

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

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Ms J. Penberthy, Principal Lawyer, Central Highlands Community Legal Centre.

The CHAIR — Thanks for coming in, Jane. My name is Clem Newton-Brown, I'm the Chair of the Law Reform Committee.

Ms PENBERTHY — Nice to meet you.

The CHAIR — You too. The committee is a cross-party committee set up by Parliament to inquire into various issues, this is one of the three inquiries that we're doing at the moment, and what we do is call for submissions from across the state and then we have some hearings where we meet people face-to-face and it gives us an opportunity to discuss the issues in a bit more detail. On the committee is Anthony Carbines, Member for Ivanhoe; Russell Northe, Member for Morwell. Jane Garrett, Member for Brunswick, who is the Deputy Chair, is an apology today, as is Donna Petrovich, who is the Upper House member for Northern Victoria. Everything you say gets taken down and a transcript is produced. You're protected by parliamentary privilege in anything you say today but not outside the room. If you could start for the transcript with your name, your address and who you represent and then launch into what you want to tell us.

Ms PENBERTHY — My name is Jane Penberthy and I'm the principal lawyer at the Central Highlands Community Legal Centre based here in Ballarat, at 15 Dawson Street North in Ballarat. I'm here because I was asked to be and I hope I can assist. I've looked at a few of our cases and asked my colleagues for some input and I think I can provide you with a few examples of interactions.

The CHAIR — Perhaps you could start by telling us a bit about the Central Highlands Community Legal Centre, what it is and what you do?

Ms PENBERTHY — We're a community legal centre funded jointly by the state Attorney General's Department and federal Attorney General's Department to provide legal advice and referral in really almost any area of law, depending on our resources, and to provide ongoing casework, which is really at my discretion if we've got the resources. I'm a part-time lawyer, there's one full-time lawyer and another part-time lawyer and some administrative staff.

We seek to provide access to justice for not necessarily disadvantaged people, but they tend to be at least in that socioeconomic demographic. We don't have any asset testing or rules or regulations as to who we act for. We prefer to provide advice by appointment and we also have some volunteer local solicitors who help on a regular basis but we do get people in off the street who need a lawyer instantly, sometimes just to witness a document, sometimes just for some simple advice, otherwise it's appointment advice.

The CHAIR — What sort of experience would you have with people with intellectual disabilities?

Ms PENBERTHY — I got some statistics out this morning. Firstly, sometimes it's hard to tell but we do have a questionnaire that we ask of people as they become our client, we ask them their background and whether they have a disability or not, and then sometimes they tell us what the disability is. Entered into the system, from 1 November 2010 to 1 November 2011, we saw 1,267 clients in total, that's about 1,200

in a year, and under the heading intellectual disability there were only six; specific learning disability there were eight; acquired brain injury disability there were eight; and psychiatric, which is very general, there were 29. That's about 50. Small percentage.

We also provide community legal education to different groups and organisations around the central highlands, our area ranges to Stawell in the north, Maryborough, Clunes, Daylesford and around, so we're the Central Highlands. We speak to groups of carers too so we have an indirect interaction with people with intellectual disabilities by especially going to acquired brain injury carer groups at hospitals, there's some well organised groups within the local hospitals, and usually I talk about powers of attorney and guardianship, they're the usual problems, so there is that interaction with those clients too through their carers.

Mr NORTHE — Jane, sorry to interrupt. Just wondering how do you guys interact with the disability advocacy groups?

Ms PENBERTHY — There's no formal arrangement. Often we will receive a referral from them and they will attend with their client and depending on capacity issues I usually check with the client if that's okay. As a lawyer my duty is to them and I've got duties of confidentiality that I need to ensure aren't being breached by having somebody else walk in, but we usually work that out easily. I've got a couple of clients that have come to the centre with Carrie McLean from Grampians Health. As with any sort of social worker relationship, the lawyer tries to tail in with what they're doing and complement what they're doing with their client in the legal aspects of the issue.

I should say also we go to the prisons, we go to Ararat Prison, which is medium security, and Langi Kal Kal, which is a minimum security prison, so I interact with prisoners who tend to have depression and psychological issues, and we provide a duty service at the Ballarat Magistrates' Court in the family violence division so that's the other area. The reason I mention that is that that's another area where I often interact with other advocates and other social workers and support workers in a team environment.

Mr NORTHE — In your experience within the prison system, one of the things that has been conveyed to us is the high rate of recidivism. Is that something that you've encountered?

Ms PENBERTHY — Recidivism as in re-entering prison?

Mr NORTHE — Yes.

Ms PENBERTHY — I don't really know if I can comment on that because I've personally been attending prisons for about a year and we keep files for seven years for all clients, so prisoners stay on the system for seven years, but if they come out and go back to Melbourne or wherever they're from we never hear from them again and I don't know if they've re-entered or where they are. Often we lose contact completely once they've left prison. It's a problem actually, we never know where they've gone.

I was going to say in relation to the prisoners, the last time I was at Ararat, which must have been October — I go once a month — I saw nine clients and I would say six of them had psych issues, two-thirds on that day. I'm not a doctor so I'm not able to judge this professionally, but as a solicitor I'm often put in the position where you do have to assess somebody's capacity, that's our job whether we like it or not, to take instructions, and I would say half to two-thirds of the prisoners suffer from a range of psychological issues, so if not intellectual disability at least depression and bipolar and all sorts of issues that you can tell impact their ability to seek services.

The CHAIR — Our inquiry is specific in looking at the issues that intellectually disabled people have with accessing justice, so that could be in relation to communications with lawyers or police or courts. Have you got any suggestions as to how the access could be better facilitated?

Ms PENBERTHY — In prisons?

The CHAIR — In any step of the justice system and with any of the players in the justice system how we can better make justice available to them?

Ms PENBERTHY — I don't know on a practical level how it would be delivered but psych services in some sort of — what's the word — we provide a duty service. So to go back to using the prison, for example, we provide a duty service, they know there's a lawyer coming, they know when and where, it's a little clinic. Legal Aid also provides a similar service. There are doctors also available. I don't know exactly what psych services they have in prison, I'm assuming they're insufficient, just anecdotally from what I gleaned from the instructions that I get. For example, a psychologist once a month in Ararat Prison might help. I can't really assist because I don't know what the setup is at the moment and what's missing.

The CHAIR — When you're dealing with people who obviously have psychiatric issues, which may be intellectual disability or maybe something else, how would it assist people in your position to better understand what their instructions are? Would it be a matter, for example, of some sort of training for lawyers or is it a matter of having a third party come in to assist?

Ms PENBERTHY — It would assist if I knew the name of a visiting psychologist or psychiatrist to the venue that I'm at, if I knew of an arrangement that I could then refer this client to them. Often they come to me and they're not legal issues anyway, the legal issue is really peripheral to the mental issue. I don't know how long prisoners have been in, I don't ask, I don't ask what their crime was. Sometimes they tell me, sometimes they tell me why they committed it and that they were suffering X, Y, Z before because of their own sexual assault when they were seven, and now they're sitting in Ararat Prison for 15 years and I don't know what level of continuing counselling they've had. If I ask them if they see a counsellor they just say "yes"; they don't divulge a lot. And it's really also not my business and that would also take the appointment way beyond a 20 minute legal appointment, when I've got 10 people in a row because it's a clinic.

I had thought about whether I could see any areas for improvement. We have an excellently running Family Violence Division in the Ballarat Magistrates' Court here,

I don't know if you know any of the background, but it was one of the pilot programs in the state and it's a dedicated family violence court with gazetted magistrates trained in family violence and all the staff and the applicant, who is usually the victim — we call them the affected family member — they have a support worker within the court and the respondent also has a support worker. There's the capacity for an order to be made for a male respondent to attend a men's behaviour change program conducted here at CAFS in Ballarat, and it's mandatory, it's part of the order so if they don't attend their program, which can run for 20 weeks, that's a breach of the Intervention Order. The only thing is they have to be assessed as being eligible and they won't be assessed as being eligible if they have mental health issues, so that's the Catch-22. Where do they go? They're the ones that need the support.

I recently had a man — and this is also as a duty service so you meet them for 20 minutes and then you're into court doing 10 intervention orders in a row, I act for sometimes the applicant and sometimes the respondent. I was going to let you know about the respondent client that I had recently who finally told me that he suffers from Asperger's Syndrome, he was socially challenged, and got so frustrated that he resorted to violence with his wife and had no communication skills. He went from zero to 100 in two seconds. With me as well. I managed to talk to him about what the order entailed and that he might be ordered to go to this men's behaviour change program, but he wouldn't have been considered eligible. After court that day, I could but I don't usually have the time to follow up every single client, I don't know where he was left in the justice system. I'm fairly sure he wasn't eligible, I don't know where he was left. Julie, the respondent worker, is very good at trying to think of as many referrals as she can but she can only give them a piece of paper with a phone number or a brochure and say go down the road to this or that service. There are lots of services available but he needed his hand held to go there. He was realising in court that he needed to improve his way of communicating and not to commit violence, and he took an Intervention Order away with him, which he consented to without admitting the allegations in it, but then what? I think that's an area there could be a second tier for some sort of if not mandatory program like the court ordered program, at least some efficient referral system in the family violence division.

The CHAIR — You appear in court as well?

Ms PENBERTHY — Yes.

The CHAIR — When you have people with intellectual disabilities do you find that the magistrates or judges deal with them appropriately?

Ms PENBERTHY — Yes, they're very good. Exceedingly good. They will adjourn or stand down a matter if there needs to be further or clearer discussion of any of the implications of any orders being made or to obtain further representation or support work. The court staff here are excellent, I can't fault them. So is VCAT, so is the Victims of Crime Assistance Tribunal, so all my interactions with courts and tribunals here have been excellent; I was going to make a point of mentioning the positive experiences. All the guardianship matters that I've ever done have all been well handled.

My main issues have been prison. I've got one client at the moment who has at least learning disabilities and cognitive disabilities, she finds it very hard to understand things. She was represented at a mediation by a barrister who she says railroaded her into a settlement. I've referred that to the Legal Services Board and they didn't want to do anything about it and it's hard to prove. Her interpretation of it is that he forced her to sign a settlement deed, but I know how mediations work and it's hard. I can't launch a Supreme Court action into professional negligence against a QC, I don't have the resources, but there's one illustration of someone's perception of being unfairly treated by a private practitioner. I guess they fall into the broader definition of justice system, we all do, all lawyers fall in there, so I've got a couple of complaints against private practitioners.

I've had a couple of Mental Health Act complaints where I've been instructed that people have been held involuntarily without proper process but I think that's fairly rare, and it's another very difficult area under Section 86 of the Mental Health Act at local hospitals. I currently have a case where I have a client who has seizures so I've interpreted intellectually disabled very broadly, I've thought of whatever I could possibly let you know. Her seizures are probably like epilepsy, but more serious, and she has an assistance dog who doesn't look like your average guide dog because he's a poodle. He's a standard poodle, she brings him in, he wears his jacket to say: I'm an assistance dog. And she's blatantly discriminated against in even public places so it's not her interaction with the justice system that's the problem but it's her experience as a person being discriminated against and what can be done about it, and really I could just write endless letters to shopping centres and church, of all places.

The CHAIR — It sounds like it's the poodle's fault for not being a Labrador.

Ms PENBERTHY — He's very good. He can tell when she's going to have a seizure and takes her to a chair. He can sense.

The CHAIR — Is that a dog that was trained for that purpose?

Ms PENBERTHY — Yes. He's an assistance dog, he's trained as an assistance dog, not a guide dog. She can see but he's got all her medical equipment in his backpack, and he can tell when she's going to have a seizure. If he hasn't been able to detect it, if she has a seizure he knows what to do, get the phone, and he will bark until someone comes. That's not an interaction with the justice system but just what can I do about blatant discrimination and we might end up at the Equal Opportunities Commission.

The only other thing I wanted to flag was the Special Circumstances List in the Magistrates' Court. It would be good if they could visit here, that's the one thing I can suggest. For example, I had a client who was charged with littering because a piece of paper fell out of his pocket and he didn't even know, and when the police reprimanded him he apologised and picked it up and they still charged him and fined him \$264. His DHS case worker did a very good job and wrote to the Special Circumstances List of the Magistrates' Court and said please revoke this. They said, no, you have to plead not guilty and come to an open hearing, which is the only process available if you're going to plead not guilty, and that was only in Melbourne. She couldn't make it, and I couldn't make it, and I couldn't get anybody else on the day from any other legal

centre because I do representations here but not all my colleagues will attend a court hearing, and she couldn't get another DHS worker because there's not enough of them, and so he didn't go to his hearing and just ended up getting a \$20 a month instalment plan on his disability pension to pay a \$264 fine for dropping a piece of paper in the Bridge Mall. If there had been a circuit for the Special Circumstances List I would have gone down and had a ball, I would have jumped all over the room and got him off.

If you can take anything with you today, if there can possibly be, seeing as we have all sorts of circuits — we have VCAT, we have County Court, we have all sorts of services on circuit or permanently here, that list would be useful.

Mr NORTHE — Jane, does that also lead to another issue that's been espoused through the inquiry thus far that maybe the police, with all due respect, and I have the highest regard for them, but maybe they don't always have the skills that are required?

Ms PENBERTHY — I have the highest regard for the police too, I work very closely with them. I don't know which particular police it was, I know a lot of local police. Whoever it was, once they've made that charge and the fine is in the system, the only way to deal with it, even if I went down to the police station, they can't, I don't think they have the power to revoke it. The only way to revoke it or deal with it is through the system, the Special Circumstances List.

Mr NORTHE — I understand that, and I guess some of the things that have been put to our committee thus far are things like having an identity card potentially which would identify somebody who might have an intellectual disability and might be displaying features that might raise suspicion to the police but at least if the police knew that somebody has an ABI, for example, they might be behaving in such a manner that they will have a better appreciation and understanding. It's been suggested that maybe they can have greater education and training for judicial staff and also the police themselves.

Ms PENBERTHY — I would assume it would be in their training, I think the police are highly trained. Obviously they're human and they have to make quick calls of judgment — and that's the other thing, often people with intellectual disability and ABIs slur, wobble a bit, look drunk, sound drunk, treated as drunks, and I know of that a fair bit. Less and less, I think. I don't know if they should have to carry a card or should they just be taken for their word and whether they have a carer present to speak for them. I don't know what police are trained in, but I know they're highly trained. I don't know if that's an area that you might have to make enquiries of police. I don't have a lot of anecdotes of any police mismanagement of people with intellectual disabilities, apart from that one. I have to take my client's word for it too, that they behaved as excellently as they tell me. I wasn't there and I have to take their word that all that happened was a piece of paper dropped out of his pocket and that he just stood there and copped it, so to speak. Who knows, it could have been, you know, a different scenario. I'm willing to accept that my clients paint a rosy picture too.

Mr CARBINES — In relation to the stats you gave earlier, as best you could on the 1,200 clients over a year, and talking about those with ABI and learning difficulties and others, do you get a sense that there would potentially be a greater

number? Is it related to people with intellectual disabilities choosing other avenues to access advocacy or not maybe knowing the pathway to your services? Have you any thoughts about that?

Ms PENBERTHY — We try very hard to let groups and organisations know that we exist but it's a hard thing to measure and we have a strategic plan as to how we will deliver our services and make them available and that's what the Community Legal Education is about really, going to the places that we think we will find the people who need us, so the hospitals, the hospices, the church groups, carer groups and health services. We have good relationships with Grampians Health and Ballarat Health and Hepburn Health. If I see a client in Daylesford I see them at Hepburn Health, I see them at the house adjoining the hospital, so legal services tail in very well with the health centres physically as well as raising their awareness that we exist so we do get a fair few referrals through those workers.

Mr CARBINES — Do you get any referrals out of Centrelink or rooming houses or places like that?

Ms PENBERTHY — I have a fairly good relationship with one of the social workers at Centrelink, Sue Wylie, really the other way around so that she can help me when I've got someone in who needs to see a social worker at Centrelink. She knows of our existence. We try to track referrals and I haven't actually got any stats on them but we've been around for almost 20 years in Ballarat so the legal centre is fairly entrenched and, as I said, we have a good group of local volunteer lawyers who provide their services and time and they're in all parts of the network too, there's quite strong networking links in Ballarat.

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

Ms PENBERTHY — I hope so. It's my pleasure. If I can assist with anything else, just let me know. See if I've mentioned everything that I thought I wanted to mention. The only other thing, as a lawyer I've mentioned capacity. The only difficulty personally as a lawyer that I have with people with intellectual disabilities is taking their instructions and being left with, as I said, the job of having to decide whether they have capacity and how to interpret their instructions. I've got a duty directly to them, I don't have a doctor sitting next to me saying: Jane, this is a load of rubbish, they're actually talking complete nonsense.

I have a client who I thought I'd just show you — I won't show you close up but I thought I would just bring you a file to give you an example of the extent of the difficulty of understanding people's instructions. I will just show you from here. These are instructions. This woman was shot dead, and she's 50 something, and she was dead for 16 days. These are her letters to Jane — me. Very concerningly, someone in my office was present when she was dead. She tells me she's in the care of a psychiatrist. She comes into the centre usually unannounced just to see me, because I was the one who saw her first, and she gives me all that paperwork. I don't have the ability to just make enquiries without her authority, which I don't think she is capable of giving, I can't make any enquiries of these people she says are her psychiatrists in Melbourne. She tells me names occasionally. I hardly really know where she comes from.

The CHAIR — Who is dead?

Ms PENBERTHY — She was dead.

The CHAIR — She was telling you she was dead?

Ms PENBERTHY — Yes. This is what I mean, I just thought I'd give you an example, this is probably my most extreme example, of how to serve a client with an intellectual disability. Short of holding her by the hand and walking her to the Base Hospital, what can I do? This is the third or fourth time she's come in. I can say: go to the police. She says she's been, she says she's got psychological help. At face value you can tell there's a little bit of a disability but she actually appears quite okay, she presents quite well, but then this kind of thing unfolds. So I just thought I would tell you that as an example of a fairly extreme issue in terms of a legal practitioner, not medical practitioner, trying to assist a client with obvious difficulties. I will work out how to help her if she comes again. I may well say: let's go down to the hospital. You can walk from Dawson Street to Ballarat Base in five minutes. As I said, that's an extreme example of something that I encounter because it's my duty and my job and my wish to assist people, but sometimes their intellectual disability makes that almost impossible. So that's just an obstacle.

The CHAIR — Thank you very much.

Ms PENBERTHY — You're welcome.

Witness withdrew.