Submission to the Parliamentary Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers

October 2011
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Introduction

The Victorian Disability Advisory Council (VDAC) welcomes the opportunity to present a submission to the Parliamentary Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers.

In line with its function as an independent advisory body to the Minister, this submission addresses high-level issues and principles in line with the terms of reference of the Parliamentary Inquiry.

About the Victorian Disability Advisory Council

The Victorian Disability Advisory Council was established under the Victorian Disability Act 2006.

The Functions of the Victorian Disability Advisory Council are to:

- Provide advice to the Minister in respect of —
  - whole of government policy directions and strategic planning and the implementation of initiatives for persons with a disability;
  - the barriers to full inclusion and participation in the community of persons with a disability and the strategies for the removal of those barriers;
  - any matter relating to disability referred to the Victorian Disability Advisory Council by the Minister;
- Effectively communicate with persons with a disability, the Government of Victoria and the community;
- Raise community awareness of the rights of persons with a disability and of the role of government, the business sector and the community in promoting those rights;
• Consult and work with other disability advisory councils or bodies whether at a national, state or local government level;

• Monitor the implementation of strategies for promoting inclusion and participation in the community of persons with a disability and for removing barriers to inclusion and participation.

**VDAC’s Submission with Respect to Disability and Human Rights**

The *Disability Act 2006* introduced a number of changes to the way disability services are offered in Victoria to make sure that people with a disability have a greater say about the planning, funding and type of assistance they receive.

This is in line with Australia’s commitment to human rights as outlined in the *United Nations Convention on the Rights of Persons with Disabilities (2006)* (UN Convention), and with the *Victorian Charter of Human Rights and Responsibilities (2006)*.

The UN Convention includes the following principles:

• Equal opportunity before the law

• Access to justice

• Liberty and security of person

• Freedom from torture or cruel, inhuman or degrading treatment or punishment

• Freedom from exploitation, violence and abuse

• Freedom of expression and opinion, and access to information

• Statistics and data collection

• Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons

• Non-discrimination

• Full and effective participation and inclusion in society
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- Equality of opportunity
- Accessibility
- Equality between men and women
- Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

This submission is also in line with Policy Direction 3 of the National Disability Strategy, which states, in relation to access to justice for people with disabilities:

Effective access to justice for people with disability on an equal basis with others requires appropriate strategies, including aids and equipment, to facilitate their effective participation in all legal proceedings. Greater awareness is needed by the judiciary, legal professionals and court staff of disability issues.

It is also in line with research which states:

- The process to lodge a complaint under the Disability Discrimination Act 1992 (Cwlth) is onerous and relies too heavily on individuals being prepared and able to take part in costly legal proceedings (Shut Out, 2009).
- A consultation on access to justice conducted by the Law and Justice Foundation of New South Wales found that there is a series of barriers preventing people with disabilities from accessing the legal system, including accessibility of court premises and processes; issues of formality and the adversarial nature of judicial proceedings; the operation of the rules of evidence; negative perceptions of players in the justice system of people with disabilities; and the lack of people with disabilities who perform significant functions within the justice system (Law and Justice Foundation of NSW, 2003).

The submission is also in line with the Victorian Charter of Human Rights and Responsibilities Act 2006, at Sections 8, Recognition and Equality before the Law and 25, Rights in Criminal Proceedings.
Recommendations

1. Training
   That training in intellectual and cognitive disability is included in all training provided to front line staff at Victoria Police, all civil and criminal Courts and Tribunals.

2. Complaint mechanisms
   That courts, tribunals, commissions and other public officials charged with responsibility for dealing with or resolving complaints be required to provide assistance to people with an intellectual or cognitive disability.

3. Information
   That all information provided to other members of the community be provided in a range of formats and in a manner that is able to be understood by people with an intellectual or cognitive disability

4. Giving Evidence
   That the rules of evidence be changed to support people with an intellectual or cognitive disability in giving evidence.

5. Advocacy
   That advocacy services be funded to provide expert advice and support to people with an intellectual or cognitive disability as victims or perpetrators.

6. Funding
   That all agencies which are funded to provide justice services to Victorians be required to demonstrate that they also provide services to people with an intellectual or cognitive disability.

7. Assistance in Reporting Crime
   That a requirement to provide support and assistance to people with an intellectual or cognitive disability to report crime be incorporated in to crime reporting mechanisms.

8. Data Collection
   That data be collected and analysed to better inform the extent of interaction with the justice system by people with an intellectual or cognitive disability.
Issues

*Disability transcends other social divides as it touches individuals of all races/ethnicities, sexual orientations, genders, religions and class strata*.\(^v\)

This submission focuses on access to and interaction with the justice system for Victorians with an intellectual or cognitive disability and relates to access to both civil and criminal justice systems.

The Council notes that improving access to justice for those specifically mentioned in the Parliamentary Review will have flow on benefits for other vulnerable groups in the community, including women, those who have a lower school education or reduced literacy skills\(^vi\), those from CALD communities, Victorian Aboriginals communities and those with other disabilities, including mental health issues as being on the fringes of the justice system and in the "too hard basket"

Evidence indicates that access to justice can be difficult for some people with disabilities who may face:

- lack of knowledge of the law and of options available for legal assistance
- lack of awareness that action may have been taken against them
- fear of retribution
- lack of autonomy to make decisions to seek legal assistance
- reliance on others to access legal assistance
- limited and poorly resourced specialist services

People with an intellectual disability face additional challenges including:

- communication difficulties with legal practitioners
- lack of financial resources
- lack of awareness that legal advice or representation may be necessary
- difficulties in communicating with legal practitioners
• lack of understanding by legal service providers as to the nature of intellectual disability
• negative stereotypes of people with an intellectual disability
• lawyers failure to acknowledge the capacity of their intellectually disabled client to give instructions vii

These disadvantages may be exacerbated, as they also face the same barriers to access to justice in the other disadvantaged groups to which they belong. These include:

• people from culturally and/or linguistically diverse backgrounds
• Aboriginal and Torres Strait Islanders
• children and young people
• older people
• people living in remote, rural and regional areas
• people with low levels of education and literacy
• gay, lesbian and transgendered people
• women
• people living in institutions (i.e. prisoners, people detained in immigration detention centres, psychiatric institutions and people released from institutions)
• people on low incomes
• homeless people
• men without legal representation for family law or domestic violence matters
• people who face multiple disadvantages. viii

Research in Europe has found that

1. Legal incapacitation procedures deprive many persons with intellectual disability of access to justice and the basic possibility to fight for their rights. ...
2. The legal right to support and services for disabled people is organised very
differently in different member states. In many areas there is no real legal right to
the services a person needs to be included in society.

3. Current legal procedures often make it almost impossible for persons with
intellectual disability to defend their rights, because of the inefficient or non-
existing provisions for adequate legal support\(^\text{ix}\).

The experience of VDAC members supports the view that there are multiple factors
which serve to further disadvantage Victorians with an intellectual or cognitive disability
and impact on their ability to access all levels of justice. The impact of these factors is
supported by Australian and International research and must be taken into account.

**Gender**

Despite the high incidence of violence experienced, services are frequently non-
existent, inaccessible or inadequate to meet the needs of these victim/survivors.
Disability service providers frequently fail to screen clients for abuse histories who are
often not believed when they report sexual and domestic violence, or their cases are not
taken seriously by the criminal justice system or service providers.\(^\text{x}\)

The extent of violence has to be viewed with deep concern, particularly in a society that
espouses principles of social justice and human rights\(^\text{xi}\). The experiences and fears of
women with disabilities are no less important and real than those for able-bodied
women.\(^\text{xii}\)

A lack of education can impact on the lives of people with disabilities, for example,
women with no post school qualifications were almost twice as likely to experience
violence that those with higher levels of education and women in lower socioeconomic
groups are more than twice as likely to experience partner violence as those in the
higher income groups. Unemployed women are 5 times more likely to experience
partner violence, and women with a past history of child abuse are also more at risk.\(^\text{xiii}\)

There is a paucity of data available regarding women with an intellectual or cognitive
disability and access to justice and there have been calls for personal safety surveys
(PSS) for women with disabilities, but a better model would be the inclusion of disability
in general PSS. However, it is clear that one of the key barriers to access to justice for them is the stereotypical assumptions made about them, particularly in relation to sexual assault. Although anecdotal evidence suggests that this analysis is valid for men with an intellectual or cognitive disability, it is clear that there is also a gender component which research shows further disadvantages women with an intellectual or cognitive disability.

Women with an intellectual or cognitive disability are:

- not believed when they do report sexual assault;
- not considered reliable witnesses;
- not considered capable of participating in the justice process.

Women with an intellectual or cognitive disability are further denied justice when they are:

- ‘punished’ by being removed from their homes to move them out of reach of the perpetrator and into an unfamiliar environment;
- placed at even greater risk of further sexual assault as a result; and
- filled with fear leading to withdrawal into social isolation.xiv

**Sterilisation**

The Late Elizabeth Hastings released a report called *The Sterilisation of Girls and Young Women in Australia: Issues and Progress* (Brady, S., Briton, J., and Grover, S. (2001)) during her final weeks as Federal Disability Discrimination Commissioner in 2001. The Report found that while 17 sterilisations had been authorised by courts and tribunals between 1992 and 2001, other data showed that at least 1045 girls had been sterilised over the same periodxv. This data only included those carried out in the private sector for which a benefit had been claimed with the inference being that it is much more prevalent than recognised. Those cases that have come before courts and tribunals involve girls with an intellectual or cognitive disability.
Socio/economic disadvantage

While all people with socio economic disadvantage have clear barriers in accessing justice, it increases the disadvantage for those with an intellectual or cognitive disability. Some of the barriers have been identified as:

- lack of knowledge of the law and of the justice system
- the high cost of legal services
- inadequate funding for legal aid service providers
- restrictive funding policy for legal aid
- restrictive legal aid eligibility guidelines
- poor coordination of legal aid services
- unavailability of legal aid services due to service providers having a conflict of interests
- The power imbalance between companies who have access to legal resources and people who have little or no resources
- limitations with pro bono legal service provision
- inaccessibility of legal information websites and helplines

Aboriginality

Intellectual or cognitive disability is frequently not recognised by justice system personnel. Recognition is even less likely if the person is Aboriginal or Torres Strait Islander. There are a number of reasons for this interplay including:

- The different conception of disability in many Aboriginal and Torres Strait Islander communities and the associated absence of recognition of disability;
- The mistrust many Aboriginal and Torres Strait Islander people have of non-Indigenous organisations and the associated fear around disclosing disability if it is recognised;
• The manner in which is masked as a consequence of other social and economic
disadvantages as well as cultural factors;
• A lack of appropriate consultation with Aboriginal and Torres Strait Islander
communities with regard to the ‘needs’ of Aboriginal and Torres Strait Islander
people when in contact with the criminal justice system;
• The absence of services and culturally relevant assessment tools; and
• A lack of training, skills and time in criminal justice system settings.

Although many Aboriginal and Torres Strait Islander people do not separate or identify
an intellectual or cognitive disability in the context of their human experience they
identify that the person is “a mess” with information and understanding therefore rely on
the issues that face them daily like other social or health issues.

This approach is complicated within the context of a western criminal justice system.
The cultural aspects of the criminal justice system is that many are provided with
Aboriginal Legal Aid support, however are not deemed “fit to plea” this then can
escalate to the point that the person may be then deemed “unfit” to make decisions or
be aware of the process without context of cultural languages or sign communication
systems used in communities. The facts facing community people is the fear and
oppression that comes with the justice system. Families are struggling to understand
the system in a way to relay that to those with communication difficulties.

Whilst Aboriginal and Torres Strait Islander people tend to be cared for by the
community as a whole, they face the reality of isolation without proper cultural
awareness of the justice system. The identification of an intellectual or cognitive
disability within these processes can have a very distinct impact on police practices,
court proceedings and sentencing options. This impact is often, though not necessarily,
beneficial to the person. For example, it can lead to the right to a support person in
police interview and can be an additional mitigating factor in sentencing.

However, the label of ‘disability’ also has the potential to further stigmatis e an already
marginalised population. The challenge for justice system service providers becomes
largely about how to ensure that Aboriginal and Torres Strait Islander people with
disabilities are treated fairly and have access to the same ‘rights’ as others throughout the system without exacerbating disadvantage by creating an additional ‘stigma’.xvii.

The lack of or limitations for Aboriginal and Torres Strait Islander people with an intellectual or cognitive disability and language access is that their literacy and numeracy skills also bring barriers to the justice system as they may see English as a third or fourth language. Many Aboriginal and Torres Strait Islander people with an intellectual or cognitive disability (diagnosed) are unable to fully comprehend many of the forms needed to be done in the justice system. Therefore, the additional need of support from others, who then add their own interpretation that may be mis-construed due to lack of cultural awareness.

**Culturally and Linguistically Diverse Communities**

Barriers to justice people from cultural and linguistically diverse communities can include language barriers and a lack of interpreters and translated materials and also a lack of interpreters who are suitably qualified. Low literacy rates and the high levels of literacy required for dealing with the legal system will have an impact. There is also a fear of racism, whether real or not, which is believed to exist in Victoria Police and the Court System, as well as a fear of authority, particularly for immigrants from war torn countries.

There may be the stereotyping of particular communities, particularly those who have recently arrived. There may be a lack of awareness of services and procedures and a lack of understanding of legal system and processes. This is all compounded by a lack of access to computers and computer literacy which may assist in gaining access to information.

**Body language**

When people have been institutionalised, there is evidence to suggest that the behaviours which are seen as appropriate by the rest of the community not deemed to be so. For example, in institutionalised people with an intellectual or cognitive disability, there may be a tendency to not look people in the eye due to a fear of punishment. For police, this is seen as disrespectful or even evidence of guilt.
Age

For older Victorians with disabilities, as with others who are aging, they may have decreased cognitive ability, greater dependence on others, which may lead to vulnerability to violence and other forms of “elder abuse”. This may be exacerbated by diminishing self confidence, and a lack of ability in access appropriate information in appropriate formats. There also appears to be a lack of specialist legal services to provide support.

Education

People with low levels of education and literacy have difficulty with the complexity of the legal system, and the ignorance of the availability of legal aid. Sometimes there is a lack of recognition that an issue has legal ramification. Because of their lack of education, there maybe ignorance of sources of legal information and a resulting ignorance of rights, resulting in an inability to assess legal options.

Rural and remote

For people with an intellectual or cognitive disability there may be a lack of access to services which is exacerbated due to their isolation, remoteness and physical distance from available services. There are often generally lower levels of literacy and numeracy. There is a particular issue regarding the lack of privacy and confidentiality in smaller rural communities, where they may not be believed, and with conservative attitudes dismissing claims of sexual assault and abuse, and where the local police may have a social relationship with the perpetrator.

- Case Study

Jane* lives in a small town in the country. She is 19 and has an intellectual disability and lives with her mum who also has an intellectual disability. Some months ago, Jane was allegedly raped by a 26 year old in her community. Although it was reported to police, no brief was prepared and no action was taken because her evidence was not seen to be reliable.

* Not her real name
The man in question frequently drives past Jane tooting his horn and yelling abuse out of the window, while Jane freezes in terror. Other members of the community have approached the police asking for assistance for Jane and seeking for the case to be reopened.

So while Jane has support from other women in the community, the police response to date has been “you know girls like that are liars, he’s a good bloke, he wouldn’t do something like that without her saying yes.”

Justice for this young woman remains notably absent.

**Acquired brain injury (ABI)**

As many as 60 per cent of offenders report histories of ABI. This rate would account for 17,900 - out of 29,700 - adult prisoners in Australia.

There appears to be a lack of knowledge generally in the community about ABI. Lack of societal awareness compounds the problem. “Effects common to ABI, such as poor short-term memory, fatigue or irritability are misinterpreted as simply flaws in the person. People with an ABI are regular mistaken as drunk, unintelligent, uncooperative, unmotivated or aggressive and unpredictable” Roughly, three in every four people with an ABI make a good physical recovery. Often the injured person will show no outward signs of disability. In some instances, there may be a lack of self awareness, in that a person with and ABI may not be able to identify as a person with a disability.

- Case Study

Tom† has an acquired brain injury. This has resulted in slurred speech, a staggering gait and a loss of intellectual capacity. Tom is often harassed by police who take his physical presentation to be the result of alcohol or drugs. When he tries to explain that he has a disability, he is often not believed, and has been arrested and spent time in the cells.

Although under the law Tom is entitled to full participation in society, he is becoming more withdrawn as police continue to interfere with his rights.

† Not his real name
Access to Justice and People with an intellectual or cognitive disability

Australia is a signatory to the United Nations Convention on the Rights of Persons with Disabilities. Article 12 of the Convention recognizes the people with disabilities are entitled to equal treatment before the law and that they enjoy legal capacity on an equal basis with other people. Article 12.3 imposes an obligation on government to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” The VDAC submits that a number of steps are required to fulfil this obligation. These include making information and forms available in accessible formats and adapting rules of evidence and procedure to facilitate the participation of people with disabilities in the justice system as litigants and witnesses.

Civil law

Access to redress in civil jurisdictions

There is a lack of comprehensive information available in formats that people with an intellectual or cognitive disability are able to understand in all courts and tribunals adjudicating disputes in civil matters.

No information appears to be available in an accessible format on the Magistrates Court, County Court or Supreme Court websites.

The Victorian Civil and Administrative Tribunal (VCAT) deals with disputes, including the purchase and supply of goods and services, discrimination, domestic building works, guardianship and administration, disability services, health, privacy, mental health, legal services, residential tenancies, and consumer credit. It also deals with disputes between people and government such as the Transport Accident Commission. While there is an “Easy Read Application and Guide for applications under the Disability Act 2006” this only relates to the disputes which fall under the Act, and to do not enable or
empower people with an intellectual or cognitive disability to make a complaint about other area with which VCAT deals.xxiii

Consumer Affairs Victoria provides a series of brochures in Easy English about a number of areas in which the VCAT has jurisdiction including: scams, contacts, door to door sales, lay-by, phone sales, refunds and refunds. It also maintains a web page for “Problems affecting Consumers with Disabilities”. However, none of the links from that page are to information in Easy English and the forms which are available on the website to assist consumers are not easily accessible to people with an intellectual or cognitive disability and do not appear to be available in Easy English.

The VDAC is very concerned that information is not provided in an accessible format for those who vulnerable to homelessness and abuse in accommodation or who are unaware of their rights when purchasing motor vehicles, seeking credit or taking on debt.

In the areas of anti-discrimination, the Victorian Equal Opportunity and Human Rights Commission provides information in an easy English version to explain discrimination, and how to make a complaint.

However, all other information appears to be in complex language. This includes information about rights and responsibilities, which could impact on a person’s ability to redress difficulties with access to services.xxiv

The Office of the Public Advocate provides information in Easy English about the role of a guardian and the role of an administrator but no other information relating to tribunal hearings or applications for guardianship and administration is provided in an easily accessible format.

By contrast, information about the right to complain provided by the Disability Services Commissioner is available in a range of formats including Easy English and audio. However, the only complaints that can be lodged with the Commissioner relate to registered disability service providers. xxv.
There are limited specialist legal aid services funded by government to assist people with disabilities to access some areas of the justice system. For example the Disability Discrimination Legal Service and Villamanta Legal Service.

However, these services are underfunded and under resourced. Moreover, they are limited in the areas in which they can provide advice or how far they can take a matter.

**Fines and debts**

People with an intellectual or cognitive disability are vulnerable to exploitation from unscrupulous sales people and credit providers. In “Fine but Not Fair, Fines and Disadvantage” the Law and Justice Foundation of New South Wales found that heavy reliance on written information and correspondence with respect to both debts and fines creates particular barriers for those with an intellectual or cognitive disability, with limited access to the ability to challenge decisions or to look at alternative payment arrangements. This may lead to interaction with the criminal system as non-payment of fines or to repay debts.

**Family law and child protection**

People with an intellectual or cognitive disability experience significant disadvantage and stigmatisation within the family law and child protection systems. People with an intellectual or cognitive disability are at significant risk of having their children removed from their care. In “Parental Intellectual disability and child protection: key issues”, Alistair Lamont and Leah Bromfield argue that there are many factors which have a greater impact on parenting ability than an intellectual or cognitive disability. These include social isolation, parental stress, parents with past histories of being abused or neglected as children, demographic characteristics such as parental income, education, and employment status, parental physical and mental health problems, children with physical or mental health problems, behavioural problems or disability, parental substance abuse; and domestic/family violence.

**Family Law, Child Protection and Aboriginal and Torres Strait Islanders**

Aboriginals and Torres Strait Islanders must have a representative present at the first meeting with the Victorian Aboriginal Child Care Agency (VACCA). There is little
understanding by child protection of disability issues – and there are 15-20 enquiries per week.

○ Case study

Sarah‡ arrived to a client’s home after receiving a strange SMS message. On arrival Sarah found Deaf Aboriginal mum Lisa* disoriented and confused, this was viewed by the way Lisa signed to Sarah in relation to the new born baby of approximately eight weeks of age. Lisa gave the baby to Sarah and continued to “flutter around” making coffee for Sarah. Sarah observed many changing factors about Lisa and was concerned. Arranging a nappy bag and continuing to talk to Lisa, Sarah made an SMS message to the local mental health worker who she knew could sign and gesture to meet her at the house. Sarah spoke to Lisa many times to assess her communication skills and her anxiety levels, Lisa appeared untidy, confused, and communicating inappropriate responses to questions of well-being. On arrival the mental health worker was introduced and was known to Lisa, Sarah took the young baby that had been “given” to her with her nappy bag and walked around the block to a nearby aunty.

On arriving back from the Aunt’s Sarah, found Child Protection workers at the house, Lisa was distraught and confused, unable to answer questions; child protection didn’t bring an interpreter, had no VACCA worker and was there after a report of child neglect. Sarah spoke to the worker in relation to the matter and explained that the child has been placed with kin to allow Lisa to get well. Child protection worker became agitated, verbally disrespectful and Lisa become more distraught, the mental health worker had organised for Lisa to attend the clinic with him and he had arranged a local interpreter for her. Child protection continued to harass Lisa for the whereabouts of her baby and Sarah explained the child was with an aunt and will assist them, but to let Lisa attend the clinic for assessment. Sarah explained that Lisa signing

‡ Not her real name
is not fluent and her lip-reading skills are nearly non-existent that “yelling” at her won’t help her at all. The Child protection worker went to make a phone call, Sarah signed to Lisa to go with the Mental Health worker that she will work with Child Protection. Lisa unable to comprehend the communication due to her illness was taken by the Mental Health worker at the local hospital.

Lisa’s illness and cognitive impairment resulted in her being placed in hospital for a period of two months, during this time Sarah worked with the aunt, child protection, aboriginal legal service worker, court interpreter and Lisa to ensure appropriate communication was used in relation to the protection order placed on Lisa’s infant. This resulted in the aunt being assess in a Kith and Kin assessment and having care of the infant until Lisa is well enough to manage. The legal requirements made on Lisa were that she must attend parenting classes, engage with aboriginal services and continue to seek mental health and well-being help. The courts struggled to understand that the limited resources for parent groups to access interpreters to go with Lisa and costs involved to have interpreters saw Lisa unable to meet those requirements and orders therefore having her child with her aunt till the age of seven months before she was able to take her home. This would have been reduced if the court also imposed that it was mandatory for services to provide appropriate access to parents who are deaf and have an intellectual or cognitive disability.

Kith and Kin voluntary placement allows families to share care the responsibility for children whilst parents struggle with the justice system and their intellectual or cognitive disability. The voluntary placement option needs to be reviewed to ensure that families are provided with the right legal support and advice in regards of placement of their children. That the justice system understand that whilst barriers exists and assessments are done by child protection and the court it too needs to warrant an appropriate kith and kin placement that respects all aspects of the rights of the parent and child.
Criminal Justice

People with an intellectual or cognitive disability are involved in the criminal justice system as victims of crime and as alleged perpetrators. This submission deals with issues of access to justice for people with an intellectual or cognitive disability, first as victims of crime and then as alleged perpetrators.

Victims of crime

Barriers to accessing the criminal justice system for victims of crime start even before they wish to make a complaint. There is very little information available to assist victims of crime who have an intellectual or cognitive disability to first recognise that a crime has been committed, to indicate what assistance is available to a victim of crime, and then to report that crime to the police, their believability and reliability as witnesses and indeed about their ability to know what is occurring.

There are limited services available to assist people with an intellectual or cognitive disability who come into contact with the criminal justice system. One such support is the Independent Third Party (ITP). ITP’s facilitate communication, help the person know their rights and support the person through the process.

ITP’s are trained and registered with the Office of the Public Advocate and are available to assist people with an intellectual or cognitive disability during interviews or when making formal statements to Victoria Police but they are not advocates.

Police policy is to require that an ITP be present when interviewing an alleged offender, victim or witness with an intellectual or cognitive disability or mental illness. However, while the person, their family or carer may request an ITP, police often have to rely on their own judgement and experience to determine if a person has an intellectual or cognitive disability. Anecdotal evidence indicates that this does not always occur.

At a time when people with an intellectual or cognitive disability are at their most vulnerable, they may be left unsupported and even where an ITP is present they may be left without an advocate.
There is a lack of data collection relating to disability in the criminal justice system, and the lack of data collection in relation to crime in the disability sector. For example, in Victoria Police statistics, victims of crime can be disaggregated by gender as well as by offence category, age and racial appearance and frequency of victimisation but not by disability. xxx

**Carer/service provider as alleged perpetrator**

For people with an intellectual or cognitive disability, one of the greatest barriers to justice occurs where the alleged perpetrator is the carer. This reduces the capacity of the person who is experiencing the abuse to report the crime, where between 40 and 70% of crimes go unreported, and that sexual assault in particular is least likely to be reported to police. The fear of retribution can act as a barrier when the person is dependent on the person about whom they are complaining, whether that is a family member, a carer or a services provider. It is reported that people with an intellectual or cognitive disability fear that they will lose access to services or their care if they report abuse. xxxi

**Corrections system**

There is an over representation of people with an intellectual or cognitive disability in the corrections system. While it is estimated that the percentage of people with an intellectual or cognitive disability ranges from about .03% to about 3%, in the prison system in Australia, the range is between 1.5% and 29%, depending on the definition used. They tend to be incarcerated more for sexual offences, criminal damage and burglary than armed robbery or homicide.

While in prison people with an intellectual or cognitive disability have a higher security rating than other prisoners. It has been suggested that this is because of a lack of supports available within the prison system.

Recidivism rates are significantly higher, with 58% of people with an intellectual or cognitive disability being recidivists compared to 36% for prisoners without an intellectual or cognitive disability. Patterns of recidivism among prisoners released from custody in 2002-03 show that prisoners with an intellectual disability or cognitive
disability, as well as having higher recidivism rates, have significantly more involvement with law enforcement prior to incarceration and are less likely to move to minimum security prisons, and have difficulties with obtaining parole.

They are shown to have higher involvement in incidents within prisons, and significant literacy, homelessness, employment and psychiatric issues. Corrections Victoria acknowledges that there are major challenges for the disability sector and the wider community. xxxiv

While there are some specialist services available, there is a need to ensure that all prisoners with an intellectual or cognitive disability have access to:

- transition services for people with a history of offending and incarceration pre and post release,
- supported housing and accommodation programs and specialist projects to assist access to stable accommodation
- disability employment services and other employment services
- child and family support programs;
- specialist employment & vocational education programs;
- industry accredited training to ex-offenders to obtain industry recognised qualifications and licences that lead to employment;
- adolescent health services, primary health services, specialist disability services, mental health and dual diagnosis health programs;
- life skills programs and projects including outdoor adventure therapy,
- budgeting, cooking and financial literacy.

Person-centred approaches, self-directed support systems, circles of support, and individual life planning are particularly essential for people with an intellectual or cognitive disability.
Interpreters for Deaf people with an intellectual or cognitive disability

The use of interpreters must require that the evidence given in court be provided by the same interpreter for the duration of the court matter, this consistency allows the client to understand the same terminology of what evidence is given, how its interpreted and the use of signs to identify evidence, that the process of cross – examination to question the evidence of Deaf people is ensure that the language is not mis-construed or miss-leading.

The use of various signs to indicate situations, items of clothing, places and people can be done differently from different interpreters this also may see interpreters voice incorrectly a place, venue, and clothing, activity from lack of awareness of the style or evidence previously given by the Deaf client.

For example, a Deaf female client with a cognitive disability in a family violence matter expressed that her pyjamas were ripped from her, however the interpreter said: “night clothes”. In cross examination the client was asked what was she wearing again she signed “pyjamas” the interpreter said “pyjamas” this then became a debate on the use of the client’s evidence given and the changing of items of clothing when in fact it was an interpreter’s error.

Rules of Evidence and Procedure

Significant steps have been made with respect to adapting the rules of evidence and procedure to improve access to justice for people with an intellectual or cognitive disability where sexual offenses are alleged. Under the Criminal Procedure Act (Vic) 2009 people with a ‘cognitive impairment’ (defined in s3 to include impairment because of mental illness, intellectual disability, and dementia or brain injury) may have alternative arrangements for giving evidence at trial a pre-recording of evidence, or a special hearing. They may also be entitled to protection from cross examination (in some circumstances).

Protection from Cross examination/Protected Witnesses

This protection is limited to “protected witnesses in sexual offences and those arising out of family violence within the meaning of the Family Violence Protection Act 2008
The protection only applies to cross examination by unrepresented litigants, witnesses’ in sexual offence proceedings and offences that would amount to family violence. It is a matter for the court to determine who is a protected witness. These may include:

(a) the complainant; or
(b) a family member of the complainant; or
(c) a family member of the accused; or
(d) any other witness whom the court declares under section 355 to be a protected witness.

Alternative arrangements for giving evidence at trial s360

Section 360 Criminal Procedure Act (CPA) provides victim/complainants with a number of options to assist in giving evidence in sexual offence proceedings including:

- giving evidence on closed-circuit television
- using screens so the victim/complainant does not have to see the accused
- allowing a support person to sit beside the victim/complainant to provide emotional support when she/he gives evidence.

The court must allow these arrangements unless the victim/complainant is aware of her/his rights but does not want them to be in place.

Recording evidence in chief for cognitively impaired witnesses in sexual offence and assault matters

Where a matter is heard in the County or Supreme Court, victim/complainants with a cognitive impairment have their evidence pre-recorded in a “special hearing” and then played at trial.

Special hearings for people with a cognitive impairment

A "special hearing" is a process where the evidence of a child or a cognitively impaired complainant being questioned by counsel is taped and then shown to the jury at a later
point. If there are re-trials then the same tape is played to the new jury. (Division 6 (ss370-76) of the CPA) There is a jury warning as to recording of special hearing.

The VDAC submits that these provisions and protections should be extended to other criminal offences where the victim/complainant or witness is a person with an intellectual or cognitive disability. It further submits that the rules of evidence in civil matters should be adapted to allow people with an intellectual or cognitive disability to have access to the justice system.

**Systemic Barriers**

There is a lack of education/training/understanding about the particular needs and barriers facing people with an intellectual or cognitive disability when trying to access the justice system. Training must be provided for all in the justice system including frontline staff in police and courts, Independent Third Parties, victim support workers, advocates, case managers, domestic violence workers – drug and alcohol workers and those working in Corrections, homelessness, Consumer Affairs Victoria, VCAT and Alternative Dispute Resolution practitioners.

**Alternate Dispute Resolution**

Aboriginal and Torres Strait Islander people with an intellectual or cognitive disability are systemically not represented appropriately in the justice system. They are placed in various situations that will see them attend courts that are not equipped to look at cultural and disability related issues such as Koorie Court and Family Violence courts. Many Aboriginal and Torres Strait Islander people not yet diagnosed with an intellectual or cognitive disability (as a label) however are known to the justice system and are seen in court without appropriate support.

The Aboriginal justice system does not in any of their plans address disability related issues in the justice system. Disability awareness in the Aboriginal Justice system needs to be addressed as a priority to ensure there is transparency, accountability and important pathways of correct intervention for these clients and the victims.

In Access to Koorie Court, Elders should be given training, awareness of the issues faced by clients of the court and make recommendations to ensure that clients with an
intellectual or cognitive disability are assessed accordingly and due process of the court matter meets the requirement of the client understanding all matters related to them.

Review of the state Aboriginal Justice plan and other policy documents related to the justice system to ensure that they are inclusive of Aboriginal and Torres Strait Islander people with an intellectual or cognitive disability (and other disabilities) as a minority group within a marginalised group. This will ensure that accountability for access and appropriate interventions are provided at a legislative level.
References

ii National People with Disabilities and Carer Council, 2009, p. 16
iv Victorian Human Rights and Responsibilities Act 2006
vi Inclusion Europe, "Justice, Rights and Inclusion for People with Intellectual Disability" (2007).

vii L. Schetzer & J Henderson, op. cit
viii L. Schetzer & J Henderson, op. cit
ix Inclusion Europe, op. cit.
xii Plunkett, Karleen and Lasic, Slavica (1998), 'Ability to Break the Silence', Women’s Health West Newsletter, Women’s Health West, Footscray
xiii S. Salthouse, WWDA (2007)“Completely Knocked Out: Australian perspectives on disability, disempowerment and domestic violence”

xvi L. Schetzer & J Henderson, op. cit
xviii L. Schetzer & J Henderson, op. cit
xix L. Schetzer & J Henderson, op. cit
xx L. Schetzer & J Henderson, op. cit
xxii Nick Rushworth (July 2011) op cit
xxiii www.vcat.vic.gov.au
xxiv http://www.humanrightscommission.vic.gov.au
xxvi Law and Justice Foundation of New South Wales (2009) Fine but not fair: Fines and Disadvantage
xxix Office of the Public Advocate, Independent Third Party Program Brochure
xxxiv http://stepping-up.org.au/
xxxv http://stepping-up.org.au/ “Protected witness” is defined broadly and includes the complainant, a family member of the complainant, a family member of the accused person, and any other witness that the court declares protected.
xxxvi Division 4 of Part 8.2 of the Criminal Procedure Act 2009.
xxxvii Division 6 of Part 8.2 of the Criminal Procedure Act 2009. Note that special hearings do not occur if the case is heard in the Criminal Division of the Children’s Court or the case is heard summarily in the Magistrates’ Court.