — criminal law, family law and civil and administrative law and our practical experience really mirrors the research that you've probably heard about or seen in a number of submissions — that people with any form of cognitive impairment are more likely to experience a legal event than those who don't. We also know that their problems are multilayered, interconnected and are compounded by a range of disadvantages, whether they're financial or social disadvantages and in terms of health and housing as well. We see that many of our clients with intellectual disabilities who don't get the right assistance and the appropriate supports will become repeat offenders. We also see that people are interacting with the justice system at the very pointy end as opposed to perhaps accessing some of the more early intervention strategies that are available but aren't as easily accessed by people with an intellectual disability.

Our submission really responds to what we see as being some of the current challenges, both on an individual and systemic level, and it looks at really what happens at the front end of the system, so there I'm talking about early intervention, and also at the back end of the system where we see people who are involved in court proceedings and find it difficult to navigate their way through the justice system.

In recent years we've seen some really excellent initiatives, in part the CIS Program, the establishment of the Neighbourhood Justice Court and the ARC List, which Carrie and her colleagues have been very intimately involved with. But our experience is that these programs still really represent the exception to the rule, and given that the

majority of people who move through the court system are affected by some form of disability or mental illness. It's our view that mainstream court procedures should really be taking up some of these principles of therapeutic jurisprudence that you find are at the bottom of the ARC List or inform the way in which the CIS Program operates. So that's really just a brief overview of some of the things in our submission and then there are obviously a number of recommendations that we would be happy to talk to you about.

**Ms GARRETT** — May I ask a question through you, Chair? In your experience and expertise, are people suffering intellectual impairment, cognitive impairment identified in most of the occasions and, if they are, are steps kicked in to deal with them, or are there steps kicked in to assess initially? How does it work practically from when they come to you through the system?

**Ms HILTON** — It's really difficult to get granulated stats on that kind of thing. What I can say is that I think we're getting better at being able to diagnose and assess people with cognitive impairments. Having said that, it's certainly not always the case that people are getting the right sort of assessment at the earliest stage possible. But maybe I can also get Carrie to speak to her practical experience because she's in court day in, day out and seeing this sort of work.

**Ms O'SHEA** — I practise solely in criminal law and a lot of people with intellectual disabilities that may have been picked up in childhood, so upon careful interviewing of clients and asking questions like what school did they go to and trying to find out if they went to a special school, that can be identified. Sometimes clients don't want to identify as being intellectually disabled so you need to probe and it can be difficult.

I had a client who came to me in his early 20s who had been through the court system and had multiple lengthy terms of imprisonment and it was never picked up that he had an intellectual disability. Through us getting a neuropsychological assessment it was identified and he was for the first time linked in with the services that he required, so there are cases where people have slipped through the gaps.

The other issue that's emerging as being a really significant one is the issue of people with acquired brain injuries, particularly as a result of long-term drug abuse because for people who are in the criminal system obviously there's a very high incidence of drug use and for those clients getting that identification, getting them to commit to getting an assessment — often it might happen in prison because that's the first time, they may have been transient and may not have been able to get to an assessment previously. Often that's the first time it's identified but then to try and find appropriate services and supports for those people can be difficult.

**Ms GARRETT** — Through you, Chair. In that case of that young man, you referred him to a neuropsychologist?

**Ms O'SHEA** — Yes.

**Ms GARRETT** — Who is funding that report?

**Ms O'SHEA** — In that case it was Victoria Legal Aid.

**Ms GARRETT** — So that would fall on you to fund those reports?

**Ms O'SHEA** — Yes. And we would also have to justify it, so I would have to say in my expert knowledge as a lawyer with no psych background, but obviously we do develop those skills to be able to assess when we think somebody has those needs and then justify the report and then obtain a report. I think lawyers generally are really getting very good at picking up when somebody may need that type of assessment. If that person had been eligible for the Court Integrated Services Program, or CISP, they could have done that screening and since that person had been before the court. Since CISP was introduced now somebody who does the ABI screening assessments so this is somebody who has been employed for that purpose with specialist knowledge in ABI and she does those screenings.

**Ms GARRETT** — Through the court process?

**Ms O'SHEA** — Through the CIS Program. So that's when people are on the supportive CIS Program they get the assessments that way and the Assessment and Referral Court can also offer those assessments.

**Ms GARRETT** — And then they are then plugged into other services from there?

**Ms O'SHEA** — Yes. Unfortunately with ABI there's certainly a lot of issues in terms of what services are available. One of our recommendations actually speaks to the issue of justice plans and their availability to people with acquired brain injuries, because at the moment a sentence plan is a type of sentence which can be attached to an adjourned undertaking or a community based order, and feel free if you would like me to explain further on some of these legal technicalities that the person before us was speaking about.

**The CHAIR** — We're changing all that. It's going to be just one community based order, it's not going to be ICO, CBO, it's just going to be the one.

**Ms O'SHEA** — Currently to get that you have to qualify as being intellectually disabled so although disability client services can provide services to people with a broad variety of disabilities, the justice plans are restricted to being only available to people with intellectual disability. The way that justice plans can be used is to ensure that people can get services through DHS and they can also be used as a mechanism for the Magistrates' Court or in the assessment for whether somebody is eligible for those available services, so it can be a really powerful tool and if somebody has an acquired brain injury and has been unable to link in with services, or have that assessment previously, it could be a very powerful way for people with ABIs to start getting the services.

**Ms GARRETT** — So you're saying ABIs aren't able to access?

**Ms O'SHEA** — No, they're not currently.

**Ms GARRETT** — Because of the definition — —

**Ms O'SHEA** — Yes.

**Ms GARRETT** — So that's something that you would say needs to be looked at, the definition of intellectual disability to include ABI?

**Ms O'SHEA** — No, it would be the definition of when a justice plan is available.

**Ms GARRETT** — To expand the category to include ABI?

**Ms O'SHEA** — Yes. At the moment a justice plan is available to somebody suffering from an intellectual disability but if they use the broad definition of disability within the Disability Act it would then become open to people with ABIs and other cognitive impairments.

**Ms GARRETT** — That's very significant.

**Ms HILTON** — Yes, so the current definition in the Disability Act is the one that we would advocate should be used.

**Ms GARRETT** — How many people do you think we're talking about, how many clients?

**Ms HILTON** — I don't know. Do you have any idea, Carrie?

**Ms O'SHEA** — No.

**Ms HILTON** — If that's something that you would like some more information about we can certainly take that on notice and give you a bit more information.

**Ms GARRETT** — Sorry, this is my last question. In terms of the justice plan process, has that been successful, is the research showing that to be successful in addressing recidivism?

**Ms HILTON** — I am not across the evaluation of justice plans but I understand certainly they have been a really valuable tool in terms of providing people with the right supports and the right sorts of mechanisms to better integrate into the community.

**Ms O'SHEA** — One of the issues with people with intellectual disabilities is they may not like receiving the services, or may fall out of receiving the services, and what the justice plan does is it mandates those services so it's an order saying that they have to engage so that can be a really positive thing.

**Ms HILTON** — Carrie has talked about the challenges sometimes for lawyers in assessing early where someone might be affected by an intellectual disability. One of the things that our work shows is that there are also issues and challenges for people working within disability services about being able to recognise or identify when someone has a legal issue, or has an issue that may have legal ramifications.

**Ms GARRETT** — Very good point.

**Ms HILTON** — They might be working with clients in terms of housing or financial services or other types of welfare associated services. There might be an issue with Centrelink with their payments, or they might have a range of

infringements, or a collection of debts that they've accrued, and a worker who is struggling just to keep up with their case load may not always be alert to the types of legal consequences that such a problem may have. One of the things that we recommend in our submission is the development of better protocols between a range of services, so legal services, health services, other types of disability services, and also the introduction of something like a legal health check in the way that you can get a health check-up, which may look at a range of health associated issues. To do that on a regular basis for legal issues so that we're getting to the problem before it escalates and becomes entrenched and becomes much more difficult to deal with.

**Ms GARRETT** — I think that's a really interesting point, and that was certainly some of the issues that were being raised by earlier submissions about people with intellectual disability issues being exploited financially, etcetera, and we were talking about how do you red flag that amongst which parts of the system they might be butting up against.

**Ms HILTON** — Yes, that's right.

**Ms GARRETT** — That's a very good point.

**Mr NORTH** — Just in your practical application, who might administer the legal health check?

**Ms HILTON** — It might be something that VLA could administer in conjunction with disability services. It obviously requires a lot of training so that people are alive to these issues, and I was interested in the discussion before about how alive Victoria Police are to these sorts of issues. I think that definitely there's a culture within Victoria Police of becoming more receptive and more cognisant of the types of issues that people have to deal with. But, it's an ongoing training requirement and it's something that really needs to become part of the normative framework that you're operating under, so that might mean VLA training disability service workers on a regular basis about the sorts of legal issues that their people might present with.

It could also practically mean holding workshops every month and we advertise those workshops and we assist people to come to our regional offices, or the place where they can most easily access. It might not actually be a legal office, it might be a community centre or somewhere where they feel more comfortable, and provide a whole range of legal checks in terms of 'let's see what things are being deducted on a monthly basis from your bank account'. Have you signed up to things that are going to get you into all sorts of debt? Have you got infringements that are being turned into warrants which means that you're going to come before a Magistrate and, if you haven't received the right assistance, be facing a prison term? So all of those things if they're identified early, and if there are the right resources put in place to capture that knowledge, I think can go a long way to ameliorating the number of people that we do see at the pointy end of the justice system. And those sorts of civil issues such as debt are the sorts of interactions with the civil justice system, they actually do result in the commission of crime. Poverty leads to the commission of crime and so if we can address those instances, we can address the factors that might lead to offending, then again I think we will perhaps reduce the number of people we see interacting with the criminal justice system.

**Mrs PETROVICH** — Through you, Chair. We've heard in a number of submissions today around time and consulting and making sure that people with disabilities have an understanding of what's occurring. I'm a little bit interested in how the Legal Aid fee structure works with that because I'm not sure that it actually allows for the additional time for consultation and interaction.

**Ms HILTON** — I think that's a very interesting point and I might throw to Carrie to speak in terms of just the practical experience or the resources that a lawyer is required to manage, for example, a client through the ARC List and then I can come back to the way that the guidelines work.

**Ms O'SHEA** — My team of lawyers, I've got a very small team of about three of us who work in the ARC List, and the work that we do is incredibly intensive with the clients that we have. We may spend an hour a day in relation to certain clients in certain periods of time and I think that we are in a very unique position to be able to provide that level of resources, and I think the organisation has made a conscious decision to make people with intellectual disabilities one of our priority client groups, and you can really see the results of that type of approach, so we will make sure that we are at court every time that client comes to court, we will go before the same Magistrate if it's in the ARC List, we will talk to them about all the other issues that they're having in their life and we will assist in overcoming some of their anxieties about court.

We develop pretty close relationships, where there's consent to do so, with their case managers from DHS and developing those relationships with the other people in the systems can be enormously beneficial. For example, when other issues arise, when other charges come in, there will be multiple sources that may be able to tell us if that occurs because the clients may not be willing or able to do that themselves, and we'll find out about issues like debt or infringements.

**Mrs PETROVICH** — How many of you are there?

**Ms O'SHEA** — There's three of us.

**Mrs PETROVICH** — And you operate out of?

**Ms O'SHEA** — Out of Melbourne. We also act as people that can be contacted so we receive calls from all our regional offices and sometimes from members of private practices and private barristers just getting advice about how to deal with particular situations. Those relationships that we build are very useful and we get other referrals from case managers who want to have that sort of type of service for their clients.

**Ms HILTON** — I think you're right in terms of the amount of work that is done on a particular file, or the assistance that's offered to a client who has an intellectual disability. This is probably the same for someone who has a mental health issue. It doesn't reflect the intense support that is required from the lawyer and that's not just legal assistance, that is a much broader form of advocacy in terms of what the previous speaker was talking about STOs in VCAT — it's quite a complex part of the law and the lawyer really has a role, and we as an agency have been very mindful of providing the best sort of advocacy that we can, to clients who are going through those sorts of processes about really explaining and understanding exactly what is

happening. But that does require an additional commitment than perhaps a client who doesn't present with those sorts of issues, and it's not necessarily reflected in how a grant of aid is given.

**Mrs PETROVICH** – There are hundreds of people being represented right across the state by a variety of lawyers, some of these people are not identified, they may be Legal Aid clients because, as you said earlier, poverty leads to crime, that's a pretty fair statement. How do we allow for a fee structure that doesn't just allow for a brief meeting and then a court appearance? Because I don't think you've really addressed the issue at this stage as to what the structure actually allows under Legal Aid.

**Ms HILTON** — It depends on what type of interaction it is, or it depends on what sort of matter it is, so there are gradations of grants of aid for each sort of matter. It's quite a complex sort of fee structure and it's different, for example, for a civil matter to a criminal matter; it depends on whether you're briefing counsel; it depends on whether you're getting a psych assessment, but all of those things go into the mix in terms of working out what the actual grant of aid is going to look like.

Perhaps that's something that we can take on notice and give you more information about how that works, but I guess I'm trying to get a sense of whether you're saying there needs to be a greater recognition, a greater financial recognition, of the type of intensive support that is required to assist people with intellectual disabilities.

**Mrs PETROVICH** — We are hearing, and we've heard a number of times today, that many people with mental disabilities are unaware of what's going on, they actually do require the process to be broken down, they do require additional time, they might require additional services to be involved. The current fee structure, I'd like to know whether that actually accommodates any of those requirements?

**Ms HILTON** — It's also not so much just the fee structure, it's really about the resources that are available within the organisation as well so it's about staffing and it's about the way in which you prioritise certain groups of people and certainly under our new strategic plan we prioritise people who have difficulty making decisions for themselves, or people who are facing detention, or people who are really experiencing forms of disadvantage, we prioritise those sorts of clients. So that means that when we look at the way in which the Legal Aid fund is divided, we will make financial commitments that recognises that priority group.

**Ms GARRETT** — Within the pie that you're given.

**Ms HILTON** — That's right, within the pie. So that's why there is a special team within Carrie's division that just services the ARC List. We have then a special team within our civil law section who are mental health and disability advocacy lawyers who are responsible and committed to assisting those sorts of clients who appear before the Mental Health Review Board and clients who have issues under the Disability Act or Guardianship and Administration Act. So we could have prioritised, for example, other sorts of issues or other sorts of clients within that pie but because of the intense support that we recognise those clients require, there have been choices made about where the organisation will invest its resources. Having said that, are we sufficiently meeting the needs of all people who require legal assistance throughout Victoria with an intellectual disability? No. Is there more that we need to be doing in

terms of early intervention, the sorts of training that I was talking about, or even providing the one-on-one support in court? Absolutely. And they are ongoing challenges that we have to address not just in terms of funding and resourcing but also the way in which we structure those services.

**Ms O'SHEA** — In terms of that point that you were making as well, in terms of having breaks and being able to explain things, a lot of that really does also fall outside the powers that we have as lawyers so the court system and the way the Magistrates' Court works in particular, as the last speaker was talking about how it goes so fast, the Magistrates have to move onto another case very quickly, often it's the process itself which can make things so hard for the client. You can explain everything to the client beforehand and talk to them afterwards but the whole process of going through the court system could be quite traumatic for somebody and very confusing and hard to reconcile with what you're telling them, regardless of how dedicated the lawyer is. In one of our submissions we mentioned changes to the court procedure so that guidelines developed as to what the courts can do to make the hearings more appropriate for people with intellectual disabilities, and particularly when you're moving up into very complex trials and pleas in the higher courts; it's a very difficult thing for most people to understand let alone someone with a disability.

I've been involved in cases where we've had reports saying the court process for them to be fit and understand the process and be able to participate meaningfully will require breaks, it will require explanations, and the judge who has tried to explain to the client at the end of the proceedings what's gone on but by that stage you've had a couple of hours of argument and we've provided an extra staff member to sit with the client and that hasn't followed through. Without appropriate guidance and expert information about what is the appropriate way to adapt the court processes, it's difficult as well, otherwise it's going on what we think might be the right sort of changes to implement. So it makes sense that breaks might be appropriate but what we've made a submission on is actual guidelines being developed in consultation with experts about what could happen. I read from the submission by the Supreme Court they've made efforts to adapt the court in certain circumstances and I think those guidelines would really assist.

**Ms HILTON** — I would echo also the previous speaker's point about the difficulty with the gap between the commission of the offence and then the time that the matter is actually listed. It can be months, it can sometimes be much longer than that, and that is very difficult for someone with an intellectual disability to comprehend. So there might be a lot of interaction between the client and the lawyer during that whole period while the matter is waiting to be listed so things like priority listing for courts with people who have intellectual disabilities or cognitive impairments is one way of addressing some of what could lead to that sort of distress and inefficiency with the court system.

**Ms O'SHEA** — It is incredibly resource intensive. We have clients with intellectual disabilities who will ring you up every day asking the same questions and you go through the same thing.

**Ms GARRETT** — I know. I'll put on the record my mother-in-law works at the mental health section of Legal Aid and I've certainly witnessed firsthand, just being in the same room with her, that resource intensiveness in a similar client base of people,

hour-long conversations, and when you've got all the other pressures as a lawyer it can be difficult.

**Mrs PETROVICH** — One final question: is there a formalised assessment process that Legal Aid uses to have an understanding — I know Carrie talked about developing intuition and questioning as you go, not that you're trained in that area but you develop those skills, is there something more formal than that that Legal Aid uses to assess whether there is a special need there?

**Ms HILTON** — We run mental health and disability training for all of our lawyers, and not just for our lawyers but also for our paralegals and administrative workers, because we understand that clients may often have that first point of contact before they actually get to see a lawyer. I'm not sure if you mean perhaps a precedent or a checklist?

**Mrs PETROVICH** — Something more formalised. A checklist was mentioned earlier by another group.

**Ms HILTON** — Those characteristics that people might present with or identify with are part of the mental health training that is a compulsory part of our new lawyers program, so everyone that comes into the organisation now has to have that sort of training to better equip them to identify people who might present with those sorts of issues. So it's certainly something that we're very aware of and committed to. But things don't always get picked up.

**Ms O'SHEA** — And it is difficult because part of the mental health training, which I actually deliver as part of my role — we're not clinicians so we really don't want to be stepping into the role of diagnosing — part of the role really is also just getting as much peripheral information as you can, which can be a bit of a detective exercise like: did you go to a specialist school? What sort of pension are you on? Rather than going through symptoms, I suppose.

**Ms GARRETT** — Through you, Chair. On that point is there a role that Legal Aid may be able to play with some of the other submissions we've had regarding lawyers generally being trained? So everybody needs legal advice at certain times in their life and perhaps the experience of those with an intellectual disability or cognitive impairment is less than ideal in certain circumstances, and one of the things we were talking about is whether or not there can be training provided for lawyers generally. One suggestion I thought of was even if it is a senior person within a firm who gets that training and can provide some direction for others, is that a role that Legal Aid could play if it was resourced properly to do so?

**Ms HILTON** — I think there's certainly a lot of expertise that's resident in the organisation because so many of our clients present with these issues. We do already run professional legal education that is open to other lawyers working in the community legal sector. It's not so much taken up probably by people working in private practice, although having said that we've recently held a comprehensive criminal law conference and there were sessions around this particular area. But it's certainly something that we would be responsive to and interested in providing more education and more awareness to the broader legal sector.

**Ms O'SHEA** — And certainly on an informal basis we've identified ourselves, particularly in terms of the ARC List, we get lots of queries from private practitioners who do Legal Aid work and we're working with the same client group, we're always amenable to answer any questions and often get calls in that sense.

**Ms GARRETT** — Through you again, Chair. Sorry, I'm asking a lot of questions today. In terms of the capacity to make informed decisions or give instructions, do you find at times that you need a third person present? I suppose in the criminal jurisdiction it is what it is, isn't it, you've been charged?

**Ms O'SHEA** — In terms of capacity to give instructions, it's definitely a really complex and difficult area that we have to deal with and there is no easy answer to it, but if we think somebody is not capable of giving instructions we are ethically obliged to make those enquiries and satisfy ourselves that they are able to participate and to give instructions, so that's when we rely on psychiatric reports and to get assessments so that happens frequently. Often it will come back that they are but we can't proceed if we think the person is not capable, and we won't, regardless of whether that would be the best or the worst outcome for the client. There are some submissions in relation to the Crimes Mental Impairment Act and how fitness issues play out in the Magistrates' Court and in the Children's Court, which are very complex.

**The CHAIR** — Thank you very much for coming in today; it's been very helpful.

**Ms HILTON** — Pleasure.

**The CHAIR** — You had something else?

**Mr NORTHE** — Just before we go. We have specialist courts — whether it's the Children's Court or the Koori Court these days — is that something that you would advocate for or is it more provided around education and resourcing and others?

**Ms HILTON** — I think it has to be a multipronged approach. We're involved in the Neighbourhood Justice Centre — we have two Legal Aid lawyers that are resident down there — and we've seen some fantastic results from their approach, which is very much being informed by the principles of therapeutic jurisprudence and also the services that are wrapped around the legal assistance that clients receive there. We've also had some really positive experiences with the ARC List and through CISP. As I mentioned in the introduction, those are quite isolated, or they're quite specialist responses that are confined geographically, so we will be really interested to see the evaluation that's coming out of the ARC List and to look at what the positive features of that pilot phase have been and how those can be incorporated in a more mainstream court response. We haven't really spoken about the difficulty in access for regional and rural clients but obviously there are very few services but also court responsive services if you are living, for example, in Wangaratta or Warrnambool as opposed to living in Sunshine or Melbourne, you're going to have access to different sorts of responses. Did you want to add anything about the specialist courts, Carrie?

**Ms O'SHEA** — I think all the things that we've talked about in terms of our role and providing that intensive support, without something like CISP to refer the clients to, or ARC or NJC, the role that we can play is very limited because if there is nowhere to refer to, all our good intentions might stop so I can't imagine working in

my role without the specialist programs or specialist courts existing regardless of the form that they take, I think there's still the evaluation for ARC that's going to come out, but I think there is absolutely no doubt in my mind that they are really important programs and I hope that they will continue in some form. They make huge differences in people's lives and we've got a whole stack of stories up our sleeves which we can explain how much difference that made.

**The CHAIR** — All right. Thank you very much.

**Ms HILTON** — Thank you.

**Ms O'SHEA** — Thank you.

**Committee Adjourned.**