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

Bendigo — 28 May 2012

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Ms T. O'Shea, Community Lawyer, Seniors Rights Victoria.

Ms O'SHEA — My name is Tabitha O'Shea. I am a community lawyer with Seniors Rights Victoria. I have prepared a written submission, which I will speak to. Are you happy for me to provide those to everyone?

The CHAIR — That sounds good. My name is Clem Newton-Brown and I am the chair of the Law Reform Committee. Donna Petrovich is here with me today. Russell Northe is also coming, but he is going to be a bit late. Until he arrives we are not a properly constituted committee in that we cannot give you parliamentary privilege, which is what we normally give people who are giving evidence. Normally it makes no difference to anybody, but if you are going to say something defamatory about somebody, please do not do so until Russell arrives.

Ms O'SHEA — No. We have some case studies that we will speak to, but they have been de-identified.

The CHAIR — That will be fine. If you are happy to start now, Russell will come in the next 20 minutes or so, I suppose.

Ms O'SHEA — If you are happy for me to start, that will be fine. I think first and foremost obviously Seniors Rights Victoria welcomes this opportunity to present to the committee and welcomes the opportunity to participate in this inquiry.

Just to give you a bit of background, I am sure you are all aware of Seniors Rights, but just to clarify it, we are a specialist community legal centre which specialises in assisting older Victorians, so people over 60 — but in the case of Indigenous persons, over 45 — who may be at risk of or experiencing elder abuse. We are a statewide service. We have joint funding partners; we are funded by Victoria Legal Aid and the Department of Health. I am the Bendigo lawyer. We have our main office in the CBD of Melbourne, and we have offices out to the east at the Eastern Community Legal Centre and then there is me here in Bendigo. We offer telephone advice to people as well as ongoing casework, community legal education and, obviously, we look at areas of the law which impact adversely on our client base and we agitate for change in those areas.

We are a unique service in that we are multidisciplinary. We not only employ solicitors like myself but we also have advocates. The advocates come from either a nursing or a social work background, and therefore we feel we provide a more holistic approach to client problems. The advocate's brief is quite broad; basically it is anything that is non-legal, whether it be assistance in obtaining alternative housing or services into the home or perhaps accessing counselling. That will fall into the brief of the advocates, and they will assist a client with that. We do all of the advice and casework together with the advocates.

Given our client base, we are going to focus on paragraph (c) of the terms of reference. We will speak to our experiences in dealing with older people and focus more on older people who may have a neurological condition, an acquired brain injury or other cognitive impairment rather than an intellectual impairment.

While we recognise that there are frameworks in place both nationally and here in Victoria to promote access to justice, we feel that there is still systemic discrimination occurring. If we focus first on the experience that some of our clients have had in dealing with agencies such as Victoria Police, we have had incidents where there has been a domestic violence situation, the police have been called to attend and they have taken the view that rather than being a family violence situation, it is more of a family situation and they are more concerned with other priorities such as sourcing alternative care arrangements or accommodation arrangements for the older person rather than applying for an intervention order or linking the older person into services.

This has a twofold effect then, because obviously if no order is applied for, there could be ongoing safety concerns of course but also that older person and the other family members or the perpetrator — the respondent — are not being linked into support services. Often our experience has told us that there might be mental issues, drug or alcohol or gambling issues that are occurring and are factors in the family violence. So if someone is not seeking assistance, not going through the court system, then they are not going to be linked into support services for themselves or the perpetrator. They may be then further disadvantaged. If an order is not applied for, they have to remove that family member from the home. They cannot access VOCAT. They cannot get assistance for changing locks et cetera. The discrimination then just continues and they are further lost.

The CHAIR — What is of most interest to the committee is instances where intellectual disability is involved. I know you are talking about it in a broader sense, but we cannot go past our terms of reference. It is

interesting to get the wider perspective, but if there are particular things in relation to people with intellectual disabilities, it would be great to focus on those.

Ms O'SHEA — Okay. Our interpretation was that paragraph (c) of the terms of reference would include clients or people with a neurological or cognitive impairment as well.

The CHAIR — Yes.

Ms O'SHEA — Because in our client base we do not so much deal with clients who will be impacted on because of an intellectual impairment, it is more because of a cognitive or neurological impairment such as dementia.

The CHAIR — Yes.

Ms O'SHEA — Or perhaps even an ABI. Most of our submission actually focuses on those aspects rather than intellectual impairment.

The CHAIR — That is fine, perhaps I should have been broader myself.

Mrs PETROVICH — Some of the examples that you have included are about people from non-English-speaking backgrounds who may have mental impairment as well. Some of the abuse you are talking about is elder abuse by their own children. Obviously there are layers of complexity in dealing with these cases. How do the authorities become aware, and what can we do to improve access for these people to those services because of the complexity?

Ms O'SHEA — I think one of the main things would be further training for police. Obviously there has been a whole lot of training around assisting women and children who might be experiencing family violence. I think the issues are fairly similar for older people, but there are specific factors which will impact greatly on older people. Clearly if the violence is being perpetrated by an adult child, often there will be some reluctance by an older person to seek assistance in the first place. They often do not understand the difference between an intervention order and the criminal justice system. They do not understand that that is civil and that it would only become criminal in the case of a breach.

What they want is that family member to be linked into support services. They want them to get help. Intervention can assist with that, because I have been aware that, even though it might not be mandatory, magistrates can frame the orders in such a way that the respondent will assume that it is mandatory that they participate in men's behavioural change programs or drug and alcohol counselling/rehabilitation programs. It is important to get linked into that system. If we had better training for police, they might not have a particular view of these matters that would lead them to prioritise issues such as alternative accommodation or alternative care arrangements.

In the case study identified in the written submission, the family members were not actually providing services to the older person. The older person was more or less independent and had a care package that was providing them with support and they had a case manager. They were not relying at all on the family members because there had already been a breakdown in that family situation. I think the importance of using independent and impartial interpreters when dealing with people from a non-English-speaking background is really important, especially as people age. Even if they have used English as a second language we often find that, especially if they are being impacted on by an impairment such as dementia, people will revert back to that first language and start relying on that and use English, the second language, very little.

Mrs PETROVICH — Would it also be an opportunity to engage health professionals? I would be concerned that a lot of these cases might go unreported completely.

Ms O'SHEA — Like I said, I think older people are reluctant. I think any victim of domestic violence can often be reluctant to report. I think this is still largely unreported. That is particularly true of older people. It is a different generation. These family dynamics are often very well entrenched: this is the way the son has always related to the mother, and this is the way he saw his father relate to his mother. So they are well entrenched. It is very hard to change those things. Because they are well entrenched they tend to be accepted as normal behaviour or as part of the way that family relates to one another. There is a reluctance by older people to

perhaps, in their view, air their dirty laundry in a public forum like a court of law. I think there are all sorts of difficulties that older people will face in getting to courts, and I will get to those in a minute.

I think if there was greater training and perhaps the use of, linking in or more crossover between services so that the health professionals and police worked together and had a more holistic approach to family violence when it impacted on older people, that might achieve better outcomes. Also, housing will be a factor. Often this occurs within the older person's home, but there may be situations where there is a granny flat or unit and the older person is living at the property of their family member and there are children involved; it may be difficult to then decide who will be removed from the family home.

I have already just touched on how this may impact on older people dealing with police. But also we have experience with magistrates' courts that, despite provision in the Family Violence Protection Act 2008 for evidence to be provided via affidavit, magistrates are reluctant to accept this type of evidence. This makes it particularly difficult for older people who will have specific issues which will make it difficult for them to be in court. If we can use the Bendigo court as an example, there are all sorts of access difficulties, and there is the absence of hearing loops. So it is very difficult. I am not hearing impaired but I can often find it hard to hear a magistrate when I am appearing before them in some of those courtrooms.

You never know when the matter will be called, so you have to sit around all day. That may cause several issues for an older person who may suffer from incontinence or who may have issues with medication and may need to take medication at a particular time. It may be difficult because they may be confronted with the perpetrator while they are at court. It is very difficult to have a private place to go to. I know particularly here in Bendigo there are no private areas where you can go to avoid seeing the other party.

In case study 2 in the written submission, we have had a magistrate who made assumptions about a client's capacity based on their lack of English and a hearing impairment or based on their physical appearance and decided to adjourn the matter and ask for a capacity assessment. At Seniors Rights Victoria we take a very broad view of capacity, but at the same time we would not be able to act for a client who could not provide us with instructions and who we did not believe had capacity. It is very important to not make those assumptions about someone who might have other impairments or who might have dementia but the dementia may not be advanced and they may still be able to provide instructions.

We have also had some difficulties where a family member, with the consent of the older person, has sought an intervention order on the older person's behalf. We have found that a magistrate has been reluctant to accept evidence from that person despite the fact that it was supported by affidavit evidence of the older person and medical evidence to explain why it was difficult for the older person to appear themselves.

Once again I think that if there were more training for court staff and for magistrates around these issues — I think we need to maybe have more of these matters come before courts so magistrates are more familiar with evidence being led in this way or with applications being made by people other than the older person and maybe some special provisions for older people. Perhaps you could talk to the registrar and maybe have a matter listed for after lunch, in the afternoon, when your client is most lucid. You could have a matter listed so that you do not have to wait around for the whole list or wait around all day not knowing when that matter was going to be called. We think that might assist.

I have mentioned briefly the issue of litigation guardians. We covered this more extensively in our submission to the Law Reform Commission in relation to guardianship and administration. This would clearly impact on people with an intellectual disability as well as our client base. If you are someone who cannot provide instructions to a lawyer and would require a litigation guardian, you may not be able to pursue your legal rights, because it would be very difficult in some circumstances to find someone to fulfil that role. Clearly a litigation guardian is going to be liable for a possible award of costs. There would not be many people putting their hand up to fulfil that role, and currently the situation varies according to the different courts and the different court rules. There is no uniform legislation covering this. To assist in this matter, I think it would be beneficial to have a government-funded litigation guardian service which could assist people in this so they could pursue their rights.

I am just lastly now going to touch on some of our experiences with regard to the Victorian Civil and Administrative Tribunal. Some of these issues might seem quite basic but can actually cause great disadvantage

to our clients. I do not know if you have any experience with VCAT notices, but they are extremely difficult to read and comprehend. Not only that but they are actually extremely hard to open in the first place. They are obviously run off on a machine. They are perforated. They are sort of like an old payslip that you have to try to peel open. They have watermarks and things on them, but even as a lawyer they are often hard to understand and comprehend. They are not sent by registered post, so there is no indication of whether a person actually received notice or not. I think, unfortunately, that there are some administrative issues at VCAT because we often find that we have asked for reasons for a decision and those decisions have been sent to the wrong party and we have never received them, and that addresses are not updated appropriately. It is quite possible that a proposed represented person or a represented person will not receive their notice because it has been sent to an old address.

We also think too that if someone is already under an administrative order — so someone is in control of their finances — it makes it very difficult for that represented person to then obtain independent legal advice. Who is going to pay the costs? If you want to complain about your administrator but you need them to release funds so that you can ask for a reassessment at VCAT, that can be very difficult.

Often we have had the experience where applications have been made to VCAT and there has not been any medical evidence to support that application yet it goes before the tribunal. Anyone can raise that issue. Even though it is supposed to be supported by medical evidence, there are often a few that just go before the tribunal in the absence of medical evidence. Then the member may request, despite the lack of evidence to incapacity, that that represented or proposed represented person obtain a specialist opinion.

That would be the opinion of a geriatrician or neuropsychologist. There is no Medicare funding for those types of assessments. The cost is between $800 and $1500. If you are on a pension and have no savings or other assets, that is quite a lot of money to come up with to prove something you are presumed to have in the first place. That causes great disadvantage.

Even though VCAT hearings are supposed to be informal and not quite like court proceedings, at times they can be difficult for a proposed represented person to understand. They often find it — and that might be because of the — —

The CHAIR — Tabitha, can I just interrupt for a minute? We have about 5 minutes to go, just so you aware.

Ms O'SHEA — Okay. I am just wrapping it up now.

They can be difficult to understand and therefore difficult for that person to participate in. They do not understand what is happening. They feel that people are talking about them but they do not understand why. They do not understand the decisions the tribunal makes. Sometimes a person might already have a guardian or an administrator, and at the moment the tribunal does not have the power to assess a decision made by a guardian or an administrator on the merits. We think that would be an important reform to make so that a represented person could challenge a decision, say, by a guardian to place them into care. They could challenge that. They would not have to necessarily get the whole order reassessed, which is how the law currently stands at the moment.

I am happy to field any questions, but any detail would be provided in the written submission.

Mr NORTHE — Tabitha, just on the VCAT matters, you raised a number of potential issues, including, I guess, the costs associated to the client coming before VCAT. Just to give regard to the fact that this committee has to provide recommendations to the Parliament — to the government — do you in your mind have any recommendations around that particular area? Are you talking about offering subsidies to those persons who may need to go undertake some form of assessment?

Ms O'SHEA — I think greater funding to community legal centres and Victoria Legal Aid to provide duty services for VCAT hearings so that there is the opportunity to obtain independent legal advice prior to a hearing would make a huge difference to the outcome.

Mrs PETROVICH — Tabitha, thank you for your presentation; it sheds a whole new light on another group of people who obviously we need to hear about. From the perspective of the Magistrates' Court issue, I can only imagine how overwhelming it is for somebody with perhaps dementia and perhaps some other issues

there to be confronted in a court situation by the perpetrator if they are suffering elder abuse. I know Bendigo is a constrained court system, but in other places is there a facility for videoconferencing or a more tribunal sort of circumstances for those things to be held?

Ms O'SHEA — Our experience is that those opportunities have not been provided to clients. At Seniors Rights — this is through the Melbourne office — we had begun a couple of years ago some work with Melbourne Magistrates' Court, trying to talk to court staff about how some of these facilities could be made available to older people and how we could structure hearings or listing matters at particular times that would impact less adversely on older people. Unfortunately that work has not really been followed up on.

I think the matter really at this point is that magistrates seem reluctant to hear matters. I know the particular matter where we had a client and someone else was applying for the order on her behalf. That was one daughter and it was being applied for against the other daughter. The magistrate perceived the matter as being an argument or a conflict between two sisters and one sister trying to prevent the other sister from accessing the mother. It was possible, but if you had read the affidavit material and seen what had been going on, it was quite clear that was not the case. The respondent had severe hoarding issues and mental health issues and had moved back into her mother's home, and the mother was starting to trip over the things that were being brought into the home. The respondent was quite verbally and physically aggressive towards the mother, and that was all clear in the affidavit material and was supported by the medical evidence as well.

Mrs PETROVICH — I am a little bit interested in the work that your group has done in that submission to the Magistrates' Court. I am wondering, is it appropriate — —

Ms O'SHEA — It was more that we had a principal solicitor at the time who was working — she arranged a couple of meetings with staff at the Melbourne Magistrates' Court. Unfortunately that did not go on, that work, and perhaps we need to formalise those things that we started a couple of years ago and then take them to other courts as well. It has been raised previously here in Bendigo.

Mrs PETROVICH — There was no written submission to the court?

Ms O'SHEA — No, there is no written submission. It has not been formalised at this stage. Certainly formalising some of those arrangements would be really beneficial.

The CHAIR — Thank you very much for your presentation; it was very helpful.

Ms O'SHEA — Thank you to the committee.

Witness withdrew.