

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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Mr M. Bernard.

The CHAIR — Thanks very much for coming today. My name is Clem Newton-Brown, I'm the Chair of the Law Reform Committee, Member for Prahran. Parliament has a number of committees, the Law Reform Committee being one of them, and it's a cross-party committee with five members of Parliament on it. Today there's myself; Anthony Carbines, Member for Ivanhoe; and Russell Northe, Member for Morwell. Also on the committee, but not available today, is Donna Petrovich, one of the Upper House members for Northern Victoria; and Jane Garrett, who is the Member for Brunswick and the Deputy Chair.

We're pretty casual. We would just like you to talk through your submission and we will probably ask you some questions as you go. You're protected by parliamentary privilege in the room here but not outside the room, so just be aware of that if any media ask any questions about anything. We record everything so if we can get you to start off with your name and your professional address and who you represent and then talk us through your submission.

Mr BERNARD — Do you prefer me to stand?

The CHAIR — No, just sit down.

Mr BERNARD — Good morning everyone. I'd like to thank Grampians disAbility Advocacy for having me, thank you, and I would like to thank everybody here for coming up also. My name is Michael Bernard and I've got what's known as an ABI, an acquired brain injury.

The CHAIR — Go on.

Mr BERNARD — As I was saying, I've got what's known as an ABI, which is an acquired brain injury.

The CHAIR — Michael, does that mean you had an accident which caused the injury?

Mr BERNARD — I've had a couple of aneurysms and a tumour removed and I've had a shunt put in my head to release the fluids over the years. Again, I had to learn to walk and talk and spent a couple of years in rehabilitation learning everything that I had forgotten. What I'm going to speak to you today is about the way the courts handle themselves, the way that the justice system flows in this town and just a couple of things in general, if that's okay.

The CHAIR — Michael, you don't work for the Grampians disAbility Association, you're a client?

Mr BERNARD — Yes, that's correct. Thanking you. I'll do this as a scenario but it's based on a true scenario. A powerful woman who resides in Ballarat, who has numerous friends in Ballarat Police, made allegations to Ballarat Police that she was assaulted by myself and that she was in fear of her life because of myself. Yes, police made their investigations and I was never charged. Yes, the same woman appeared at my residence, accommodated by two police officers for her protection, and also served papers on me. Due to my ongoing health issues, the Ballarat courts would not

accept a medical certificate from my doctor that I was unfit to attend court, hence a warrant for my arrest was issued. A woman friend of mine, also with a disability, was treated in the same manner. I have and still experience being judged by my appearance by Victoria Police, Ballarat law courts and even solicitors. Prior to any investigations, I have been advised to seek a good lawyer. When I sought legal advice my then solicitor made the same opinion because of my presentation and judged me by the way I looked and also suggested that if I went to court the judge would find me guilty because of the way I looked.

On numerous occasions, one night specifically, there was a knock at the door of my unit and my daughter went to answer the door, which I said to her: don't answer the door to strangers. I proceeded to answer the door myself and I heard a voice behind the wire screen and it was a lady police officer and she repeated the word "served" a couple of times. As I opened the wire door, there was a police lady and a policeman. The police lady had a baton above her head and the policeman had a capsicum spray in his hand and he said: don't come any further or we'll spray you. The police lady also stated that she would smash me on the head with the baton. At that point I asked them to leave my residence as my daughter was visibly shaking, as I was myself. That's just one incident that's happened.

With another incident, I turned around and presented a medical certificate to the courts stating due to my health that I cannot attend a conference down there and that was rejected, even though it was by a doctor. It was rejected on the grounds that you have to attend. I find that ludicrous in this day and age so I didn't attend.

On another court date — —

The CHAIR — Can I just clarify, are you saying that because of your acquired brain injury that there are no circumstances under which you should attend court?

Mr BERNARD — No. What I'm trying to say is I am entitled to have an Independent Third Person come with me because I don't always grasp what's going on or sometimes I have trouble, in particular in the heat. Like at the moment I come across as probably half-normal but in summer when I get hot I get a bit agitated and I tend to stutter and I tend to walk funny and my head heats up and I have trouble with the brain. Again, throughout the years, I've been pulled over and stopped on the streets for being drunk and disorderly and yet I haven't had a drop of alcohol for seven years, so you can't always judge a book by what it seems.

The CHAIR — On that point, do you carry anything with you, a medical certificate or something like that, to show police that you have an injury?

Mr BERNARD — Yes, I do.

The CHAIR — Does that help?

Mr BERNARD — Sometimes it does seem to help, other times it's like they take it like you're a smart aleck. That's happened to me a couple of times.

The CHAIR — So what is it that you show them?

Mr BERNARD — Sorry about not being so prepared.

The CHAIR — No, not at all; you're more prepared than most people.

Mr NORTHE — Whilst the Chair is having a quick look at that, I noticed that a committee consultation session was held recently and the idea of a New South Wales card was put forward in that meeting. Is that something that you would support, Michael?

Mr BERNARD — Yes, I think there needs to be something out there for people. The same thing happened whilst I was driving one day, and it turned out that it was one of the ladies that came up to my unit with the police baton, she spotted me in the car and pulled me over. She must have rung or wrote a letter to Melbourne suggesting that my licence be pulled. Anyway, under the Freedom of Information Act I obtained her name and wrote back and I wanted to make an appointment to see her but that never came to fruition; however, I am tested every year for my licence anyway and I had just undergone the test two weeks prior to getting pulled over. They keep a good eye on you with an ABI if you've got a driving licence anyway.

The CHAIR — On your driving licence does it have something that indicates you have an ABI?

Mr BERNARD — No.

The CHAIR — The idea of having a card as just discussed, an identity card that identifies you as having an ABI, when we've put that to other people at other hearings it was suggested that there was a concern that it could be stigmatising for a person with an ABI to have it set out on a card. Do you agree with that or do you think it would be helpful?

Mr BERNARD — No, I think it would be very helpful. It depends on what way you look at the issue and it depends on who is looking at the card also. For instance, if you bring it out and like the same day as I brought that out the lady obviously turned around and thought that I was trying to get a bit further up the ladder, if you want to look at it that way, but that was in no means that way. I was a bit distraught that day. I happened to deal with police that morning and I was on my way to a funeral in Kyneton where a friend of mine had just been killed on a motorcycle, that was his burial, and incidentally he was killed by an off-duty police officer on her way to work, she had done an illegal U-turn on the main highway that takes you through Sunbury. I had a bit of anxiety that day but I certainly wasn't out of line or out of order.

Getting back to what you're saying, it depends on who you are showing but I believe anyone that's fair and just will look at the card, yeah. There needs to be something. I've been breathalysed before and taken to the police station where I've asked for a blood test just to prove my point, and that's been a four hour job just waiting for them to come and take your blood.

The CHAIR — It seems you've had issues with the police and the courts. What suggestions do you have for us that we can consider to recommend changes that would make things better?

Mr BERNARD — Well, I've made numerous complaints to the OPI and if they've been answered they haven't wanted to take it any further, they haven't listened to what I've said. I would like to point out that allegations were made against me approximately four years ago, like I said, but that they were never, ever proven. The police interviewed me and I was happy to go down and give my time and get interviewed by the police. They called for witnesses and where the incident was supposed to have happened there was in excess of 80 to 100 people at the hotel with an open window so someone would have come forward if there had have been an incident. One of the policemen turned around and said to me, he interviewed me and he said to me: you seem like you've got a pretty good attitude. I thanked him for it. He said: we've exhausted all our attempts to find somebody that's seen anything so we don't think you will hear anything more of this. That's fine.

The next thing I know I get a piece of paper in the mail and I read through it and didn't understand it, but what it meant was that this certain person was suing me for in excess of \$100,000. They've just taken it from criminal to civil. I didn't, at that time, understand the difference between civil and criminal. I made a complaint to a local superintendent here in Ballarat and asked to see him, which his reply was: why would I want to speak to you when I've got in excess of 100,000 people in Ballarat? My response back was: well, why not? The last superintendent, if I ever had any problems all I'd have to do is ring him up and we were on first name basis and he wouldn't hesitate to speak to me at all. He said: well, I'm not going to speak to you. Then I made a suggestion to him, and I'll say what I said to him, I said to him: what are you on the take? I knew I would get a reaction and that's what it was designed to do. He said: when do you want to meet? So we met later that week and I tried to discuss this with him and again he said: it's civil. But I said: hang on a sec, it didn't start off as civil, it started off as criminal. But you could not get through and tell him, he just wouldn't listen.

Initially when this all came about there was another policeman that was supposed to interview me after he interviewed someone else. He didn't get back to me so I got back to him and after tracking him down — he had got a promotion — he said that it's out of his hands now. The original policeman that took the statement, which I spoke to again, he said that when I go to court he will put a good word in for me and tell the judge what happened. That didn't happen, you know what I mean? Since then he's been shipped off out of town so this just went civil and that's it. I've put over \$15,000 of my own money into this out of my disability pension. That doesn't seem like much money but it is quite a big sum when you've got to cut down on your living expenses. Without a word of a lie I ate creamed rice for two years just so I could survive. But whenever I've asked for help with this, it's been knocked back, I've never had any help whatsoever from the police. The only people that's helped me is this organisation here and a good solicitor that I now have has come forward and taken up the case on my behalf.

One day, for instance, my letterbox had a lock on it. I hadn't long moved into this unit and I just assumed that it was the lady that lived there before me, but it wasn't. Anyway, because I couldn't get my mail out, it stayed in the letterbox. Anyway, I ended up by getting the council in to get some bolt cutters and cut it, but by the time I got the mail out I was supposed to have been in court and because I didn't turn up to

court there was a warrant issued for my arrest. Again, that's people interfering with your mail.

What happened one day was I went to court and I had an Independent Third Person with me. This other party didn't like the Independent Third Person I had with me so she stressed the point that we're not going into this mediation today while that other person is there. And I said: well, I'll tell you now, I'm not going into court today if I haven't got an Independent Third Person. When I got to court, what I did was you sign in as usual and I shook the young lady's hand who was behind the counter and she came up to me and said: is it right that you don't want to go through with this today? I said: no, that's not correct. I'm willing to mediate today but with my Independent Third Person there and this lady won't allow my Independent Third Person to be there so bad luck, so be it. Anyway, I turned around and said: well, seeing that I'm not going to go into court today I will leave. And the solicitor turned around and replied to me: if you leave here today, we will go to the magistrate straightaway and get a warrant issued for your arrest. I said: but you cannot do that because I've arrived here today, I'm willing to talk, but she won't let me have my ITP there.

What's happened, I've decided to leave the court, I've left the court, they've gone and seen the magistrate and what they've done is they've taken out a warrant for my arrest for not turning up and it's documented that I did turn up. Then I had the policeman come around to my unit and he wanted to arrest me on the spot and put me in the cells for seven days unless I could arrange bail money, and I said: no, sorry I can't arrange bail money, I haven't got that sort of money. And who is going to look after my animals? He said: well, I've got no choice; I'm the meat in the sandwich here. He was called in from a country town. I said: I understand that and I apologise for that. Because I know how he feels. I said: look, all you've got to do is some good old-fashioned police work and just go down and check the ledger at the courthouse and you will see that I did sign in on that day so there's no problem. He said that it's not up to him to do that. He said: I've got to arrest you. I asked him if he knew another policeman that I knew and he said he did, so I said to him: ring him up and ask him what my word's worth. He done that and then he turned around and said to me: your word is good. So we shook on it that I would be there next Thursday and I wouldn't bolt. Like I said to him, where am I going to go anyway? You're not going to leave your house and your animals.

So that Thursday he came and took me to court. We got inside the mediation room and, again, I was knocked back from having an ITP with me. I said: I don't have to say anything. They said: when we ask you questions you will answer the questions or you will spend four hours in the cells. I said: this is not right. Also the policeman who dropped me off, it was his job to drop me off at the police station and go. This third person turned around and said: don't leave me here with him, he's out of control. I proceeded to get the police officer a chair to sit down on and she said: don't you sit on that chair; you stand there. So he had to stand there for two hours. I answered some of their questions but I didn't answer all their questions because, again, I was knocked back from having my ITP.

The CHAIR — Michael, we've only got a few minutes left. Fiona, did you want to say anything today as well?

Ms TIPPING — Yes.

The CHAIR — We've about five or 10 minutes left. Do you mind if Fiona — —

Mr BERNARD — No. Thank you very much for your time.

The CHAIR — Thank you, Michael.

Ms TIPPING — I'm Fiona Tipping from Grampians disAbility Advocacy based in Ballarat, 20 Eastwood Street Ballarat, 3350. I am the author of case study number three in Debbie's submission. It's still ongoing. Do you want me to just give a brief background?

The CHAIR — Yes.

Ms TIPPING — Basically this situation has been two years in the making and is still going on, allegations of sexual abuse of my client's nieces were made by her sister against her husband. This happened in November 2009. As a result, Child Protection took her four children away and placed them in two separate foster homes. The husband was incarcerated prior to trial and then the police decided to start pressuring the mother into making a statement and giving evidence against her husband. An independent person was called in in this situation but in this case she proceeded to tell my client to leave her husband so she can get her children back and start a new life basically. Then the police went and drove her out to the women's prison as part of the pressure to say: this is where you'll be living if you don't give evidence against your husband. My client has an intellectual disability, and it's not all that apparent to begin with but she doesn't grasp anything for very long. She will take bits out of sentences and create a whole new meaning so she doesn't understand what's going on. They managed to get a statement out of her, and she also wants to please people so she's just that sort of person.

I was called in by Child Protection, actually Lisa Lodge asked for my assistance because they felt that she needed some assistance in liaising with Child Protection and the police and all that sort of stuff so that's when I came on board in March. The husband was already in jail at that time. About seven months later it went to trial. I was allowed in as a support person in the closed court because of the nature of the allegations. It went to trial for about two weeks and they were completely exonerated of all charges. I got to see all the evidence, it was a clear-cut not guilty. Police were found to have manipulated evidence, they excluded crucial photographs that would have proven things. The problem is that they're still trying to get the kids back. To this day they've had 45 adjournments in less than two years trying to get the kids back, there's no reunification plan. The problem is that I was told by the magistrate that there are differing levels of proof required for Child Protection. Child Protection does not believe they're innocent despite the court of law ruling, and that's been the problem dealing with a particular section of Child Protection, which is the Mallee region, it's been pretty onerous.

I've been working with a solicitor, the family law solicitor. He wrote a submission to the Human Rights Commission because we both felt — I rang the Human Rights Commission because I was frustrated, because I just felt this is ridiculous. They

agreed to intervene in terms of defending the Human Rights Charter because so many breaches were made, as far as I'm concerned. Still no reunification and it's been adjourned until January next year but in the meantime all of the children have suffered hugely. They're still in foster care. One of them tried to commit suicide, one of the children was found with a rope around his neck. Both parents are getting counselling for depression.

The CHAIR — With specific examples, we as a committee can't consider specific examples. What we're looking at is recommendations to Parliament as far as changes to laws that would make access to justice better for people with intellectual disabilities. We've only got a couple of minutes left. Are there any specific examples you can give us as to what changes in law should be made to address all the situations which have been brought up in your very comprehensive report and in Michael's evidence today as well?

Ms TIPPING — Number one, I'm thinking the culture with the police. The way they investigate things, it's all with a focus on convict, convict, convict. If it had been properly investigated in the first place a lot of this wouldn't have happened.

The CHAIR — Presumably there's a requirement that if someone has an ABI that they are allowed a third party.

Ms TIPPING — This person has an intellectual disability, not an ABI.

The CHAIR — So it's a matter of enforcing the current law as it stands; is that right?

Ms TIPPING — Yes. I also think that the Independent Third Person should be better trained because this one wasn't, this one didn't understand.

The CHAIR — So they come from a pool of independent people the police just call in randomly?

Ms TIPPING — Yes. I think it's the Office of the Public Advocate who trains them, that's my understanding. But this woman clearly did not understand my client's intellectual disability and the police too, they didn't understand. Education, I think, has to be paramount because it's just horrendous. It also affects everything, it's not just the justice system, it affects how Child Protection liaise, they rely too heavily — I suppose they have to, they've got no choice — on the police. You know, it's contaminated everything because they're still undergoing various sex offenders risk assessments and things like that and the assessors actually contact the police and Child Protection and the police say: oh, they got off on a technicality. So therefore, all of the assessments have been contaminated.

Mr NORTHE — Fiona, as an advocate, how far do you get involved in these scenarios that you've articulated, those examples? It seems to me from a distance that you're not empowered enough to have that inherent understanding of your client, which you know better than most, are you not having enough of a say?

Ms TIPPING — Well, this all happened before I came on board.

Mr NORTHE — Generally advocates who work across the state working with clients, is there not enough involvement from advocates?

Ms TIPPING — Yes, we get denied. In this case what could be added to the submission, I suppose, is that the Legal Aid barrister, for example, that was called in to assist my client in getting her children back in the last court case refused the advocacy service. I had to get an alternate advocate to support her because I'm a key witness in the court thing, having witnessed all sorts of horrible things, so I got an alternative one. She was left in the corridor. I tried to introduce the advocate to the barrister, the barrister seemed to have a hypertension attack, as far as I could see, and just refused to see her; she was left standing in the corridor eavesdropping basically. The reason given to me by the family law solicitor was that he wanted to distance himself from our organisation because Child Protection had made allegations about me supposedly manipulating my client, and that he was an expert in disabilities from a previous life and wanted to make his own assessment. But she kept requesting an advocate be with her in a briefing and he refused. They refused to accept the court ruling so Child Protection just refused to believe the not guilty verdict and the police refused to and so therefore they're still being punished by the children not being returned.

I actually attended a meeting with Child Protection, that was where they got my client to come in without telling me about it. She asked me to come with her and they were actually shocked to see me there, they were getting them to sign permission to release information forms so that they could have an assessment done. They weren't giving her help to understand what it was about because I was the person there to help her to understand what it was, so they tried to sneak it in without me being there. I actually thought it was appalling.

Mr CARBINES — Michael, when you have had an Independent Third Person present, is that someone that you've chosen or had involvement in who that person is that's assisting you?

Mr BERNARD — Yes, about 80 per cent of the time I've got a friend that understands me more than anybody and knows how I think and whilst I will do the talking and explain things, he can correct me if I'm wrong and take it from there. In general, a lot of the ITPs do not know what you're talking about for a start. Before I got ill I had done an Independent Third Person course and you're given a whole lot of paperwork and you read up on it and it changes from time to time but you just go in there and I used to go in there manned with a briefcase and a whole lot of documents but some of the ones that have come and represented me over the time haven't had a clue what's going on, they've got no idea, and they don't know the law, they know nothing about the law, they're happy to stick with what the police have got to say. If the police say this is good, this is A, B and C they tend to agree with that. You may as well not have the person there, no disrespect to them.

Mr CARBINES — So some people, for example, with an ABI might know someone who can regularly be their Independent Third Person whereas others might be a bit luck of the draw?

Mr BERNARD — Yes, that's correct. The thing is with my friend, I've got him down as a friend of the courts now and he's registered so that they know that he can come along and talk on behalf of myself if he's asked questions.

Mr CARBINES — Just a final question, Michael. Does that mean if the courts need to get in touch with you, or perhaps the police, that might also flag or trigger that there's an Independent Third Person that they might speak to or contact on your behalf?

Mr BERNARD — Yes, that's correct. And that goes all the way across, like most things I can take in but not for very long. I've had dealings with the Ombudsman and all sorts of different things but sometimes I don't understand what people are saying and, again, this person is very good at understanding the system. For instance, if you handed me that document I could read through that but how much of it I would take in, I couldn't tell you and as soon as I walked out the door I would turn around and say: now what did that document mean? Yet if I've had time to sit down and study it and study it, well, I can get the grasp of it.

The CHAIR — Thank you very much for coming in today. The written submission is a very detailed submission and has given us some very good ideas. Thank you, Michael, for your perspective as somebody in the system, it's been very invaluable to have you come in as well, so thank you very much, it was well done.

Mr BERNARD — I thank you, ladies and gentlemen, for coming up and letting me share my time and our time with you; it's much appreciated. I apologise if I've been a bit stumbly.

The CHAIR — No, not at all. Thank you.

Witnesses withdrew.