

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 — 21 May 2012

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Mr M. Holcroft, President, Law Institute of Victoria.

The CHAIR — Welcome, Michael. As you would be aware, the Law Reform Committee is given references by Parliament to investigate and report back on to government, and then government responds to our recommendations. We have done one report so far, which was tabled about a month or so ago, which was an inquiry into donor-conceived children. So this is our second inquiry, which we are doing concurrently with an inquiry into sexting. Everything you say is protected by parliamentary privilege here but not outside the room. We record everything and you get a transcript of that which you can check and correct if need be, so if you could start with your name, professional address and who you represent and then talk us through your submission.

Mr HOLCROFT — Certainly. I am Michael Holcroft, and I am the president of the Law Institute of Victoria, and that address is 470 Bourke Street, Melbourne. The Law Institute of Victoria represents the vast majority of the practising lawyers in Victoria; around 80 per cent of practising lawyers are voluntary members of our association. We do quite a bit of policy work, and at various times we have up to about nine policy lawyers working for us, and obviously we lodged a policy submission in relation to this parliamentary inquiry, which is dated 11 October 2011.

The CHAIR — Can I just clarify: has your submission been endorsed by the Institute or is it your personal submission?

Mr HOLCROFT — No, it is an Institute-endorsed submission. In fact it was signed off by the previous president of the Law Institute of Victoria, Ms Caroline Counsel, but it is a fairly rigorous process before you get sign-off, which includes it going to the committee set up to respond with a policy officer. It then goes to the council liaison officer for that section, and then once approved it goes up to the president for final sign-off. Often, but not always, the submissions are also taken back to the general committee of council, which is 18 law councillors, for sign-off but it really depends on the time frame and whether that is possible. Unfortunately a lot of things we are asked to respond to we do not get a great deal of time to respond to. I cannot personally recall whether this one went to the full council, but certainly it is endorsed by them.

The CHAIR — Okay.

Mr HOLCROFT — So rather than read through the submission, what I would perhaps like to do is highlight three or four of the really major aspects, and I am happy to take any questions that you have after that.

The CHAIR — Sure.

Mr HOLCROFT — The first one is that lawyers come into contact with a large number of people with intellectual disabilities — certainly those who are in or about to enter the criminal justice system but also with the Department of Human Services work. We do a lot of work as independent child advocates in the DHS family division of the Magistrates' Court, and whilst lawyers are not psychologists clearly, they are reasonably good I think at recognising some of the warning signs. But they could be further enhanced by perhaps having a professional checklist of warning signs. What we are not very good at sometimes is making the distinction between intellectual disability, mental illness and other factors that might come into play such as drug and alcohol issues, acquired brain injuries and things of that nature.

One of the big problems that we have is that certainly all the children and most of the adults who come before us with intellectual disabilities and mental illness are people who are clients of Victoria Legal Aid or Aboriginal Legal Aid, which means they have not got the ability to fund psychological assessments themselves. Whilst I appreciate that Victoria Legal Aid has funding restrictions themselves, their guidelines are such that unless you have previously been assessed as having an intellectual disability or mental illness, basically they will not fund the psychological report to tell you that they have. That is an issue. What we would prefer — and obviously it would require additional resources to go to Legal Aid and be perhaps quarantined for this purpose — is a set of guidelines, and if the legal practitioner reaches those guidelines and forms the view that this person is suffering an intellectual disability or mental illness, then there would be an ability to apply for that report so that that can be investigated.

The other problem that we have is that often people do not volunteer that they have an intellectual disability. Some people are much better at masking these than others. Others simply go very quiet and tend to be very agreeable. Sometimes it is a bit hard telling the difference between a shy child — especially children — and one with cultural issues, especially in the Indigenous culture, where they will not necessarily look you in the eye.

They tend to be agreeable, and it takes a further skill set to try and get instructions in the best of cases. Then if that person has an intellectual disability, there is no way that they will tell you that they have. So unless they have some carer or supporter with them prior to entering the criminal justice system, there really is no way of knowing and no way of satisfying the Victoria Legal Aid requirements to get the report to confirm your suspicions.

So the first part is: we do not have the skills as lawyers to actually diagnose, and we have to acknowledge that. We can see warning signs, and we think that could be improved, and once that is improved, we would like the ability to then refer it back to the experts to see what eventuates because what we do believe is that, especially at a juvenile level, getting justice plans in place is a very good way of stopping repeat offending.

We know that people with intellectual disabilities are overrepresented in both juvenile detention and the prison systems. There is reference in our submission to a study from the Department of Justice, which was a prison study released entitled 'Intellectual Disability in the Prison System' from 2003 to 2006. It is referenced in the submission. We are also aware that there is a Corrections Victoria survey as well under the Department of Justice, 'Acquired Brain Injury in the Victorian Prison System,' again identifying that there is a large overrepresentation of people with those disabilities.

Acquired brain injury may of course qualify as an intellectual disability if it has resulted in a substantial limitation in intellectual function and adaptive skills and if it is diagnosed prior to 18 years of age. So we have identified those as issues.

One of the other parts that came out of the submission is that we are concerned about the police having a definition of 'mental disorder' in their operating handbooks. We think that is unhelpful and that it would be better to separate the different types of issues.

The CHAIR — 'Mental disorder' being a catch-all phrase?

Mr HOLCROFT — Yes, being a catch-all phrase which includes intellectual disability, acquired brain injury, personality disorder and neurological disorder. Often the way you would interview and question people is quite different depending on which of those circumstances they are affected by. What we certainly recognise is that people do not come before us or the criminal justice system normally with just one issue. Intellectual disability may be masked with some other issues — depression, drug and alcohol issues — and it is obviously difficult sometimes to cut to the chase.

Another thing that we do see with people with intellectual disabilities is they tend to be followers more than primary offenders. We are concerned with the government's position with respect to compulsory sentencing of people to terms of imprisonment unless they are diagnosed as having — one of the exceptions is mental illness. Once again the difficulty becomes getting the funding to diagnose. If extra funding is not made available to identify people before the courts who may have mental illness or intellectual disability, then we fear that this will increase the number of people in custody, and, as I said, often as a secondary offender — a co-accused, an aider and abetter almost. Being with other people committing acts of gross violence, obviously they are going to be drawn in as well. We were particularly focused on encouraging the government to rethink the position with respect to any form of mandatory sentencing of youth offenders. At the moment I understand that is being referred for further consultation. We would be happy if it was never considered, but that is another process.

With the police having that catch-all phrase, we think that people with intellectual disabilities are probably discriminated against in some way. Especially if they are young people, they may have an independent person present at any interview but if the independent person is not qualified to look for the warning bells and is not aware that this person has an intellectual disability, it will not act as any safeguard at all.

Once again you will have questions asked in a leading manner by sometimes experienced, sometimes inexperienced, police officers, and the natural response of many people with intellectual disabilities is to agree, because that is generally a path of least resistance and generally you are less likely to get into trouble or get into dispute if you agree. A lot of people learn that technique even though they might not appreciate the ramifications of what their admissions will result in.

I personally acted at one stage for a person with an intellectual disability as an agent. He had confessed to a very public stranger rape. We were lucky enough that the process of DNA evidence being assessed had been started

before this person gave himself up. Ultimately the DNA evidence came back and said it was not possible it was this person at all. After searching for a stranger rape, which is obviously something that scares the community and focuses police attention — as it should — this person I presume was simply seeking attention, and almost got a lot more attention than he wanted.

Mr NORTHE — Michael, I am not sure if you were here for some of the earlier discussions, but there was a lot around the independent third person and ensuring that that person is registered and has relevant qualifications and may be even known to the person who is being interviewed. Can you maybe elaborate your thoughts a little bit more on that?

Mr HOLCROFT — Obviously there would be more benefit if the person was known, because you are more likely to know whether there is some underlying difficulty. It is not going to happen all the time, but certainly if people have had prior contact with health professionals, a person who is known to the person being interviewed is far more likely to know that, but not always. I guess there is a concern that people who act a lot as independent third persons sometimes need to have some ongoing training to define their role so that they are not even subconsciously suggesting that they are there to assist the police in getting answers out of people. Clearly we would say that is an inappropriate role, but we suspect anecdotally that that does occur from time to time.

If you can get a person from that same cultural community, then also that increases the likelihood that that person may know of difficulties. But even then, when we talk about Indigenous culture, I am not sure how well intellectual disability is understood or identified.

Mr NORTHE — On the same basis you were talking earlier about having a checklist just to assist that identification. Are there any models around that you have seen that would say, ‘This one is the best practice’?

Mr HOLCROFT — I have not seen one, but I strongly suspect that the psychologists or the psychiatrists do have one. Part of our submission would be — and I do not expect it would require a lot of funding — to have a model checklist developed by people with the required expertise. That could well be circulated widely amongst lawyers, even court staff, independent third persons and police.

Mr NORTHE — It appears at the moment there are probably a few different types of checklists that are doing the rounds, so it makes sense, I would have thought.

Mr HOLCROFT — Especially as far as justice is concerned the Department of Justice could put forward a checklist. Alternatively I think you are speaking with the judge in charge of the Children’s Court later on, Paul Grant. He may have some ideas about what the Children’s Court does or what the Children’s Court clinic might do. The Children’s Court clinic is not one of my areas of specialty. I certainly believe it would be worthwhile having that sort of checklist, and it would not be an expensive process in the scheme of things. From the Law Institute of Victoria’s point of view, we would be more than happy to run training courses for our members if such a checklist was available, and we would promote it as we do with a number of things for the benefit of our members and the community. We think that would be a very good first step.

The CHAIR — Michael, maybe another 5 minutes or so?

Mr HOLCROFT — Certainly. The other thing that I am aware of is that Corrections Victoria is also looking into how they treat disability services, because there is a huge overrepresentation in corrections that we see. People really need to be identified at an early stage in the corrections process if they have got an intellectual disability, because otherwise they get put with mainstream prisoners and the chances of victimisation increase dramatically.

We also see from the studies that people with intellectual disabilities are less likely to be granted parole, presumably because they cannot meet the criteria, and we suspect have increasing cases of them being put into high-risk prison detention for their own safety rather than the safety of others. Once again, we do not believe that is appropriate.

The Law Institute of Victoria has an overriding policy that we prefer to address the causes of crime rather than adopt a lock-them-up-and-throw-away-the-key mentality. In our submission anything that results in early

identification of people with intellectual disabilities and with mental illness enables us in the courts to better address that recidivism in that way.

Mr CARBINES — I just want to take you back, Michael, to a scenario. If you talk about people with an intellectual disability in particular probably more relying on Legal Aid funding when they are being represented and how their lawyer can access reports or psychological evaluations to assist, what then would be a run-of-the-mill sort of example? Is it really then a matter of representing your client? You go to court and you have not been able to perhaps access a psychological evaluation, is it then a matter that the court might request that? Is that what ends up happening, whereas you may perhaps not furnish them with that as part of how you might represent a client? What happens?

Mr HOLCROFT — If we go back, as a lawyer, if you suspect that the client does have substantial underlying difficulties and the person has not been previously diagnosed as having an intellectual disability or has not revealed to you that they have had treatment for mental illness, then all you can do realistically is put your concerns before the court. In some circumstances the court might then order a report. That has its own difficulties with people with intellectual disabilities because they are not always the most reliable at turning up to appointments or getting themselves to appointments.

The CHAIR — Those reports are normally ordered as a sentencing aid rather than as an aid to determine innocence or guilt.

Mr HOLCROFT — That is exactly correct. In fact even the Children's Court is not able to determine the issue of capacity to plead, so in fact you have got to go to the County Court for that. That is a further step, and something that could well be addressed. So you would get a pre-sentence report normally, or you would request one, which the court may or may not be able to arrange. It is not so bad perhaps when you are in Melbourne, but if you are in the regions or the suburbs, the ability to get those reports within a timely period, even if the court so orders, is very difficult. The last thing that we want is having people remanded, to have to send them down to Parkville or somewhere to get them assessed in custody when private practitioners could be available if properly funded.

Mr CARBINES — It must take up, I assume, an element of the court's time, because those cases are still in the book to be dealt with to some extent before they may then be referred off to seek reports that — —

Mr HOLCROFT — It would certainly be one or two extra attendances at court or court events if you like, which has a cost at each step. It has a cost for the prosecutors. It has a cost for the defence. It has a cost for the judiciary. It is using up court time. If you are able to access the report and attend with the report, which would normally perhaps be on the second occasion rather than the first mention, you would save probably just as much if not more money than you would by having the court attendances. The difference is that the money would be going towards a psychological report rather than each of the participants as advocates and judicial members in the courts.

The CHAIR — We are going to have to wind it up, Michael. Are there any concluding comments?

Mr HOLCROFT — No, they are the main ones. As I said, the submission has been lodged in full, so it is just a matter of trying to highlight and assist.

The CHAIR — Thanks very much.

Mr NORTHE — I was just going to ask, Michael, about the ARC list, but we can do that with our next guests, I suppose.

Mr HOLCROFT — We have been strong supporters of those programs.

The CHAIR — All right. Thanks for coming in.

Witness withdrew.