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

Submission by the Ballarat and District Law Association Inc

Author (on behalf of the Association) Philip Lynch, President

It is noted that the key issues of this Inquiry include, but not limited to:

(i) participants’ knowledge of their rights;
(ii) availability of appropriate services and supports;
(iii) dealings with the police; and
(iv) the operation of the courts;

For the purposes of this submission, intellectual disability is defined as:

“a broad concept encompassing various intellectual deficits, including mental retardation (MR), deficits too mild to properly qualify as MR, various specific conditions (such as specific learning disability), and problems acquired later in life through acquired brain injuries or neurodegenerative diseases like dementia. Intellectual disabilities may appear at any age.”

This submission is written from the perspective of the practitioner. However, its focus is better services to and equal justice for the intellectually disable client

SUBMISSION

It is the evaluation of this submission that, in varying degrees, from commencement of dealings with the intellectually disabled and in the continuing proceedings, that the solicitor, and, in some instances, notably the country solicitor is in a bleak position that is passed onto the client

It should be noted it is perceived this commences at law school and continues throughout the lawyers career

1.  Law school/legal training

The Law Society of New South Wales\(^1\) states as follows:

It is not the role of a solicitor to be an expert in capacity assessment of their client. However, a solicitor can be involved in carrying out a “legal” assessment of their client’s capacity which involves:\(^2\)

\(^1\) When a client’s capacity is in doubt A Practical Guide for Solicitors 2009
Making an initial, preliminary assessment of capacity—looking for warning signs or 'red flags' using basic questioning and observation of the client. If doubts arise, seeking a clinical consultation or formal evaluation of the client’s capacity by a clinician with expertise in cognitive capacity assessment. Making a final legal judgment about capacity for the particular decision or transaction.

At neither law school or in legal training for articles, was the writer taught anything concerning the issues of the intellectually disabled raised subsequently in this submission. Research with younger practitioners shows that this situation has not changed. Neither does this appear (unless the seminar on dealing with difficult clients covers this category of persons which at best seems moderately insulting) are such matters covered in compulsory legal training.

2. Commencement of legal proceedings/instructions

From the perception of the solicitor, there exist 3 distinct areas of difficulty at this stage with the intellectually disabled client:

(A) the client is aware and obviously is in the category and has a carer/guardian; and;

(B) the client is unaware or denies being in the category but it is suspected by the solicitor on the facts and matters before her/him that said client may fall into the category

(C) the client subsequently becomes disabled

(A) the client is aware, is obviously is in the category and has a carer/guardian;

The practice of law in Victoria is highly regulated for both the protection of the client (and the solicitor). Amongst said rules and regulations are the Legal Practice Act 2004 with attendant regulations and the Professional Conduct and Practice Rules 2005. No solicitor disputes the value of these to the client and as a guideline to practice. One of the central (even golden rules) is that of client confidentiality. In regard to same, these rules define as follows:

"client" with respect to a practitioner or a practitioner's firm means a person (not an instructing practitioner) for whom the practitioner is engaged to provide legal services for a matter.3

Serving the interests of Justice and complying with the Law

A practitioner must not, in the course of engaging in legal practice, engage in, or assist, conduct which is:

(i) dishonest or otherwise discreditable to a practitioner;

2 The American Bar Association Commission on Law and Aging and the American Psychological Association, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, Washington, 2005 at ABA at p3:
(ii) prejudicial to the administration of justice; or

(iii) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute.4

1. Duty to Client

1.1 Honesty and Confidentiality

A practitioner must, in the course of engaging in legal practice, act honestly and fairly in clients’ best interests and maintain clients’ confidences.5

3. Confidentiality

3.1 A practitioner must never disclose to any person, who is not a partner proprietor director or employee of the practitioner’s firm, any information which is confidential to a client and acquired by the practitioner's firm during the client's engagement, unless –

3.1.1 the client authorises disclosure;

3.1.2 the practitioner is compelled by law to disclose;

3.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client’s claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence;

3.1.4 the information has lost its confidentiality; or

3.1.5 the practitioner obtains the information from another person who is not bound by the confidentiality owed by the practitioner to the client and who does not give the information confidentially to the practitioner.6

All clients, without exception to intellect and any disability should be entitled to the full benefit of these Rules and the conduct arising from them.

However, it is perceived this is not occurring. If the intellectually disabled client attends with either carer or guardian, and said carer or guardian remains with said client, the requirement for confidentiality can be offended. This is made more complex if:

(a) the carer or guardian is the position of being a witness to the event complained of; or (and the writer has been in this situation);

(b) The carer or guardian is the problem or issue (as in a family law matter or family violence matter or matters of similar ilk) and is seeking a divorce or intervention order; and

5 ibid
6 ibid
the carer or guardian will not leave the room as they maintain their right to advocate for the client

However, this situation, though highly problematical, does not compare in complexity to situation B being

(B) “the client is unaware or denies being in the category but it is suspected by the solicitor on the facts and matters before her/him that said client may fall into the category of intellectually disabled”. This situation occurs with enough frequency to the writer alone to make it a significant issue.

The Law Institute of Victoria Ethics sections says the following on this matter

Q. I am not sure if my client understands what’s going on. Can I take the client’s instructions?

A. Solicitors can only take instructions from clients with the capacity to instruct.

Very few of us have any training or qualification to make an assessment of capacity, yet we can be disciplined for refusing to comply with valid instructions, or for complying where capacity is later shown to be lacking.

Where a client is clearly lacking capacity, instructions should not be followed. The client may need a guardian or other form of authorised representative. Although that raises its own issues, a client who is clearly lacking capacity is a relatively straightforward problem. The situation is far more difficult where a solicitor merely has some doubt.

If you have any real doubt, it is sensible to obtain independent confirmation of your client’s status. Clients will often be less resistant to this suggestion if you explain that the independent assessment is in their own best interests, so that the instructions they are giving will not later be challenged.

The law and some observations are discussed in Kantor, a Court of Appeal decision from December 2004. Some factors considered by the Court were:

- Who bears the burden of proving the Will?
- The capacity of a testator with dementia
- The evidence of the solicitor present at the execution as to the capacity of the testator
- Medical evidence as to the capacity of the testator to have testamentary capacity in periods of lucidity

This obviously deals primarily with Wills but extends to all legal dealings

I submit it is to be presumed that as a solicitor I know this should somebody complain or an issue arise

To give a criminal case example (based on true facts)
I get a call about X (the client) from the Police stating same is in the cells. On arrival I discover that X has gone to the Police Station with several knives threatened the police and dared them to shoot him. X is therefore a danger to himself and theoretically a danger to others. Apart from the perceived mental health issues (which I am not qualified to diagnose), there appears to be some intellectual disability (this is only a suspicion). His father is his carer (or says he is). His father is not much better than X.

As noted by my colleague, Ms Hadden, solicitors are not medical practitioners, nor should they attempt to practice as same.

Here is what arose from the matter of X:

1. he was placed in Melbourne Assessment Prison;
2. I could find nobody in Ballarat or even close to Ballarat to assess him for his perceived problems (this being despite their being a number of services that could, but do not, fit the bill)⁷;
3. my submissions to the court that he should not be in Remand were routed by the various Magistrates on the basis of public safety (a justifiable concern);
4. I had to get the Court to order a report from Forensicare. This takes at least 12 weeks; and
5. Thus, X spent 4 months in gaol. It should be noted that once the Court was given professional knowledge of X’s various psychological issues and intellectual disability, then a game plan of processes could be put in situ to allow X to re-enter the community

Thus, even IF I suspect a client may not be in a position to give me instructions I should follow the LIV advice. There are not the resources to do so. It should be noted this case occurred in Ballarat with a population of 80,000 and services for same. In this circumstances, the situation as say Maryborough or Ararat must, by definition, be much worse

(C) The client subsequently becomes intellectually Disabled

As noted by the New South Wales Law Society

Capacity is fluid

A person’s capacity can fluctuate over time or in different situations, so you will need to assess their capacity for each decision whenever there is doubt about capacity. Even where a client lacked the ability to make a specific decision in the past, they might be able to make that decision later on. Clients might also regain, or increase their capacity, for example by learning new skills or taking medication.

Other factors such as stress, grief, depression, reversible medical conditions or hearing or visual impairments may also affect a person’s decision-making

⁷ It should be noted that the Ballarat Psych Services, even if they were an option, would be not be an option as, in my experience, they are largely distrusted by the clients
capacity.  

This can and, it is submitted, does, present at times a more pressing issue for the client and solicitor if the client through acquired brain injuries or neurodegenerative diseases like dementia, deteriorates to a level where instructions become unreliable. If the deterioration is at the significant end of the scale, this does not present an issue. However, the varying degrees, where the deterioration is up to the moderate degree, it does present issues if instructions seek to be changed to, in the solicitor’s her/his opinion, the detriment of the client. This can be rectified with the assistance of the client’s medical practitioner if:

- There is awareness of the deterioration by the solicitor; and
- The client will inform you of the identity of the Doctor; and
- If they will sign a release (an instructional problem in itself) for their medical information from the Doctor/treating facility.

In a plea in mitigation is a criminal matter such information is vital to the court as a factor in sentencing. The absence of same can result in harsher sentencing of the client. It is also an important factor for the court in other areas of law, notably wills and probate.

**INTERACTIONS WITH THE POLICE**

Having read the commentary of Ms Hadden, I access same as follows and agree wholeheartedly:

"The Ballarat Victoria Police do their best but they have to conduct records of interview before formally charging a person with an indictable offence or crime. Whilst the Independent Person system (where an Independent Person from the Office of Public Advocate is called on by the Police Station to attend a record of interview of a suspect person) is at least something, that person is not qualified to assess or diagnose whether a suspect person has an intellectual disability or mental impairment, which may mean that a formal record of interview by the Police should not commence or even take place. Likewise, the police officer is not qualified to assess or diagnose whether a suspect has an intellectual disability, they can only make a ‘guess’ on their years of policing experience. So, invariably the unsuspecting suspect with an intellectual disability answers all questions put to him or her in a formal police record of interview without understanding the questions or their answers, their right to silence and their right to make a ‘no comment’ record of interview”.

And subsequently add if, as Ms Hadden notes, the Police lack the resources and relevant advice at time of interview to assess intellectual disability at the time of interview, then same skews the process at inception. It is on the information received that the court relies, and on which the solicitor structures a defence (which may be moot after said interview as there is a significant difference between a client stating “I did it” and saying “I did it, but” or having the intellectual capacity to remain quiet and say “no comment”) or a plea in mitigation. This situation needs to be rectified to enable equal justice.

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8 When a client’s capacity is in doubt A Practical Guide for Solicitors 2009 Law Society of NSW
9 Rightfully, the medical practitioner/treating facility will not cooperate/assist without the requisite documentation from the client
SENTENCING

There are three perceived issues with sentencing:

1. Information before the Court

This has been dealt with previously. The perceived issues commence with the police interview and proceed to the information that can and should be made available to the court as part of its discretion in the sentencing process. The Defence/Plea in Mitigation situation can be simply stated as

- A lack of knowledge by solicitors in the recognition of intellectual disability coupled with
- A lack of local resources (and extensive timeframes for resources external [such as Forensicare] whilst clients may languish in prison awaiting trial/mitigable material

2. Comprehension of Sentencing

Here, again, I use an example, based on true facts, and not unusual

a. X has been caught and bought to court on a drink driving charge;
b. X has her/his licence suspended;
c. this situation is explained to X by the court and by legal representation
d. despite c above, on leaving the court, X gets in her/his vehicle and drives away

Leaving aside the bloody minded client, this situation has occurred on a number of occasions to this practitioner when a moderate disability is known (and even pled in mitigation) for the client. Conversation with other solicitors leads to belief it is not unusual. This creates a danger to the client (both physically and through gaol time for subsequent offence) and to the community

3. Baseline/mandatory sentencing

Judicial discretion is defined as:

**Judicial discretion** is the power of the judiciary to make some legal decisions according to their discretion. Under the doctrine of the separation of powers, the ability of judges to exercise discretion is an aspect of judicial independence. Where appropriate, judicial discretion allows a judge to decide a legal case or matter within a range of possible decisions. However, where the exercise of discretion goes beyond constraints set down by legislation, by binding precedent, or by a constitution, the court may be abusing its discretion and undermining the rule of law. In that case, the decision of the court may be ultra vires, and may sometimes be characterized as judicial activism.

Chief Justice John Marshall wrote the following on this subject:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law. (Osborn V. Bank of
In Markarian v R [2005] HCA 25 per GLEESON CJ, GUMMOW, HAYNE AND CALLINAN JJ

Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies (Johnson v The Queen [2004] HCA 15; (2004) 78 ALJR 616 at 618 [31] per Gleeson CJ, 624 [26] per Gummow, Callinan and Heydon JJ; [2004] HCA 15; 205 ALR 346 at 348, 356.)

Thus, it can be seen that discretion exists if discretion is allowed by the legislature. Baseline sentencing from the writers perspective, enable such discretion to exist. Thus, any mitigation that could be raised for a person’s intellectual disability, could not and will not be a factor that the court can consider. It is our contention that such removal of discretion would be prejudicial to the intellectually disabled.

**Other areas of Law**

The main attention of this document has been centred on criminal law. however similar problems of comprehension, confidentiality and representation embrace all areas of law from conveyancing through contract and family law to the major issue of wills and probate (which seems to be the major focus of the courts).

These will be continuing and significant issues for both the intellectually disabled client and the practitioner unless training for the practitioner and specialized advocacy/medical advice is made available to the client in a timely manner.

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