

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 — 30 April 2012

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Mr M. Andison, Senior Solicitor, Policy and Advice Directorate, Office of Public Prosecutions.

The CHAIR — Thanks for coming, Matthew. My name is Clem Newton-Brown; I am the chair of the Law Reform Committee. This is a cross-party committee set up by Parliament to enquire into references we are given. We then report back to Parliament with recommendations for law reform which may or may not be picked up by government. We record everything, and you will get a copy of the transcript and if there are any corrections, they can be made. You are covered by parliamentary privilege in the room but not outside, so if you are answering any inquiries from journalists or others just keep that in mind, not that we are anticipating journalists will be outside the room.

Could you start by giving us your full name, your professional address and who you represent and then talk us through your submission?

Mr ANDISON — My name is Matthew Andison. My professional address is 565 Lonsdale Street, Melbourne. I represent the Office of Public Prosecutions and I am a senior solicitor within the Policy and Advice Directorate. Thank you for the opportunity to speak at this important inquiry. I have prepared a written outline which I will speak to and perhaps I could provide you all with the copies of that. Hopefully there are sufficient copies here.

The first set of points I will make concern intellectually disabled accused persons and the final point concerns intellectually disabled witnesses. Before I make the first set of points I should say something about the Crimes (Mental Impairment and Unfitness to be Tried) Act. The Act provides a framework for dealing with accused persons who may be unfit to stand trial or have the defence of mental impairment. Basically a person is unfit to stand trial when they are unable to understand the charge they face or the court proceedings; so unfitness concerns a person's mental state at the time they are before the court. Most accused persons we see who are unfit to stand trial are so because of an intellectual disability.

The CHAIR — How do you assess that?

Mr ANDISON — Typically what happens is that if a person is charged with a criminal offence they get representation, at which point their solicitors would identify that there is an issue with respect to their cognitive abilities and ultimately get them assessed by a mental health professional so that we have some evidence concerning their intellectual disability, if they have one.

The CHAIR — Does the OPP organise that?

Mr ANDISON — It depends on the circumstances of the case. If a person is prosecuted by our office and there is a real issue about a person's intellectual disability, typically what happens is that their defence will get an assessment and we will also get a second opinion concerning their mental state.

Ms GARRETT — Does that happen through a panel of doctors?

Mr ANDISON — We use an organisation called Forensicare to provide us with the assessments and expert evidence about people's mental state. That is our arrangement at the moment. Maybe that will change in the future, but we utilise only them. There is obviously a vast array of circumstances which can arise. In many cases because of their intellectual disability people may not be charged. It is only where someone is charged by the police and ends up being prosecuted by the Director of Public Prosecutions that we become involved. In any event, I will continue with the explanation of the Act.

Most people we see who are unfit to stand trial are so because of an intellectual disability; that is, in contrast to a mental illness. The defence of mental impairment is concerned with a person's mental state at the time of the offence. A person will have a defence of mental impairment if they did not understand the nature of their conduct or that their conduct was wrong. The Act allows the County and Supreme courts to impose custodial and non-custodial supervision orders upon persons who are unfit to be tried and who are found to have committed offences, and also upon persons who establish a defence of mental impairment. That, very briefly, is the Act.

The first point I would like to make concerns unfitness to stand trial in the Children's Court and the Magistrates' Court. Those courts have no jurisdiction to deal with cases where an accused is unfit to stand trial. Where such a person is charged with offences which would ordinarily be dealt with in one of those courts, either the case needs to be committed to the County Court or the charges withdrawn. To proceed in the County

Court requires two separate jury trials — the first to determine the person's fitness to stand trial and the second to determine their liability for the offence. Our options are, in circumstances where a person is unfit to stand trial and the case would normally be dealt with in the Magistrates' Court or the Children's Court, to run two jury trials or to withdraw the charges. It is an entirely unsatisfactory state of affairs in our view.

The CHAIR — And the accused is exposed to potential high penalties with the case being heard in the County Court?

Mr ANDISON — No, because there is only one set of penalties available under the Act that the County Court and the Supreme Court have jurisdiction to impose. That is the supervision order regime: you can get either custodial or non-custodial supervision orders. They last indefinitely, incidentally, when imposed in the County Court. But we would say that the process to which they are subject is a more formal one — two jury trials and a County Court judge — and it is a more drawn-out process. It is arguably tantamount to discriminating against the person on the basis of their intellectual disability. I would go as far as to say that.

Ms GARRETT — Because of the extraordinary effort and pressure?

Mr ANDISON — That is right. If the Magistrates' Court and the Children's Court had the power to dispose of the case appropriately, it could be dealt with in one or two hearings very quickly.

The CHAIR — On the other hand you are saying that you might drop the case because it is all just too hard?

Mr ANDISON — Not that it is too hard. It may be that the Director of Public Prosecutions does not necessarily have the resources, considering all the circumstances that are in the public interest, to run two jury trials in respect of this case where the person may pose no serious risk of committing offences or it is a minor offence in the first instance. So the Director can choose not to prosecute a case where he considers it is not in the public interest to do so.

The CHAIR — What percentage of cases would that be — —

Mr ANDISON — Where cases are not prosecuted?

The CHAIR — Yes. In this class of case.

Mr ANDISON — I would not be able to provide you with a percentage of cases which would fall into the category where the Director decides it is not in the public interest to prosecute because of an intellectual disability or a mental illness. I could not say, sorry. If you require it I could endeavour to provide some statistics on that, but it would be impossible for me to say at the moment.

Mr NORTHE — I would say that it is not even just the percentages but knowing the numbers of cases — —

Mr ANDISON — Which fall into this category?

Mr NORTHE — Yes, that fall in the category of 'stand unfit for trial' and they have to be sent to other court jurisdictions.

Mr ANDISON — Yes. We will start with Victoria Police. There will be matters in the Magistrates' and Children's Courts of which Victoria Police have conduct where the person raises an issue about their mental state, and it may be that Victoria Police at that point decide, without any involvement by the DPP, to withdraw the charge at their discretion. It may be that the person is not charged at all because the police investigate and determine that the person is intellectually disabled, for example, and decline to charge because of that. So in those — —

The CHAIR — We have had some evidence. I think one of the parents gave us some evidence that their son was well known to the police and they sort of look after him in that sense.

Mr ANDISON — Yes. So there would be a large amount of cases which never come to our office that fall into that category. Where cases do, what typically happens is it will be a case where with the persons being charged, the police will raise an issue as to their mental state, particularly an intellectual disability, and the police will refer it to us because they do not want the case simply to be withdrawn; they want a supervision

order imposed. I can say, just in my experience, it could be a dozen or so cases or more a year which fall into that category — with the police referring them to us, asking us essentially to have it uplifted to the County Court and dealt with. But there would be an abundance of cases that never come to our office which simply fall away in the summary stream.

Mrs PETROVICH — So primarily the police are actually making that assessment of whether the case is going to proceed or whether the charges are going to be withdrawn?

Mr ANDISON — Initially, yes.

Mrs PETROVICH — Initially?

Mr ANDISON — Yes.

Mrs PETROVICH — Do you think in some cases that there may be offenders out there who are using this system to their advantage, who may in fact not have a disability or an impairment?

Mr ANDISON — I would only be speculating about that, so I could not give you a certain answer. I do not know.

Mrs PETROVICH — In your view are the police able to make those assessments often, as Clem has said, that some of these offenders may be known to the police, but in cases where they are not I suppose the assessment can be quite difficult?

Mr ANDISON — Indeed. Yes. Again I could not comment on whether in my experience I believe Victoria Police could make an assessment about the legitimacy or otherwise of someone's intellectual disability. I am not familiar enough with its processes for identifying and assisting people in those early stages.

Mrs PETROVICH — If the case does actually come to the court, is there any further assessment made at that point?

Mr ANDISON — In the cases that we deal with, indictable offences, typically it is simply a matter of the defence providing a report. If we think there is a real issue in the report that raises a serious issue about the person with an intellectual disability, then we will seek a second opinion. That is our process. In terms of court processes, there is a power in the Act to allow the court to order a report — the County Court — but that does not happen until the matter is actually in the County Court so, yes. But it is a real problem, the lack of jurisdiction in the lower courts to adjudicate on fitness and to impose supervision orders in respect of unfitness. The solution is to simply confer on those courts the power to do that, to decide the question of unfitness and to impose supervision orders upon a successful — —

Ms GARRETT — And would that be through existing sitting members, magistrates and judges on the Children's Court?

Mr ANDISON — Yes.

Ms GARRETT — Would you need any additional list or would it just be part of the day-to-day practice in your view?

Mr ANDISON — I would not want to speak on behalf of the Magistrates' Court, but in our view these matters could be fairly expeditiously dealt with in the Magistrates' Court by magistrates rather than having to go to two jury trials in the County Court and all the associated expenditure and delay that that occasions in the County Court. A similar point can be made in respect of the defence of mental impairment, as distinct from unfitness. The Magistrates' and Children's Courts can decide whether someone has a defence of mental impairment, but they can only order an unconditional discharge. So if someone is charged with an offence and prosecuted by the police and the defence comes along with a report that says, 'This person did not appreciate what they were doing at the time because of their intellectual disability', for example, the magistrate can say, 'Yes, I am satisfied that you were relevantly mentally impaired within the meaning of the Act', but all they can do is discharge the person out into the community without any supervision order being imposed.

In some of those cases, the police will refer them to us and say, ‘Well, we think that there ought to be a supervision order imposed to both protect the community and assist the offender’, and then we are again faced with the choice of having to go to the County Court to seek that order rather than letting it be dealt with in the Magistrates’ Court.

Ms GARRETT — Again.

Mr ANDISON — Yes. It is simply a matter of empowering the Children’s Court and the Magistrates’ Court with the ability to impose supervision orders in those cases in respect of the defence of mental impairment. The legislative solution to these problems is actually quite simple, I think, and I do not know why it has not been addressed earlier. I am simply unable to explain that. But it is a really big problem for us.

Ms GARRETT — Okay.

Mr ANDISON — That is the summary jurisdiction.

Mrs PETROVICH — If I may, on the issue of cost we have heard from the prison system that there are about 40 per cent of prisoners who have some sort of mental or intellectual issue. That is a concern to me when we are starting to talk about County courts and the process around that.

Mr ANDISON — Yes.

Mrs PETROVICH — Have we got any estimates on the type of cost to the state of this process without looking at a clear assessment before they get to these two circumstances?

Mr ANDISON — No. We have not done any analysis into that. If you require it, we can certainly look at how much it costs our office to provide the preparation work by lawyers and also to brief barristers to prosecute the trials. We can provide you with the costs for that, if that would be of assistance.

Mrs PETROVICH — Yes. That would be wonderful if you could do that, thank you.

Mr ANDISON — Okay, no worries. The next point I would like to make concerns the definition of ‘mental impairment’ in the Act. The Act does not define mental impairment. The authorities make it clear that a mental impairment includes a mental illness, but it is not clear whether a mental impairment includes an intellectual disability. So if a mental impairment does not include an intellectual disability, there is a risk that intellectually disabled offenders will simply be acquitted without any supervision order being imposed because the prosecution cannot prove mens rea.

On the other hand, there is a risk that intellectually disabled offenders who did not understand that their conduct was wrong will be found to have committed offences because they cannot establish a defence of mental impairment. In our view, where a person does not understand the nature of their conduct or that it was wrong because of intellectual disability, that person should be found not guilty by reason of mental impairment and be liable to a supervision order. That would be achieved by defining ‘mental impairment’ to include ‘intellectual disability’.

The next point concerns the committal procedure for an accused who is unfit to stand trial. Where a question arises as to the accused’s fitness to stand trial on a committal proceeding, the committal must be completed in accordance with the Criminal Procedure Act. The Criminal Procedure Act requires the magistrate to ask the accused whether they plead guilty or not guilty. That is inappropriate because in many cases an accused who is unfit to stand trial will be able to plead guilty or not guilty. The solution is to simply amend the Criminal Procedure Act to provide an appropriate committal procedure for a person who is unfit to stand trial.

The next point I would like to make is that the Act is not clear on whether there can be a consent mental impairment hearing after a finding of unfitness to stand trial. The Act allows the defence of a mental impairment to be determined by a judge alone, where the defence and prosecution agree that the evidence establishes a defence of mental impairment. The difficulty is that an accused who is unfit to stand trial will generally be unable to agree to that, so what normally happens after an accused is unfit to stand trial is that the matter proceeds as a special hearing before a jury. But in one case we had in the Supreme Court, the accused was found unfit to stand trial in the matter then proceeded as a consent mental impairment hearing before a judge

alone. So the Act requires some clarification of whether there can be a consent mental impairment hearing after a finding of unfitness to stand trial.

The final point I will make concerns intellectually disabled witnesses. While interpreters are regularly used in court for witnesses from non-English-speaking backgrounds, little assistance is available to ensure that intellectually disabled witnesses give their best possible evidence in court. In other jurisdictions, such as the UK, witness intermediaries are used to provide that assistance. Witness intermediaries can assist intellectually disabled witnesses by explaining the questions asked of them and in turn explaining the answers given.

The CHAIR — Are you suggesting that witnesses provide their own intermediaries who understand the problems that they have or that there would be a court-appointed intermediary?

Mr ANDISON — What I understand happens in the UK is that legislation allows persons who are approved by the court to provide that service. I would expect, and I do not know this for sure, that that service would be provided by the state, not by the person themselves — not by the witness. But I do not know the details about funding arrangements or who organises that service.

Mr NORTHE — So in the UK there is a registration board or something of that ilk already set up from which the intermediaries could be utilised?

Mr ANDISON — Yes, there is some sort of court approval process. That is my understanding, yes. It is certainly provided for by the legislation.

Mrs PETROVICH — If I may, Chair, how many of these people would be attending court on their own? Obviously they have representation, whether that be Legal Aid or a duty lawyer perhaps. But apart from very time-poor legal representation, I suppose, when you look at maybe a number of their cases in a day — —

Mr ANDISON — Yes.

Mrs PETROVICH — Would they have a special person who could assist them?

Mr ANDISON — We are concerned with witnesses, not accused persons, so they would not necessarily have legal representation. Our office has a witness assistance service which is comprised of social workers who, where possible, will assist witnesses with special needs in giving their evidence. But it is a case of being next to them in the witness box, facilitating the giving of their evidence to the court, which is my point — that some people need some assistance in giving their best possible evidence in court.

In some cases I would make the point that a witness intermediary could mean the difference between a prosecution proceeding or the charges simply being withdrawn. One of the main barriers faced by an intellectually disabled witness may be a perception by those involved in the process that they lack credibility, and it may be that an intermediary could overcome that barrier, so we would recommend that consideration be given to introducing that sort of arrangement in Victoria.

Mr NORTHE — Matthew, one of the other things we have been hearing is, when someone with an intellectual disability comes before the judicial system, how important it should be to have somebody close to that particular person who can communicate with them and who has been there for a long period of time. Would you suggest that that might be considered as well as and on top of an intermediary? Would you suggest that having someone who knows that person very well would also assist in that regard?

Mr ANDISON — Yes. It may be that that person would need to be approved by the court as a suitable person to facilitate the evidence, but certainly that would make eminent sense in my view.

Mr CARBINES — Just to pick up on a couple of things that Russell mentioned, I was going to ask about what is potentially happening in the UK around approved people and whether they can in some cases be someone known to the witness or someone who the witness has some confidence in already as an advocate in other matters perhaps, so I was interested that you touched on that. I did have a query about whether there have been any examples overseas, and you touched on witness intermediaries in the UK. I was also having a look at part of the submission which talked about how you can question witnesses and the potential interventions by the judiciary around defence counsel in cross-examination — —

Mr ANDISON — Yes.

Mr CARBINES — That is touched on again in the submission. That also cuts both ways around how a prosecutor can play a greater role in protecting those witnesses in a court case. All across this, it looks as though it is about how you provide greater levels of education or opportunities for empathy and understanding on behalf of all the component parts in a court case. Is there anything else besides that sort of work that can assist in terms of actual mechanisms in the court that would require work from us in a legislative framework as opposed to providing the opportunities for a greater understanding and empathy about the value — trying to place a better value on the contribution a witness with an intellectual disability can make to a court case?

Mr ANDISON — The only legislative response we have thought of is the witness intermediary one. The others may be more matters of policy — of education et cetera. The witness intermediary one was the only one we could think might be facilitated by some sort of legislative response.

Mr CARBINES — Thank you.

Mr ANDISON — Unless the committee has any particular questions, that concludes my evidence.

Ms GARRETT — That was very helpful.

Mr ANDISON — Thank you.

The CHAIR — You are suggesting specific legislative changes to deal with these issues.

Mr ANDISON — Yes.

The CHAIR — Have you considered putting together a draft of the suggested changes? Is that something that has been considered, or is it more: this is the issue that needs to be looked at and you have not gone into that sort of detail?

Mr ANDISON — We have not put together, for example, a draft model which we have provided to the Department of Justice or anything to that effect. I understand that Victoria Legal Aid has put together a model in respect of proceedings in the Children's Court — the issue of unfitness to stand trial in the Children's Court — which we have had a look at and which we endorse, but we have not done that at our office.

The CHAIR — If the committee decides to take up some of these recommendations, would the OPP be in a position to provide further detailed information as to what it would actually look like?

Mr ANDISON — Absolutely.

The CHAIR — We will bear that in mind and be in touch again if need be.

Mr ANDISON — Thank you. Could I just clarify the issue concerning costings I was going to look into?

Ms GARRETT — The two County Court trials.

Mr ANDISON — It was in respect of legal representation for the Director of Public Prosecutions in those cases that proceed in the County Court to jury trials.

Ms GARRETT — And also some sense of the numbers of cases — not percentages or anything but how many times that has happened and perhaps, if it is possible, how many times the decision has been made to withdraw.

Mr ANDISON — Certainly. I will endeavour to find out those matters and provide you with that information.

The CHAIR — Thanks, Matthew. You have done a lot of work on this. That is a great amount of detail.

Mr ANDISON — Thank you.

Witness withdrew.