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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Ms D. Griffiths, Principal Solicitor and Executive Officer, and

Mr V. Avery, Lawyer, Villamanta Disability Rights Legal Service.

The CHAIR — Thank you very much for attending. This is a committee set up by Parliament to do inquiries. We are given references, we go out into the community and get submissions and then we write a report to government that recommends changes to legislation. The government then responds to that. Hopefully some of the good ideas we come up with, with the help of you and other people, will assist in that process. Everything is recorded, and you will receive a Hansard transcript of the hearing, when it is prepared, which you will be able to check so you are happy with it. You are covered by parliamentary privilege only in this room. Could you start with your name, your professional address and who you represent before you tell us what you want to tell us.

Ms GRIFFITHS — I am Deidre Griffiths from Villamanta Disability Rights Legal Service. We are at 44 Bellerine Street, Geelong, but we are a statewide service in Victoria. Our priority constituents in our community legal centre are people who have an intellectual disability, but in a more general way we provide services to people with any kind of disability.

The CHAIR — What is Villamanta?

Ms GRIFFITHS — It is the name of the street that we were first in when we started our service some 20 or so years ago. Since then we have moved to Bellerine Street, but we did not think we would change the name.

The CHAIR — Who funds Villamanta?

Ms GRIFFITHS — FAHCSIA, the federal Department of Families, Housing, Community Services and Indigenous Affairs.

Mr AVERY — I am Viv Avery; I am a solicitor at Villamanta Disability Rights Legal Service. I am one of the case work solicitors there, dealing with clients in a variety of areas, from child protection to guardianship to — whatever comes in, to be honest with you.

The CHAIR — We have your written submission. Could you please take us through the points you want to highlight.

Ms GRIFFITHS — I assume people have had an opportunity to read our submission, so I will not read it to you, but I will briefly outline some of the most important points, and then I will hand over to Viv to talk more to our submission. We have also brought a copy of the final version of our publication *People Who Have an Intellectual Disability and the Criminal Justice System*, a draft of which we had sent to the parliamentary committee previously.

As I said, Villamanta is a statewide service that works on disability-related legal and justice issues. We have a priority constituency of people who have an intellectual disability. We are hoping that this publication will be useful as a guide and an educational tool for people who work in all parts of the justice system, to enable them to better work with people who have an intellectual disability.

Mr NORTHE — We have already received that and had a flick through, so that is good. Now we have two.

Ms GRIFFITHS — The one you got before is the draft, and the one I have given you today is the final version. You could put the first version in the recycle bin.

The CHAIR — Are there any significant changes between what you had provided and the final?

Ms GRIFFITHS — Yes, there is one section of the law — we were about to go off to the printer when the section of the law was changed — about community-based orders becoming community corrections orders. So we pulled out a section and wrote a new section, and probably quite a bit of polishing up has gone on since.

The CHAIR — So we will just ignore the one you have given us.

Ms GRIFFITHS — Yes. Other than that, it is fairly similar. I will just mention some of the areas that are of great concern to the Villamanta Legal Service. There are people who have intellectual disability or cognitive impairment as victims or witnesses. We believe much more needs to be done about this to enable equity in the justice system. It is the same for people who have an intellectual disability or cognitive impairment as accused persons.

In our submission we have spoken to the experiences of people with a disability or cognitive impairment interacting with the police. I reiterate that adequate and appropriate training is urgently required in this area for all members of the police force, that Villamanta has experience and knowledge in this area and would be willing to provide that training and that we would include people who have a disability to help provide that training, if it were required.

Then there is the experience of people who have intellectual disabilities or cognitive impairment interacting with court staff, which we have spoken to in our submission. Once again, adequate and appropriate training is urgently required for all court staff throughout Victoria so that staff can feel informed and comfortable about how to appropriately treat people who have an intellectual disability or other cognitive impairment with an appropriate level of dignity, such as would be provided to other members of the community. There is also the experience of people who have intellectual disabilities or cognitive impairment interacting with prison staff. The same experiences, issues and urgent need for adequate and appropriate training as those referred to in the previous categories apply there.

Of particular concern is the overrepresentation of people who have intellectual disabilities or cognitive impairment in prison. This discrepancy needs to be urgently, thoroughly and professionally investigated and appropriate measures to address it developed and implemented. In particular, the reasons for people who have a cognitive impairment entering the justice system in the first place need to be objectively established. Only once these are known can appropriate steps, including early intervention, training and education, more and better support in the school system and the provision of additional support to participate equally in the community, be implemented. Villamanta believes that investment in these areas will be well repaid by less people who have cognitive impairment entering the justice system and more of them being able to contribute positively to the community.

Then there is the experience of people who have intellectual disabilities or cognitive impairment in the prisons. As we know, they do not fare well in prison, and the same experiences, issues and urgent need for training as those referred to in relation to the other categories also apply to prison and corrections staff. We believe our guide will be of assistance to many working in corrections and in prisons. We would be prepared to provide training, if that were wanted.

Another area is people who have intellectual disabilities or cognitive impairment who are in prisons inappropriately. This is of extremely grave concern to Villamanta. We have observed that there are many people in prison who should not be in prison at all but should be held in more appropriate settings. This is confirmed by senior staff of offender management services, Corrections Victoria and the Department of Justice, who have stated publicly that the reason many such people are held in prison is that there is, ‘nowhere else for them to go’. Unfortunately only a few people who have intellectual disability are held in appropriate accommodation in Victoria, at the Disability Forensic Assessment and Treatment Service, and they are those who have committed extremely serious offences. Some others are held in the prison system but in special sections of prison. There are many others who are held in the general prison and who have not been identified as having an intellectual disability. We believe much more needs to be done in this area.

Mr NORTHE — Deidre, can I interrupt at that point. You have just touched on it, I think — throwing back to probably your previous submission — and that is the fact that some offenders are ending up in the corrections system, incarcerated because they have not been identified until it is too late, if you like, as having an intellectual disability. Would you people have any evidence of percentage numbers or otherwise?

Mr AVERY — In dealing with the clients that we deal with in all the areas, a large proportion of them would not be identified at all in terms of having an intellectual disability. One of the problems with that answer, by the way, is the definition of ‘intellectual disability’, because there is the definition under the Disability Act, which is quite limited, and then there is the definition, which would be much broader, which would be like a sociological definition and would include all the other co-related issues — behavioural issues and all those sorts of things. An example I can give you, a very brief one, is of a young lad I represented in the Children’s Court fairly recently. He had never been identified as having an ID, and he had significant behavioural problems. His mother had rejected him for years, and all those sorts of things. He had a string of offences going back five or six years. It was not until we got hold of him that we asked the Department of Human Services for an assessment of an ID. That is five or six years of offending, which means that the police did not pick it up and the courts and the court staff did not pick it up. Not that we are riding in on a white horse, but it was not until we picked the thing up that the young man was able to be identified as having an ID and appropriate services could be organised. It is not unusual in the criminal system for that to happen to us. It comes to us a long time after they have started in the system.

The same goes for child protection matters. We had a lady who was identified as having an intellectual disability. The baby was taken from her at birth, not because she had any protective concerns in relation to her ID but the child was taken from her because of protective concerns in relation to domestic violence. Within weeks, that relationship had ended; the child was never returned. What they did was six months after the birth of the child they sent it off to Tweddle, which is the assessment group for parenting skills. They did not give her an assessment in terms of intellectual disability. They said, 'Off you go. Go and do the Tweddle, and we will assess your parenting skills based on the standards that we apply'. So no assessment was done in terms of her intellectual disability and no assessment was done in terms of her learning style. No assessment was done of any of those things, and she clearly failed — because the standard that was being applied was too high for her; it was inappropriate. Therefore that was an issue of lack of identification. Even though they have identified an ID, they have not taken the steps to ameliorate that at any point in time.

There are even some of the other things that we come across in terms of the people, as Deidre has pointed out, with them going into prison when it is inappropriate for them to do so. Again, the clients that we come across, 90 per cent of them have not been identified as having an ID or having the ID assessed, and that is a significant problem. Overall figures we do not know, but our experience is that they are exceedingly high.

Mr NORTHE — I suppose from my perspective a lot has been said about improving the training standards for police and judicial officers and others. That is fine, but is there a better way to try to foolproof the system to ensure that those persons with an ID are being encapsulated earlier and being assessed earlier?

Mr AVERY — Certainly a large proportion of people who have intellectual disabilities and end up in the justice system as children have gone through the DHS system. Therefore there is a significant step there where the linkages could occur between disability services and child protection. It does not occur. There is a protocol arranged between the two sections of the department, but it does not seem to be followed as much as it possibly should be. There are other examples. We actually had a young lady with an ID brought to us by disability services because child protection were not taking into account her disability, and they could not get the protocol to link. So that is one significant place where we can do it.

The police, with great respect to them, I think have not quite got the capacity to learn the skills to identify. LEAP already has flags on it for Aboriginality and flags on it for cultural needs. There is no reason why a flag cannot be put on there for intellectual disability. It is a pretty simple process. I know that they have a text section — I cannot think what they call it — and they can put things in there, but it gets lost in that. So the flag is an important area.

The lady previously spoke about the nurse in Queensland. It is an excellent system. We have, as you pointed out, a system in Victoria for identification at that point, so at each individual point. But if we go back to the main issue, DHS are often involved with a lot of children at a very early point, and that is where a large portion should be picked up and linked through.

Ms GRIFFITHS — One of the issues, of course, is that if 70 is set as the level — an IQ of 70 — for an intellectual disability, anyone who has sort of scraped through with a little bit above that is going to be in with those not having an intellectual disability. We have mentioned in our submission that there is a particular group of people who have intellectual disabilities or cognitive impairment and Asperger's syndrome or high-functioning autism spectrum disorders. Many people have an intellectual disability or cognitive impairment and Asperger's syndrome or high-functioning autism but also people who have an IQ slightly above or even significantly above 70 and also have Asperger's syndrome or high-functioning autism are at greater risk than people who do not have a disability of entering the justice system.

Those people can end up in the system, and they are put in with the other prisoners because they had an IQ that showed up above 70. There can be some highly intelligent people who have Asperger's syndrome who really cannot function socially at all and are completely lost in the prison system. You might say that strictly speaking they do not meet the definition for intellectual disability, but they are worse off than a lot of people who have just an intellectual disability, because of their significant difficulties in functioning socially and recognising voice tones and subtleties of language such as double meanings, sarcasm, body language and generally functioning in society. Those people will be in the mainstream prison system, and they certainly should not be there; they should be in a different setting.

Mr NORTHE — The ABIs.

Mr AVERY — Yes. There is a process in the Sentencing Act that allows somebody with a disability — we will keep it at that at this point — to engage the penal provisions which are more appropriate to intellectual disability. The problem with that one of course is that it relies on the Disability Act definition, and that is they have to have a capacity of less than 70. Yet the act does include a definition of disability, which includes Asperger's, in a sense. It says disability also means a neurological impairment which is likely to be permanent and substantially reduce their skills or whatever. One solution could possibly be to broaden those provisions in the Sentencing Act to allow for people who have higher than 70 to be able to engage those penal provisions. That would assist them; it would take them out of the prison system into a more appropriate environment.

The CHAIR — We do not have too much longer. Do you have much more to get through?

Ms GRIFFITHS — I will just hand over to Viv to talk to a few points.

Mr AVERY — Listening to the lady previously, she has actually covered a lot of what we were going to do, so this will make it reasonably short. One of the major things that we have identified is the ability of a client to not be able to engage their rights in many forms. The lady previously did identify that as a significant issue. She talked about the independent third person, and she talked about the Centrelink system as well. The child protection system is also one in which that does work and that works for both the parents and the child — a child with an intellectual disability and the parents with intellectual disabilities.

What we have found is that it is not an admission which you get in the Centrelink system, 'Oh, yes, I took money, which I shouldn't have done'. But their legal rights are often curtailed by the Department of Human Services because they will put an option to a client in a manner in which the client believes they have no options: 'We will take the child and put it into foster care'; 'You can come and see the child within so and so weeks'; or 'You can come and see the child every fortnight'. It is put in a fashion where they do not have an option. Very often in the child protection system they do not have an independent third person. They do not have legal representation, because Legal Aid does not fund that, generally. Although I have had Legal Aid funding on an exceptional basis for that to occur, in the main Legal Aid does not fund things like the best interests plans meetings in the Department of Human Services. Those best interests plans are the ones where there is a subtle taking away of rights from the parents who have an intellectual disability. Often it is because — and this is not a condemnation of DHS — of the lack of resources and they believe there is a need to move the child very quickly.

The other thing of course is that the Department of Human Services rely on studies which show that in moving a child from the care of a parent they say is incapable of doing so to somebody who is capable of doing so, the studies they rely on are often based on abuse. That is, the child has suffered physical abuse, sexual abuse, deprivation — all those types of abuse. The argument is often, 'Well, we need to move the child away, we need to reduce the level of access simply because it will cause confusion in the child. If the child then re-engages with the actual parent, that is going to cause them harm because it is going to be stressful for them'. Nothing could be further from the truth for people with intellectual disabilities. The person with an intellectual disability has, in many cases, the capacity to give the emotional support for the child that is needed. There is no study that shows an intellectual disability person cannot provide for the intellectual needs of a child. They certainly can provide in many cases for the protective needs of the child, but there is this presumption based on studies of the HSUs that the person with an intellectual disability is struggling, therefore they use those studies to justify the argument.

We actually had a case recently for which we went to court. We were prepared to argue that the client was making good guardianship decisions. DHS in their court documents acknowledged the good guardianship decisions. A couple of days before the thing was to run they changed the application to be one of permanent care. We lost, simply because the child had been out of the home for two and a half, nearly three, years. So the ability to get that child back to the mother was lost. What had happened was that all along the line the mother was told, 'No, we're taking the child. No, you can't have regular access. It will only be short-term access', and that person did not have an advocate. They did not have a legal advocate in any of those meetings. They had lawyers at the court, but they did not have lawyers in the best interests planning meetings. We got it again very late in the piece, and that is where we argued the client had good guardianship decision-making skills.

There is no reason why the parent could not have, if it was true — which we do not agree it was, but if it was true — the capacity to look after the day-to-day needs of the child. There is nothing in the system to allow her to have regular, ongoing and significant contact with the child, because it is her family. That was one of the significant reductions in a person's rights. In effect the Charter of Human Rights right to a family has been taken away from her.

Mr NORTHE — Viv, on that point, obviously in the state there are a number of disability advocacy networks that are used; what role do they have to play in those types of scenarios — or should they be playing?

Mr AVERY — They should be playing. It is not a matter that they do not; it is a matter that there are not the resources available for each individual client. The role they should be playing is essentially the same role that the lady previously said, and that is during the meetings identifying that the client understands the questions they are being asked, identifying the rights which are being looked at to be taken away, identifying whether or not there is another option available to them. On their own they cannot compete with the Department of Human Services staff. With an advocate, they may be able to present arguments that are appropriate to do so.

And of course the best interests planning meeting minutes are often used against the client in the contests — 'You said that.' We had one example of an Asperger's gentleman to whom the Department of Human Services said, 'You have problems looking after your child, don't you?'. He said, 'Yes, of course I do' — well, 'Yes, I do'. He did not say, 'Of course I do'; he has Asperger's. He said 'Yes'. It is true; he has problems. Sorry, so do I, so does everybody else. He meant, 'I have day-to-day problems', but his Asperger's meant that he gave a concrete answer to a question they then used against him in the contest. That is one of the problems with lack of identification and lack of linking with the disability services in child protection.

In all, I think there are four main themes to our submission: identification of the sociological — I prefer that — definition of disability. Do I need to explain that? Is it worth explaining? Okay, I will do it.

Mr NORTHE — Go ahead.

Mr AVERY — Disability is defined in terms of society. That is pretty useless as a definition. Essentially there is a condition, which leads to a restriction, which leads to a disability. Mr Carbines wears glasses; he has a condition, which is poor eyesight. The restriction is he probably cannot read or write with his glasses off, therefore if he does not have glasses on, he has a disability — he cannot read or write. Intellectual disability is exactly the same, except it is much broader. The condition is the intellectual disability, however that is identified. The restriction is that they may not have the communication skills, they may not have the learning skills that a person without an ID has. They may have a lack of social skills. In our society if the police turn around and say, 'We will interview in a specific way', there is no disability. If the police interview them using cognitive interviewing techniques, whatever that is, there is a disability; it restricts that person.

Yes, we have to define disability in terms of something which is objective, in terms of IQ, in terms of those things, but broader. Identification of an intellectual disability is the first one; defining the disability is the second one; engaging the right to ensuring that the client is able to engage rights, whether that is through the services acting in a way or having an advocacy service available; and lastly, obviously, that comes down to resources. They are the four main themes that run through all of our submission, I think.

The CHAIR — Thank you very much for that. It has been very helpful.

Mr AVERY — Thank you very much. Thank you for your time.

Witnesses withdrew.