

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

Bendigo — 28 May 2012

Members

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Witnesses

Mr L. Docherty, President, and
Mr L. Singe, Treasurer, Bendigo Law Association.

The CHAIR — We are a cross-party committee which is constituted by Parliament to investigate various inquiries. In this Parliament we have just handed down our first report, which is on donor-conceived children, and we are waiting on a response from government on that. This is our second inquiry. We have basically called for submissions — that is, for people to write a submission and make recommendations to government, which may or may not be picked up. Thanks for your contribution.

You are covered by parliamentary privilege in the committee but not outside the committee room. We record everything through Hansard. You will get a copy of that, and you can suggest changes to it if anything is inaccurate. If you could start with your name, who you represent and your professional address to begin with, and then just talk us through your submission.

Mr DOCHERTY — I will start. Luke Docherty, President of the Bendigo Law Association, and my address is 135 McCrae Street in Bendigo.

Mr SINGE — My name is Lachlan Singe, Treasurer at the Bendigo Law Association, and my address is 337 Hargreaves Street, Bendigo.

Mr DOCHERTY — I will start by basically saying that I will be covering the criminal side of things and Lachlan will be covering the civil side of things. In terms of opening, we wholeheartedly agree with the extension or otherwise in the terms of reference under paragraph (c). We believe that consideration definitely should be given to expanding upon any recommendations to cover people with acquired brain injuries or neurological conditions, because we often find in our experience that those things are tied to people with intellectual disabilities.

First port of call: the Law Institute of Victoria made a submission which the Bendigo Law Association supports in simple terms, I suppose, but there are issues in terms of that submission being quite Melbourne-centric. There are regional issues that we will raise. I will return to that in a second.

In terms of the police guidelines on their dealings with people with IDs, they seem adequate. There are processes such as the independent third person when people are interviewed and so on which are appropriate in our view, but we would support continued training in terms of identifying people with intellectual disabilities on both sides of the coin, both for police and the legal profession — they are notoriously difficult to identify in the absence of either disclosure from your client or some other evidence they provide. We would support some sort of increased training in that area.

The Law Institute submission also raises issues around Legal Aid funding to assist and identify — —

The CHAIR — As far as training goes, is that something you would envisage — that the Law Institute would perhaps provide that training for its members?

Mr DOCHERTY — Yes, managed under the CPD program, we would suggest. There are programs open for that, so there are certainly opportunities for legal practitioners to take that training, but whether or not they take advantage of that — —

Mr SINGE — If I can just touch on that too, certainly I do not believe that any of that kind of training actually forms part of the junior practitioner's cert when they are doing what I call articles but nowadays is called — what is it? — supervised legal traineeship or something like that. None of the modules, in my understanding, actually require them to have any training whatsoever to identify someone with a disability of any kind, let alone an intellectual one. Certainly in my experience those sorts of things can be very subtle. It is not something that perhaps comes easily to a lot of people. Having been practising for a while now, it is a lot easier to identify those things early, but certainly just in the last week we have had some incidents with younger practitioners not quite recognising that perhaps certain conversations needed to be had before they could talk with that person. It is nothing major, of course, but at the same time it is a difficulty we have seen firsthand just recently.

Mr DOCHERTY — I suppose as an extension of that, the Law Institute's submission makes recommendations or suggests that there has been a change to the way in which psychological and psychiatric reports are obtained and funding for those is obtained through Legal Aid. We support its submission in relation

to that: there needs to be some flexibility provided around assisting practitioners to identify those issues that clients are having.

The CHAIR — Normally a psych report is done as a part of sentencing.

Mr DOCHERTY — Yes.

The CHAIR — Are you suggesting that funding for that report needs to be provided at the stage of you getting instructions?

Mr DOCHERTY — In some circumstances it would be of assistance.

The CHAIR — Okay.

Mr DOCHERTY — Not all, obviously, but in some circumstances it would assist. There are also initiatives that the Institute has raised, including the ARC list and the CISP program. Those are positive programs that assist in, I suppose, addressing reoffending rates prior to sentence: counselling around alcohol, drugs, homelessness, which again we often find is experienced by people with IDs.

Here in Bendigo that is not as well supported. We did have what was called CREDIT/Bail program, which was centred around drug use. You would refer your client for an assessment by Bendigo Health, and if they were assessed as suitable for that program they would be provided with counselling for a period of three months. That was just around drug use. That has now fallen away, and there is actually no worker available to assess anyone who may be suitable for that program currently. Bendigo Health says there is funding there for it, but there is no worker there to assess anyone.

In terms of supports here, we rely upon the existing supports that someone may have in the background, but as they often have not been willing to engage with supports before, they have to come to court with no-one — they are there by themselves — which is quite difficult in some circumstances.

One of the other major programs that we have at the moment is called a special needs list, and that is an unfunded ad hoc program run by a psychiatric or mental health liaison officer who works for Bendigo Health and is stationed with the Bendigo court. That program has been running since 2005, firstly under the guise of the mental impairment list but now as a special needs list. In 2005 it had a starting number of about 7 clients, in 2010 there were 31 and in 2011 there were 30, and it is not being as well utilised as it could be. I just have two short documents that have been provided to me by Mr Matthew Gleisner, who is the mental health liaison officer, and I can certainly tender those, I suppose. It is certainly a growing list, but aside from where matters are dealt with in addition to or with the support of psychological reports or otherwise, it is the only program directly supporting people with IDs. It has actually expanded and has to cover people with ABIs and neuropsychological and neuro problems.

From the criminal side of things, the regional perspective is that here in Bendigo we require some funding or otherwise. Maybe the ARC list or the CISP program could be rolled out here in Bendigo, because it is an area that is sadly lacking.

Mr NORTHE — Sorry, Luke, just to clarify for the record, Bendigo is not the recipient of those programs currently?

Mr DOCHERTY — No. The special needs list relies upon practitioners referring their clients onto that list. Often they will not be accepted onto that list unless they have had some sort of contact with psych services or disability services before. That is a hurdle, because some people with those issues do not engage or have never engaged, and they may be stopped from accessing that service or that list. Basically we want what Melbourne has. An ARC list and a CREDIT or CISP program would be of great help here in Bendigo.

Mr NORTHE — Of course the CISP program is running in some regional areas. Not here?

Mr DOCHERTY — Not here, no, and this is one of the busier courts. In terms of committal stream issues or matters, we take in Kyneton up to Swan Hill and Echuca as well as Maryborough, so any strictly indictable offences committed are dealt with through the Bendigo court. It is a very busy court, and I suppose it is underresourced in those sorts of areas.

Mr SINGE — In terms of my side of the fence, I suppose, from a civil perspective probably the primary issue that is raised in the terms of reference and perhaps the one I will spend more time on is participants' knowledge of their rights, which can be a big issue in our rather large civil sphere. Obviously primarily we deal with things along the lines of WorkCover and the TAC, but I spend a fair bit of my days worrying about victims of crime. One of the primary things we do see is that people are not aware — simply have no idea — that they have any rights whatsoever as victims. These are people who are often injured. We are talking about victims of rapes, attempted murder and those sorts of things, and they simply are not informed by the police, or indeed if they are it is something that is kind of tacked on at the end of making the initial police statement about something that is obviously quite traumatic for them.

As far as that side of things goes, honestly, I literally have lost count of how many people have come in, sometimes three, four or five years down the track after a traumatic criminal act, and said, 'I just had no idea this existed'. It is probably an issue across the board, but it is a particular issue with those with intellectual disabilities, simply because those with intellectual disabilities typically perhaps do not have the initial wherewithal to think, 'Maybe I should go see a lawyer', or something along those lines.

The Victims of Crime Assistance Tribunal is set up to deal with these problems virtually for that primary purpose — to deal with people who have been victims — and those with intellectual disabilities, certainly in my experience, can be the most vulnerable of all and more in need of the things that VOCAT provides, like counselling and particularly some of the medical expenses that unfortunately cannot be paid for by people with intellectual disabilities on account of the fact that they are less likely to have paid employment or something along those lines.

Mr NORTHE — So, Lachlan, if I may, St Luke's Anglicare addressed us earlier with regard to what it does, but from what you are just saying, there obviously seems to be some breakdown in communication around referral to St Luke's in this instance.

Mr SINGE — Yes. One thing I would say is that certainly St Luke's has been on board doing that sort of coalface stuff, I suppose, for the last two years roughly — I cannot quite recall; they would know better than I would. But certainly in terms of that, things have improved recently, but there is still an issue with the nexus between making that police report and getting through to victims of crime. Certainly as a reasonably experienced practitioner in that area I have run seminars with other community assistance programs, such as the women's health refuge whose name escapes me, and those sorts of things for people who simply were not aware that this sort of stuff existed.

It is more often just that there are people in those kinds of circumstances who do not have great coping skills, and that comes from intellectual disability — or indeed no intellectual disability on occasion. But the fact is that they need that initial advice of 'Hey, I think you'd better go and talk to someone'. Obviously St Luke's would be the primary place that you would be sending someone along to. On occasion we do have clients who will come in — in relation to, say, a transport accident even — who perhaps are not as savvy due to an intellectual disability, and they have not been told by the hospital or someone along those lines that that kind of assistance is sometimes available, obviously depending on circumstances.

In many respects what I see as an issue, particularly with VOCAT and sometimes with others, is that those with an intellectual disability often need a bit more of a helping hand to just get them through to these programs. They are available for them; it is more just that first step.

The other thing to say about perhaps the civil side of the fence is that typically once a person has been able to obtain legal advice — provided they obviously have something to go ahead with — they are usually well looked after, hopefully by their solicitors but also by the court. You would probably be aware that there are various things, particularly in the civil streams, where litigation guardians, for example, are appointed. That can put a bit of pressure on families and carers and those sorts of things, who are obviously part of the terms of reference here. But in my experience most people who are appointed litigation guardians are fine to deal with and they act responsibly; you would not appoint them litigation guardian in the first place, I would hope, if you did not think they were going to do that. I certainly should also say, just in terms of this, that I think the senior master's office does quite a good job in dealing with when someone receives payments and whatnot.

The issue, perhaps, that we do see from time to time is that those with intellectual disabilities can get large payments on occasion and perhaps they do not have that support there — or, indeed, not a litigation guardian, because it is a matter of degree, of course, as to whether you appoint one — and often you will see them making probably what you would term questionable financial decisions et cetera. There could be some way to help people along those lines, to sort of get in their ear. We do have a responsibility to act in their best interests, and often you say, ‘Look, it would be a very good idea to go and get financial advice’, but to someone who does not really know what to do there, it being incumbent on the solicitor to push them that way, it might be best if they did have some kind of liaison service — even through TAC or WorkCover or something along those lines — that would perhaps allow guidelines to be set up for them to kind of follow once they get that kind of amount. It is their money, of course, but at the same time you see a fair bit of waste. The number of new Monaros et cetera you might see is a bit of a worry, to be frank. This is supposed to be providing for them. I can talk until I am blue in the face about that, but not a lot is going to help. I do not know whether that might be something to be looked at.

Just on a couple of the other things I have seen, I have noticed that in (b) you have got ‘deliver just and equitable outcomes’. Often, as I said before, when we have people with intellectual disabilities they may not be working and those sorts of things, and the greater than 5 per cent whole person impairment threshold for public liability and negligence matters can really put a massive spanner in the works when it comes to those people getting what we would consider to be a just or equitable outcome. We simply have matters where someone who is working will get under 5 per cent and we can get them compensation and they feel that they have had justice, whatever that means, whereas with someone who does not, we have had to say, ‘Look, we’re sorry, but that is just not something that we can do’, and it is purely a financial problem there. Realistically speaking, that is not just restricted to people with intellectual disabilities; we see it a lot with children and elderly people as well. It is a major issue, and certainly that can be a very difficult thing to be explaining to someone with an intellectual disability.

The last thing I would say, in terms of perhaps not just the civil side of the fence but also legal practice in general, is that we are not psychologists; we do not know what exactly is meant by ‘intellectual disability’ and all those kinds of things. I think, though, most practitioners would recognise when someone has it, and as I said before, it is a bit of a varying degrees issue. I can certainly say that from my experience of those with ABIs, particularly from motor vehicle accidents — that is where I would see most of those — I would suggest that they would need more help, not less, than those with intellectual disabilities. Certainly those with ABIs are the most difficult clients that I have to deal with.

As far as those things go, there is help for the profession from the LIV; we do get some guidance from them. I am not suggesting that we need more assistance once we have got our runs on the board, so to speak, but certainly for younger practitioners I think it would be invaluable if part of your training was on at least how to deal with someone who does have either an intellectual disability or an ABI, or whatever it might be. Perhaps it is something that needs to be looked at either by the LIV or as part of the outcomes of this.

Mr DOCHERTY — Just touching again on that, there are programs run by the LIV and other providers, but they are optional.

Mr SINGE — Elective programs.

Mr DOCHERTY — You go along and get your CPD point, but they are optional programs, and so a lot of solicitors — legal practitioners — do not or will not go into that. Perhaps that is appropriate, because they may not be dealing in a high-volume sort of area where you are going to have a lot of people with these sorts of issues.

The CHAIR — Luke, in the criminal context, do you have any examples or comments about people who have a mental impairment and, as far as the reports you have got, how they have been able to deal with or been handled by the police and also in relation to statements being made to police which perhaps needed to be done in a way that took into account that impairment?

Mr DOCHERTY — There are always anecdotal reports that they have not been treated appropriately. I cannot raise any specific points. The courts here will recognise if the police have stepped out of line, but by that time often the horse has bolted. I cannot add anything else.

Mr NORTHE — We have heard reasonably often that the ITPs have a very strong role in terms of being with somebody with an intellectual disability when being questioned by police — on either side of the fence, if you like. But also on some occasions it has been said that maybe those people need to be registered and qualified and that it may be beneficial to have a family member or somebody also sitting in the room who might know that person's impairment better than others and how they communicate and respond.

Mr DOCHERTY — I think both of those options are appropriate in certain circumstances. I am not sure whether having a family member in, for instance, some criminal investigations would assist, but certainly a formal training program or registration program in relation to ITPs is probably an appropriate path to follow. These people are the most vulnerable in our society. They need to be protected, and by the time they get to the court stage they are generally — it is the front-of-house, early-on stuff.

Mr NORTHE — Within that same discussion, how do you assess somebody? Is there one format to assess a person and identify whether they might have an intellectual disability?

Mr SINGE — I suspect there is probably not a one-size-fits-all. The kinds of things we have to do as practitioners would be the sorts of things you have probably got to consider. Unfortunately we do not have a test either, so it really comes down to gut; how you think this person is understanding what you are saying to them. Obviously they can be reasonably lofty kinds of things you are rabbiting on about, but if the person does not look like they are comprehending or indeed are asking questions or taking a tack that does not seem to be where you think you are going with it, the alarm bells start to ring. I would have hoped that, particularly from a police perspective, that would occur as well. I do not know whether it does; it is not my area.

Mr DOCHERTY — In some circumstances where these sorts of people — I keep saying it that way — have been ostracised or otherwise because of their disability, they will hide it, and they will not get that support. As Lachlan said, you go by gut and whether they are accepting what you have been saying. It could be half an hour or an hour into your conversation with them. If we cannot identify it, then I do not know how police are going to identify it unless it is actually disclosed or there is some other evidence to indicate that they have that issue. It is really about identifying it and identifying it as early as you can. How do you go about doing it? How long is a piece of string?

Mr NORTHE — The other thing for me, and it is only a personal observation, is that there seem to be so many stakeholders, whether it is the police, the community legal centres, the Department of Human Services, Legal Aid, PILCH, Centrelink or the health services — it goes on and on. It seems to be a bit of a mishmash in terms of people understanding their rights, and you have the disability advocacy services that exist out there as well. How does it all come together so a person who has an intellectual disability or mental impairment can understand their rights and what services are available to them?

Mr SINGE — I do not know; perhaps some sort of road map would be appropriate or something along those lines, but I do not know how you would tailor that for, as you say, so many stakeholders. I can imagine it would be very difficult. At the same time, we see issues from time to time.

One other thing on the community legal centres you mentioned just before, we have sometimes had to refer people down to the Mental Health Legal Centre in Melbourne, more often than not because of what you might perceive to be more psychological rather than intellectual difficulties, if I can put it that way. However, I do not know that the community legal centre here, which has been going for seven years or so now, is that well equipped to deal with those kinds of issues. Luke might have something to say about that. But, as far as I know, there are still some referrals of that nature going down to Melbourne, which may mean that another practitioner is required or someone who is experienced or more experienced in these types of issues or something along those lines.

Mr NORTHE — We heard from Anna Howard from the Campaspe Legal Centre this morning.

Mr DOCHERTY — Anecdotally everyone is underresourced and everyone is being slammed by these things.

Mr NORTHE — But I suppose for our committee it is important for us to hear that. We understand there is a funding or resource issue over there, but if you can put a procedural or other good suggestions to this committee, it is important that we hear those as well.

Mr SINGE — I would say that anecdotally clients with any kind of intellectual disability would take up a lot more of the time, over and above the norm, of practitioners. Again I do not know exactly what you do about that.

Mr DOCHERTY — You cannot do anything; you have to put that time in.

Mr SINGE — Yes. Exactly. You just have to put the time in.

The CHAIR — Thank you very much for coming in. It was very helpful.

Mr NORTHE — Thank you, gentlemen.

Committee adjourned.