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

Ballarat - 17 November 2011

Members

Mr A. Carbines
Ms J. Garrett
Mr C. Newton-Brown
Mr R. Northe
Mrs D. Petrovich

Chair: Mr C. Newton-Brown
Deputy Chair: Ms J. Garrett

Staff

Executive Officer: Dr V. Koops
Research Officer: Ms V. Shivanandan
Administration Officer: Ms H. Ross-Soden

Witness

Mr P. Lynch, Honorary President, Ballarat and District Law Association Inc;

Ms D. Hadden.

The CHAIR — Welcome to the committee. Thanks for coming today. My name is Clem Newton-Brown, I'm the Chair of the committee. As you are no doubt aware, this is a parliamentary committee set up to inquire into various references, and this is one of three references that we're looking at at the moment. There's five of us on the committee but only two of us here, Russell Northe and myself. Russell is the member for Morwell. The other members are Anthony Carbines, who has just left, who is the member for Ivanhoe; Jane Garrett, member for Brunswick, is the Deputy Chair; and Donna Petrovich, who is the Upper House member for Northern Victoria. We will be passing onto them the evidence you give and also there will be a transcript prepared, which they will read as well. You're protected by parliamentary privilege for anything you say in the room but not outside the room in relation to the inquiry. If you could start with your name and professional address and who you represent for the transcript and then launch into it, please.

Mr LYNCH — My name is Philip Lynch, I am the Honorary President of the Ballarat and District Law Association and my professional address is 2032 Geelong Road, Ballarat.

Ms HADDEN — My name is Dianne Hadden and I'm a lawyer practising in Ballarat. My professional address is 712 Skipton Street, Ballarat, and I'm a sole legal practitioner.

The CHAIR — The Law Association, can you tell us a bit about what that is, is that a voluntary group of people in the local area who are lawyers?

Mr LYNCH — We are a voluntary committee, we're given money by the LIV to provide services for our members.

The CHAIR — Is it a branch of the LIV?

Mr LYNCH — It's not. I think we're a branch of them but we're an incorporated association, we are separate from the LIV.

The CHAIR — How many members do you have?

Mr LYNCH — 138.

The CHAIR — The evidence you're giving today, is that on behalf of the membership or are these your personal views?

Mr LYNCH — I spoke to the membership on the matter and they agree with me on some of the things I say but I will say that they are in fact my personal views. I have noted the inquiry and key issues in this matter and noted that in fact there is a definition of intellectual disability. Some intellectual disabilities appear to be inherent, such as mental retardation, and some can be acquired at a later stage, such as an acquired brain injury or neurodegenerative diseases like dementia.

This is a very difficult issue to cover but I have noted in fact that in varying degrees, from commencement of dealings with the intellectually disabled in the court system and continuing through the proceedings, the solicitor in some instances, notably the

country solicitor, is in a bleak position that is passed onto the intellectually disabled client. I note that this commences, from my opinion, at law school and continues through the lawyer's career. I note here that in fact the Law Society of New South Wales in their document of 2009, *When the Client's Capacity is in Doubt, A Practical Guide for Solicitors*, notes:

> "It is not the role of a solicitor to be an expert in capacity assessment of their client. However, a solicitor can be involved in carrying out a legal assessment of their client's capacity which involves: making initial, preliminary assessment of capacity — looking for warning signs or red flags using basic questioning and observation of the client. If doubts arise, seeking a clinical consultation of formal evaluation of the client's capacity by a clinician with expertise in cognitive capacity assessment and making a final legal judgment about capacity for the particular decision or transition."

Not at law school, nor in legal training for articles, which I did in Canberra, was I taught anything concerning the issues above concerning the intellectually disabled. Research with younger practitioners shows that this situation has not altered or changed. Neither does it appear, unless the seminar that I keep receiving from my compulsory legal training, called Dealing with Difficult Clients, covers this category, which at best seems moderately insulting to the intellectually disabled. So such matters are not covered in initial law school nor are they covered in compulsory legal training; therefore, any preliminary assessment by a lawyer or a solicitor is basically guesswork, we are not trained to do it and therefore we do not know how.

With the commencement of legal proceedings, I note three distinct areas of difficulty here. A, the client is aware and obviously is in the category and has a carer or guardian; b, the client is unaware or denies being in the category but it is suspected by the solicitor on the facts and matters before her or him that said client may fall into the category and, c, the client subsequently during proceedings becomes disabled.

To deal with a, the client is aware, is obviously in the category and has a carer or guardian. The practice of law in Victoria is highly regulated for both the protection of the client and the solicitor. Amongst said rules and regulations are the Legal Practice Act 2004 with attendant regulations and the Professional Conduct and Practice Rules 2005. No solicitor disputes the value of these to the client and as a guideline to practice. One of the central, even golden, rules is that of client confidentiality. In regard to same, these rules are defined as follows: A client with respect to a practitioner or a practitioner's firm, means a person not an instructing practitioner, for whom the practitioner is engaged to provide legal services for a matter.

Further, we have rules about serving the interest of justice and complying with the law and the practitioner must not, in the course of engaging in legal practice, engage in, or assist, conduct which is dishonest or otherwise discreditable to a practitioner; prejudicial to the administration of justice or likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute.

The most important regulation is the duty to the client. 1.1 of the Legal Practice Rules states: Honesty and confidentiality. A practitioner must, in the course of engaging in

legal practice, act honestly and fairly in the clients' best interests and maintain clients' confidences.

We then go to three, confidentiality. A practitioner must never disclose to any person, who is not a partner, proprietor, director or employee of the practitioner's firm, any information which is confidential to a client and acquired by the practitioner's firm during the client's engagement, unless the client authorises such disclosure; the practitioner is compelled by law to disclose; the practitioner discloses the information in circumstances in which the law would probably compel its disclosure, despite the client's claim of legal professional privilege; the information has lost its confidentiality or the practitioner obtains the information from another person who is not bound by confidentiality owed by the practitioner.

All clients, without exception to intellect and any disability, should be entitled to the full benefit of these rules and the conduct arising from them. However, it is perceived this is not occurring. If the intellectually disabled client attends with either carer or guardian, and said carer or guardian remains with said client, the requirement for confidentiality can be offended. This is made even more complex if the carer or guardian is in the position of being a witness to the event complained of or — and I have been in this situation — the carer or guardian is the problem or issue, as in a family law matter or family violence matter, or matters of similar ilk, and the client is seeking a divorce or an intervention order or some other order against the carer or guardian, and the carer or guardian will not leave the room as they maintain their right to advocate for the client. However, this situation, though highly problematical, does not compare in complexity with b, which is the client is unaware or denies being in the category but it is suspected by the solicitor on the facts and matters before her or him that said client may fall into the category of intellectually disabled. This situation occurs with enough frequency to me alone to make it a significant issue.

I note the Law Institute of Victoria Ethics section says the following on the matter. The question was asked by somebody: I am not sure if my client understands what's going on. Can I take the client's instructions? They reply: Where a client is clearly lacking capacity, instructions should not be followed. The client may need a guardian or other form of authorised representative. Although that raises its own issues, a client who is clearly lacking capacity is a relatively straightforward problem. The situation is far more difficult where a solicitor merely has some doubt. If you have any real doubt, it is sensible to obtain independent confirmation of your client's status. Clients will often be less resistant to this suggestion if you explain that the independent assessment is in their own best interests, so that the instructions that are given will not be later challenged. This advice was largely on a wills matter, which is always a problem for lawyers in matters of capacity, but I maintain it extends to all legal dealings. I submit it is to be presumed that as a solicitor if the Ethics Committee makes such a ruling, I should know about this and follow the said ruling.

I shall further give a criminal case example based on true fact. I get a call from X, the client, from the police station stating he's in the cells. On arrival I discover that X has gone to the police station with several knives threatening the police and daring them to shoot him. X could arguably be a danger to himself and theoretically a danger to others. Apart from the perceived mental health issue, which I'm not qualified to diagnose, there appears to be some intellectual disability but there is only a suspicion.

His father is his carer, or states to be his carer. His father appears to not be much better than X in capacity.

As noted by my colleague Ms Hadden, solicitors are not medical practitioners, nor should they attempt to practise as same. Here is what arose from the matter of X. He was placed in Melbourne Assessment Prison. I could find nobody in Ballarat, or even close to Ballarat, to assess him for his perceived problems. My submission to the court that he should not be in remand were routed by the various magistrates on the basis of public safety, which is a justifiable concern. I had to get the court to order a report from Forensicare. This takes up to 12 weeks and, thus, X spent four months in jail. It should be noted that once the court was given professional diagnoses of X's various psychological problems and intellectual disability, then a game plan of processes could be put in place to allow X to enter the community.

Thus, even if I suspect a client may not be in a position to give me instructions, I should follow the LIV advice but there are no resources in Ballarat, and Ballarat has a population of 80,000, that can do what needs to be done for the intellectually disabled in a timely manner. I note that the Ballarat and District Law Association covers a wide area and with 80,000 people the problem is bad in Ballarat, but in Maryborough or Ararat by definition it must be much worse.

A client subsequently becomes intellectually disabled. As noted by the New South Wales Law Society, capacity is fluid. A person's capacity can fluctuate over time or in different situations, so you will need to assess their capacity for each decision whenever there is doubt about capacity. Even when a client lacked the ability to make specific decisions in the past they may be able to do them later on. Clients might regain or increase their capacity, for example by learning new skills and taking medication.

Other factors such as stress, depression, reversible medical conditions or hearing or visual impairments may also affect a person's decision-making capacity. This can and, it is submitted, does present at times a more pressing issue for the client and solicitor if the client, through an acquired brain injury or neurodegenerative diseases like dementia, deteriorates to a level where the instructions become unreliable. If the deterioration is significant, or at the significant end of the scale, this does not present an issue. However, the varying degrees, where the deterioration is up to the moderate degree, does present with a problem if instructions seek to be changed and, in the solicitor's opinion, these are to the detriment of the client. This can be rectified with the assistance of the client's medical practitioner if there's an awareness of the deterioration by the solicitor, and the client will inform you of the identity of the doctor, and this does not happen in every situation, and if they will sign a release form — an instructional problem in itself — for their medical information from the doctor or treating facility. In a plea in mitigation in a criminal matter such information is vital to a court as a factor in sentencing. The absence of same can result in harsher sentencing of the client. It is also an important factor for the court in other areas of law, notably wills and probate.

Interactions with the police, Ms Hadden will be speaking on that because I've actually said I agree with what she said in her submission wholeheartedly. But I subsequently add, as Ms Hadden notes, if the police lack the resources and relevant advice at the

time of the interview to assess intellectual disability, this skews the process at inception. It is on this information received that the court relies, and on which the solicitor structures a defence, which may be made moot after said interview as there is a significant difference between a client saying "I did it" and saying "I did it, but" or having the intellectual capacity to remain quiet and say "no comment" or a plea in mitigation. The situation needs to be rectified to enable equal justice to the intellectually disabled.

Sentencing. There are three perceived issues with sentencing that I can see. Information before the court, and I have dealt with this previously, but I note that the perceived issues commence with the police interview and proceed to the information that can and should be available to the court as part of its discretion in the sentencing process. The defence plea in a mitigation situation can simply be stated as a lack of knowledge by solicitors in the recognition of intellectual disability coupled with a lack of resources and extensive timeframes for external resources, such as Forensicare, which is in Melbourne, while clients may languish in prison awaiting trial or mitigable material.

Two, comprehension in sentencing. Again, here I use an example based on true facts, and this is not unusual. X has been caught and taken before a court on a drink driving charge. X has his or her licence suspended, this situation is explained by the court and by legal representation, and sometimes quite vehemently. Despite this, on leaving the court X gets in his or her vehicle and drives away. Leaving aside the bloody-minded client — and we all have those — this situation has occurred on a number of occasions to myself as a practitioner and others when a moderate disability is known and even pled in mitigation. This creates a danger to the client both physically and through perceived or actual jail time for subsequent offence and to the community.

Baseline mandatory sentencing. I have read this. I note, and I will leave the committee to actually read what a judicial discretion is on the matter but I note in very short order that if one reads through this it can be seen that discretion exists if the discretion is allowed by the legislature. Baseline sentencing from the writer's perspective disables such discretion to exist; thus any mitigation that could be raised for a person with an intellectual disability could not and will not be a factor that the court can consider. It is my contention that such removal of discretion would be prejudicial to the intellectually disabled.

I note here that this has largely been about criminal law; however the problems of comprehension, confidentiality and representation embraces all areas of law from conveyancing through contract and family law to the major issue of wills and probate, which seems to be the major focus of the court when they're making decisions on these matters. These will be continuing and significant issues for both the intellectually disabled client and the practitioner unless training for the practitioner and specialised advocacy and medical advice is made available to the client in a timely manner. Thank you.

The CHAIR — Thank you very much. Dianne, did you want to go into your submission?

Ms HADDEN — Yes. Do you want me to read it?

The CHAIR — No; perhaps just highlight — —

Ms HADDEN — You've got my submission. I must say, for the record, amend on page three — as a lawyer — b.i., break down barriers, it should read, not break down barristers. I must have had some other thought in my mind at the time. So that should read barriers.

The CHAIR — Also for the record, I recognise you as being a former Member of Parliament and, I understand, a former member of this committee.

Ms HADDEN — Thank you. Yes, I had a wonderful seven years on this committee and we did a lot of work — I think there was nine reports — and it was good work and there were a few lawyers on it too, a few country lawyers, so we knew the ins and outs of things.

The CHAIR — Bush lawyers.

Ms HADDEN — We were not allowed to call ourselves bush lawyers. There's enough social workers who are bush lawyers in Ballarat. I'm under parliamentary privilege but that's the problem.

The CHAIR — Perhaps if you could just highlight the main points.

Ms HADDEN — The difficulty is assessing the degree of your client's intellectual disability or mental impairment, as the Committee knows, that is an assessment that can only be done by a medical practitioner and a psychiatrist or clinical psychologist. And that's the difficulty, although experienced lawyers, as Phil and I have been around a long time, in dealing in the criminal justice system and guardianship and administration areas, you pick up the signs but that doesn't mean that we must assume that the person has an intellectual disability just because they might be slow or their behaviour is a little bit erratic. There's a number of definitions of mental illness apart from the medical term in the American DSM4.

The CHAIR — Dianne, just following on from the point you just made, would you say that a barrier to accessing justice for people with intellectual disability is actually being identified as such?

Ms HADDEN — The diagnosis, yes. The intellectual disability definition in the Disability Act is very different to the definition of mental illness under the Mental Health Act. Under the Mental Health Act Section 8(1)(a), if a person has a mental illness being a condition that is characterised by a significant disturbance of thought, mood, deception of memory. Definition of intellectual disability in the Disability Act 2006 means a significant subaverage general intellectual functioning and significant deficits in adaptive behaviour, each of which became manifest before 18 years of age. Clearly lawyers, social workers, carers or anyone else is not qualified to make that assessment of a person.

Talking about figures and client numbers, and I said earlier with the previous submitter that I thought it would have been hundreds who fall into the intellectual disability category in Ballarat alone. Our population is just touching on about 98,000

at the moment, or 99,000; we're actually ahead of Bendigo. This year alone I've had, within the criminal justice system, four adults, and one child. Within the guardianship and administration area of VCAT, I've got one adult. In relation to wills, and I know we shouldn't pick on the elderly, but I've got to make that call if they're in their 70s or 80s, and I want to be satisfied that they have the capacity to make a will or a power of attorney, then I will ask them to see their doctor and have their doctor give me a letter, their treating doctor it must be, not any other doctor, to assess whether they have legal capacity. That hasn't been an issue and I do that as a matter of course because that's the first question the Probate Registrar will ask if there's any difference between a will, the proposed grant of probate and the death certificate, especially if there's any mention of dementia — you don't die of dementia, you die of a condition. If there's any hint then the Probate Registrar of the Supreme Court will ask for medical evidence on affidavit and the solicitor submitting the probate documents to go on affidavit as well. I've done that, I've been through that process. So you learn to cover yourself a bit.

Assessing intellectual disability is an issue. The issue in Ballarat is we've got about 20 clinical psychologists practising in Ballarat. None of them do court reports. They will see your client but not for reporting to the court so that's of no assistance to a lawyer.

Mr NORTHE — Dianne, can I just interrupt for a moment if that's okay. I know in your submission you talk about ARC and you talk about rolling that out further, and that's well understood and well articulated, but going back right to the start where there's somebody with an intellectual disability comes before the police and the police bring them in for whatever it is, and I understand of course there's the independent person system which can help, at that particular point in time what should happen from a practical viewpoint? And, I guess, making the assumption that the independent person who is appointed to assist may not be qualified to talk about that individual.

Ms HADDEN — No, they're not.

Mr NORTHE — So what do we need from a practical point?

Ms HADDEN — An independent person is a well-meaning person who sits there to ensure that their client is not getting belted up by the police during the process, that's in effect what it is, and to try and explain and be a bit of a witness, because they can be called as a witness too. The police are experienced too, they're experienced in dealing with suspects. My view is that if they have any inkling or any suspicion that the suspect has an intellectual disability or a mental impairment then the police should not commence the interview and they should call in a police doctor who attends the custody centre here to prescribe medication, they should have the person assessed, even if by the police GP that attends the custody centre. The GP is not a psychiatrist, can't diagnose, but at least as a GP — and it's a she — she would be able to say: it is my belief this person has a mental impairment or intellectual disability. And that's where it should stop.

Mr NORTHE — I understand you're saying an assessment but I wanted to draw down into who that might be.

Ms HADDEN — It has to be a qualified person. Even the ARC list and the CISP lists in Melbourne court have qualified persons. Our Chief Magistrate, Mr Ian Grey, refers to that in his submission but both the ARC and CISP lists at the Melbourne Magistrates' Court are specialist courts and they have qualified persons who are able to assess mental health and intellectual disability, they're clinical practitioners, qualified psychologists and a social worker so it's not just anyone, a well-meaning person that just goes into these areas.

And what I've done too, I've printed out — I don't know whether you may or may not have it — is the CISP eligibility and referral process as well as the assessment request. That is available on the website. I will tender that for you. Professor Richard Fox, lawyer and author and lecturer at Monash University, in his current publication, Victorian Criminal Procedure of State and Federal Law 2010, goes into the areas of assessing intellectual disability and how they're dealt with under the State Act and Commonwealth Act. I've copied those couple of sections too. It's a very difficult area.

What Ballarat court needs is a CISP program. We have two very, very good programs at the moment, which I've mentioned in my report on page four, our CREDIT/Bail program, but it's one case manager, she's not on a full-time basis, she does an enormous job, but a client can't just rock up and see this person, the person has to be referred once they're within the criminal justice system, referred by the Magistrate within that program. That certainly needs to be expanded, in my view.

Mr NORTHE — Mary and Jacob just spoke about that.

Ms HADDEN — Yes. Well, that needs to be expanded. And I know what the community think, the community don't like taxpayers' money being spent on the criminal justice system. That's not going to change, that view by the public is not going to change. People with intellectual disabilities who find themselves within the criminal justice system do commit crimes, horrendous crimes. Don't think they're just the ordinary shop theft and kick a door in, they are horrendous crimes. The low level ones are probably managed to a certain degree but once they start re-offending then the police have to do something because it's impacting on small business and it's impacting on people's safety and on the offender's safety.

We also have the court liaison service with, again, the on-call registered psychiatric nurse. She's based at the courthouse on-call and only by order of the magistrate and it's pretty difficult to get an order. I've been able to get one once, I think it was more luck than anything, only because my client was suicidal and it was a contested bail application, the police wanted him back in Port Phillip because he was on parole. I managed to get the magistrate early this year to have him assessed, because she needed an assessment urgently, there was no good him going back to the cells and the bail application adjourned because there was no other facility to assess him quickly. Forensicare is months and months and months, it takes about three to six months, and the magistrates will be told how many they can refer a week to Forensicare.

The court liaison officer, as she's called, or service, CLS, she assessed my client but she didn't have access, as I didn't, to any of his medical reports, which were all with the parole officer. The parole officer is not required to be involved with the bail

application, and the parole officer, under the Corrections Act, is a totally separate entity and I don't get access, nor does my client, to those reports, nor does the court. The registered psychiatric nurse did an amazing job over a two hour interview in the police cells between Perspex glass, you don't sit down across a table, and assessing his mental status as to whether he could cope being within the prison system awaiting his trial, which was going to be probably 12 months away. That could be improved upon. She gives a very lengthy report, it's about 10 or 12 pages, but again she's an experienced registered psychiatric nurse who works at Grampians Psychiatric Services.

Phil mentioned, as the previous submitters mentioned, the difficulty in getting assessments of intellectually disabled clients, and you do need an assessment. As lawyers we are not allowed to give medical evidence from the bar table.

Mr LYNCH — The other problem is the cost. The cost is sometimes prohibitive. If you're on Legal Aid that's fine.

Ms HADDEN — It's not fine, they only offer $200, that's why you can't get a report.

Mr LYNCH — And in the situation of X that I was talking about, he wasn't on Legal Aid. Forensicare said: we will write you a report but it's going to cost you $150 for the report. And he said: I haven't got $150; I've been in jail for the last three months.

Ms HADDEN — I would like to see the CISP program expanded, which will mean more resources. The difficulty is room within our courthouse because we simply don't have the room. Her room is about the size of a toilet. Literally is. So we just don't have the room within the courthouse and I don't think it's a facility that can be housed outside the court building, for security reasons, and it certainly couldn't be housed at the Corrections office, which is the Department of Justice building because that means that those CREDIT/Bail people are mixing with parolees and other people on community based orders, which is another issue because once they get within the criminal justice system they're mixing with other offenders, especially if the other offenders have drug and alcohol addictions, it's a recipe for disaster.

I had a 14 and a half year old client this year and had she been under 14 she would have been in the category of not being able to have been charged between the age of 10 and 14; her ability to commit a criminal offence in our state might have been questioned. The magistrate certainly picked that up because she was 14 years and five months at the time of the offending, but it was very serious offending, group offending, which was affray, and serious assaults within our community in a public place. Her father was with her, I ensured that during the interviews and my instruction taking, because he was her guardian and parent but it was very difficult because you've got to tread a very fine line in relation to confidentiality of your client. But we got through it and I got her a good result. I'm just hoping that she will perform under her sentence. I needed a report from her service providers and also a psychologist report, and I was able to get that in a fairly quick time but it is difficult. It's also difficult with people with an intellectual disability within our system to

actually comply with all the rules and the appointments, because that's not within their parameter of living and their boundaries and it all often becomes very stressful.

The other issue that I do find, and have found over the years, and I don't know how we change it or improve it is, as Phil mentioned, the carers often have a view of, look, let's just get it over and done with, get in, plead guilty and you walk out and you're on your way. If a person has got a mental impairment then they can't be found to be guilty within our legal system. But that is a pressure that's placed often on the intellectually disabled offender and it's an issue.

Mr NORTHE — What about the supports within the court system itself, you acting on behalf of your client, how do we ensure that the judge, the magistrate, whoever is hearing the particular case, understands the individual and the complexities around that individual?

Ms HADDEN — Magistrates do.

Mr NORTHE — And vice-versa, how does a client actually understand that they've got to tender evidence, how do they understand that they're giving the right — —

Ms HADDEN — It relies on the lawyer, the skills of the lawyer, the medical reports you've got. Our magistrates here are very skilled, they've been around a long time. Never, ever think a judge or magistrate doesn't know what goes on in the community or doesn't understand.

Mr LYNCH — They understand but the problem is, and Dianne has alluded to this, you then can get up and say: my client is intellectually disabled. I want a doctor's report, I want this. Dianne and I have discussed this. One of the problems we have in Ballarat is a lot of these reports come out of Ballarat Psychiatric Services, and a lot of people don't trust Ballarat Psychiatric Services, for whatever reason, but if you've got an intellectually disabled client, hang on, you're saying I'm a mental case. No, no, no, that's just what we've got to do, but because of the level of their intellectual disability you have a very hard time explaining to these people that in fact, no, that's just the way it has to be done. At the end of the day some of these people, as Dianne has said, throw their hands in the air and say: to hell with it, I'll just plead guilty. That's not justice, as far as I'm concerned.

Ms HADDEN — The other thing too in relation to the CREDIT/Bail program, and the previous submitters alluded to it, is a facility where people can live while they're on that CREDIT/Bail program. It would be ideal if we did have a residential facility but then you're not going to be able to house everyone on the CREDIT/Bail program within that facility and the CIS program and the ARC program in Melbourne Magistrates' Court do not take offenders who have been charged with violent offences or sex offences. We have very few accommodation places in Ballarat for men, homeless men, a lot of homeless men come through our system. There's a lot for women but not for men, which is most unfortunate. We have Peplow House, which used to house about 30 to 40 men. It was run and owned by the Ecumenical Council of Churches, it's a two storey building in Webster Street Ballarat. When they handed it over to the State Government, Department of Human Services, it went from a 30 to

40 bed facility to I think a 10 or 12 bed short term stay, three to six weeks maximum. That's the only facility for men in Ballarat.

The other thing I was going to just give you, just some study notes in relation to mental impairment fitness to plead, and it's got the cases and texts. I won't presume you're lawyers or non lawyers but it goes to the Crimes (Mental Impairment and Unfitness to be Tried) Act. It's about six pages and I will tender that. There's a Supreme Court decision of Verdins; Court of Appeal Decision of R v Verdins, Buckley and Vo (2007), which is the Bible for sentencing of an offender with a mental impairment. That's if they're fit to plead and they either plead guilty or it goes to trial and it looks at whether or to what extent an offender's moral culpability is mitigated by the presence of a mental condition will depend on the nature and severity of the condition and the nature and seriousness of the offence, and there's a criteria there which the courts follow in relation to what they call guiding principles, so you certainly need your medical evidence at that point if you want to do a plea that your client's moral culpability in an aggravated burglary or a vicious or serious assault is mitigated by their mental capacity or their ability to reason. So that's our Bible and the magistrates know it and if you can't refer to it and raise it before the magistrate, you're in trouble.

The other case the previous submitters mentioned too is a case of CM Cain before Lazry J in the Supreme Court, I think it was about October last year, but that covers not only children offenders but also adult offenders within the Magistrates' Court, which means any indictable offence if the child or adult has an unfitness to plead, or fitness to plead, there's often an overlap, they have to go upstairs, as we call it, to the County Court, and that issue has to be dealt with first before a jury and then if they're unfit to plead then they get put away at the Governor's pleasure and there's not many places they can go anymore because we no longer have our psychiatric hospitals — we had a big psychiatric hospital in Ararat, Stawell and Ballarat.

You get to know them, you see them in the courthouse, you see them walking in streets, you see them in the shops, and you only need to look sideways at some of these unfortunate people, and anything could happen to you so you've really got to be very careful.

The CHAIR — Verdin's case only relates to the sentencing?

Ms HADDEN — That's right, yes. With an offence you have to have both the intent and do the act. If you've done the act and don't have the intent then you can't be convicted. The intent is the mens rea, the ability to reason and intend to the consequences of your actions. That's about all I wanted to say.

The CHAIR — Thank you very much for that, it was very helpful.

Committee adjourned.