

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

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Mr B. Roberts, Education and Outreach Adviser, Legal Services Commissioner.

The CHAIR — Thanks for coming in, Bradley. My name is Clem Newton-Brown, I'm the Chair of the Committee. This is a cross-party committee which is set up by Parliament to report back on specific issues and this is one of our terms of reference which you've given us a submission on, so thanks very much for coming in to present to us orally.

Mr ROBERTS — Pleasure.

The CHAIR — On the Committee is myself; Jane Garrett is the Deputy, and Donna Petrovich. Anthony Carbines and Russell Northe won't be with us today so there will just be the three of us today. Anything you say here, you have parliamentary privilege but not outside the room. It's all taken down and you get a copy of the transcript once it is prepared. You can't change your evidence but if there are errors you can correct them.

Mr ROBERTS — Sure.

The CHAIR — If you could start with your full name and your professional address and who you represent and then take us through your submission.

Mr ROBERTS — Bradley Roberts. My business address is Level 10, 330 Collins Street, Melbourne. I'm the Education and Outreach Adviser to the Legal Services Commissioner; I'm representing Michael McGarvie, the Legal Services Commissioner, today. Did you want me to go through the submission in detail; what exactly do you want?

The CHAIR — You can assume we've read it but maybe just talk us through the key points.

Mr ROBERTS — Okay. I can give you a bit of an overview about how I came to get all the information for the submission. As indicated in the written submission, the Legal Services Commissioner has a statutory responsibility under the Legal Profession Act to educate the community about legal issues and the rights and obligations that flow from the client-practitioner relationship. This responsibility is delivered via face-to-face meetings with a whole range of different organisations that offer support to the community; places that people turn to for assistance in times of need. By informing those organisations we reach a wider audience and therefore we can make sure that the Commissioner's message is passed on to the clients of those organisations.

We don't meet directly with individual members of the community to pass on the message to consumers. In the past we have held public information sessions but we found that they were not very well patronised, we didn't get a lot of people coming along to that. Generally when we say who we are, people don't think they're going to want to make a complaint about a lawyer so they don't turn up. We made the decision to make contact with community support organisations as opposed to individuals, and I think it's quite effective.

The discussions with these support organisations serve two main purposes. The first one is to make sure that they're aware of who the Commissioner is and what the Commissioner's responsibilities are, so that if one of their clients wants to make a

complaint about a lawyer they can do so. The second is to seek feedback with a view of understanding the types of problems that consumers have experienced when they've dealt with lawyers. Not all problems with lawyers are raised in complaints, not all people make complaints about lawyers; some of them are just minor issues, niggling concerns, others are major issues.

The CHAIR — Like we lost and we're not happy so we'll blame the lawyer.

Mr ROBERTS — That's quite often the case, yes.

The CHAIR — Jane and I both have legal backgrounds.

Ms GARRETT — Not that we had any trouble.

Mrs PETROVICH — And I'm married to a barrister.

Mr ROBERTS — I should say also that the written submission, the comments raised in the submission, are not the views necessarily of the Commissioner but they're just the views or the concerns that were raised with the Commissioner by the organisations that I have spoken with.

The CHAIR — That's the whole content of your submission?

Mr ROBERTS — Yes; they're basically the comments that other organisations have raised. We haven't sat down and analysed everything, "the lawyers aren't doing this properly". These are people's concerns that they have raised with us. The comments made in the written submission are more or less confined to consumers' engagement with lawyers and are not really focussing on engagement with the police or the court system at all but some of those comments may have occurred in the meetings as well. The reason for that is the Commissioner is concerned with regulation of the profession and not with the police or the court system or the prison system. But, of course, that doesn't stop community groups from expanding on all areas that they engage with the legal profession.

With the information, we use feedback from the interviews with the community groups to inform our education activities for lawyers as well. We do that through seminar and conference presentations, interactive workshops which look at legal ethics and client management as major issues, and also by informing the professional associations about emerging issues and trends that we see when we're talking to community groups.

The most common issues that I have heard when I have spoken to the community groups that deal with people with disabilities would be issues such as the significant power imbalance between the lawyer and client. There's a lot of intimidation there, it's unintentional intimidation but it's intimidation nonetheless that's brought on by communication difficulties, language that is used in discussions by lawyers, and the complexity of the justice system, which I suppose that can lead to a bit of intimidation as well.

The CHAIR — Can I just clarify, are you talking of the experiences of disabled people or generally?

Mr ROBERTS — Both. Generally for all people with disabilities but also people with intellectual disabilities. Expectation management — the no-win, no-fee work that some law firms do in particular is quite difficult for people to understand. If they hear no-win, no-fee and they lose and they're hit with a bill at the end of it, they don't quite understand.

The CHAIR — Fair enough too.

Mr ROBERTS — That's a fairly common issue that's been raised by a number of organisations I've spoken to. Access to legal assistance — people with disabilities seldom have much money, not being able to hold down jobs, so they rely upon community legal services; specialist legal services; Victoria Legal Aid and pro bono services and they're not always available for them. Those who cannot afford or who can't obtain representation sometimes resort to self-representation and that can cause problems with courts, the courts can delay matters until they get representation, and it makes the whole process look a bit more cumbersome.

Ms GARRETT — Can I just ask a question on that. Clearly there's a very strict regulation of how lawyers conduct themselves in Victoria, as there should be, and there's costs agreements and client agreements that need to be signed. When you say that people might not understand what they've signed, wouldn't there be redress? What's your understanding of how that works?

Mr ROBERTS — They can lodge a complaint with the Commissioner's office if they haven't been given paperwork, like costs disclosure. If they've signed it but haven't really understood it, then I'm not sure what the Commissioner can do about that. If they've signed a document, the Commissioner doesn't know whether they have had someone read the document and explain it to them, whether the lawyer has actually explained it to them or not.

Ms GARRETT — Because there's pretty strict obligations on lawyers to make sure that the clients are capable of consent to terms.

Mr ROBERTS — From what I understand, some groups have said that clients with intellectual disabilities may just agree to things anyway. If the lawyer has said: do you understand this? They will nod, they will express that they had understood whereas they may not really have understood. It could be stress; it could be just their capacity to understand.

The CHAIR — How do we deal with that given that every person with a disability is going to be different? How do you train lawyers to know that they're giving informed answers to their questions?

Mr ROBERTS — It's a good question. I think it's very hard to do. We've raised this with the lawyers in the past. We made a submission to a forum that the Victorian Bar and the Law Institute had back in 2009, which was a Disability and Incapacity Forum, and our submission included a summary of a lot of what I've mentioned here today and what was in their submission were the recommendations made by the disability support organisations themselves on how lawyers can work more effectively with people who have disabilities. We have provided that information to the Law Institute and the Victorian Bar; what they've done with that I'm not certain.

Ms GARRETT — Because if there is a case arising from how the person acquired the injury, for example, then clearly the lawyer would need to be cognisant of the fact that the injury has been the result of whatever is claimed to be the negligent outcome or a traffic accident, etcetera, so presumably the lawyer is more than aware because it would need to be listed in the damage suffered. I suppose where the client is cognitively impaired for another reason and is running a different sort of a case, perhaps this needs to be looked at, you would hope, and if there is a concern about some lawyers out there that people are raising those complaints and you've raised it with the Law Council and the Bar Council — —

Mr ROBERTS — Law Institute. When I've spoken to community groups in some particular areas — I think Geelong is definitely one and Gippsland was another and there was a third one, I can't remember exactly where it was, regional Victoria again, it might have been Bendigo — they've said that they've got some really good lawyers that they deal with all the time, so some lawyers are exceptionally good. I have not had any complaints from any groups that I've spoken to about a lawyer or a law firm that have repeat bad services with people with disabilities. What has been mentioned to me was that when lawyers deal with clients on a regular basis or when they receive more business, for example from an advocacy group when they've referred clients onto a lawyer, those lawyers tend to learn from their previous experience with people with disabilities and they know more things to look for, they know what to ask, how to express themselves to make sure they're understood. It's probably something that there's not a lot of training, maybe there is no training at all out there, certainly not from the universities, but there's not a lot of training for lawyers who learn how to interact with people with disabilities.

Ms GARRETT — Except if their firm — —

Mr ROBERTS — Except if their firm has experience with that, yes; they might have internal training. Other than the forum that the Law Institute of Victoria and the Victorian Bar ran back in 2009 I haven't seen anything but I don't scrutinise to find out what people run, I haven't seen anything specifically about dealing with people with disabilities.

We were going to prepare a fact sheet about how to communicate with people with disabilities but we took the view that lawyers should be communicating with everyone equally, they should make the best effort to make sure all clients have a full understanding of what their client understands and they're able to sign with full knowledge about what they are signing.

Mrs PETROVICH — From my perspective, not being a lawyer — —

Mr ROBERTS — Nor am I, can I say.

Mrs PETROVICH — — — and talking to people who attend courts, whether they have a disability or not, courts are a very concerning place for any member of the public, whether you have a disability or not. It would strike me that if we have no training, which is what you're saying in the submission that there is very little training, less firms offer it to individual lawyers, the complaints that you're having, are they from people with disabilities who actually may be attending court or at their preliminary meeting with a lawyer there was perhaps no one to assist them at all, like

an aide or an intermediary in some respects, because it seems that courts are pretty daunting anyway and if you've got a disability, and people who aren't used to working with disabled people, have you made any recommendations around that sort of process?

Mr ROBERTS — To my knowledge, no, no specific recommendations. The contents of the submission we made to the Victorian Bar and Law Institute of Victoria focused on three main areas: communication with clients with cognitive disabilities; engaging support services. We find that a lot of support services aren't engaged by lawyers, the lawyers will deal with the client and once the matter is dealt with that's the end of the matter, they don't deal with it any further, and then the support services have got to try and find out what happened, the client doesn't always explain to them, they don't always fully understand what's happened, so the support services then try and make contact with the lawyer to find out what happened and that's more time for the lawyer and his bill for that time. Whether they can bill I don't know.

The other area is developing a relationship with the client, which we talked about the high-stress environment like a court, how it reduces the ability of a client to absorb what's happening. Taking the client out to a calmer environment can help. I don't think we've had a lot of complaints received from the public about problems with the lawyer from people with a disability. Certainly we wouldn't categorise them any differently to be able to search for them, we don't check the boxes and say this person has this disability, that's one of the reasons why they're complaining. Most of the issues that have been raised are from the community support organisations that I spoke to from their perspective so it's not necessarily complaints that have been made to our office, they're concerns that are held by consumers of those support organisations.

Mrs PETROVICH — And most of those agencies that you're talking about, are they dealing with either pro bono or Legal Aid services?

Mr ROBERTS — Most of them are, yes.

Mrs PETROVICH — When you then talk about the follow-up, I imagine Legal Aid doesn't cover anything other than a court appearance either?

Mr ROBERTS — I'm not too familiar with what Legal Aid do and don't do for most purposes but I think the majority of what people have said — —

Mrs PETROVICH — It just concerns me that the cost implications of this might mean that these people aren't getting the follow-up that they need. Thank you.

Mr ROBERTS — Some of the other major issues that have arisen are insufficient time with VLA duty solicitors and a lack of continuity when lawyers change. One of the groups I spoke to — it was quite a large organisation — said that there's a lot of concern about a client might go to court on a number of occasions, they will see a different duty solicitor every time and they've got to explain their situation to them again and again and again. That can be difficult with people who have difficulty with communicating, it can be frustrating and that can be quite, I suppose, disenfranchising so people don't want to go through the process if they've got to explain themselves again and again.

Mrs PETROVICH — Do you think the problem is with the legal profession or the process that actually gets the client to the legal profession and the process around that as far as how those people are communicating and whether they actually have any backup or assistance?

Mr ROBERTS — I think there's a couple of problems there. It's a lack of support, the lack of access to support from the CLCs and Victoria Legal Aid, they're limited with what they can do, limited with funding so they've consequently got a limit on what they can do, how much they can offer the client. I think they do a good job, we don't really get complaints about VLA or CLCs about not servicing the client. We do sometimes get complaints but they don't generally go anywhere because they're not found to be substantiated basically for the most part. The inability for clients to pay for private legal services would drive them towards the pro bono or the CLC or VLA services. What was the first part of your comment?

Mrs PETROVICH — It just strikes me that it's because it's about the billing structure and perhaps if you're using Legal Aid or pro bono services then perhaps there's not a nexus there between perhaps some assistance with those clients because usually your law practitioner has such a short period of time to deal with that client, maybe there's a lack of understanding about perhaps maturity or the sorts of issues that client is actually facing to communicate with them. I just wondered whether you had actually looked at those communication tools?

Mr ROBERTS — We raise communication as an issue generally with all lawyers when we speak to them in our forums, when we have ethics workshops, when we go and do presentations to groups of solicitors through a range of different seminars or conferences that we present at. Communication is maybe one of the top two or three issues that we receive. Costs is probably the top one and then communication, but communication does go into costs as well so communication is quite a significant issue. The feedback that I've received has been focussed on communication; people with disabilities don't understand some of the legal jargon, they don't understand the terms. Often, as I've been told, they don't want to appear naive or stupid so they don't ask questions, they feel intimidated so they don't want to show that they don't understand so they will just nod and they will say: yes. But afterwards when they talk to the support service they will say: I don't understand what happened, what do I have to do? Which, I suppose, brings into it the importance for having a support worker to attend with someone with a disability, which is not always allowed, some lawyers cite privacy reasons and restrict that and actually prevent support workers from assisting a client in an interview, for example.

Ms GARRETT — How widespread do you think that is?

Mr ROBERTS — I don't know. I've heard it from a couple of groups but it's not every single group. I have asked groups before: do you have problems with actually going in to see a lawyer? And some groups say: no, we've got good relationships here, they work with us well. Some groups say that there's too much emphasis put on the support worker and the role the support worker can play; lawyers require too much of their services, and their services are stretched anyway. One group I spoke to in Frankston was commenting about that, saying that they're asked to provide reports and detailed analyses of the situation, they provide it to the lawyer but the lawyer doesn't end up using it, so they're asked to do a lot of work but the result from the work isn't

necessarily obvious to the support services. So some services are very, I suppose, over stretched, they're asked to do a lot, and other services are excluded. I can't recall any particular group that have said that, and I've spoken to 27 or 28 different groups who have given me information over the last three or four years, so there's a range of different approaches.

I don't think it's widespread that lawyers will exclude support workers but it certainly has come up so it's not something that will be such a massive issue that the Commissioner needs to flag it as being a big issue with the law associations but it certainly has come up and we have made that submission in the notes we've provided to that conference about engaging support services. Allowing the support worker, a family member or a friend to be present in interviews with the client can help reduce the stress of the client. If a support person is present, lawyers should engage with the client as well as the support person. Some groups have said when they are present with a lawyer the lawyer talks to them and doesn't talk to the client, whereas the client is the client and they should be referring to them as well. But that's not a common complaint that I've heard.

Ms GARRETT — Through you, Chair, does your organisation, the Legal Services Commissioner, give some guidance to these groups through the Outreach Program about what their members should be asking lawyers?

Mr ROBERTS — We do. We have a brochure, which is just a simple DL size brochure for all consumers which talks about working with your lawyer, so hints and tips about how to work with your lawyer, how to engage with your lawyer, and it does talk about having someone with you if you need some support and assistance. Ask questions if you don't understand something. I think it's important to let people know. It's not just people with disabilities but generally; if you don't understand something don't just go away and come back later on, sort it out then and there with your lawyer. Time is obviously an issue too; people with disabilities often need more time to communicate. I spoke to Scope a couple of times and that's one of the biggest issues that they raised with us was that lawyers often have very limited time, the client might need a longer time-frame to communicate, whether it's verbally or whether it's through text or some other technical assistance to spell out what they're trying to say, they need some more time and some lawyers may not have the time to do that, or if they have to take extra time then it costs extra money because it's more of their time that they would bill.

Ms GARRETT — Do you have specific materials for the disability advocate groups?

Mr ROBERTS — No, it's general.

Ms GARRETT — Do you think that might be of assistance?

Mr ROBERTS — It probably would be of assistance, it would narrow it down, we would probably put more information of some of the comments we've received from other groups about things to ask, things to be aware of, that could be something that we could certainly look at.

Ms GARRETT — Including issues like training, etcetera.

Mr ROBERTS — Yes.

The CHAIR — Do most of the people who present with mental disabilities have carers with them who assist them through the process or do they just come in on their own?

Mr ROBERTS — I think most of them would probably have carers with them. There was one organisation I spoke to who deals a lot with the prison system and people in the prison system who have intellectual disabilities and they made a comment that some of those individuals can self-represent because they can't get access to a lawyer, they don't have the funds to get access to a lawyer. They're frustrated with the Victoria Legal Aid system, not being able to get access to a duty lawyer or have to repeat themselves so they self-represent. In terms of ongoing interviews with lawyers, I don't know, I haven't really been told about that by groups.

The CHAIR — The problem of not knowing whether the person understands what's been discussed with their lawyer, could that perhaps be a recommendation or a guideline that anyone who has a disability has someone close to them with them who understands them and perhaps can help interpret whether the person actually understands what's being asked of them?

Mr ROBERTS — It would certainly help the person with the disability, absolutely. It would help to shortcut any potential of them not understanding by having someone else with them who can ask questions.

The CHAIR — Maybe if you know the person, you've grown up with them or whatever, a sibling or something, it may seem as if they're not understanding but the person who knows them well might say: no, that means he's understanding.

Ms GARRETT — I suppose you've got the issues of checks and balances on that too. You would want to be certain that the person was there acting in the individual's best interests.

Mr ROBERTS — Yes, an independent advocate. That was raised once by one of the groups I spoke to in Geelong about people attending and arguing for what they thought was best for their client, or best for the person with a disability, as opposed to what is actually best for the person with a disability. I can't comment too much about that because I haven't had a lot of feedback on that but it has been raised.

Ms GARRETT — Because that is a major issue. If you look at some of the very disturbing incidences of things like elder abuse that are being exposed in the community with people not acting — —

Mr ROBERTS — People with disabilities who have children in family law matters.

Ms GARRETT — And whether there is stuff to be learnt from how the guardianship system operates. Anyway, they're big issues.

The CHAIR — Do you have anything else?

Mr ROBERTS — I can briefly talk to you about what the Commissioner has done. I've told you about the submission that we've made to the LIV and the Victorian Bar forum.

Ms GARRETT — Have we got a copy of that?

Mr ROBERTS — No, but I can leave a copy.

Ms GARRETT — That would be helpful, thank you.

Mr ROBERTS — I'll leave that with you. That was 2009.

Ms GARRETT — That's helpful; thank you.

Mr ROBERTS — We actively seek out disability support organisations across Victoria to make sure that they're aware of who we are and what we do as the Commissioner. I have spoken to 28 organisations, that includes organisations that deal with clients who have mental health issues because sometimes they are cognitive issues and they deal with clients who have intellectual disabilities. It doesn't include community health services and other general support services that also deal with clients with disabilities, such as Anglicare, Centrecare, Salvation Army and so forth. We've provided formal training to our complaints handling staff on disability awareness. In that training we've covered disabilities and how that might present in a client, the relevant disability legislation and communication skills for working with someone who has got disabilities so we have looked at it ourselves.

We encourage complainants, if someone wants to make a complaint, we encourage them to use their support person when making contact with our office, and we will go so far as to visit people in their homes to interview them to discuss their complaint with them. Earlier this year we went out and spoke to a client who wanted to make a complaint about a lawyer from Colac. I think the client suffered a brain injury from a motor vehicle accident and had a complaint about his lawyer from the case that was subsequent to that, so our complaint handlers went out there for the day and met with him in his home and discussed the matter with him and with his carer, so we will actually make that effort.

Generally speaking, complaints about lawyers must be made in writing but we will make every effort to make sure that the complainant can make that complaint to us. If it's verbal we will type it up for them and get them to review it and approve it before receiving it officially.

Ms GARRETT — Thank you.

Mr ROBERTS — Anything else I can help you with?

The CHAIR — No, that's been very helpful; thank you very much.

Mr ROBERTS — Thank you.

Witness withdrew.