C O R R E C T E D V E R S I O N

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 — 21 May 2012

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Judge P. Grant, President, and

Mr F. Zemljak, Magistrate, Children's Court of Victoria.

The CHAIR — Welcome. As you are no doubt aware, we get references from Parliament to investigate various matters and then we report back to government, which will then act or not on our recommendations. We have just tabled our first report, which was on donor-conceived children and their rights to know their origins. This is the report that we will be tabling over this year. Thank you very much for your submission and for coming today. You are protected by parliamentary privilege in this room. You will get a transcript of everything that is said today and the opportunity to correct any mistakes. You can commence with your name and who you represent and your professional address and then talk us through your submission.

Judge GRANT — My name is Judge Paul Grant, and I am the President of the Children's Court of Victoria. The professional address is 477 Little Lonsdale Street, Melbourne.

Mr ZEMLJAK — My name is Francis Zemljak. I am a magistrate at the Children's Court of Victoria. My address is also 477 Little Lonsdale Street, Melbourne.

Judge GRANT — Chair, if you do not mind, we might speak beyond our submission because the submission we made was a fairly narrow one, directed towards advising the committee of some of the problems that exist for parents and carers who come into the Family Division of our court. In the letter that we received from the research officer inviting us to address the committee in this hearing we were asked really to do three things: one, explore the barriers that the Children's Court considers children with an intellectual disability experience when they come before the court; two, explore measures that the court has in place to alleviate the stress and anxiety that might be experienced by children coming before the courts; finally, any suggestions the court may have for improvements that could be made to enhance the access and interaction that children with an intellectual disability have with the justice system. Mr Zemljak and I thought we would speak briefly, if we could, to those three issues, which are not really discussed in our written submission.

I would like to commence by saying — and I am sure you are aware of this — that the Children's Court essentially has two divisions. The Criminal Division deals with young offenders aged 10 and over and under 18, although if a young offender offends before their 18th birthday and is charged before their 19th birthday, we will still deal with them. The other division is the Family Division. That is the division that deals with child protection and also crimes (family violence).

I want to talk first briefly about the Criminal Division and perhaps highlight some of the protections that exist for all young people but also young people with a disability when they are coming into the division. Firstly, the legislation requires that all children and young people who appear in the Criminal Division be legally represented. So without exception young people who come into our court have lawyers to speak for them.

Secondly, unlike some jurisdictions — England, for example — Victoria still applies the principle of doli incapax, which means young offenders aged 10 and over and under 14 are able to avail themselves of the presumption that they are incapable of committing an offence, unless it can be shown that they understood not only that they were doing something that was wrong but that they understood that they were doing something that was seriously wrong. Although that provision is not applied that frequently in our court, one could imagine circumstances where that provision may be applicable and particularly applicable for someone with an intellectual disability.

There are within the legislation that governs the operation of the court, the Children, Youth and Families Act, provisions that enable us to get assessments from the Department of Human Services as to the suitability of a young person to participate in services provided by disability services. So if we are looking at placing a young person on a probation order or a youth supervision order, we can seek a pre-sentence report and the Secretary of the Department will, if we request it, seek an assessment from disability services and advise us if the person is eligible for those services, and if so, we can put them on what we call a justice plan. One of the difficulties with that process is it takes a long time. Normally, if we get pre-sentence reports, DHS or youth justice are able to deliver reports in about six weeks. If we seek a report as to someone's intellectual disability, it takes about 12 weeks. That is indicative to us of a system that is under some pressure. It is taking a lot longer to get reports where disability services are involved.

Finally, our court does have very good support from the Salvation Army and from Court Network, and so those two organisations are able to assist particularly family members who might be at court to support young people

with a disability who appear in our court. They are some of the protections for young people in the Criminal Division. But there are also some difficulties or some problems, and I want to highlight those.

Firstly, a young person may have a particularly severe disability, which means that an issue of fitness to plead is raised. If we have a young person who does not understand the nature of the proceedings or is unable to instruct counsel and there is an issue of fitness to plead that is raised, then the Children's Court does not have jurisdiction to determine the issue and the young person could find themself in the County Court for adjudication of that issue.

The CHAIR — Do they come back to the Children's Court after that?

Judge GRANT — No, the matter has to be resolved, Chair, at the County Court. We think that is a significant issue. In 2010 Justice Lasry in the Supreme Court confirmed that the Children's Court did not have jurisdiction where an issue of fitness to plead arose. That was never clear. Although we always felt — or I always felt — we did not have jurisdiction, Justice Lasry confirmed we did not. But he made a strong recommendation that the court be given jurisdiction, and we have in fact written to the Attorney on that issue, and the Attorney has referred it to the Department of Justice to look at.

The second issue relates to the defence of mental impairment. That is only available, according to current legislation, if a person suffers from a mental illness at the time of the offence. We have written to the Attorney-General urging reform of the law so that the definition of 'mental impairment' covers not only mental illness but intellectual disability, acquired brain injury and severe personality disorder, because we think there must be cases where someone with a severe intellectual disability may, if the law was defined broadly enough, be able to avail themself of the defence of mental impairment. Importantly, there is significant overrepresentation of young people with an intellectual disability in the youth justice system, particularly in youth detention.

The most recent report of the Youth Parole Board indicated that, on a particular date when this snapshot was taken — namely, September 2010 — 14 per cent of detainees in the youth justice centre were registered with disability services. I would also like to refer the committee to the report of the Drugs and Crime Prevention Committee, *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People — Final Report* of July 2009, where there is from page 263 right through to page 268 a significant discussion on young offenders with disabilities.

Indeed that committee made three significant recommendations which this committee is probably already aware of but which I think are worth highlighting. Firstly, that committee recommended that the range of accommodation support services for young people with a disability involved with the juvenile justice system be expanded in all regions of Victoria. That was recommendation 28. Recommendation 29 was:

> Given the evidence relating to the disproportionately large numbers of young people with psychiatric or intellectual disabilities detained or otherwise involved in the youth justice system, the committee recommends that a review of youth justice clients with disabilities, including acquired brain injury and learning/language difficulties, be undertaken with the aim of improving service delivery, including accommodation options.

Recommendation 30 was that the committee recommended that the Department of Human Services, in partnership with relevant service providers, develop and implement a new residential forensic mental health treatment centre or contained therapeutic facility for juvenile offenders. The court would say that those recommendations still apply today.

That is enough, I think, by way of introduction to the Criminal Division. I want to say a few things on the Family Division, and then I will ask Mr Zemljak if he wishes to add anything.

What I would like to say about children with intellectual disability in the Family Division is to first comment about some of the process issues that we have observed in our court. At the moment children who come before our court who are subject to a protection application are only represented by lawyers if they are mature enough to give instructions. That means that about 45 to 50 per cent of children coming into our Family Division are represented by lawyers. The Victorian Law Reform Commission, in its recent review of child protection applications in the Children's Court and then more recently in the Cummins inquiry, recommended that all children in the Family Division be recognised as parties to proceedings. It seems to those of us who work in the

court that the Cummins report made three important recommendations that will benefit not just children with intellectual disability but all children coming into our Family Division.

Firstly, that there be an expansion of the age range for those young children who are subject to application in the Child Protection Division. At the moment children under 17 can be brought into our court. That is anomalous, because in the Criminal Division children under 18 are dealt with, and as far as family violence matters are concerned, children under 18 can come into our Family Division. Cummins said that this anomaly needed to be corrected and applications should be permitted for young people under the age of 18. The court agrees with that.

Secondly, Cummins recommended, as I have already outlined, that all children be represented by lawyers. There are different models of representation depending on whether a child is mature enough to give instructions or not. If the child is mature enough to instruct a lawyer, then the child will be represented on the instructions model. If the child is not mature enough to instruct a lawyer, they will be represented on the best interests model. Cummins identified the age of 10 as being a significant benchmark to distinguish between those mature enough to give instructions and those who were not. Again, the court supports the expansion of representation to all children appearing in our Family Division.

The third recommendation coming out of the Cummins report that has an important impact on the way children are dealt with by the court is a recommendation that says that children should not be brought to the court unless they have expressed a desire to come to court and that expression is informed — in other words, the child is mature enough to make an assessment that, 'Yes, I want to be at court and I want to be part of that process'. At the moment a lot of children are brought to court to instruct lawyers, and the court environment is not a good place for children, especially at the Melbourne Children's Court where there is very significant overcrowding. We agree with a number of recommendations coming out of the Cummins inquiry which we think are of benefit to all children, and that includes children with a disability.

Focusing more particularly on children with a disability, I want to refer the committee to a report that has just been launched today. Both Mr Zemljak and I were present at the launch of this report. It is the report from the Victorian Equal Opportunity and Human Rights Commission on *Desperate Measures — the Relinquishment of Children with Disability into State Care in Victoria*. There are two things that I would like to comment upon on this report. The first one is about access to services, and I would like to quote from the opening paragraph on page 6, which says:

> It is well understood that our disability system does not meet demand for services and is crisis driven. This means that families with children with disability do not get the support they need, when they need it, and for as long as they need it. Without adequate support some families reach crisis point.

I think that statement is a pretty accurate summary of the experience of all of us who work in the Family Division of the court.

The second point I would like to make is that just as there is overrepresentation of children with a disability in our Criminal Division, there is overrepresentation of children with a disability in our Family Division. It would not surprise you but the court does not keep very good records on this, so it was helpful to see that this report was able to provide information on this topic. Again, at page 25 the report notes that:

> … children with disability are overrepresented in the out-of-home care population. Although 7 per cent of children have a disability, among children entering out-of-home care for the first time in 2007–08 the prevalence of disability more than doubled to 15.4 per cent.

This report then refers to more recent data — namely, a snapshot survey on 10 June 2011 — which showed that 22 per cent of all children in residential care were considered by the Department of Human Services to have a disability.

The CHAIR — Judge, if I could interrupt you for one moment. I would just like to welcome parliamentary representatives from Kenya, I understand. Welcome to this committee, and we will have a bit of a chat at the end of this submission if you are still here.

Judge GRANT — Thank you, Mr Chair. The final point I would like to make is to re-emphasise a point we made in our written submission to the committee, which is that in our experience those parents and carers who do not have the capacity to participate in proceedings in our Family Division need better support than they are

currently getting. Mr Zemljak can speak to his experience, because I know he has on at least two occasions engaged the Public Advocate to assist families who do not have the capacity to assist themselves. The Public Advocate has been very keen to assist us, and has assisted us, but indicated that they do not have the resources to assist us as frequently as we would like them to be able to assist us.

That is a summary of some of the matters that I think are important, and I now ask Mr Zemljak to speak to matters that he would like to highlight in our court.

The CHAIR — Thank you.

Mr ZEMLJAK — I will be very brief. I think Judge Grant has covered the main points that I was concerned about. I am a magistrate who sits mainly in the Family Division. Having come to the bench after perhaps 20 or 25 years as a family lawyer and with a particular interest in independent children's lawyers representation in the Family Court, I was intrigued and on occasion dismayed as to the models that were used in the Children's Court for the representation of children.

I have certainly been heartened by the recommendations of the Cummins inquiry, which focus on the need to represent children on a best interests model rather than an instructions model. I have taken the view, which I think most of my colleagues have now adopted, particularly in our submissions to the Cummins inquiry, that the best interests model is a way of ensuring that children are kept as far away from the court process as possible. I would have thought that an expansion of the best interests model would particularly assist children with a disability in ensuring that children, for example, between the ages of zero and seven, who just as a matter of course are not represented in our courts, have a voice.

Children who do not have the maturity to instruct can only be represented in a court under the current legislation if there are exceptional circumstances. I must admit that I am tempted on a weekly basis to be creative to try to find exceptional circumstances so that those children can be represented, but I would tentatively suggest that really most of the children that we see live in exceptional circumstances, and their families are exceptional in terms of them all having multiple serious issues which require government intervention.

In terms of the Public Advocate, which is the last matter that Judge Grant raised, I think I am the first magistrate to have appointed a litigation guardian in our court for adults. The Public Advocate was appointed by me. Their role was, I thought, magnificent in the way they represented a particular person in their capacity as a substitute decision-maker, but their resources were so limited that after that case came to a conclusion we received a letter from the Public Advocate indicating that they could not take up any more appointments as litigation guardian in our court. Our view is that they cannot refuse an appointment, so notwithstanding that letter I have continued to appoint them, and they have continued to do a wonderful job, but I am very aware of the stresses that that is causing that organisation in terms of being able to provide the litigation guardian role to our court, given the nature of litigation in our court, which by its very nature is complex and distressing.

I think there is nothing much I would want to add over and above what Judge Grant has said on those points.

The CHAIR — Thank you very much for your comprehensive submissions, both written and oral. Any further questions?

Mr NORTHE — I have only got a statement. I thought it was a wonderful submission, not only what you have provided here but verbally today just outlining the issues at hand, and also some really terrific recommendations for our committee to consider. So thank you. Well done.

Judge GRANT — Thank you.

Mr CARBINES — I was just thinking, I did note down the report that you referred to from equal opportunity.

Judge GRANT — I have a spare copy if you would like it.

Mr CARBINES — No doubt we should be able to track it down.

Judge GRANT — It was just launched this morning. I think it has got some very — —

Mr CARBINES — I would have thought so. We will certainly track it down for our committee members. That would be good.

Judge GRANT — You would all be able to have access obviously to that report as well. It is a fairly comprehensive report.

The CHAIR — Thank you again. Well done.

Committee adjourned.