

**Law Reform Committee**

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**Inquiry into Access to and  
Interaction with the  
Justice System by People  
with an Intellectual  
Disability and their  
Families and Carers**

March 2013

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# **Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers**

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Report of the Law Reform Committee for the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers

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ORDERED TO BE PRINTED

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Victorian Government Printer

Parliamentary Paper

No. 216, Session 2010-2013

**Parliament of Victoria**

**Law Reform Committee**

Inquiry into Access to and Interaction with the Justice  
System by People with an Intellectual Disability and  
their Families and Carers – Final report

ISBN – 978-0-9807201-7-4

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# Committee Members

This Inquiry was conducted during the term of the 57th Parliament.

The members of the Law Reform Committee are:

Mr Clem Newton-Brown, MP (Chair)

Ms Jane Garrett, MP (Deputy Chair)

Mr Anthony Carbines, MP

Mr Russell Northe, MP

Mrs Donna Petrovich, MLC

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# The Law Reform Committee

The Victorian Parliament Law Reform Committee is constituted under the *Parliamentary Committees Act 2003*, as amended.

The Committee comprises five members of Parliament drawn from both houses and all parties.

The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with —

- a) legal, constitutional or parliamentary reform
- b) the administration of justice
- c) law reform.

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# Terms of Reference

Referred by the Legislative Assembly on 10 February 2011.

That pursuant to the *Parliamentary Committees Act 2003*, the Law Reform Committee is required to inquire into, consider and report no later than 30 March 2012\* on access to and interaction with the justice system by people with an intellectual disability and their families and carers, including:

- a) key issues and themes, including 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;
- b) measures within Australia and internationally to improve access to, and interaction with, the justice system, including but not limited to measures that seek to:
  - i) break down barriers to the justice system and enhance participation;
  - ii) deliver just and equitable outcomes;
  - iii) facilitate collaborative and co-ordinated approaches across government departments and agencies; and
  - iv) provide responses that address the circumstances of the offender and offence concerned.
- c) consideration as to whether the findings of the inquiry have broader application to people with a disability other than an intellectual disability, for example those with an acquired brain injury or neurological condition leading to cognitive disability.\*\*

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\* The reporting date was extended to 30 November 2012 by resolution of the Legislative Assembly on 28 March 2012. The reporting date was further extended to 5 March 2013 by resolution of the Legislative Assembly on 12 December 2012.

\*\* Paragraph (c) was inserted by resolution of the Legislative Assembly on 30 June 2011.



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# Chair's Foreword

People with an intellectual disability or cognitive impairment are more likely to experience barriers and disadvantages when seeking access to and interacting with the justice system compared to people without these disabilities. Throughout the course of the Inquiry, the Committee heard consistent evidence noting the difficulties people with an intellectual disability or cognitive impairment experience understanding complex questioning and legal processes, and how these difficulties are exacerbated when people working in the justice system are not sensitive to the particular needs of people with these impairments.

A number of services and supports for people with an intellectual disability have been put in place over time, and these have improved responses from the justice and community sectors to people with an intellectual disability. However, opportunities remain to better accommodate the unique needs of people with an intellectual disability or cognitive impairment when involved in justice settings.

The Committee heard that people with a cognitive impairment, such as an acquired brain injury, are disproportionately represented in the justice system. A number of submissions and witnesses expressed concern that, despite the fact that people with a cognitive impairment face similar challenges to people with an intellectual disability in the justice system, people with a cognitive impairment are not able to access the range of services available to people with an intellectual disability. Consequently, the Committee recommends that the Victorian Government consider providing case management services to people with a cognitive impairment who seek access to, or are interacting with, the justice system.

While the Committee heard that efforts are being made within the police service, the courts and the legal profession to recognise the needs of people with an intellectual disability or cognitive impairment, it was also clear that more can be done to enhance awareness of the challenges experienced by these people in the justice system. The Committee proposes extensive awareness raising measures about intellectual disability or cognitive impairment for personnel working in the justice sector. These include improved knowledge and understanding of indicators of intellectual disability or cognitive impairment, the difficulties that may be experienced by these people when interacting with the justice system, and mechanisms that could accommodate their special needs.

The Committee also proposes examining existing measures of support made available to people with an intellectual disability or cognitive impairment when interacting with the justice system, with a view to determining whether there is unmet demand for these supports and if so, how this demand can be met.

The Committee's recommendations aim to ensure that all aspects of the justice system maintain and promote the rights of people with an intellectual disability or cognitive impairment. The Committee's approach recognises the important role the police service, the courts and the legal

profession play in safeguarding the rights of people with an intellectual disability or cognitive impairment.

The Inquiry involved extensive research, and the Committee consulted widely, hearing from individuals, disability service providers, advocacy groups, Government agencies, the courts and members of the legal profession. On behalf of the Law Reform Committee I wish to thank all those individuals and organisations that took part in the Committee's Inquiry.

I would particularly like to thank all the people who shared their personal experiences and stories with the Committee during the course of this Inquiry. Some of these stories appear as case studies in the Committee's report. This evidence helped to highlight to the Committee the challenges that are experienced by people with an intellectual disability or cognitive impairment when they interact with the justice system, and in the community generally.

I would like to thank my fellow Committee members – Deputy Chair Ms Jane Garrett MP, Mr Anthony Carbines MP, Mr Russell Northe MP, and Mrs Donna Petrovich MLC – for their thoughtful contributions to the Inquiry, and for their collegial and constructive approach to the work of the Committee.

Finally, I would like to thank the staff of the Committee for their ongoing dedication to the work of the Committee and for their excellent work towards this report: the Executive Officer, Dr Vaughn Koops; the Research Officer, Ms Vathani Shivanandan; and the Administrative Officer, Ms Helen Ross-Soden.

**Mr Clem Newton-Brown MP**  
**Chair**

# Executive Summary

## Chapter One: Introduction

The *Inquiry into access to and interaction with the justice system by people with an intellectual disability, their families and carers* undertakes a broad examination of the place of people with an intellectual disability or cognitive impairment in the justice system, including interactions with the police, courts, legal profession and corrections system. Studies have consistently found that people with an intellectual disability or cognitive impairment experience a number of significant disadvantages that may increase the likelihood that they will come into contact with the justice system. Evidence presented to the Committee suggested that opportunities remain to better accommodate the unique needs of people with an intellectual disability or cognitive impairment in the justice system.

Consistent themes highlighted in evidence included:

- the importance of accurate data to quantify the level of involvement that people with an intellectual disability or cognitive impairment have with the justice system;
- the link between social and economic disadvantages and potential contact with the justice system;
- the limited awareness by the community and justice system personnel of common indicators of intellectual disability or cognitive impairment; and
- the importance of adequate, accessible and effective services and supports for people with an intellectual disability or cognitive impairment, both while in the community and during their transitions through the justice system.

The Committee heard from a wide number of stakeholders and individuals during the course of the Inquiry, including disability service providers, disability advocacy groups, the legal profession and the courts.

## Chapter Two: The justice system and people with an intellectual disability or cognitive impairment

Common life experiences of people with an intellectual disability or cognitive impairment include: increased dependence on others to complete daily activities; limited education, training and employment opportunities leading to financial constraints or dependence on social welfare; and increased social isolation. The degree to which these disadvantages affect a person varies from person to person and may be ameliorated through the provision of appropriate support.

Data quantifying the involvement of people with an intellectual disability or cognitive impairment in the justice system is not collected in a systematic way. Data from correctional settings suggest that between 1.3 and 2.5 per cent of the prison population may have an intellectual disability,

while cognitive impairments such as acquired brain injuries (ABI) may be present in up to 42 per cent of male prisoners and 33 per cent of female prisoners respectively.

Compared to population estimates of the incidence of these impairments, it appears that people with an intellectual disability or cognitive impairment are overrepresented throughout the justice system. The absence of comprehensive data about the involvement of people with an intellectual disability or cognitive impairment in the justice system has consequences for determining what services and supports should be made available. The delivery of services and supports for people with an intellectual disability or cognitive impairment could likely be improved if better data on their interaction with the justice system was available.

## Chapter Three: Definitions of intellectual disability and cognitive impairment

Definitions for 'intellectual disability' typically emphasise different aspects of intellectual, functional and adaptive abilities that a person exhibits during his or her developmental years. For clinical purposes intelligence quotient testing is frequently used to define intellectual disability, with scores of less than 70 indicating a degree of intellectual disability. In Victoria, the *Disability Act 2006* (Vic) adopts similar clinical approaches to defining intellectual disability.

Clinical definitions of intellectual disability are useful for diagnosing the existence of intellectual disability. However, they may be of limited use when considering how the justice system should respond to the needs of a person with an intellectual disability and for determining the capacity of a person to understand and exercise his or her legal rights.

In Victoria a distinction is made between intellectual disability and cognitive impairment when determining what services and supports should be provided under the *Disability Act 2006*. Cognitive impairment tends to refer to a broader range of impairments than encompassed by definitions of intellectual disability, and typically include impairments that arise during adulthood. It is often the case that people with a cognitive impairment have experienced a more diverse range of lived experiences than people with an intellectual disability.

However, depending on how and when the disability manifested people with an intellectual disability and people with a cognitive impairment may experience similar difficulties when seeking access to and interacting with the justice system. Difficulties with recall, comprehension and expressive language may be experienced by people with either impairment. These difficulties suggest that appropriate measures should be adopted to ensure equitable and effective access to justice both by people with an intellectual disability and by those with a cognitive impairment. The Committee's recommendations aim to achieve greater parity in services and supports available to people with an intellectual disability and people with a cognitive impairment.

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## Chapter Four: Access to services and supports

The provision of services and supports to people with an intellectual disability has changed dramatically over time. In the 1970s and 1980s treatment and care was generally moved from custodial settings to community-based support and the provision of specialised services.

Now the legislative and policy framework governing the provision of services and supports to people with an intellectual disability encompasses a range of national and Victorian strategic policies, the *Disability Act 2006*, the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and international treaties and conventions. This framework articulates principles and objectives for the delivery of services and supports to all people with a disability.

Disability services are provided by a range of groups and organisations including government departments, community service organisations, advocacy groups, and families and carers. These services can help alleviate the effect of a disability on a person and therefore encourage greater and more effective participation in the community.

Access to services provided by the Department of Human Services and community organisations is often inhibited by resource constraints and eligibility criteria. The Committee makes a number of recommendations calling for the Victorian Government to examine the availability of resources for existing services and supports, to ensure that all people with an intellectual disability or cognitive impairment are able to access services as required. The Committee recommends that specialist case management services, drawing upon comparable services available to people with an intellectual disability, be made available to people with a cognitive impairment.

A person with an intellectual disability or cognitive impairment may require the support of a number of different service providers at one time. Consequently, the level of coordination and collaboration between agencies that provide services and supports to clients may be disjointed. The Committee recommends that measures be taken to coordinate the delivery of services to people with an intellectual disability or cognitive impairment. Key measures may include: an outline of available services and supports in the community; clarification of agency roles and responsibilities; and the establishment of guidelines to inform the exchange of information between agencies.

## Chapter Five: Police and people with an intellectual disability or cognitive impairment

The manner in which people with an intellectual disability or cognitive impairment interact with the police often sets the scene for how a person manoeuvres through the justice system. The Committee heard that improving police officers' ability to identify people with an intellectual disability or cognitive impairment could substantially improve subsequent interactions of those people with the justice system.

When police do not recognise the presence of an intellectual disability or cognitive impairment, existing service and support mechanisms may not be offered. Currently the Victoria Police Manual defines 'mental disorder' widely to encompass mental illness, intellectual disability, ABIs and neurological conditions. Given inherent differences between these conditions, the Committee recommends that the Manual be amended to distinguish between these impairments and provide guidance on common indicators and appropriate responses.

At present police training offers opportunities to enhance disability awareness, but does not differentiate between different disabilities. While acknowledging available training for police officers, the Committee considered there was some need to enhance training in the identification and interaction with people with an intellectual disability or cognitive impairment.

A person identified as having an intellectual disability, ABI, dementia or mental illness is entitled to the support of an independent third person (ITP) during police interviews. The role of the ITP is to ensure that as far as possible the interview proceeds in a way the interviewee understands. The ITP program is funded and delivered by the Office of the Public Advocate. The Committee recommends that the obligation to arrange for an ITP be reaffirmed in the Victoria Police Manual to ensure that ITPs are present for interviews where appropriate. Concerns were also expressed about the adequacy and availability of ITPs given the voluntary nature of the ITP role.

## Chapter Six: Lawyers and the judiciary

Legal language can often be incomprehensible to people with an intellectual disability or cognitive impairment. The Committee heard that more simple and plain English format documents outlining legal rights and processes should be available, to minimise opportunities for a person with an intellectual disability or cognitive impairment to come into inadvertent and adverse contact with the justice system because he or she is unable to access information regarding legal rights and responsibilities. The Committee recommends that the Victorian Government develop a comprehensive community education campaign targeted towards people with an intellectual disability or cognitive impairment, to increase knowledge of legal rights and responsibilities.

A person with an intellectual disability or cognitive impairment may have limited financial means and as such may come to rely on legal services provided through community legal centres and Victoria Legal Aid. The Committee recognises that demand for services provided by community legal centres and Victoria Legal Aid often exceeds their resource capacity and accordingly recommends that the Victorian Government ensure people with an intellectual disability or cognitive impairment are able to access these services when required.

Lawyers interacting with a client with an intellectual disability or cognitive impairment may have difficulty identifying that the client has an impairment. It is important for a lawyer to correctly identify the presence of intellectual disability or cognitive impairment, in order to ensure that instructions are



taken in an appropriate manner, and that evidence is presented appropriately in court. The Committee recommends that guidance material outlining indicators of intellectual disability or cognitive impairment, issues prosecuting and defending clients with an intellectual disability or cognitive impairment, appropriate communication techniques, and supports available in the community should be distributed to members of the legal profession.

As a further measure to improve lawyer's interactions with people with an intellectual disability or cognitive impairment, the Committee believes that there is merit in allowing an independent support person, similar to that of an ITP in police interviews, to be present when a lawyer is interacting with a client with an intellectual disability or cognitive impairment.

## **Chapter Seven: Criminal responsibility and court processes**

The Committee heard a number of concerns regarding the operation of the *Crimes (Mental Impairment and Unfitness to Stand Trial) Act 1997* (Vic), particularly around the procedures adopted by the courts when examining an accused's fitness to stand trial. The Committee urges the Victorian Government to consider:

- amending the Act to allow a trial judge, as opposed to a specially appointed jury, to determine an accused's fitness to stand trial;
- whether additional considerations should be taken into account by the courts when investigating an accused's fitness to stand trial, for example, whether an accused can rationally respond to the charges against them or exercise their procedural rights;
- whether the jurisdictions of the Magistrates' or Children's Courts should be expanded to allow these courts to investigate an accused's fitness to stand trial; and
- whether deferring fitness investigations could minimise the complexity of and time involved in conducting both an investigation into an accused's fitness to stand trial and into their criminal responsibility.

The Committee also considered the defence of mental impairment under the Act. Under the Act 'mental impairment' is not defined and instead the courts have relied on the common law insanity defence to interpret the statutory defence. It is the Committee's view, in order to avoid doubt as to the meaning of 'mental impairment', that the Act should be amended to include a definition of the term to encompass impairments commonly associated with the insanity defence.

Therapeutic and problem-solving models of justice have been developed to provide a more positive way of addressing offending behaviour and to encourage active participation in the process. While beneficial, access to specialist courts, lists and programs is often limited to particular courts, locations and to particular categories of defendants. The Committee recommends that the Victorian Government examine the feasibility of

expanding specialist courts, lists and programs that are currently available in the Magistrates' Court of Victoria.

## **Chapter Eight: Evidence**

When seeking to give evidence in court a person with an intellectual disability or cognitive impairment may feel alienated and isolated from court proceedings due to difficulties understanding the complex court environment. This can result in assumptions being made about the credibility, reliability and competency of a person with an intellectual disability or cognitive impairment to give evidence in court. With appropriate modifications and supports both prior to and during court appearances, a person with an intellectual disability or cognitive impairment may be able to provide better evidence to the court.

Further measures to facilitate effective participation in court proceedings may be warranted, given barriers that may be experienced by all people with an intellectual disability or cognitive impairment when interacting with the court. In other jurisdictions, the provision of witness support during court hearings has been beneficial in terms of providing moral support and assistance with understanding questions to and responses from a person with an intellectual disability. The Committee believes the Department of Justice should explore the possibility of establishing a witness intermediary scheme to assist communications with a person with an intellectual disability or cognitive impairment involved in court proceedings.

The Committee recommends that the courts should be more flexible in the management of cases involving a person with an intellectual disability or cognitive impairment. This could include allowing more breaks during hearings, or creating priority listings in cases involving people with these impairments.

## **Chapter Nine: Sentencing decisions and options**

When sentencing an offender the courts are guided by sentencing purposes which include the punishment, deterrence, rehabilitation and denunciation of the offender, and the protection of the community. When sentencing an offender with an intellectual disability or cognitive impairment sentencing purposes of deterrence and punishment may be of less relevance given the impact of the disability on moral culpability, and on the offender's appreciation of the wrongfulness of the offence.

The courts have recognised that traditional custodial sentences such as imprisonment may be particularly inappropriate for offenders with an intellectual disability or cognitive impairment. The burden of imprisonment may weigh more heavily upon such an offender given that he or she may lose access to his or her support networks, and may be more vulnerable to victimisation when in custody. A number of alternative custodial and non-custodial sentencing options are available when an offender with an intellectual disability is being sentenced.

Before determining the type of order to be imposed the courts are able to ask either the Department of Human Services or the Department of Justice

to produce a pre-sentence report. The report establishes an offender's suitability for a particular order and whether necessary facilities exist for their management. Evidence expressed concern about delays in the production of pre-sentence reports, and the consequences of this for treatment and management of offenders with an intellectual disability or cognitive impairment. The Committee recommends that Departments ensure pre-sentence reports are not delayed for people with an intellectual disability or cognitive impairment compared to other offenders.

When sentencing an offender with an intellectual disability to a community corrections order, the courts may impose a justice plan condition. The justice plan outlines, among other things, available services that are designed to reduce the likelihood of reoffending. The option to impose a justice plan condition is not available to the courts when sentencing an offender with another kind of cognitive impairment. Given the similarities in disadvantages, challenges and support needs experienced by people with these impairments, benefits may arise if the courts had discretion to impose a justice plan condition for all offenders with a disability.



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  - the need to take extra time in interviewing;
  - the risks of the person’s susceptibility to authority figures, including a tendency to give answers that the person believes are expected;
  - the dangers of leading or repetitive questions;
  - the need to allow the person to tell his or her story in their own words;
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# Glossary

ABI	Acquired brain injury
AAIDD	American Association of Intellectual and Development Disabilities' Definition, Classification and Systems of Supports
ABS	Australian Bureau of Statistics
ACSO	Australian Community Support Organisation
AIHW	Australian Institute of Health and Welfare
ARC List	Assessment and Referral Court List
ATSI	Aboriginal and Torres Strait Islander
Capacity	The ability of a person to understand and give legal consent to an action or arrangement.
CASA	Centre Against Sexual Assault
Cognitive impairment	Include impairments due to, but not limited to, intellectual disabilities, mental illnesses, dementia and acquired brain injuries.
Committal proceedings	Proceedings for an indictable charge before a Magistrate who examines evidence to determine whether the defendant should be sent to trial.
CCO	Community Corrections Order A sentencing order, as an alternative to imprisonment, that requires a defendant to undertake unpaid community or educational work under the supervision of Corrections Victoria.
CDC	Community Development Committee
CVP	Community Visitor Program A Community Visitor is a person who has the authority to visit any residential mental health or disability service to enquire into and monitor the quality of care of residents.
CPD	Continuing Professional Development
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women 1979
CISP	Court Integrated Service Program

COAG	Council of Australian Governments
Charter	the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)
CISP	Court Integrated Service Program
CJDP	Criminal Justice Diversion Program
CREDIT	Court Referral and Evaluation of Drug Intervention and Treatment program
Cross examination	The questioning of a witness by a party other than the one calling the witness.
CALD	Culturally and Linguistically Diverse Communities
Custodial sentence	A sentence of imprisonment
CSO	Custodial Supervision Order A custodial sentencing order requiring a person found not guilty of an offence because of mental impairment to be detained in custody in either a residential institution, registered residential service or in prison.
DAP	Disability Action Plan
DSC	The Disability Services Commissioner
Defendant	A person charged with an offence.
DHS	Department of Human Services
DSM	American Psychiatric Association's Diagnostic and Statistical Manual for Mental Disorders
DPP	Director of Public Prosecutions
Duty lawyer	A lawyer at court, who provides free legal assistance to people appearing before court.
EED	Earliest Eligibility Date The earliest date by which an offender may be released on parole.
ERP	Enforcement Review Program
Examination in chief	The questioning of a witness by the party who called the witness.



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HASI	Hayes Ability Screening Index An objective screening tool designed for use by professionals working in the justice sector, to aid the identification of people with an intellectual disability or cognitive impairment.
ICD	World Health Organisation's International Classification of Diseases and Related Health Problems
ICF	World Health Organisation's International Classification of Functioning, Disability and Health
ITP	Independent Third Person An independent person who can be called upon to provide assistance to a person with a cognitive impairment who is being interviewed by the police.
Indictable offence	A serious offence that is triable before a judge and jury.
IQ	Intelligence Quotient
K-Bit	Kaufman Brief Intelligence Test
LEAP	Law Enforcement Assistance Program Primary information system used by Victoria Police for recording information about crimes and personal information about accused and convicted offenders.
LIAC	Law Information Access Centre
LIV	Law Institute of Victoria
LSC	The Legal Services Commissioner
Litigation guardian	An adult who can act in court on behalf of a person under 18 years or who has a disability, and may be liable for costs if the case is unsuccessful.
MACNI	Multiple and Complex Needs

Mitigation	Circumstances that go towards the reduction of punishment which the court may order against an accused or prisoner.
NACLC	National Association for Community Legal Centres
NCSO	Non-custodial Supervision Order A sentencing order available for defendants found not guilty of an offence because of mental impairment, requiring that the accused be released from custody on conditions determined by the courts.
Non parole period	The minimum term a prisoner must serve before being eligible for parole.
NDIS	National Disability Insurance Scheme
NDS	National Disability Strategy
NJC	Neighbourhood Justice Centre
NSWLRC	New South Wales Law Reform Commission
OPA	Office of the Public Advocate
OPP	Office of Public Prosecutions
PACER	Police, Ambulance and Crisis Assessment Early Response unit
PACT	Police and Community Triage team
PAST	Peninsula Access Support and Training Services
Remand in custody	An order requiring that a person charged with an offence be detained in custody until the matter is heard before the court.
Re-examination	The questioning of a witness by the party who called the witness, after the witness has been cross-examined.
RTO	Residential Treatment Order Sentencing order available for offenders with an intellectual disability who have been found guilty of a serious offence or indecent assault.
SAC	Sentencing Advisory Council
SOG	Senior Officers Group on Intellectual Disability and the Criminal Justice System

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SOCAU	Sexual Offences and Child Abuse Unit
Summary offence	A minor offence heard in the Magistrates' Court
Summons	A document requiring a person to attend court on a specified date
SRS	Supported Residential Service
Sworn evidence	Evidence given under oath.
UNCROC	United Nations Convention on the Rights of a Child
VALID	Victorian Advocacy League for Individuals with Disabilities Inc.
VCAT	Victorian Civil and Administrative Tribunal
VCASP	Victorian Coalition for ABI Service Providers
VCOMR	Victorian Committee on Mental Retardation
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VLA	Victoria Legal Aid
VLRC	Victorian Law Reform Commission
VPM	Victoria Police Manual Procedural manual guiding the administration and operation of Victoria Police.
WALRC	Western Australian Law Reform Commission
WAS	Witness Assistance Service
YJC	Youth Justice Centre Place of detention of a young person aged 15 to 21.
YRC	Youth Residential Centre Place of detention of a young person under 15 years.



# Chapter One: Introduction

On 10 February 2011 the Legislative Assembly of the Parliament of Victoria referred an *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers* to the Law Reform Committee. On 30 June 2011 the Committee's reference was expanded to include consideration as to whether any of the Committee's findings have broader application to people with other cognitive impairments such as acquired brain injuries (ABIs) or other neurological conditions.

The Committee's Inquiry has taken place in an environment where concern has been expressed about the vulnerabilities and disadvantages people with an intellectual disability or cognitive impairment experience when involved in the justice system. The Inquiry also recognises the important role the courts, police force and the legal profession can play in safeguarding the rights of all Victorians, including those with a disability.<sup>1</sup>

Disadvantages and vulnerabilities experienced by people with an intellectual disability or cognitive impairment when interacting with the justice system require that measures be put in place to achieve more equitable and effective access to justice. It is critical that awareness of the needs of people with an intellectual disability or cognitive impairment is improved, and that all aspects of the justice system ensure that the rights of people with an intellectual disability or cognitive impairment are maintained.

## 1.1 Background

### 1.1.1 Terms of reference

The Committee's Terms of Reference ask it to inquire into access to and interaction with the justice system by people with an intellectual disability, their families and carers. The Terms of Reference highlight some of the key issues the Committee should consider, including:

- participants' knowledge of their rights;
- availability of appropriate services and supports for participants;

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<sup>1</sup> Mary Wooldridge, MP, 'Justice for people with an intellectual disability' (Media Release, 14 February 2011).

- participants' dealings with the police;
- operation of the courts; and
- measures within Australia and internationally that seek to improve participants' access to and interaction with the justice system.

#### **1.1.1.1 Scope of the Committee's review**

The Committee has taken a broad view to examining all aspects of the justice system. The report focuses particularly on aspects of the criminal justice system, such as interactions with the legal profession, the police, the courts and the corrections systems.

The Committee received evidence commenting on other aspects of the justice system, such as interactions with the civil justice system in respect of guardianship, family and child protection matters and Victorian Civil and Administrative Tribunal hearings. While these are important issues, the Committee was unable to consider these issues during the course of this Inquiry, due to constraints in time and resources. The Committee notes, however, that many of its findings and recommendations are applicable to interactions that people with an intellectual disability or cognitive impairment may have with the civil justice system.

## **1.2 Context of the Inquiry**

### **1.2.1 Past reviews of intellectual disability and cognitive impairment and the justice system**

Reports have been conducted over many decades examining the disadvantages experienced by people with an intellectual disability or cognitive impairment when involved in the justice system, causes for their involvement in the justice system and methods to improve their interactions with the justice system.

Studies have consistently found that people with an intellectual disability or cognitive impairment experience a number of significant disadvantages – increased social isolation, minimal education and training opportunities, and increased dependence on others for daily living – that can increase the likelihood that they will come into contact with the justice system. Studies have also consistently identified improvements that should occur in service provision, both within the human services and justice sectors, to improve outcomes for people with an intellectual disability or cognitive impairment.

Table 1 provides an overview of key Victorian reviews of human and justice sector responses to people with an intellectual disability or cognitive impairment.

**Table 1: Key reviews of intellectual disability and cognitive impairment in Victoria.**

Year	Review	Key findings and scope
1977	Report of the Victorian Committee on Mental Retardation <sup>2</sup>	This report suggested a major shift in the delivery of services to people with an intellectual disability away from institutional settings into community-based settings.
1982	Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons <sup>3</sup>	This report set the scene for the establishment of protections for people with an intellectual disability and led to the establishment of the Office of the Public Advocate (OPA).
1984	Report of the Committee on the Legislative Framework for Services to Intellectually Disabled Persons <sup>4</sup>	This report recast the legislative framework for services to people with an intellectual disability by calling for distinctions to be made in service provision for people with an intellectual disability and people with a mental illness. The report led to the development of the <i>Intellectually Disabled Persons Act 1986</i> (Vic).
1987	Report of the OPA on the <i>Criminal Justice System and the Person with an Intellectual Disability</i> <sup>5</sup>	This report discussed the overrepresentation of people with an intellectual disability in the criminal justice system and made recommendations on how the needs of people with an intellectual disability could be met within the justice system.
1988	Report of the OPA into a <i>Study of People with Intellectual Disabilities as Victims of Crime</i> <sup>6</sup>	This report discussed the vulnerabilities of people with an intellectual disability as victims of crime, and examined barriers to effective participation in the justice system by people with an intellectual disability as victims of crime.
2000	Report of the Victorian Auditor General into <i>Services for People with an Intellectual Disability</i> <sup>7</sup>	This report examined the Department of Human Services' management of services to people with an intellectual disability and discussed areas of unmet demand in service provision to this group of people.
2001	Report of the Review Panel Appointed to Consider the Operation of the Disability Services Statewide Forensic Service <sup>8</sup>	This report recommended changes to the compulsory treatment and care of people with an intellectual disability.
2003	Report of the Victorian Law Reform Commission into <i>People with Intellectual Disabilities at Risk</i> <sup>9</sup>	This report examined the legislative framework of both the human and justice services in dealing with the compulsory treatment of people with intellectual disabilities.

<sup>2</sup> Victoria Committee on Mental Retardation, *Report of the Victorian Committee on Mental Retardation*, VCOMR, Melbourne, 1977.

<sup>3</sup> Victorian Ministers Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, *The protection of intellectually handicapped persons and the preservation of their rights*, Health Commission of Victoria, Melbourne, 1982.

<sup>4</sup> Committee on a Legislative Framework for Services to Intellectually Disabled Persons, *Report of the Committee on a Legislative Framework for Services to Intellectually Disabled Persons*, Health Commission of Victoria, Melbourne, 1984.

<sup>5</sup> Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987.

<sup>6</sup> Office of the Public Advocate, *Silent victims: A study of people with intellectual disabilities as victims of crime*, OPA, Melbourne, Report prepared by Kelley Johnson, Ruth Andrew and Vivienne Topp, 1988.

<sup>7</sup> Auditor General Victoria, *Services for people with an intellectual disability*, VAGO, Melbourne, 2000.

Reviews of similar issues have also been conducted across Australia and internationally. Two noteworthy reviews have been conducted by the New South Wales Law Reform Commission.<sup>10</sup>

During the course of the Inquiry the Committee has found that while positive changes have been made in how the justice system responds to the unique difficulties experienced by people with an intellectual disability and cognitive impairment, more needs to be done to achieve equitable access to justice for this particularly vulnerable group.

## 1.2.2 Key themes

### 1.2.2.1 Prevalence and incidence of involvement in the justice system

Researchers both within Australia and internationally have concluded that people with an intellectual disability are likely to be overrepresented within the justice system. The extent to which this occurs is unclear, however, primarily due to inconsistencies in the way people's impairments are identified and recorded, and also because governments do not systematically record data on the involvement of people with an intellectual disability or cognitive impairment in the justice system.

People with cognitive impairments such as acquired brain injuries (ABIs) also appear to be significantly overrepresented within correctional settings. One study estimated that 33 per cent of male prisoners and 42 per cent of female prisoners had an ABI.<sup>11</sup>

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<sup>8</sup> Review Panel Appointed to Consider the Operation of the Disability Services Statewide Forensic Service, *Report of the review panel appointed to consider the operation of the Disability Services Statewide Forensic Service*, DHS, Melbourne, 2001.

<sup>9</sup> Victorian Law Reform Commission, *People with intellectual disabilities at risk: A legal framework for compulsory care*, VLRC, Melbourne, Final report, 2003.

<sup>10</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system', viewed 11 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>>; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: An overview*, NSWLRC, Sydney, Consultation paper 5, 2010; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, NSWLRC, Sydney, Consultation paper 6, 2010; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, NSWLRC, Sydney, Consultation paper 7, 2010; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Forensic samples*, NSWLRC, Sydney, Consultation paper 8, 2010; New South Wales Law Reform Commission, *Young people with cognitive and mental health impairments in the criminal justice system*, NSWLRC, Sydney Consultation paper 11, 2010; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, NSWLRC, Sydney, Final report, 2012.

<sup>11</sup> Corrections Victoria, *Acquired brain injury in the Victorian prison system*, Department of Justice, Melbourne, 2011, p. 22.



### 1.2.2.2 Disadvantages and vulnerabilities

People with an intellectual disability or cognitive impairment experience a number of common life experiences – increased dependence on others to complete daily activities, limited education and employment opportunities and limitations in conceptual, social and daily living skills. These disadvantages can lead to people with an intellectual disability or cognitive impairment experiencing social isolation, and increase the risk that they will become involved in the justice system.

These disadvantages can also significantly affect the ability of a person with an intellectual disability or cognitive impairment to have effective access to and interaction with the justice system. A person with an intellectual disability or cognitive impairment may find it difficult to understand how to exercise their legal rights.<sup>12</sup> The Committee heard limited employment opportunities may lead to a greater reliance on social welfare, which can affect how easily legal advice or representation can be obtained.<sup>13</sup> Evidence suggested that in court settings a person with an intellectual disability is likely to experience difficulties comprehending complex court procedures and practices, which may alienate them from the process.<sup>14</sup>

Research and evidence indicates that with appropriate services and support a person with an intellectual disability or cognitive impairment will often be able to minimise the difficulties that they experience due to their impairment.<sup>15</sup>

<sup>12</sup> See for example Intellectual Disability Rights Service, *Enabling Justice: A report on problems and solutions in relation to diversion of alleged offenders with intellectual disabilities from the New South Wales court system*, IDRS, Sydney, 2008, p. 74; Office of the Public Advocate, *Silent victims: A study of people with intellectual disabilities as victims of crime*, OPA, Melbourne, Report prepared by Kelley Johnson, Ruth Andrew and Vivienne Topp, 1988, p. 52.

<sup>13</sup> See for example Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, pp. 5-6; Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, pp. 8-9; Name withheld, *Submission no. 23*, 9 September 2011, p. 2; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 21; Bradley Roberts, Education and Outreach Adviser, Legal Services Commissioner, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 7-8; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 16.

<sup>14</sup> See for example Angela Alexander, *Submission no. 8*, 6 September 2011, p. 3; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 8; Daniel Clements, Manager, Brosnan Centre, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, pp. 31-32; Richard Coverdale, Director, Centre for Rural and Regional Law and Justice, Deakin University, *Transcript of evidence*, Geelong, 20 March 2012, p. 3; Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 9; Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 11; Nadine Hantke, Team Leader, Eastern Regional Mental Health Association, *Transcript of evidence*, Melbourne, 21 February 2012, pp. 7-8; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 5; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 27; Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 10; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 18.

<sup>15</sup> See for example Australian Human Rights Commission, *Indigenous young people with cognitive disabilities and Australian juvenile justice systems*, AHRC, Sydney, 2005, pp.

### **1.2.2.3 Community and justice sector knowledge and awareness**

Even where mechanisms are available in the justice system to assist people with an intellectual disability or cognitive impairment, they may not be able to access them either because they do not know about available services, or because justice sector personnel do not identify that they have a disability. People may experience difficulties identifying a person with an intellectual disability or cognitive impairment for many reasons, such as the person being reluctant to disclose their disability, the person being unaware they have a disability, or limited awareness by justice system personnel and the broader community of common indicators of people with an intellectual disability or cognitive impairment.<sup>16</sup>

Even when a person with an intellectual disability or cognitive impairment has been correctly identified, evidence shows that when interacting with this group of people incorrect assumptions are often made about their credibility and capacity. The importance of training and raising awareness of the difficulties experienced by people with an intellectual disability or cognitive impairment was a consistent theme in evidence presented to the Committee.

### **1.2.2.4 Accommodation of special needs**

Both federal and state governments provide and oversee the delivery of disability services in Victoria. The Department of Human Services (DHS) funds disability services throughout the state and manages the state's funding of non-government community organisations to deliver these services. The DHS also funds a range of specialist behaviour support and case management services to assist people's transition through the justice system.

The needs of people with an intellectual disability or cognitive impairment have been accommodated in the justice system through the provision of a range of measures, such as alternative procedures for giving evidence, allowing independent support people to be present when interacting with the police, and providing alternative sentencing options. However, the use and adequacy of these alternative measures for assisting interaction with the justice system was consistently questioned in evidence received by the Committee.

## **1.3 Inquiry process**

The Committee called for public submissions to the Inquiry in August 2011 and wrote to 448 stakeholders, including disability service providers,

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11-12; Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987, p. 2.

<sup>16</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 7; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 2; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 23; Jane Penberthy, Principal Lawyer, Central Highlands Community Legal Centre, *Transcript of evidence*, Ballarat, 17 November 2011, p. 25.

community legal centres and disability advocacy groups across the state as well as government agencies, and organisations representing legal and disability services. In response the Committee received 60 submissions from interested groups and individuals

The Committee also convened 10 public hearings with 78 witnesses representing 46 organisations. The Committee consulted widely and heard from individuals, disability service providers, advocacy groups, government agencies, the courts and the legal profession. Consultations took place in Melbourne and in Geelong, Ballarat, Bendigo and Mildura. The Committee is grateful for those who took the time to participate in hearings, particularly those who travelled some distance to appear before the Committee.

The Committee expresses its sincere thanks to all those who contributed to the Committee's Inquiry.



## Chapter Two: The justice system and people with an intellectual disability or cognitive impairment

People with an intellectual disability or cognitive impairment may experience a number of challenges when interacting in the community. These can include increased dependence on others to complete daily activities, reduced access to education and employment opportunities, increased social isolation, dependence on welfare, and limited access to money and finance. As a consequence of these challenges, people with an intellectual disability or cognitive impairment may experience various forms of disadvantage. In some cases, the accumulation of these disadvantages can contribute to contact with the justice system, as victims, offenders, or witnesses.

This Chapter examines some common experiences of people with an intellectual disability or a cognitive impairment when they become involved with the justice system. This Chapter also examines the relative proportion of people with an intellectual disability or cognitive impairment involved in the justice system, and provides an overview of some of the causes that contribute to that involvement.

### 2.1 Common life experiences and vulnerabilities

People with an intellectual disability or a cognitive impairment are often dependent on others to complete daily activities, have reduced access to education and employment opportunities, and may experience social isolation.<sup>17</sup> The Committee received extensive evidence about the challenges people with an intellectual disability or cognitive impairment experience when living in the community. The following Case Study provides an example of these challenges:

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<sup>17</sup> See for example Jonathon Goodfellow and Margaret Camilleri, *Beyond belief, beyond justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice*, Disability Discrimination Legal Service, Melbourne, 2003, p. 42; Queensland Advocacy Incorporated, *Justice for all: People with an intellectual disability and the criminal justice system*, QAI Incorporated, Brisbane, 2001, pp. 22-23.

*Case Study 1: K.A.'s story.<sup>18</sup>*

*“K.A.’ is a 43-year-old woman who has both a mild intellectual disability and a mental illness. She presents reasonably well, but her disabilities have seriously impeded her decision-making and impulse control.*

*K.A. has had very limited formal education and has limited life skills. She was the child of parents who had cognitive impairment and substance abuse issues. She was taken by child protection services in the formative years and placed into state care as a result of abuse by her parents. She had infrequent contact with her parents while in care.*

*K.A. spent many years in care and developed significant behavioural problems. She was bullied and teased by other people from a very young age for being ‘simple’ and ‘stupid’. By her teens she had a criminal history for minor offences including property damage, assault and disturbing the peace.*

*While in state care, K.A. did not receive any disability support services. The accommodation/care she was provided was generic, the same as for children/people who do not have a disability. Following state care she was able to maintain private rental. However, for many years she was living transiently and at times was homeless. K.A. has never been able to find employment, lives on a disability support pension and has no savings.”*

People with an intellectual disability experience limitations to adaptive functioning in varying degrees, which may include limitations in conceptual, social and daily living skills.<sup>19</sup> Villamanta Disability Rights Legal Service, a specialist community legal centre working only on disability-related legal issues, described typical social and cognitive characteristics that a person with an intellectual disability may exhibit. These include that the person may:

- appear to be indifferent to others, or socially isolated;
- find it difficult to concentrate or have poor listening skills;
- appear to lack empathy;
- behave in ways that appear socially inappropriate, for example, by standing too close to others, or speaking too loudly; and/or
- have difficulty anticipating the consequences of their actions.<sup>20</sup>

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<sup>18</sup> Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, p. 9.

<sup>19</sup> Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 4.

<sup>20</sup> Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, pp. 11-12. See also Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 6.

With appropriate support a person with an intellectual disability will often be able to live quite capably in the community.<sup>21</sup> For example, a person with an intellectual disability may benefit from attending specialised schools with programs specifically designed for students who have cognitive limitations, rather than attending mainstream schools where that person may fall behind his or her peers. The needs of people with an intellectual disability or cognitive impairment depend very much on the individual, however, and in some cases a person with an intellectual disability may benefit from participating in the mainstream education system. In any case, the quality of support provided to the person is of critical importance.

When support for people in the community is not available, or is not adequate, a person with an intellectual disability or cognitive impairment is more likely to experience social or economic disadvantage, and consequently is at greater risk of exposure to crime either as a victim or perpetrator.

## 2.2 Crime by people with an intellectual disability or cognitive impairment

People with an intellectual disability are more likely than people without a disability to interact with the justice system.<sup>22</sup> Typically, offenders with intellectual disabilities:

- are young;
- are less likely to have been married or in a de facto relationship;
- have a history of homelessness;
- have received less formal education or training qualifications than their peers; and
- are more likely to have a co-existing substance abuse problem or psychiatric illness.<sup>23</sup>

It is difficult to quantify the interactions that people with an intellectual disability or cognitive impairment have with the justice system, as only

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<sup>21</sup> See for example Australian Human Rights Commission, *Indigenous young people with cognitive disabilities and Australian juvenile justice systems*, AHRC, Sydney, 2005, pp. 11-12; Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987, p. 2.

<sup>22</sup> See for example Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007: The study found that people with an intellectual disability were more likely to be imprisoned, to reoffend and be denied bail when compared to prisoners without an intellectual disability.

<sup>23</sup> See for example Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, pp. 10-12; Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, p. 38; Law Reform Commission of Western Australia, *Court intervention programs: Final report*, LRCWA, Perth, Project no. 96, 2008, p. 95.

limited statistics are currently collected. Nevertheless, the Committee received evidence that people with an intellectual disability or cognitive impairment appear to be overrepresented in interactions with the justice system.<sup>24</sup>

## 2.2.1 Extent of involvement

### 2.2.1.1 Community estimates

Although a number of studies have estimated the prevalence of intellectual disability in Australia, there are substantial variations in estimates. These variations are due to a number of factors, including:

- the use of a single criterion for some surveys (such as an intelligence test alone), and the use of dual criteria (such as the use of intelligence tests and adaptive skills assessments) in other studies;
- the use of different intelligence quotient (IQ) cut-off scores to define intellectual disability; and
- the selection of different population groups as the study group (for example, children, adults, the aged or the general population).

In 2003 and 2009 the Australian Bureau of Statistics (ABS) conducted the *Survey of Disability, Ageing and Carers*. The survey aimed to examine the prevalence of disability in Australia, measure the need for support of older people and those with a disability, and to provide a demographic and social profile of people with a disability in Australia. The ABS found that in 2003 approximately three per cent of Australians (588 700 people) had an intellectual disability, although for the purposes of the 2003 study, 'intellectual disability' included conditions such as dementia, ADHD and autism spectrum disorders.<sup>25</sup>

The study demonstrated that people may experience a variety of health conditions and diseases during their lives. The ABS found that approximately 0.9 per cent of Australians identified intellectual disability or a developmental disorder as their main disabling condition in 2003 and 2009. Prevalence rates of other cognitive impairments were 0.2 per cent

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<sup>24</sup> See for example Carers NSW, *Submission no. 17*, 9 September 2011, p. 3; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 1; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 8; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 6; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 7; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 1; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 21.

<sup>25</sup> Australian Institute of Health and Welfare, *Disability in Australia: Intellectual disability*, AIHW, Canberra, 2008, p. 7.



for head injuries or acquired brain injuries (ABIs) and 0.3 per cent for Alzheimer's and dementia.<sup>26</sup>

Estimates in 2009 varied across states, with Victoria recording the lowest prevalence of intellectual disability at 0.8 per cent. Prevalence of intellectual disability was recorded at 0.9 per cent for New South Wales, Queensland and Western Australia, 1.1 per cent in South Australia, 1.2 per cent in the Australian Capital Territory, and 1.3 per cent in Tasmania and the Northern Territory.<sup>27</sup>

Table 2 presents a range of historical international and Australian estimates of the prevalence of intellectual disability. These results demonstrate that differences in definitions and research methods can lead to significant variation in estimates of the prevalence of intellectual disability within the community.

**Table 2: Comparison of international and domestic estimates on intellectual disability.<sup>28</sup>**

Study area	Year	Estimates (%)	Data sources and method
World		0.3-0.4	Agency records
Australia	1989	0.42	Australian Bureau of Statistics survey
Australia	1993	0.73	Australian Bureau of Statistics survey
World		1.0-1.5	Independent research
Australia	1993	1.7	Australian Bureau of Statistics survey
Australia	1993	1.86	Australian Bureau of Statistics survey
United States	1960s	3	US President's Taskforce and President's Panel on Mental Retardation
New South Wales	1973	4.558	Department of Education and Department of Health
Victoria	1983	0.342	Survey on client data of Mental Retardation at Health Commission and Department of Education in Victoria
Western Australia	1983	0.44	Agency records

<sup>26</sup> Australian Bureau of Statistics, 'Disability, ageing and carers', viewed 15 June 2012, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features12009?Opendocument>>.

<sup>27</sup> Australian Bureau of Statistics, 'Disability, ageing and carers', viewed 15 June 2012, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features12009?Opendocument>>.

<sup>28</sup> Australian Institute of Health and Welfare, *The definition and prevalence of intellectual disability in Australia*, AIHW, Canberra, 1997, pp. 22, 24, 27-28. Note the prevalence of intellectual disability from the 1993 ABS Survey of Disability, Ageing and Carers differs because of different methods adopted to defining the disabling conditions encompassed by the term intellectual disability. For example, the higher prevalence estimates of 1.86 and 1.7 are attributable to a wider band of conditions being included within the term intellectual disability, while the 0.73 estimate takes a narrower approach to defining intellectual disability.

South Australia	1981	0.29	Survey on number of people with an intellectual disability known to main service agency
Tasmania	1972	0.541	Survey on records held by Mental Health Services
Queensland	1976	0.341	Survey on records from Queensland's Subnormal Children's Welfare Association and Central Assessment Clinic

### 2.2.1.2 Prevalence in the criminal justice system

Compared to most estimates of the incidence of intellectual disability and cognitive impairment in the community, it appears that people with an intellectual disability or cognitive impairment are overrepresented in the justice system.

In 2007 Corrections Victoria commissioned a study to examine the characteristics of male prisoners with an intellectual disability who were released from prison between 1 July 2003 and 30 June 2006.<sup>29</sup> The study found that 1.3 per cent of people released from prison during this period (102 out of 7805 people) were registered with the Department of Human Services (DHS) as having an intellectual disability.<sup>30</sup> The Committee was told by Mr Peter Persson, Manager of the Disability, Ageing and Youth portfolio within Corrections Victoria, that approximately 2.5 per cent of Victoria's prison population is currently identified as having an intellectual disability.<sup>31</sup> Given that people with an intellectual disability comprise between 0.8 and 0.9 per cent of the Victorian population,<sup>32</sup> evidence from Corrections Victoria suggests that people with an intellectual disability are anywhere between 40 and 300 per cent more likely to be imprisoned as people without an intellectual disability.

Statistics on the number of young people with an intellectual disability who face custodial sentences point to an even greater overrepresentation. The Youth Parole and Youth Residential Board for the 2010-11 year noted that between 14 and 27 per cent of young people who came before it presented with an intellectual disability.<sup>33</sup> Another survey conducted in October 2011 by the DHS found that of the 168 males and 8 females detained in youth detention, 39 per cent presented with issues concerning intellectual functioning, 22 per cent were registered with the DHS, and 40 per cent had

<sup>29</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007.

<sup>30</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 17.

<sup>31</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 5.

<sup>32</sup> Australian Bureau of Statistics, 'Disability, ageing and carers', viewed 15 June 2012, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features12009?OpenDocument>>.

<sup>33</sup> Department of Human Services, *Youth Parole Board and Youth Residential Board: Annual report 2010-11*, DHS, Melbourne, 2011, p. 20.

mental health issues.<sup>34</sup> These figures demonstrate that young people with an intellectual disability are significantly overrepresented in custodial settings compared to adults with an intellectual disability.

The study found that compared to prisoners without an intellectual disability, prisoners with an intellectual disability presented with more extensive criminal offending, ranging from involvement in youth detention centres to prison sentences. Table 3 summarises the criminal history of offenders with an intellectual disability when compared to those without an intellectual disability. The findings illustrate that people with an intellectual disability are overrepresented in the prison system, and that this cohort of people have higher recidivism rates.

**Table 3: Criminal history of prisoners with an intellectual disability compared to prisoners without an intellectual disability.<sup>35</sup>**

Criminal History	Offenders with an intellectual disability		Offenders without an intellectual disability	
	Number (N=102)	%	Number (N=244)	%
Youth orders	38	37.3	25	10.2
Prior community orders	1	15	38	15.6
	2-3	29	62	25.4
	4-5	27	37	15.2
	6+	26	19	7.8
Prior sentence terms	1	24	32	13.1
	2-3	17	39	16.0
	4-5	21	26	10.7
	6+	20	20	8.2

In 2011 Corrections Victoria commissioned another study to examine the prevalence of ABIs in the Victorian prison system. The study found that 31 of 74 male prisoners (42%) and 14 of 43 female prisoners (33%) were assessed as having an ABI.<sup>36</sup> By contrast, in 2003 the ABS found there were approximately 432 700 people (2.2%) in the state of Victoria with an ABI.<sup>37</sup> It is likely therefore that people with an ABI are substantially overrepresented in the justice system compared to people who do not have an ABI.

<sup>34</sup> Department of Human Services, *Youth Parole Board and Youth Residential Board: Annual report 2011-12*, DHS, Melbourne, 2012, p. 12.

<sup>35</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 18.

<sup>36</sup> Corrections Victoria, *Acquired brain injury in the Victorian prison system*, Department of Justice, Melbourne, 2011, p. 22: The study cohort was represented by prisoners who were received in the Melbourne Assessment Prison between 2007 and 2008 and who accepted invitations to participate in the survey.

<sup>37</sup> Australian Institute of Health and Welfare, *Disability in Australia: Acquired brain injury*, AIHW, Canberra, 2007, p. 6.

In Victoria neither Victoria Police nor the Department of Justice systematically collect statistics on those agencies' involvement with people with an intellectual disability.<sup>38</sup> The Magistrates' Court of Victoria told the Committee it estimated that 55 per cent of people coming before the Courts have a mental impairment. The Magistrates' Court noted that while the figure is not "... disaggregated into specific categories of mental impairment, it is reflective of the fact that the majority of accused present at court with underlying mental health issues (which may or may not include intellectual disabilities)."<sup>39</sup>

The recent introduction of the specialist problem-solving court in the Magistrates' Court – the Assessment and Referral Court List (ARC List) – has provided an opportunity to quantify some of the Court's interaction with people with an intellectual disability or cognitive impairment. To be eligible to participate in the ARC List the offender must have a cognitive impairment or mental illness and be charged with certain criminal offences. The ARC List was established as a three year pilot program in March 2010 and began accepting referrals in April 2010.

Between July 2011 and June 2012 the ARC List convened 1144 hearings, with 15 per cent involving defendants with an ABI, and 9 per cent involving defendants with an intellectual disability.<sup>40</sup> As comparative figures of people with an intellectual disability and those without a disability presenting before the Magistrates' Court are unavailable, it is unclear whether people with an intellectual disability or cognitive impairment were overrepresented when appearing before the courts.<sup>41</sup>

It appears that people with an intellectual disability are also overrepresented in the justice system in other jurisdictions. For example, in New South Wales estimates of intellectual disability in the community range from two to three per cent, but studies suggest that people with an intellectual disability represent 12 to 13 per cent of the prison population in New South Wales.<sup>42</sup>

In its Inquiry into *People with an Intellectual Disability in the Criminal Justice System*, the New South Wales Law Reform Commission (NSWLRC) commissioned research to examine the presentation of people

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<sup>38</sup> See for example Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 1; Victoria Police, *Submission no. 34*, 23 September 2011, p. 2.

<sup>39</sup> Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 5.

<sup>40</sup> Magistrates' Court of Victoria, *2011-12 annual report*, Magistrates' Court of Victoria, Melbourne, 2012, p. 97.

<sup>41</sup> *Justice Legislation Amendment Act 2012 (Vic)*, section 7: Note that recent changes have been made to the information to be included in the Magistrates' Court Annual Report as to the operation of the ARC List. Information required includes the number of people in each impairment category who were subject to criminal proceedings, the number of accused referred and accepted on the ARC List and the number of proceedings finalised. These amendments may help to further quantify the level of involvement that this group has with the Magistrates' Court.

<sup>42</sup> See for example S Hayes and D McIlwain, *The prevalence of intellectual disability in the New South Wales prison population: An empirical study*, Criminology Research Council, Canberra, 1988; S C Hayes and G Craddock, *Simply justice*, Federation Press, Sydney, 1992, cited in New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system', viewed 11 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>>.

with an intellectual disability before the Local Courts in New South Wales. The NSWLRC found that approximately 14.2 per cent of people in the sample had an IQ below 70, and 8.8 per cent were identified as having a borderline intellectual disability with an IQ between 70 and 79.<sup>43</sup> Of 86 people surveyed in a study of people appearing before two rural courts in New South Wales, 31 had an IQ below 70 (36%) and 18 had a borderline intellectual disability (20.9%).<sup>44</sup>

The prevalence of intellectual disability in the United Kingdom is 2.04 per cent. A study of the prevalence rates of intellectual disability in police settings in the United Kingdom found that around 9 per cent of suspects had an IQ of 70 or below, while 42 per cent were identified as having a borderline intellectual disability, with IQs between 70 and 79.<sup>45</sup>

## 2.2.2 Types of crimes committed

People with an intellectual disability typically commit minor offences such as trespass, public transport offences, property damage, shoplifting and nuisance offences.<sup>46</sup> The study commissioned by Corrections Victoria into the characteristics of prisoners with an intellectual disability found that although prisoners with an intellectual disability committed serious violence offences at about the same rate as prisoners without an intellectual disability (see Table 4), a significantly higher proportion of prisoners with an intellectual disability had previously been charged with a serious violence offence – 45 per cent of prisoners with an intellectual disability compared with 32 per cent of prisoners without an intellectual disability.<sup>47</sup>

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<sup>43</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system: Appearances before local courts', viewed 15 June 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/RR4TOC>>: Note an IQ of below 70 is commonly taken to be indicative of the person having an intellectual disability, and an IQ between 70-79 or 70-85 is commonly classified as a borderline intellectual disability.

<sup>44</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the justice system: Two rural courts', viewed 15 June 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/RR5TOC>>.

<sup>45</sup> G Gudjonsson, I Clare, S Rutter and J Pearse, *Persons at risk during interviews in police custody: the identification of vulnerabilities*, HMSO, 1993, cited in New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system', viewed 11 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>>.

<sup>46</sup> See for example Judith Cockram and Rod Underwood, 'Offenders with an intellectual disability and the arrest process', *Law in Context*, vol. 17, no. 2, pp. 101-119, 2000, pp. 107-108; Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, p. 38; Intellectual Disability Rights Service, *Enabling Justice: A report on problems and solutions in relation to diversion of alleged offenders with intellectual disabilities from the New South Wales court system*, IDRS, Sydney, 2008, p. 71; Law Reform Commission of Western Australia, *Court intervention programs*, LRCWA, Perth, Consultation paper, 2008, p. 95; New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system', viewed 11 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>>; Glenn Rutter, Manager, Court Support and Diversion Services, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 21.

<sup>47</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 19.

These patterns in offending behaviour are clearly illustrated in research conducted by Corrections Victoria between 2003 and 2006. Table 4 compares serious charges against prisoners with an intellectual disability with charges against prisoners without a disability. Burglary and other property-related offending were committed by prisoners with an intellectual disability at higher rates than prisoners without a disability – 21.6 and 24.5 per cent compared to 11.5 and 16 per cent respectively.

**Table 4: Offending profile of prisoners with an intellectual disability when compared to prisoners without a disability.<sup>48</sup>**

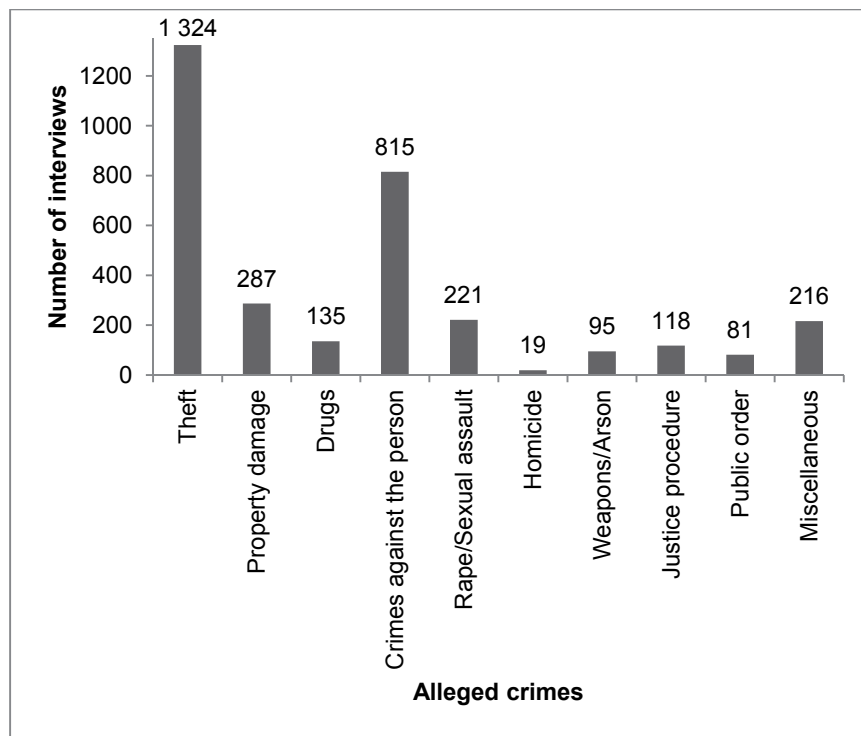
Most serious offence committed	Prisoners with an intellectual disability		Prisoners without an intellectual disability	
	Number (N=102)	%	Number (N=244)	%
Homicide	1	1.0	2	0.8
Sex	5	4.9	14	5.7
Other violent	12	11.8	29	11.9
Robbery and extortion	9	8.8	17	7.0
Burglary	22	21.6	28	11.5
Other property	25	24.5	39	16.0
Justice procedure and good order	17	16.7	57	23.4
Drugs	1	1.0	27	11.1
Driving and traffic	6	5.9	24	9.8
Other	4	3.9	7	2.9

This pattern in offending behaviour is also illustrated in research completed by the Office of the Public Advocate (OPA) examining repeat users of the Independent Third Person (ITP) program. This program is operated by the OPA and provides a person suspected of having a cognitive impairment or mental illness with the assistance of an independent person during police interviews. Figure 1 illustrates the offences alleged against people who were repeat users of the ITP program. The OPA found that between 2000 and 2010 repeat users of the ITP program were largely involved in theft and theft-related crimes – of the 3311 interviews which an ITP attended, 1324 (40%) involved allegations of theft and theft-related crimes.

<sup>48</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 20.



**Figure 1: Alleged offence type committed by a person with a cognitive impairment requiring an Independent Third Person.<sup>49</sup>**



Often offences committed by people with an intellectual disability are not premeditated.<sup>50</sup> A study conducted in Queensland found that people with an intellectual disability typically committed minor offences, and that co-existing social and environmental factors often contributed to the offending.<sup>51</sup> Furthermore, the Inquiry conducted by the Law Reform Commission of Western Australia into *Court Intervention Programs*, including programs particularly targeted to people with an intellectual disability, found that crimes committed by people with an intellectual disability were often directly related to the person’s disability. For example, nuisance-related offending is often attributable to the person being unable

<sup>49</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 106.

<sup>50</sup> See for example New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system', viewed 11 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>>; New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, NSWLRC, Sydney, Consultation paper 7, 2010, p. 31; Standing Committee on Law and Justice, *Crime prevention through social support*, New South Wales Parliament, Sydney, First report, 2000, pp. 161-162.

<sup>51</sup> Queensland Advocacy Incorporated, *Justice for all: People with an intellectual disability and the criminal justice system*, QAI Incorporated, Brisbane, 2001, p. 27. See also Office of the Public Advocate, *From corrections to the community: The need for transitional support services for offenders with a cognitive disability*, OPA, Melbourne, 2003, pp. 13-14.

to understand legal consequences when approached by the police, or having poor impulse control.<sup>52</sup>

### 2.2.3 Difficulties examining the involvement of people with an intellectual disability in the justice system

The identification of people with an intellectual disability both within the community and in the justice system was considered a significant issue in submissions received and evidence heard by the Committee.<sup>53</sup> A number of stakeholders expressed concern about the inadequacy of data currently collected on the level of involvement of people with an intellectual disability in police, courts and corrections settings.<sup>54</sup> In noting its concern, the Federation of Community Legal Centres observed that the lack of data was a "... significant impediment to understanding the interaction between cognitive disability and the justice system".<sup>55</sup> The Victorian Aboriginal Legal Service suggested that the way government departments and agencies respond to people with an intellectual disability "... is severely impaired by the lack of good quality data concerning the contact people with cognitive disabilities have with the justice system".<sup>56</sup>

The Committee notes that the Magistrates' Court was able to provide the Committee with some statistics on the involvement of people with a mental impairment with that court. The Supreme Court of Victoria does not collect statistics on people with an intellectual disability who come before the courts.<sup>57</sup>

Victoria Police stated that it only collects data when a person's impairment requires the police to undertake a specific response; for example, where

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<sup>52</sup> Law Reform Commission of Western Australia, *Court intervention programs*, LRCWA, Perth, Consultation paper, 2008, p. 95. See also Standing Committee on Law and Justice, *Crime prevention through social support*, New South Wales Parliament, Sydney, First report, 2000, pp. 161-162.

<sup>53</sup> See for example Autism Victoria, *Submission no. 16*, 9 September 2011, p. 5; Julie Boffa, Policy Manager, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, pp. 32, 35; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 4; Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 1; Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 13; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 1; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 4; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 23; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 5-6.

<sup>54</sup> See for example Chris Atmore, Policy Officer, Federation of Community Legal Centres (Victoria) Inc., *Transcript of evidence*, Melbourne, 24 October 2011, p. 32; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 36; Patricia Malowney, Deputy Chair, Victorian Disability Advisory Council, *Transcript of evidence*, Melbourne, 24 October 2011, p. 9; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 1; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 21.

<sup>55</sup> Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 5.

<sup>56</sup> Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 48.

<sup>57</sup> Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 1.



an ITP is required to assist a person during a police interview.<sup>58</sup> Victoria Police suggested that it would be “inappropriate” to collect data to quantify the level of contact between the police and people with an intellectual disability. Reasons articulated by Victoria Police for this position were that:

- having an intellectual disability is not always a relevant or primary consideration in a person’s involvement with police;
- the impact of an intellectual disability on a person’s capacity to engage with police depends on their form of intellectual disability and degree of impairment;
- the data would be based on identification by non-experts, that is police, who predominantly identify cognitive impairment based on a person’s words, actions, circumstances and available information, for the purpose of providing appropriate supports;
- a person with an intellectual disability may not wish to, or be able to, self-identify as having an intellectual disability; and
- the administrative burden on more than 10 000 police members across the state may not be proportionate to the benefit.<sup>59</sup>

The Committee notes that even statistics from Corrections Victoria, which provided evidence on the overrepresentation of people with an intellectual disability in prisons, may underestimate the actual incidence of intellectual disability, because Corrections Victoria only identified people registered with the DHS as having an intellectual disability. People registered with the DHS do so voluntarily, so statistics provided by Corrections Victoria may not account for people who either do not wish to register with the DHS, or who have an undiagnosed disability.<sup>60</sup>

It also appears that there may be a large cohort of people who engage with police, or appear in courts and prisons, who have a borderline intellectual disability. This includes people who do not meet the strict definition of an ‘intellectual disability’, but nevertheless have impaired social and intellectual functioning. A 1988 New South Wales study demonstrated that when strict definitions of intellectual disability were adopted, only two per cent of the prison population was classified as having an intellectual disability. However, when wider definitions were adopted to encompass prisoners with borderline intellectual disabilities, the proportion of prisoners increased considerably to 12.5 per cent.<sup>61</sup>

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<sup>58</sup> Victoria Police, *Submission no. 34*, 23 September 2011, p. 2.

<sup>59</sup> Victoria Police, *Submission no. 34*, 23 September 2011, p. 2.

<sup>60</sup> See for example Beth Aufdemberge, Katie-anne Powell, Lainie Hocart, Malinthe De Mel, Cameron Soleimani and Wendy Couzens, *Submission no. 18*, 9 September 2011, p. 1; Nick Rushworth, Executive Officer, Brain Injury Australia, *Transcript of evidence*, Melbourne, 21 February 2012, p. 42.

<sup>61</sup> S Hayes and D McIlwain, *The prevalence of intellectual disability in the New South Wales prison population: An empirical study*, Criminology Research Council, Canberra, 1988, cited in Corrections Victoria, *Intellectual disability in the Victorian prison system*:

## 2.2.4 Causes of involvement with the justice system

In 1996 the NSWLRC described three primary hypotheses to explain the overrepresentation of people with an intellectual disability in the justice system – the differential treatment hypothesis, the psychological and socio-economic disadvantage hypothesis, and the susceptibility hypothesis.<sup>62</sup> These three hypotheses have been articulated in a number of subsequent reports.<sup>63</sup>

### 2.2.4.1 Differential treatment hypothesis

The differential treatment hypothesis suggests that people with an intellectual disability are more likely to be suspected by the police of committing a crime, and be convicted of a crime by the courts. The differential treatment hypothesis therefore suggests that people with an intellectual disability are treated differently from those without a disability when they come into contact with the justice system. The hypothesis suggests that people with an intellectual disability:

- may not have their rights explained to them in ways that they can understand;
- may be more likely to be arrested, questioned and detained for minor infringements of public order law;
- may be convicted more easily because they are likely to confess to the crime; and
- may be more likely to receive a custodial sentence.<sup>64</sup>

The differential treatment hypothesis suggests that incorrect stereotypes and assumptions are made by people working in the justice system which can affect the treatment of people with an intellectual disability or cognitive impairment. Submissions and oral evidence expressed concern about assumptions and stereotypes made about people with an intellectual disability or cognitive impairment when they interact with the justice system.<sup>65</sup> For example, Inclusion Melbourne, a disability service provider, stated that:

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*Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 9.

<sup>62</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system', viewed 11 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>>.

<sup>63</sup> Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007.

<sup>64</sup> See for example Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, pp. 29-30.

<sup>65</sup> See for example Lois Bedson, Policy and Research Officer, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 25; Lynne Coulson Barr, Deputy Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 15; Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 12; Inclusion

Often people with cognitive disabilities are confused with people who have mental illness or are seen as difficult, uncooperative, or intoxicated. People with disabilities displaying characteristics of their disability (such as autism, epilepsy, cerebral palsy, etc.) have at times been inappropriately arrested for drunken driving, drug abuse, voyeurism, assault and other crimes.<sup>66</sup>

In its submission the OPA stated that a limited understanding of intellectual disability can often affect police interactions with people with an intellectual disability:

A limited understanding of cognitive disability could impact on the effectiveness of police interviews. As a result, police may make incorrect characterisations of people with cognitive impairments:

- Behaviours like defensiveness, failure to make eye-contact or acquiescence are wrongly interpreted as signs of guilt in persons with cognitive disability. These behaviours, however, are often displayed by people with cognitive disability when encountering authority figures.
- Police often assume people with cognitive disability who have had repeated contact with the justice system are aware of their rights because they are able to repeat these rights verbatim. However, when probed by an ITP, few of these clients can explain what their rights mean.<sup>67</sup>

In evidence to the Committee, an advocate quoted by the Grampians disAbility Advocacy said that in her experience people with an intellectual disability can be dealt with in an abrupt and dismissive manner when they come before the courts or when they are interviewed by the police, simply because the person does not understand what has been asked of them.<sup>68</sup>

The importance of improving awareness about intellectual disability and cognitive impairment by the community, and particularly by the police, the courts and the legal profession, are explored in greater detail throughout this report.

#### **2.2.4.2 Psychological and socio-economic disadvantage hypothesis**

The psychological and socio-economic disadvantage hypothesis suggests that people with an intellectual disability are more likely to be exposed to environmental factors that lead to them becoming involved in crime. Common economic and social disadvantages among people with an intellectual disability include higher exposure to health risks such as drug

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Melbourne, *Submission no. 9*, 6 September 2011, p. 2; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 3; Jane Penberthy, Principal Lawyer, Central Highlands Community Legal Centre, *Transcript of evidence*, Ballarat, 17 November 2011, p. 25; Youthlaw, *Submission no. 49*, 20 October 2011, pp. 1-2.

<sup>66</sup> Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 2.

<sup>67</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 25 (citations omitted).

<sup>68</sup> Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 12.

and alcohol abuse, homelessness, poor education and unemployment.<sup>69</sup> A person with an intellectual disability who is homeless, for example, might trespass in an attempt to find shelter without realising that community support services may be able to assist with providing accommodation.

The study conducted by Corrections Victoria examining the characteristics of prisoners with an intellectual disability found that prisoners were more likely to be Indigenous, unemployed, had received less education, and had previously had contact with psychiatric services. Findings showed that:

- prisoners with an intellectual disability were significantly younger than prisoners without a disability both at the time of reception into correctional facilities (28.2 years compared to 33.3 years) and at the time of their first adult sentence of imprisonment (21.8 years compared to 29.1 years);
- a greater proportion of prisoners with an intellectual disability were Indigenous (16.7% compared to 4.9%);
- prisoners with an intellectual disability were more likely to report primary level education as their highest level of education compared to prisoners without a disability (8.8% compared to 2%);
- prisoners with an intellectual disability were less likely to have been employed at the time they received their first prison sentence compared to prisoners without a disability (16.7% compared to 34.3%); and
- significantly more prisoners with an intellectual disability reported that they had received treatment for a psychiatric disorder (27.5% compared to 13.1%).<sup>70</sup>

A number of submissions suggested that the psychological and social disadvantages experienced by people with an intellectual disability contributed to their involvement with the justice system.<sup>71</sup> Ms Rhonda Lawson-Street, State Manager for the National Disability Service in Victoria, told the Committee that social isolation was often experienced by people with an intellectual disability. She suggested that support services and intervention programs that increase opportunities for people with an intellectual disability to participate in the community would reduce the

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<sup>69</sup> See for example Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, pp. 31-37; Standing Committee on Law and Justice, *Crime prevention through social support*, New South Wales Parliament, Sydney, First report, 2000, p. 163.

<sup>70</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, pp. 17-18.

<sup>71</sup> See for example Chris Atmore, Policy Officer, Federation of Community Legal Centres (Victoria) Inc., *Transcript of evidence*, Melbourne, 24 October 2011, p. 32; Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 5; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 3; Radius Disability Services, *Submission no. 28*, 12 September 2011, p. 1; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 2.

number of people with an intellectual disability who commit criminal offences.<sup>72</sup>

In its submission to the Committee, the OPA expressed the view that people with a cognitive impairment are often denied an opportunity to participate effectively in the community due to insufficient housing and support services in the community. Dr John Chesterman, Policy and Education Manager at the OPA, said that "... appropriate housing and social support are the most important preventative measures that our society can take to stop people with disabilities from becoming involved in the justice system in the first place ...".<sup>73</sup>

Ms Kristen Hilton, Director of Civil Justice Access and Equity at Victoria Legal Aid (VLA), said that VLA clients with an intellectual disability often seek assistance for legal problems that are associated with a range of social disadvantages that include health, housing and financial issues. She said that in VLA's experience clients who present with these disadvantages and who do not receive assistance in overcoming or minimising them, tend to repeatedly present as offenders.<sup>74</sup>

These psychological and social disadvantages are exacerbated for people with an intellectual disability who live in rural and regional communities. Mr Richard Coverdale, Director at the Centre for Rural Regional Law and Justice at Deakin University, recently conducted a research project titled *Postcode Justice – Rural and Regional Disadvantage in the Administration of the Law*. In his evidence Mr Coverdale acknowledged it would be unlikely that services equivalent to those provided in metropolitan Melbourne could be made available in all regional settings, but argued that the consequences of not delivering services and support in regional settings needs to be thoroughly examined in order to minimise the inequities currently experienced by people with an intellectual disability when interacting with the justice system.<sup>75</sup>

A related cause for offending among people with an intellectual disability is that while people diagnosed with an intellectual disability are eligible to access a range of support services both in the community and when involved in the justice system, people with mild to moderate intellectual disabilities are often ineligible or are not identified as requiring support. People with borderline intellectual disabilities also experience similar disadvantages to people who meet the definition for intellectual disability but are often ineligible for support services available to people who meet the definition for intellectual disability, which may explain the increased

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<sup>72</sup> Rhonda Lawson-Street, State Manager, National Disability Services Victoria, *Transcript of evidence*, Melbourne, 7 November 2011, p. 14.

<sup>73</sup> John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 23.

<sup>74</sup> Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 35.

<sup>75</sup> Richard Coverdale, Director, Centre for Rural and Regional Law and Justice, Deakin University, *Transcript of evidence*, Geelong, 20 March 2012, pp. 4-5.

involvement they have with the justice system compared to those who fit within standard definitions of intellectual disability.<sup>76</sup>

### 2.2.4.3 Susceptibility hypothesis

... people with an intellectual disability are more likely to get 'caught up' in offending behaviour rather than having intent to commit an offence. This occurs due to a lack of a full understanding of what is appropriate behaviour as well as a lack of understanding of the justice system.<sup>77</sup>

In contrast to the differential treatment hypothesis, the susceptibility hypothesis suggests that a person's impaired mental abilities makes him or her more susceptible to committing offending behaviour. A person with an intellectual disability may have poor impulse control; could be more susceptible to being exploited by people who subsequently involve them in offending behaviour; may respond inappropriately to social cues and socially accepted behaviours; and may be more prone to suggestions (particularly by people in authority) making them more likely to confess to crimes that they have not committed.<sup>78</sup> A person with a cognitive impairment, such as an ABI, may have problems associated with anger and aggression related to their injury. The combination of these features may lead to a person with an intellectual disability or cognitive impairment being more susceptible to becoming involved in criminal behaviour.

## 2.3 Crime against people with an intellectual disability

Vulnerabilities and disadvantages experienced by people with an intellectual disability also dispose them to become involved in the justice system as victims of crime. Limited research has been conducted into the victimisation of people with an intellectual disability, mental illness or other cognitive impairments.

### 2.3.1 Extent of involvement as victims of crime

Challenges experienced by people with an intellectual disability can also place them at a greater risk of becoming victims of crime. Statistics on the involvement of people with an intellectual disability as victims of crime are very limited and often not specifically recorded.

A 2012 report by the OPA on repeat users of the ITP program provides some information on the interaction of people with an intellectual disability

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<sup>76</sup> See discussion in section 2.2.1.2 about the prevalence of people with borderline intellectual disabilities within the justice system.

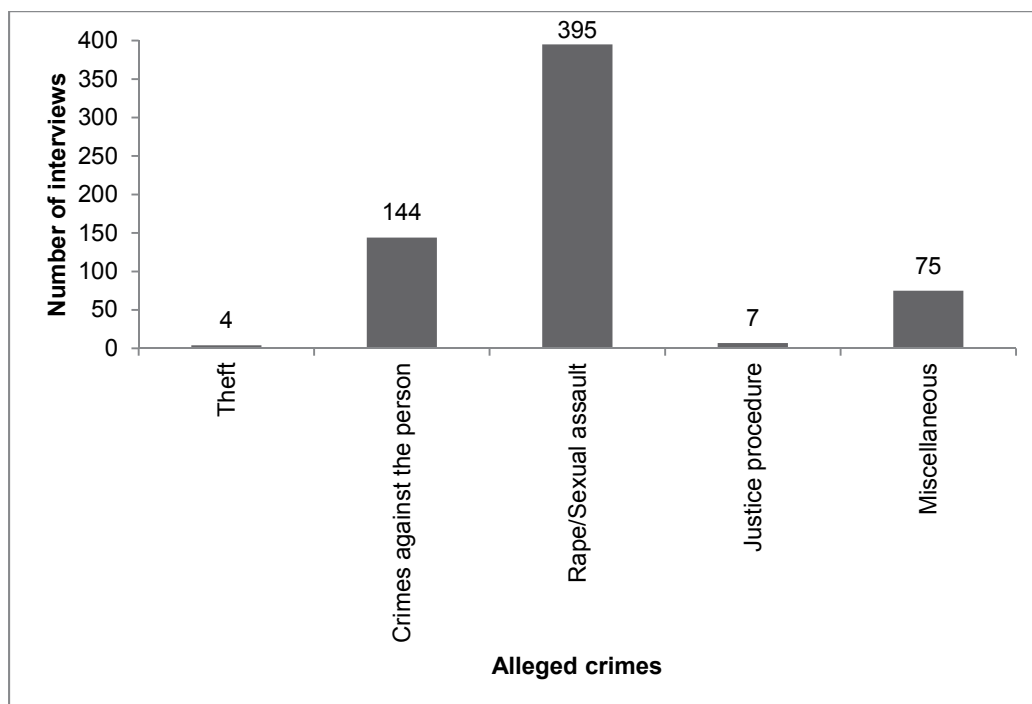
<sup>77</sup> Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 23.

<sup>78</sup> See for example Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, pp. 28-29; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 23; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 3; Louis Schetzer and Judith Henderson, *Access to justice and legal needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, Law and Justice Foundation of New South Wales, Sydney, Stage 1: Public consultations, 2003, pp. 10-11; C Wilson, T Nettelbeck, R Potter and C Perry, 'Intellectual disability and criminal victimisation', *Trends and Issues in Crime and Criminal Justice*, vol. 60, 1996, p. 2.



with the police. The study found that between the period 1 July 2005 and 30 June 2010, 575 alleged victims were assisted by an ITP during interviews. A breakdown of the types of crimes alleged by victims is shown in Figure 2.

**Figure 2: Alleged crimes committed against people with a cognitive impairment requiring an Independent Third Person.<sup>79</sup>**



Research suggests that people with an intellectual disability or cognitive impairment are more vulnerable to crimes being committed against them than members of the wider community, and that crimes are often committed in residential settings by a staff member or other resident.<sup>80</sup> A study of people appearing in police stations in South Australia as victims found that people with an intellectual disability were three times more likely to be victims of physical assault, sexual assault and robbery compared with people who do not have an intellectual disability.<sup>81</sup> Increased vulnerability to sexual assault among people with an intellectual disability or cognitive impairment is attributable to a number of causes, which include:

<sup>79</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 108.

<sup>80</sup> See for example H Brown, J Stein and V Turk, 'The sexual abuse of adults with learning disabilities: Report of a second two-year incidence survey', *Journal of Applied Research in Intellectual Disabilities*, vol. 8, no. 1, pp. 3-24, 1995; M Carmody, 'Invisible victims: Sexual assault of people with an intellectual disability', *Journal of Intellectual and Developmental Disability*, vol. 17 no. 2, pp. 229-236, 1990.

<sup>81</sup> C Wilson and N Brewer, 'The incidence of criminal victimisation of individuals with an intellectual disability', *Australian Psychologist*, vol. 27, no. 2, pp. 114-117, 1992.

- lack of understanding by a person with an intellectual disability about the risks and consequences of certain actions;
- difficulties associated with articulating and communicating the fact of their disability;
- increased dependence on others; and
- physical and social isolation.<sup>82</sup>

### 2.3.2 Difficulties examining the rate of victimisation

The incidence of people with an intellectual disability as victims of crime is difficult to quantify for a number of reasons – victims may fail to understand that a crime has been committed against them; they may fear reprisal or loss of support if they report the crime; or police may respond inadequately to allegations. It is therefore possible that people with an intellectual disability may present more frequently as victims of crime if barriers to accessing justice are removed.

Often people with an intellectual disability do not report crimes that have been committed against them. For example, the CASA Forum, which represents 15 Centres Against Sexual Assault in Victoria, stated that:

... perpetrators target women with cognitive impairment because they are less likely to be able to tell others what happened, people to whom they disclose often discount their disclosure and it is hard for them in some cases to explain what has happened due to their lack of communication or the limited capacity of their communication aide.<sup>83</sup>

Studies have found that people with an intellectual disability may be more vulnerable to victimisation when living in supported residential settings, and that victimisation may be underestimated due to inaction by service providers. Victims may fail to report a crime if they fear they will lose support services as a result of reporting an incident against them. This view was advanced in a submission by the Victorian Disability Advisory Council:

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. ... people with an intellectual or

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<sup>82</sup> See, for example, Office of the Public Advocate, *Violence against people with cognitive impairments: Report from the Advocacy/Guardianship program at the Office of the Public Advocate, Victoria*, Melbourne, Report prepared by Janine Dillon, 2010, p. 8; Victorian Law Reform Commission, *Sexual offences*, VLRC, Melbourne, Final report, 2004, pp. 321-323.

<sup>83</sup> CASA Forum, *Submission no. 33*, 21 September 2011, p. 4. See also Eileen Oates, Chief Executive Officer, Loddon Campaspe Centre Against Sexual Assault, *Transcript of evidence*, Bendigo, 28 May 2012, p. 32.



cognitive disability fear that they will lose access to services or their care if they report abuse.<sup>84</sup>

The Victorian Disability Advisory Council also noted that where the alleged perpetrator is the carer, the capacity of a person with an intellectual disability to report the crime is diminished. The Council cited research indicating that between 40 and 70 per cent of crimes against people with an intellectual disability go unreported for this reason.<sup>85</sup>

Mr Laurie Harkin, Disability Services Commissioner, told the Committee that although 25 per cent of referrals received by the Commission are made by people with a disability, this might not represent the true extent of the problem:

... people feel afraid, that they can't raise the issues of concern they have with the people that they have a concern about. It's usually because the dimension of dependency that exists around the support arrangements that are provided ...<sup>86</sup>

Another issue identified in submissions and evidence was that people with an intellectual disability or cognitive impairment may lack understanding or awareness that an offence has been committed against them.<sup>87</sup> Mr Harkin said that inadequate education is given to people with an intellectual disability to assure them of their rights, so that they know "... you've got the right to be treated fairly, you've got the right not to be abused, you've got the right to feel safe ... these rights are frequently not the experience of people with intellectual disability."<sup>88</sup>

Evidence received by the Committee also suggested that people with an intellectual disability or cognitive impairment may not report offences that have been committed against them due to difficulties they have previously experienced interacting with the justice system, particularly the police. Dr Margaret Camilleri and the Victorian Disability Advisory Council noted that victims with an intellectual disability are often not viewed as "good" witnesses because they have communication difficulties, and that incorrect assumptions are made by the police and the courts about their reliability, credibility and ability to participate in the justice system. Consequently, offences reported by people with an intellectual disability or cognitive impairment may not be prosecuted.<sup>89</sup> Mr Harkin said that in his experience:

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<sup>84</sup> Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 21 (citations omitted).

<sup>85</sup> Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 21.

<sup>86</sup> Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 17. See also CASA Forum, *Submission no. 33*, 21 September 2011, p. 2; Communication Rights Australia, *Submission no. 13*, 8 September 2011, p. 6.

<sup>87</sup> See for example Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 20; Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, p. 11.

<sup>88</sup> Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 13.

<sup>89</sup> Margaret Camilleri, *Submission no. 46*, 10 October 2011, p. 6; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 9. See also Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 29.

... police are moved by the need to think about the likelihood of success of taking a brief of evidence to a court and would be influenced by the prospect of its success or failure ...<sup>90</sup>

Consequently, when allegations of crime are made by people with an intellectual disability or cognitive impairment they may not always proceed to prosecutions in court, which will also lead to the incidence of crime against people with an intellectual disability being underestimated.

## 2.4 Methods to improve data collection

Crime statistics generally provide data on gender, offence category, age and ethnicity, but not disability. Consequently, it is difficult to conduct systematic analysis and identification of ways to address and improve access to and interaction with the justice system by people with an intellectual disability or cognitive impairment. However, anecdotal evidence, and the limited statistical evidence that is available, strongly suggests that people with an intellectual disability and cognitive impairment form a significant, and disproportionate, proportion of offenders and victims of crime.

Finding 1: Anecdotal evidence, and the limited statistical evidence that is available, strongly suggests that people with an intellectual disability or cognitive impairment form a significant, and disproportionate, proportion of offenders and victims of crime.

Failing to identify people with an intellectual disability or cognitive impairment in justice statistics reduces the state's capacity to identify how the justice system should best respond to and interact with people with intellectual disabilities and cognitive impairments. The Committee heard that improved data collection by the departments and agencies that regularly come into contact with people with an intellectual disability would form an important resource for improving outcomes for people with an intellectual disability or cognitive impairment.<sup>91</sup>

As statistics reveal that people with an ABI are significantly overrepresented in the prison system, this group of offenders may also be overrepresented in interactions with the police and the courts. The Committee believes that ongoing data collection to examine the involvement of people with a cognitive impairment or intellectual disability with the police and the courts would assist police and the courts to better accommodate their needs. The Committee believes that improved data

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<sup>90</sup> Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 12.

<sup>91</sup> See for example Chris Atmore, Policy Officer, Federation of Community Legal Centres (Victoria) Inc., *Transcript of evidence*, Melbourne, 24 October 2011, p. 32; Julie Boffa, Policy Manager, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, p. 35; Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 12; Jesuit Social Services, *Submission no. 38*, 30 September 2011, pp. 8-10; Life Without Barriers, *Submission no. 32*, 19 September 2011, pp. 3-4; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, pp. 48-49; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 5.

collection will assist efforts to determine how services can be developed to support this group of people, both when interacting in the community and more specifically when involved in the justice system.

The Committee accordingly recommends that the Department of Justice, with representatives from Victoria Police, the Office of Public Prosecutions, the courts and the DHS, establish an integrated process for the collection of statistics regarding the level of contact that people with an intellectual disability or cognitive impairment have with these agencies, and that these statistics be retained in a centralised database. The database should include information on:

- the number of offences in Victoria involving people with an intellectual disability or cognitive impairment, either as victims or offenders;
- the number of police reports taken, charges laid and prosecution rates for such offences; and
- prosecution outcomes.

Recommendation 1: That the Department of Justice, with representatives from Victoria Police, the Office of Public Prosecutions, the courts and the Department of Human Services, establish a centralised database for the collection of statistics on people with an intellectual disability or cognitive impairment who have come into contact with the justice system. The database could include information on:

- the number of offences in Victoria involving people with an intellectual disability or cognitive impairment, either as victims or offenders;
- police reports and prosecution rates for such offences; and
- prosecution outcomes.

Given limitations in data examining the number of people with an intellectual disability or cognitive impairment in the justice system, the Committee believes further research should be conducted to examine involvement by people with an intellectual disability or cognitive impairment with the justice system. The Committee notes that Women with Disabilities Victoria and the OPA are currently undertaking a research project on violence against women with disabilities, including those with cognitive impairments. The project, *Voices against Violence*, is a two-year project aimed at examining the nature and incidence of violence against women with disabilities in Victoria. The Committee believes that this kind of research will assist to identify ways in which the justice and human service systems can be more responsive to the needs of people with an intellectual disability or cognitive impairment in the justice system.

The Committee anticipates that the collection of data for the centralised database described in Recommendation 1 will provide important information to assist Government agencies to allocate resources and improve service delivery. The Committee believes that there may also be opportunities to identify improvements to services delivery through qualitative research.

Recommendation 2: That the Victorian Government commission research to measure the incidence of interactions with the justice system and human services by people with an intellectual disability or cognitive impairment, and to identify opportunities to improve service delivery.

## Chapter Three: Definitions of intellectual disability and cognitive impairment

One of the difficulties that arises when analysing circumstances surrounding access to justice for people with an intellectual disability or cognitive impairment is that a variety of definitions are used for these terms. As noted in Chapter Two, a range of scientific and sociological criteria – including self-reporting, IQ testing, behavioural assessment, or a combination of these – have been used in studies to estimate community prevalence of intellectual disability. Internationally, and within Australia, a range of definitions are also employed by the public sector, and in law.

In Australia the terms ‘intellectual disability’ and ‘cognitive impairment’ are used in both the human services and justice sectors. The term ‘intellectual disability’ generally refers to a person who has difficulty learning or managing daily living. Generally the term refers to a condition that is either evident at birth, or is expressed before a person reaches adulthood.

The term ‘cognitive impairment’ is generally used to refer to a person who has suffered from a loss of brain function that affects his or her judgement. Cognitive impairment is a broad concept that encompasses learning disabilities, acquired brain injuries (ABIs), drug or alcohol abuse, neurological disorders, tumours, and autism spectrum disorders. Often, although not always, the term ‘cognitive impairment’ refers to conditions acquired after maturity.

In this Chapter the Committee examines definitions for intellectual disability currently used in Victoria in clinical settings, and in legislation underpinning the justice and human service systems. Distinctions made between intellectual disability and cognitive impairment more generally, and the consequences of drawing such distinctions, are also explored.

### 3.1 What is an intellectual disability?

People with an intellectual disability have significantly lower than average intellectual abilities, and deficits in areas such as conceptual, social and personal skills. A person with an intellectual disability is likely to experience challenges interacting with others, as he or she will often find it difficult to understand complex instructions or concentrate for extended periods of time, and will often respond inappropriately in stressful situations.<sup>92</sup>

<sup>92</sup> Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 4.

The term 'intellectual disability' may be applied to a broad range of people with quite different capabilities.<sup>93</sup> For example, a person with a severe intellectual disability may be unable to acquire basic skills in speech and personal care, while a person with a mild intellectual disability may be able to acquire these skills, live independently in the community, and gain employment.

Although the need for treatment, care and support for people with an intellectual disability has long been recognised, it was not until the development of psychometric testing at the beginning of the twentieth century that formal classification of the condition became widespread.<sup>94</sup> Prior to this a person suspected of having an intellectual disability would be assessed by a clinician who would have his or her own individual methods for determining whether the person had a disability.

The first psychometric test was developed by two French physicians, Alfred Binet and Theodore Simon, in 1905. The test was developed primarily to identify students who may require specialised education, and was refined during the course of the century to provide a mechanism for diagnosing intellectual disability.<sup>95</sup>

Intelligence tests and assessments of adaptive behaviours are now the principal diagnostic tool for identifying whether a person has an intellectual disability. On the basis of these tests a person may be identified as having a mild, moderate or severe intellectual disability. The key criteria used to identify intellectual disability is the presence of significant impairments in intellectual functioning, difficulties in adaptive behaviours, and the manifestation of these during the developmental period in a person's life.<sup>96</sup>

### 3.1.1 Clinical versus statutory definitions

Traditional clinical approaches viewed intellectual disability as a disease or illness suffered by the person. The focus of these models was to identify symptoms of the disability, causes, possible treatments or cures, and methods to prevent reoccurrence.<sup>97</sup>

Purely clinical approaches to identifying intellectual disability are often insufficient, however, as they fail to recognise the way environmental and

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<sup>93</sup> Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, p. 13.

<sup>94</sup> James Harris, *Intellectual disability: Understanding its development, causes, classification, evaluation and treatment*, Oxford University Press, New York, 2006, pp. 13-20: for a discussion on the historical origins of what is now considered an intellectual disability.

<sup>95</sup> James Harris, *Intellectual disability: Understanding its development, causes, classification, evaluation and treatment*, Oxford University Press, New York, 2006, p. 14.

<sup>96</sup> See for example American Psychiatric Association, *Diagnostic and statistical manual for mental disorders: Text revision*, APA Press, Virginia, 2000. See also *Disability Act 2006* (Vic), section 6(3) which adopts the use of standard intelligence testing for the purposes of determining a person's eligibility for disability supports and services.

<sup>97</sup> Errol Cocks, *An introduction to intellectual disability in Australia*, Australian Institute on Intellectual Disability, Canberra, 1998, p. 42.

social factors can affect a person with an intellectual disability. Consequently, statutory and clinical definitions of intellectual disability have evolved to encompass a broad appreciation of other factors that affect people with an intellectual disability.

### 3.1.1.1 Clinical definition

For clinical purposes one of three diagnostic tools are typically used to identify intellectual disability — the World Health Organisation's *International Statistical Classification of Diseases and Related Health Problems* (ICD-10),<sup>98</sup> the American Association of Intellectual and Developmental Disabilities' *Definition, Classification and Systems of Supports* (AAIDD-11)<sup>99</sup> and the American Psychiatric Association's *Diagnostic and Statistical Manual for Mental Disorders* (DSM-IV).<sup>100</sup>

Figure 3 summarises definitions of intellectual disability used in these clinical tools. Each emphasise different intellectual, functional and adaptive abilities that a person must exhibit in order to be diagnosed with an intellectual disability.

**Figure 3: Clinical definitions of intellectual disability.**

**ICD-10:** *The World Health Organisation's classification of "mental retardation" is a condition of arrested or incomplete development of the mind, which is especially characterised by impairment of skills manifested during the developmental period, skills which contribute to the overall level of intelligence such as cognitive, language, motor and social abilities. Retardation can occur with or without any other mental or physical condition. The ICD-10 does not specify an age threshold for which the disability must be present in order for the diagnosis to be made.*

**AAIDD-11:** *The AAIDD specifies that an intellectual disability originates before 18 years of age and is characterised by significant limitations in both intellectual functioning (such as a person's ability to reason, learn and problem solve) and adaptive behaviour, which encompasses a person's conceptual, social and practical skills.*

<sup>98</sup> World Health Organisation, 'International statistical classification of diseases and related health problems 10th revision', viewed 1 February 2013, <<http://apps.who.int/classifications/icd10/browse/2010/en>>.

<sup>99</sup> American Association of Intellectual and Developmental Disabilities, *Intellectual disability: Definition, classification and systems of supports*, American Association of Intellectual and Developmental Disabilities, Washington, 2010.

<sup>100</sup> American Psychiatric Association, *Diagnostic and statistical manual for mental disorders: Text revision*, APA Press, Virginia, 2000. See also American Psychiatric Association, 'Intellectual developmental disorder', viewed 8 June 2012, <<http://www.dsm5.org/ProposedRevisions/Pages/proposedrevisions.aspx?rid=384>>: the DSM-IV is currently being reviewed. While the proposed new definition is largely similar to that contained in the DSM-IV, the proposed new definition removes the reliance on intelligence testing for determining intellectual disability. One of the proposed categories for defining whether a person has an intellectual disability is that a person would generally have "deficits in mental abilities such as reasoning, problem-solving, planning, abstract thinking, judgement, academic learning and learning from experience".



**DSM-IV:** The American Psychiatric Association defines “mental retardation” as:

- significantly sub-average general intellectual functioning (defined as an IQ of 70 or below);
- concurrent existence of significant limitations in adaptive functions in at least two of the following areas—communication, self-care, home living, social and interpersonal skills, use of community resources, self-direction, functional academic skills, leisure, health and safety; and
- the onset of the deficits was before the age of 18.

Although a range of criteria are used to identify intellectual disability, most clinical tools employ intelligence quotient (IQ) tests to determine whether or not a person has a disability. Most IQ tests are designed to conform to a normal distribution over the population – so that, for example, the results of IQ testing over a population will mean around two per cent of the population have an IQ of 70 or less (and two per cent of the population have an IQ of 130 or more). This means that definitions for ‘intellectual disability’ based solely on IQ tests provide an assessment of a person’s ability to answer questions or solve problems in relation to other people, rather than assessing a person’s behavioural or adaptive abilities. This may mean that, for example, people who for all practical purposes have similar capacities to cope in the community may be assessed differently in terms of intellectual disability.

IQ scores are used to categorise a person as having a mild, moderate, severe or profound intellectual disability. Intellectual capacity, social skill and ability to perform core activities such as self-care, communication and mobility vary considerably across the spectrum of mild to profound disability. Table 5 outlines the IQ cut-off points for mild, moderate, severe and profound intellectual disability defined in clinical diagnostic tools.

**Table 5: IQ cut-off points defined in clinical diagnostic tools.<sup>101</sup>**

	DSM-IV	ICD-10
Mild	IQ between 50-55 and 70	IQ between 50-69
Moderate	IQ between 35-40 and 50-55	IQ between 35-49
Severe	IQ between 25 and 34-40	IQ between 20-34
Profound	IQ under 25	IQ under 20

The Australia Bureau of Statistics’ (ABS) *Survey of Disability, Ageing and Caring* provides examples of each limitation:

<sup>101</sup> American Psychiatric Association, *Diagnostic and statistical manual for mental disorders: Text revision*, APA Press, Virginia, 2000, pp. 39-40; World Health Organisation, 'International statistical classification of diseases and related health problems 10th revision', viewed 1 February 2013, <<http://apps.who.int/classifications/icd10/browse/2010/en>>.



- profound – the person always needs assistance from another person to perform a core activity;
- severe – the person sometimes needs assistance from another person to perform a core activity, or has difficulty understanding or being understood by family or friends, or can communicate more easily using sign language or other non-spoken forms of communication;
- moderate – the person does not need assistance, but has difficulty performing a core activity; and
- mild – the person has no difficulty in performing a core activity but uses aids or equipment because of the disability.<sup>102</sup>

People who do not satisfy the criteria for intellectual disability but have low intelligence and/or who have impaired adaptive behaviours are said to have a borderline intellectual disability. Some witnesses expressed concern that people with borderline intellectual disabilities may be more disadvantaged than people who meet clinical criteria for intellectual disabilities when they come into contact with the justice system, because they do not have access to services and supports made available to people who meet clinical definitions of intellectual disability.<sup>103</sup>

While the causes of intellectual disability are numerous, the American Association of Intellectual and Developmental Disabilities has identified common descriptive causes of intellectual disability. These include:

- infections or diseases which may include infections carried by the mother prior to birth and viral infections that may be caught after birth;
- trauma most commonly caused at birth;
- metabolism or nutrition deficiencies;
- brain diseases after birth such as tuberculosis; or

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<sup>102</sup> Australian Bureau of Statistics, *Disability, ageing and carers: Summary of findings Australia*, ABS, Canberra, 2003, pp. 26-27: A core activity is defined as a communication, mobility or self-care activity.

<sup>103</sup> See for example Julie Boffa, Policy Manager, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, p. 35; Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, pp. 5-6; Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 2; John Lesser, Magistrate, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 26; Ian McLean, Chief Executive Officer, Golden City Support Services, *Transcript of evidence*, Bendigo, 28 May 2012, p. 11; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 23; Nick Rushworth, Executive Officer, Brain Injury Australia, *Transcript of evidence*, Melbourne, 21 February 2012, p. 44.

- chromosomal abnormalities, the most common being Down syndrome.<sup>104</sup>

While clinical definitions of intellectual disability are useful for identifying intellectual disability, they may be less useful when considering how the justice system should respond to the needs of a person with an intellectual disability.<sup>105</sup> For example, definitions of intellectual disability that focus on examining intellectual and functional abilities will not always provide a reliable indication of a person's capacity to understand his or her legal rights and responsibilities. Furthermore, the classification of a person as having a 'mild' or 'moderate' intellectual disability may suggest that the disability is inconsequential when determining how support and procedures should be modified to assist the person to move through the justice system.

It is also possible for a person assessed on different occasions to obtain different outcomes, due to environmental or emotional factors. Where this occurs, a diagnosis indicating a particular level of impairment may be of limited value when determining how the justice system should respond and interact with a particular person.

### 3.1.1.2 Statutory definition

The *Disability Act 2006* (Vic) is the principal legislation that deals with disability issues. The Act sets out the framework for the delivery of supports and services for people with a disability in Victoria. The Act provides a broad definition of 'disability' and a specific definition of 'intellectual disability'. A 'disability' is defined under the Act as:

- a) A sensory, physical or neurological impairment or acquired brain injury or any combination thereof, which –
  - i) is, or is likely to be, permanent; and
  - ii) causes a substantially reduced capacity in at least one of the areas of self-care, self-management, mobility or communication; and
  - iii) requires significant ongoing or long term episodic support; and
  - iv) is not related to ageing; or
- b) an intellectual disability; or
- c) a developmental delay.<sup>106</sup>

A person with an 'intellectual disability' is defined as someone over the age of five who has the concurrent existence of significant sub-average intellectual functioning and significant sub-average deficits in adaptive

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<sup>104</sup> Examples cited in Errol Cocks, *An introduction to intellectual disability in Australia*, Australian Institute on Intellectual Disability, Canberra, 1998, pp. 52-62.

<sup>105</sup> Beth Aufdemberge, Katie-anne Powell, Lainie Hocart, Malinthe De Mel, Cameron Soleimani and Wendy Couzens, *Submission no. 18*, 9 September 2011, p. 2.

<sup>106</sup> *Disability Act 2006* (Vic), section 3.

behaviours that manifested before they were 18 years old.<sup>107</sup> In order to identify a person as having an intellectual disability for the purposes of the Act:

- a standard intelligence test must indicate that the person has an intelligence of not higher than two standard deviations below the average population. If this is the case then the person is taken to have significant sub-average general intellectual functioning; and
- a standard test used to assess adaptive behaviour must indicate a score at or below the second percentile of people of the same age and cultural background. If that is the case then the person is taken to have significant deficits in adaptive behaviour.<sup>108</sup>

The Act does not specify adaptive behavioural limitations that would help to define whether a person has an intellectual disability, although these would typically affect a person's communication, social skills, and ability to live independently.<sup>109</sup>

The definition of intellectual disability in the *Disability Act 2006* employs similar criteria to the DSM-IV, requiring that a person's IQ, functional and environmental capacities, and needs must be considered. The Act's definition of intellectual disability excludes some people who suffer from cognitive impairments such as ABIs or Alzheimer's disease, where those conditions arise after the age of 18 years.

Victoria is the only state in Australia that provides a legislative definition for 'intellectual disability' to determine access to and eligibility for disability support services provided by health and welfare departments. Definitions for 'disability' in other states include people whose disability is attributable to an intellectual disability or cognitive impairment.<sup>110</sup> Other states also provide definitions of 'intellectual disability' and 'cognitive impairment' in various criminal justice and guardianship legislation, but not for the purposes of determining eligibility for access to disability services.

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<sup>107</sup> *Disability Act 2006* (Vic).

<sup>108</sup> *Disability Act 2006* (Vic), section 6(3).

<sup>109</sup> This can be compared to the position in Queensland in that state's *Forensic Disability Act 2011* (Qld). That Act sets out the framework for the detention, care and support of people with a cognitive impairment or intellectual disability who have been placed under a court order. That Act defines 'intellectual disability' in similar terms to the *Disability Act 2006* (Vic), but also sets out how limitations in adaptive behaviours are to be determined by defining areas where a person with an intellectual disability may have limitations. Examples of adaptive behaviours include the areas of communication, self-care, home living, social skills, the use of community services, leisure: see for example *Forensic Disability Act 2011* (Qld), Schedule 1. A similar framework exists in New Zealand in relation to offenders with a mental impairment who have been charged with or convicted of an offence. For example, the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ) sets out adaptive behaviours which a person may have limitations in.

<sup>110</sup> See for example *Disability Services Act 1986* (Cth), section 8; *Disability Services Act 1991* (ACT), section 4; *Disability Services Act 1993* (NSW), section 3; *Disability Services Act 1993* (NSW), section 2; *Disability Services Act 1993* (NSW), section 5; *Disability Services Act 2006* (Qld), section 11; *Disability Services Act 2011* (Tas), section 4.

### 3.1.2 Distinction between intellectual disability and cognitive impairment

The *Disability Act 2006* draws a distinction between intellectual disability and other cognitive impairments for the purpose of determining whether a person is eligible to access specialist disability services provided by the Department of Human Services (DHS). The Committee explored whether differences between people with an intellectual disability and those who have other cognitive impairments are relevant for determining access to services and supports provided by the justice and human service systems.

A cognitive impairment refers to a broader range of conditions than is usually encompassed by definitions of intellectual disability. For example, cognitive impairment may include Alzheimer's disease, dementia, autism spectrum disorders, multiple sclerosis, and ABIs as a result of trauma, stroke, tumours or drug and alcohol abuse.<sup>111</sup> The term is used to refer to conditions that affect a person's ability to understand and process information, often including intellectual disability, and is used frequently in legal contexts.

A person with an ABI may experience changes in their cognitive, as well as their physical, abilities. For example, Ms Jacqui Pierce, who has extensive experience working with people with ABIs, told the Committee that people with an ABI typically have difficulty with "... their thinking processes, their planning processes, their ability to organise things in their mind and come out with a coherent answer."<sup>112</sup>

The Committee heard from Mr Michael Bernard, who has an ABI as a result of a tumour and aneurysm, who said that while he is able to read complex information, his ability to recall and retain that information can sometimes be affected. He said that he has to read information repeatedly in order to ensure that he has understood it and can recall it at a later date.<sup>113</sup> Ms Pierce told the Committee that such difficulties are often experienced by people with an ABI. She told the Committee that:

Loss of short-term memory is fairly common, and capacity to learn new skills. Long-term memory is often there and still fully intact. The vast majority of people with a brain injury would have some short-term memory issues unless there is repetition, like constant retraining of the brain ...<sup>114</sup>

While people with cognitive impairments such as ABIs may appear and behave similarly to people with an intellectual disability, the Committee was told that people with a cognitive impairment tend to have a more diverse range of lived experiences, depending on how and when the impairment

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<sup>111</sup> Kerry Stringer, Former Chair, Victorian Coalition of ABI Service Providers Inc., *Transcript of evidence*, Melbourne, 21 February 2012, p. 11.

<sup>112</sup> Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 21. See also Leadership Plus, *Submission no. 35*, 23 September 2011, pp. 2-3; Nick Rushworth, Executive Officer, Brain Injury Australia, *Transcript of evidence*, Melbourne, 21 February 2012, p. 40.

<sup>113</sup> Michael Bernard, *Transcript of evidence*, Ballarat, 17 November 2011, p. 10.

<sup>114</sup> Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 23.

manifested. These experiences could include more formal education and training, employment, and long-term relationships with spouses and friends. Consequently, the Committee was told that there was justification for distinguishing between these conditions.<sup>115</sup> For example, the Legal Services Commissioner told the Committee that:

Clients with congenital intellectual disabilities or brain injuries sustained early in their lifetime (e.g. from disease or trauma) tend to have received less formal education than others in the population, therefore their level of awareness of their rights may be limited. ... Clients with acquired brain injuries (e.g. from illness or accident) sustained later in life are more likely to have received more formal education and are therefore more likely to be better informed about their rights, and therefore more likely to advocate for themselves [when] seeking assistance within the justice system.<sup>116</sup>

In its Inquiry into *People with an Intellectual Disability and the Criminal Justice System*, the New South Wales Law Reform Commission suggested that two key differences were material when determining how the justice system should respond to people with an intellectual disability or cognitive impairment.<sup>117</sup> These were that different methods are used to identify whether a person has an intellectual disability or cognitive impairment, and that in contrast with a person with an intellectual disability, it is possible that a person with a cognitive impairment might improve over time, therefore altering services and supports that should be available to them.

### 3.1.3 Other legal definitions of intellectual disability

The Committee notes that the definition of intellectual disability contained in the *Disability Act 2006* is used primarily to determine a person's eligibility for disability support and services. There are a number of other ways that intellectual disability is defined in legal contexts. Often the terms 'cognitive impairment' and 'mental impairment' are used interchangeably with intellectual disability.

In Victoria a number of pieces of legislation are applicable to people with an intellectual disability. These include the *Guardianship and Administration Act 1986* (Vic), the *Crimes Act 1958* (Vic), the *Evidence Act 2009* (Vic), the *Sentencing Act 1991* (Vic), the *Magistrates' Court Act 1989* (Vic), the *Equal Opportunity Act 2010* (Vic) and the *Criminal Procedure Act 2009* (Vic).

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<sup>115</sup> See for example Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 21; Nick Rushworth, Executive Officer, Brain Injury Australia, *Transcript of evidence*, Melbourne, 21 February 2012, p. 45; Victorian Coalition of ABI Service Providers Inc., *Submission no. 42*, 7 October 2011, p. 2.

<sup>116</sup> Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 1.

<sup>117</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system', viewed 11 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>>.

### 3.1.3.1 Discrimination legislation

The *Equal Opportunity Act 2010* and the *Disability Discrimination Act 1992* (Cth) provide a framework for the protection of people against unlawful and discriminatory practices.

The *Equal Opportunity Act 2010* prohibits discrimination on the grounds of an attribute that a person may have. An attribute may be an 'impairment', which includes a "malfunction of a part of the body, including ... a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder".<sup>118</sup> For the purposes of the Act, this can include impairments that a person may develop in the future (including impairments that a person may be more predisposed toward) and any behaviour that may arise because of the impairment.<sup>119</sup>

The *Disability Discrimination Act 1992* provides that it is an offence to discriminate against someone on the basis of their disability. A 'disability' is defined broadly to include:

- a total or partial loss of a person's bodily or mental functions;
- a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction; or
- a disorder that affects a person's thought processes, perceptions of reality, emotions or judgments.<sup>120</sup>

As in the *Equal Opportunity Act 2010*, the broad definition employed in the *Disability Discrimination Act 1992* encompasses past, present and future disabilities, and so includes cognitive impairments that would be excluded if the definition of intellectual disability were used, such as disabilities that arise in adulthood.

### 3.1.3.2 Justice legislation

Following a report by the Victorian Law Reform Commission (VLRC) into *Sexual offences*, legislative changes were introduced to create specific offences for certain acts committed against people with a cognitive impairment, and to modify court processes where a person with a cognitive impairment disability was involved. The VLRC drew on evidence that people with a cognitive impairment are particularly vulnerable to sexual assault and abuse due to their dependence on support from others, and made a number of recommendations to facilitate people with a cognitive impairment giving evidence in court and police settings. The VLRC recommended that the term 'cognitive impairment' be adopted, as it was a widely accepted and recognised term.<sup>121</sup>

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<sup>118</sup> *Equal Opportunity Act 2010* (Vic), section 4.

<sup>119</sup> *Equal Opportunity Act 2010* (Vic), section 4.

<sup>120</sup> *Disability Discrimination Act 1992* (Cth), section 4.

<sup>121</sup> Victorian Law Reform Commission, *Sexual offences*, VLRC, Melbourne, Final report, 2004, p. 321.



Amendments to the *Crimes Act 1958* in 2006 created a number of sexual offences for acts against people with a cognitive impairment. Under the Act, 'cognitive impairment' includes impairments due to mental illness, intellectual disability, dementia or brain injury, with intellectual disability defined in accordance with disability legislation.<sup>122</sup> During the second reading of the Crimes (Sexual Offences) Bill 2006 speakers noted that while the definition of 'cognitive impairment' was wide, it was necessary to protect people who the VLRC found were particularly vulnerable to sexual assault and abuse due to their dependence on support from others.<sup>123</sup>

The *Evidence Act 2008* also contains provisions relating to evidence taken from "vulnerable witnesses", including people with a cognitive impairment or intellectual disability. Under the Act special powers can be used by the court to set conditions on the questioning of specific witnesses, including those with a cognitive impairment or intellectual disability.<sup>124</sup> The Act does not define intellectual disability or cognitive impairment.

The *Criminal Procedure Act 2009* establishes procedures for criminal proceedings in the Magistrates', County and Supreme Courts of Victoria. The Act describes procedures that are to be followed when the courts consider sexual offence cases involving a complainant with a cognitive impairment.<sup>125</sup> As in the *Crimes Act 1958*, the Act defines 'cognitive impairment' widely to encompass impairments due to mental illness, intellectual disability, dementia or brain injury.<sup>126</sup>

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) provides the framework for determining when a person is fit to be tried, and when the defence of mental impairment may be exercised. While the Act does not define a 'mental impairment', it provides that the defence is established if:

- ... the person was suffering from a mental impairment that had the effect that –
- (a) he or she did not know the nature and quality of the conduct; or
  - (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).<sup>127</sup>

The Act also describes proceedings that apply when a person has been found unfit to stand trial. A person can be found unfit to stand trial if he or she is unable to:

- understand the nature of the charge;

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<sup>122</sup> *Crimes Act 1958* (Vic), section 50.

<sup>123</sup> Peter Ryan MLA, *Parliamentary debates*, Legislative Assembly, 7 February 2008, p. 27.

<sup>124</sup> *Evidence Act 2008* (Vic), section 41.

<sup>125</sup> *Criminal Procedure Act 2009* (Vic), sections 99, 123, 163, 181.

<sup>126</sup> *Criminal Procedure Act 2009* (Vic), section 3.

<sup>127</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 20.

- enter a plea to the charge and to exercise the right to challenge jurors or the jury;
- understand the nature of the trial;
- understand the substantial effect of any evidence given in support of the prosecution; or
- give instructions to his or her lawyers.<sup>128</sup>

While most people with an intellectual disability or cognitive impairment will be fit to stand trial when they are given information in simple terms, or when they receive sufficient support to understand court processes, the courts have occasionally interpreted the standard for determining fitness broadly to include people who do not have a mental illness. For example, the court in *R v Sexton* said that an accused's ability to comprehend and participate in proceedings may be compromised through physical difficulties as well as intellectual and mental disabilities.<sup>129</sup>

Both the *Sentencing Act 1991* and the *Magistrates' Court Act 1989* define intellectual disability in accordance with the definition contained in the *Disability Act 2006*.<sup>130</sup>

The *Guardianship and Administration Act 1986* addresses the appointment, powers and responsibilities of substitute decision-makers. Substitute decision-makers can be appointed under the Act for people with a disability. The Act adopts a broad definition of 'disability' which is defined to include someone with an intellectual impairment, mental illness, brain damage, physical disability or senility.<sup>131</sup>

## 3.2 The Committee's approach

The Committee is mindful that a purely clinical definition of intellectual disability may not be useful when assessing the capacity of a person to understand and exercise his or her legal rights and responsibilities. Instead a clinical definition provides a useful starting point for identifying whether a person has an intellectual disability.

There may be some merit in adopting uniform terminology when determining how the justice and human service systems should respond to people with an intellectual disability or cognitive impairment. The Committee recognises that many of the challenges people with an intellectual disability or cognitive impairment experience when they come before the justice system are similar. However, the Committee also heard evidence to suggest that in many cases the life experiences of people with a cognitive impairment and those with an intellectual disability are sufficiently diverse to warrant different approaches to be taken when

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<sup>128</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 6.

<sup>129</sup> *R v Sexton* (2000) 77 SASR 405, 416. See also *R v Miller (No 2)* [2000] SASC 152.

<sup>130</sup> *Magistrates' Court Act 1989* (Vic), section 3(1); *Sentencing Act 1991* (Vic), section 80(1).

<sup>131</sup> *Guardianship and Administration Board Act 1986* (Vic), section 3(2).



responding to their needs. On balance, it is the Committee's view that the human services system draws an appropriate distinction between intellectual disability and other disabilities, which include cognitive impairments.

However, the Committee recognises that people with a cognitive impairment and those with an intellectual disability experience similar challenges and difficulties when interacting with the justice system. The Committee is of the view that appropriate measures to facilitate interaction with the justice system are equally applicable to both cohorts of people. However, many existing measures are only available to people with an intellectual disability. The Committee therefore makes a number of recommendations, in the remainder of its report, that aim to achieve greater parity in accessing services and support when people with a cognitive impairment seek access to and interact with the justice system.



## Chapter Four: Access to services and supports

People with intellectual disability encounter special challenges that are different from people with other types of disabilities in a number of important aspects. For example, they have difficulty learning and applying knowledge and in decision making. They may have difficulty identifying and choosing options at key life transition points. They often have difficulty adjusting to changed circumstances and unfamiliar environments and therefore need high support during times of change ...<sup>132</sup>

The *National Disability Strategy 2010-2020*, endorsed in 2011 by the Council of Australian Governments (COAG), recognises that it is important for people with a disability to participate in decisions that affect their lives.<sup>133</sup> For this to occur some people may need to be supported by disability and advocacy services. Advocacy and support services can enable people with a disability, including people with an intellectual disability or cognitive impairment, to exercise their legal rights and help to lessen barriers that prevent them from participating in society.

Support for people with an intellectual disability or cognitive impairment can involve a diverse range of groups and organisations, including Government departments, community service organisations, advocacy groups, and families and carers. Disability support can include financial and income support, supported accommodation, assistance with daily and independent living, and the provision of social and leisure activities.

### 4.1 Legislative and policy framework

In 2005 the Victorian Government released the policy document *A Fairer Victoria*, which described the Government's long term plan to address disadvantage and increase opportunities for all Victorians to participate in the community. Five key objectives were outlined in the policy:

- to maintain access to universal services;
- to reduce barriers to opportunity;
- to support disadvantaged groups;

<sup>132</sup> Australian Institute of Health and Welfare, *Disability in Australia: Intellectual disability*, AIHW, Canberra, 2008, p. 1 (citations omitted).

<sup>133</sup> Council of Australian Governments, *National Disability Strategy 2010-2020*, FaHCSIA, Canberra, 2011.

- to provide targeted responses to high risk areas; and
- to involve communities and make it easier for communities to work with the Government.<sup>134</sup>

The objectives and principles described in the policy subsequently informed development of the *Disability Act 2006* (Vic).

#### 4.1.1 *Disability Act 2006* (Vic)

Following the release of the *State Disability Plan 2002-12* in 2002, the *Intellectually Disabled Persons' Services Act 1986* (Vic) and the *Disability Services Act 1991* (Vic) were also reviewed. This culminated in the passage of the *Disability Act 2006*. The Act establishes the framework for the provision of services and support for all people with a disability.

One of the key aims articulated in disability policies and the *Disability Act 2006* is to adopt a person-centred model for the delivery of disability services. This approach encourages people with a disability, to the extent that they are able, to be involved in decisions about their lives and to ensure that the support they receive responds to their needs.

There are six components of the new disability framework:

- administration of the Act, including the establishment of new roles and responsibilities;<sup>135</sup>
- provision of disability services;<sup>136</sup>
- provision of residential services;<sup>137</sup>
- oversight of the services system;<sup>138</sup>
- use of restrictive interventions; and<sup>139</sup>
- provision of compulsory treatment.<sup>140</sup>

##### 4.1.1.1 Scope and principles

The stated purpose of the *Disability Act 2006* is to introduce a legislative framework that “reaffirms and strengthens [the] rights and responsibilities of people with a disability and which is based on the recognition that this

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<sup>134</sup> Department of Planning and Community Development, *A Fairer Victoria: Creating opportunity and addressing disadvantage*, DPCD, Melbourne, 2005, p. 5.

<sup>135</sup> *Disability Act 2006* (Vic), Part 3.

<sup>136</sup> *Disability Act 2006* (Vic), Part 4.

<sup>137</sup> *Disability Act 2006* (Vic), Part 5.

<sup>138</sup> *Disability Act 2006* (Vic), Part 6.

<sup>139</sup> *Disability Act 2006* (Vic), Part 7.

<sup>140</sup> *Disability Act 2006* (Vic), Part 8.

requires support across the government sector and within the community.”<sup>141</sup>

The Act applies to all people with a disability, defining three broad categories of persons with a disability:

- a person who has a sensory, physical or neurological impairment or an acquired brain injury (or any combination of those conditions) that:
  - is likely to be permanent;
  - substantially reduces his or her capacity in at least one area of self-care, self-management, mobility or communication;
  - means that a person requires significant ongoing support; and
  - is not related to ageing;<sup>142</sup>
- a person with an intellectual disability; or
- a person with a developmental delay.<sup>143</sup>

The Act addresses the provision of disability services to people with a disability in treatment facilities and in the community. The Act also establishes a system for oversight of the Act’s operation, for monitoring services provided under the Act, and for responding to complaints under the Act. The oversight system is comprised of the Victorian Disability Advisory Council, the Disability Services Commissioner, the Senior Practitioner and the Community Visitor Program.<sup>144</sup>

The Act articulates a number of principles regarding the place of people with a disability in the Victorian community. These include the principle that all people with a disability have the same rights and responsibilities as other members of the community, and that they should be empowered to exercise those rights and responsibilities. The Act describes these as rights to:

- a) respect for their human worth and dignity as individuals;
- b) live free from abuse, neglect or exploitation;
- c) realise their individual capacity for physical, social, emotional and intellectual development;
- d) exercise control over their own lives;

<sup>141</sup> *Disability Act 2006* (Vic), section 1.

<sup>142</sup> *Disability Act 2006* (Vic), section 3.

<sup>143</sup> Both ‘intellectual disability’ and ‘development delay’ are defined under the *Disability Act 2006* (Vic). See Chapter Three for discussion about the definition of ‘intellectual disability’.

<sup>144</sup> *Disability Services Act 2006* (Qld), Part 3.

- e) participate actively in the decisions that affect their lives and have information and be supported where necessary, to enable this to occur;
- f) access information and communicate in a manner appropriate to their communication and cultural needs;
- g) services which support their quality of life.<sup>145</sup>

The Act also articulates principles that apply specifically to people with an intellectual disability. These principles recognise that:

- a) persons with an intellectual disability have a capacity for physical, social, emotional and intellectual development;
- b) persons with an intellectual disability have the right to opportunities to develop and maintain skills and to participate in activities that enable them to achieve valued roles in the community;
- c) services for persons with an intellectual disability should be designed and provided in a manner which maximises opportunities for persons living in residential institutions to live in community based accommodation;
- d) persons with an intellectual disability living in a residential institution have the right to a high quality of care and development opportunities whilst they continue to reside in the institution;
- e) services for persons with an intellectual disability should be designed and provided in a manner that ensures developmental opportunities exist to enable the realisation of their individual capacities;
- f) services for persons with an intellectual disability should be designed and provided in a manner that ensures that a particular disability service provider cannot exercise control over all or most aspects of the life of a person with an intellectual disability.<sup>146</sup>

Under the Act, disability services are provided directly by the Department of Human Services (DHS) or by organisations who receive funding from the DHS. The Act sets out principles for the delivery of disability services, including that:

- services should assist people with a disability to be included in the community;
- services should maximise the choice and independence of people with a disability;
- services should recognise that people with a disability may need different types of support; and
- services should be of a high quality and protect the rights of people using the services.<sup>147</sup>

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<sup>145</sup> *Disability Services Act 2006* (Qld), section 5(2).

<sup>146</sup> *Disability Services Act 2006* (Qld), section 6(1).

<sup>147</sup> *Disability Services Act 2006* (Qld), section 5(3).

The Act requires that any advice, notice or information provided to people with a disability under the Act be provided in writing and explained by the person who provides it, using language and/or communication methods that the person is most likely to understand.<sup>148</sup>

## 4.1.2 Human rights framework

Under the *Disability Act 2006* people with a disability have the right to enjoy the same civil, cultural, economic and political rights as people without a disability. There are two main international instruments that provide the overarching framework for the protection of human rights to all people – the *Universal Declaration of Human Rights*<sup>149</sup> and the *International Covenant on Civil and Political Rights*<sup>150</sup>. There are also a number of treaties that recognise the human rights of particular groups in society including women, children, and people with a disability.

Nationally, the *Disability Discrimination Act 1992* (Cth) applies, and a number of states have adopted comparable discrimination legislation.<sup>151</sup> In Victoria the *Charter of Human Rights and Responsibilities Act 2006* (Vic) affirms the rights and responsibilities of all Victorians. This legislation describes the rights and responsibilities of both people with an intellectual disability or cognitive impairment and the organisations that provide support to those people. However, the ability for people with an intellectual disability or cognitive impairment to exercise their legal rights and responsibilities is constrained by a number of factors, which are discussed in greater detail throughout this report.

### 4.1.2.1 International treaties

The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* recognise a number of fundamental rights, including that:

- no one shall be subjected to cruel, inhumane or degrading treatment or punishment;<sup>152</sup>
- all persons are to be considered equal before the law and are entitled without any discrimination to equal protection of the law.<sup>153</sup>

<sup>148</sup> *Disability Services Act 2006* (Qld), section 7(1).

<sup>149</sup> *Universal Declaration of Human Rights*, GA Res 217A (III) (entered into force 10 December 1948).

<sup>150</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>151</sup> See for example *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1998* (Tas).

<sup>152</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), article 7; *Universal Declaration of Human Rights*, GA Res 217A (III) (entered into force 10 December 1948), article 5.

- no one shall be subjected to arbitrary arrest, detention or exile,<sup>154</sup> and
- all persons should be considered equal before the courts and tribunals.<sup>155</sup>

The *United Nations Convention on the Rights of a Child*<sup>156</sup> (UNCROC) and the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>157</sup> (CEDAW) set out rights specific to children and women. CEDAW is directed toward ensuring the equal treatment of women with men in all aspects of life. UNCROC defines rights that are specific to all children under 18 years of age. For example, UNCROC recognises that a “mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community”.<sup>158</sup> UNCROC states that no child shall be subjected to cruel, inhumane or degrading treatment or punishment, and that every child who has been deprived of liberty shall be treated with humanity and respect.<sup>159</sup>

A number of international treaties recognise the rights of people with disabilities including those with an intellectual disability. These include the *United Nations Declaration on the Rights of Disabled Persons*<sup>160</sup> and the *United Nations Declaration on the Rights of Mentally Retarded Persons*<sup>161</sup>. These declarations recognise that people with a disability have the same civil and political rights as other human beings,<sup>162</sup> that they should have the right to medical, psychological and functional treatment,<sup>163</sup> that they should

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<sup>153</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), 26; *Universal Declaration of Human Rights*, GA Res 217A (III) (entered into force 10 December 1948), article 7.

<sup>154</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), article 6.1; *Universal Declaration of Human Rights*, GA Res 217A (III) (entered into force 10 December 1948), article 9.

<sup>155</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), article 14.1.

<sup>156</sup> *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>157</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>158</sup> *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), article 23(1).

<sup>159</sup> *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), articles 37(a), 37(c).

<sup>160</sup> *Declaration on the Rights of Disabled Persons*, GA Res 3447 (xxx) (entered into force 9 December 1975).

<sup>161</sup> *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI) (entered into force 20 December 1971).

<sup>162</sup> *Declaration on the Rights of Disabled Persons*, GA Res 3447 (xxx) (entered into force 9 December 1975), article 4; *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI) (entered into force 20 December 1971), article 1.

<sup>163</sup> *Declaration on the Rights of Disabled Persons*, GA Res 3447 (xxx) (entered into force 9 December 1975), article 6; *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI) (entered into force 20 December 1971), article 2.



be protected from exploitation,<sup>164</sup> and that when involved in judicial proceedings their physical and mental conditions should be fully taken into account.<sup>165</sup>

In March 2007, Australia signed the *Convention on the Rights of Persons with Disabilities*. This Convention provides the most comprehensive statement for the protection of the rights and dignity of all people with a disability, including those with an intellectual disability. The Convention aims to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.<sup>166</sup>

The Convention reaffirms that people with a disability have the right to recognition before the law.<sup>167</sup> The Convention goes further by requiring parties to the Convention to ensure effective access to justice for people with a disability.<sup>168</sup> There are a number of other provisions in the Convention that have a bearing on how the justice system interacts with people with a disability. These include access to facilities and services,<sup>169</sup> the recognition of alternative communication systems,<sup>170</sup> the provision of accessible information,<sup>171</sup> and the participation of persons with a disability in policy settings and program development.<sup>172</sup>

Australia is obliged under the Convention to introduce measures that promote the human rights of people with a disability. The Convention also requires the Government to actively involve people with a disability in the development and implementation of new policies and legislation.<sup>173</sup>

There are also a number of international treaties that set out human rights in the administration of justice, including protections for people subject to detention or imprisonment. These include the *Standard Minimum Rules for*

<sup>164</sup> *Declaration on the Rights of Disabled Persons*, GA Res 3447 (xxx) (entered into force 9 December 1975), article 10; *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI) (entered into force 20 December 1971), article 6.

<sup>165</sup> *Declaration on the Rights of Disabled Persons*, GA Res 3447 (xxx) (entered into force 9 December 1975), article 11.

<sup>166</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 1.

<sup>167</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 12.

<sup>168</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 13.

<sup>169</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 9(1).

<sup>170</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 21.

<sup>171</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 9.

<sup>172</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 29.

<sup>173</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 4(1)(a).

*the Protection of Prisoners*<sup>174</sup> and the *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*<sup>175</sup>.

Although international law does not become part of Australian law unless it has been specifically incorporated into domestic legislation, these treaties can help inform the development of policy and assist with the interpretation of domestic legislation. Furthermore, international treaties can provide useful guidance for minimum measures that should be made available to all people, particularly those with an intellectual disability or cognitive impairment.<sup>176</sup>

#### **4.1.2.2 Charter of Human Rights and Responsibilities Act 2006 (Vic)**

The Victorian *Charter of Human Rights and Responsibilities Act 2006* defines the basic human rights of all Victorians. The rights and responsibilities contained in the Charter are largely derived from the *International Covenant on Civil and Political Rights*.

The Charter has two primary goals. Firstly, it aims to ensure an appropriate balance is maintained in the protection and promotion of human rights when legislation is being developed.<sup>177</sup> The Charter's rights are not absolute. Instead, the Charter requires that rights should be balanced against each other and any public interest arguments for limiting those rights. Limitations are justifiable if such limitations are reasonable in a free and democratic society.<sup>178</sup>

Secondly, the Charter places all public authorities, including the police, the courts, local councils and public servants, under a responsibility to act in a manner that preserves the rights of people under the Charter.<sup>179</sup> The Charter recognises that the Government may outsource the delivery of government services to private entities and specifies that the obligation to comply with the Charter extends beyond core Government agencies. For example, organisations that manage Victoria's privately operated prisons – the Fulham Correctional Centre and the Port Philip Prison – are obliged to comply with the Charter.<sup>180</sup>

The Charter sets out a number of rights that are particularly relevant to the Committee's Inquiry. These include that every person has the right to:

- recognition as a person before the law;<sup>181</sup>

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<sup>174</sup> 'Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955', viewed 8 February 2013, <<http://www.unhcr.org/refworld/docid/3ae6b36e8.html>>.

<sup>175</sup> 'Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment', viewed 8 February 2013, <<http://www.un.org/documents/ga/res/43/a43r173.htm>>.

<sup>176</sup> New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: An overview*, NSWLRC, Sydney, Consultation paper 5, 2010, p. 19.

<sup>177</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, sections 28-30.

<sup>178</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, section 7(2).

<sup>179</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, section 38(1).

<sup>180</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, section 4(1)(c).

<sup>181</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, section 8(1).

- be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her;<sup>182</sup>
- be treated with humanity and respect when deprived of liberty;<sup>183</sup>
- a fair and public hearing before an independent and impartial court;<sup>184</sup> and
- communicate with a lawyer or an advisor, be provided with legal aid if it is in the interests of justice to do so and to have the assistance of specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance.<sup>185</sup>

A survey commissioned by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in 2010 found that community perspectives on the operation of the Charter have been relatively positive. Table 6 provides a summary of some of these findings.

**Table 6: Organisation and individual perspectives on the Charter of Human Rights and Responsibilities.**<sup>186</sup>

Response to survey questions	Agree (%)		Disagree (%)	
	Org	Ind	Org	Ind
Victoria is making steady progress towards building a culture where human rights are recognised throughout our community	68	48	20	39
Victoria is making steady progress towards building a culture where human rights are protected throughout our community	50	24	26	54
The Charter has had a positive impact on the provision of service delivery by public authorities	47	33	27	26
The Charter has had or is having a positive effect on the development of Victorian laws	57	41	17	7
The Charter has had a positive impact on Victorian courts and legal systems	47	30	12	14
The Charter has contributed to fairer outcomes for the Victorian community	59	37	11	22

The Charter potentially provides an important mechanism for people with an intellectual disability or cognitive impairment to challenge decisions made about service provision and treatment. Challenges can be made

<sup>182</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, section 21(4).

<sup>183</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, section 22(1).

<sup>184</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, section 24(1).

<sup>185</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, section 25.

<sup>186</sup> Victorian Equal Opportunity and Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities*, VEOHRC, Melbourne, 2011, p. 14.

directly to the public authority concerned, the Victorian Ombudsman, or in proceedings before a Victorian court or tribunal.

A report published by the VEOHRC in 2011 indicated that while the Charter provides some protections for people with a disability, significant improvements are needed to ensure that people with a disability have full and equal enjoyment of all rights and freedoms enshrined in the Charter.<sup>187</sup> The VEOHRC found that the ability for advocates and individuals to exercise their rights is constrained by: lack of awareness about the rights contained in the Charter; limited resources for disability advocacy groups to deliver programs that educate people about their rights; and community perceptions about the ability of people with an intellectual disability or cognitive impairment to exercise their rights.

### 4.1.3 Policy framework

There are a number of policy frameworks at both state and national levels that help define the nature of services and support that should be made available to people with a disability. These include the *State Disability Plan 2002-2012*, the *National Disability Strategy 2010-2020* and the *National Disability Agreement 2007*.

#### 4.1.3.1 *State Disability Plan 2002-2012*

The State Disability Plan describes Victoria's vision for the provision of services to people with a disability. The Plan was developed in consultation with people with a disability, their families and carers, service providers and community groups. The Plan outlines the Government's commitment to providing a range of services to satisfy the diversity of needs of people with a disability.

The five priority strategies outlined in the Plan are to:

- 1) ensure that disability supports focus on assisting people with a disability to live in the community and participate in activities of their choice in ways that are meaningful to them;
- 2) develop strong foundations for disability supports to ensure that supports can respond to people's needs;
- 3) promote and protect people's rights, ensuring that support providers and the community as a whole respect and promote the rights of people with a disability;
- 4) strengthen local communities to create more accessible and inclusive communities for people with a disability; and

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<sup>187</sup> Victorian Equal Opportunity and Human Rights Commission, *Talking rights: Consulting with Victorians about the rights of people with disabilities and the Charter*, VEOHRC, Melbourne, 2011, p. 5.

5) make public services more accessible.<sup>188</sup>

The *Disability Act 2006* requires a new State Disability Plan to be prepared by 1 January 2013. Under the Act the purpose of the new Plan is to further the objectives and the principles set out in the Act. In doing so the Plan must:

- identify the needs of people with a disability;
- establish goals and priorities for the support of people with a disability;
- identify objectives and policy priorities for the development and delivery of services to people with a disability; and
- identify strategies for achieving those outcomes and priorities.<sup>189</sup>

The Act also requires that the new Plan have regard to the needs of people with different disabilities, which may warrant the development of multiple strategies to respond to those needs.<sup>190</sup>

In December 2012 the new Victorian *State Disability Plan 2013-2016* was released. This plan affirms the importance of ensuring that all people with a disability are able to participate in the community. One of the Plan's goals is to better protect and promote the rights of people with a disability.<sup>191</sup> Actions for implementing this goal over the coming two years include:

- enabling people with a disability who are victims of crime to exercise their rights in the criminal justice system;
- strengthening advocacy and self-advocacy approaches; and
- increasing the awareness of workers in victims services and criminal justice agencies of the information and support needs of people with a disability.<sup>192</sup>

The Committee is encouraged by the Plan's focus on encouraging and enabling people with a disability to exercise their rights, and looks forward to the implementation of the actions identified in the plan.

#### **4.1.3.2 National Disability Strategy 2010-2020 and National Disability Agreement 2007**

The National Disability Strategy 2010-2020 and the National Disability Agreement 2007 influence the provision of support services for people with

<sup>188</sup> Department of Human Services, *Disability Act 2006 policy and information manual*, DHS, Melbourne, 2009, pp. 11-12.

<sup>189</sup> *Disability Act 2006* (Vic), section 37(4).

<sup>190</sup> *Disability Act 2006* (Vic), section 37(1).

<sup>191</sup> Department of Human Services, *Victorian state disability plan 2013-2016*, DHS, Melbourne, 2012, p. 17.

<sup>192</sup> Department of Human Services, *Victorian state disability plan 2013-2016: Implementation plan 2013 and 2014*, DHS, Melbourne, 2012, p. 15.

a disability by defining the framework for the funding, monitoring and support of people with a disability.

The National Disability Agreement (formerly the *Commonwealth State and Territory Disability Agreement*) was developed to: assist people with a disability to live as independently as possible; help them to establish stable and sustainable living arrangements; increase their choices; and improve their health and wellbeing.<sup>193</sup> Several priority areas are identified in the Agreement, including the development of an early intervention and planning framework, increasing workforce capacity, improving access to aids and equipment, and improving access to disability care.<sup>194</sup>

The National Disability Strategy was an initiative of COAG and was developed in collaboration with Commonwealth, state and territory governments. The Strategy was developed in response to a review conducted by the Senate Community Affairs Committee into the *Funding and Operation of the Commonwealth State and Territory Disability Agreement*. Among other things, the Senate Committee considered that a high level strategic policy was required to address the complex needs of people with a disability, their families and carers.<sup>195</sup>

The Strategy outlines a ten-year national policy framework to guide government reforms for the delivery of mainstream and specialist services to people with a disability, their families and carers, across six key areas. The six priority areas cover:

- inclusive and accessible communities;
- rights protection, justice and legislation;
- economic security;
- personal and community support;
- learning and skills; and
- health and wellbeing.<sup>196</sup>

In relation to rights protection, justice and legislation the Strategy sets out five policy directions, being to:

- increase awareness and acceptance of the rights of people with disability;

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<sup>193</sup> Council of Australian Governments, *National Disability Agreement 2007*, FaHCSIA, Canberra, 2009, p. 4.

<sup>194</sup> Council of Australian Governments, *National Disability Agreement 2007*, FaHCSIA, Canberra, 2009, pp. 8-9.

<sup>195</sup> Senate Standing Committee on Community Affairs, *Funding and operation of the Commonwealth State/Territory Disability Agreement*, Parliament of Australia, Canberra, 2009, recommendation 4.

<sup>196</sup> Council of Australian Governments, *National Disability Strategy 2010-2020*, FaHCSIA, Canberra, 2011, p. 10.



- remove societal barriers preventing people with disability from participating as equal citizens;
- recognise the right of people with disability to have access to justice;
- recognise the right of people with disability to be safe from violence, exploitation and neglect; and
- establish more effective responses from the criminal justice system to people with disability who have complex needs or heightened vulnerabilities.<sup>197</sup>

The Strategy suggests that although many states do provide some rights-focused legislative protections to people with a disability, more can be done to promote awareness and acceptance of those rights.<sup>198</sup>

The Strategy states that a number of significant measures should be taken to ensure that all people with a disability have effective access to justice, and that effective access to justice for people with a disability may require the development of strategies to facilitate their participation in legal proceedings. Such strategies could, for example, include the use of aids and equipment in court proceedings.<sup>199</sup> The use of services and support in court to assist people with an intellectual disability or cognitive impairment to understand and participate in court proceedings is discussed in Chapters Seven and Eight.

The Strategy also recognises that under the *Convention on the Rights of Persons with Disabilities*, Australia is obliged to “promote appropriate training for those working in the field of administration of justice, including police and prison staff.”<sup>200</sup> During the course of this Inquiry, the Committee received evidence affirming the importance of adequate disability awareness training for personnel working in the justice sector.<sup>201</sup>

<sup>197</sup> Council of Australian Governments, *National Disability Strategy 2010-2020*, FaHCSIA, Canberra, 2011, p. 10.

<sup>198</sup> Council of Australian Governments, *National Disability Strategy 2010-2020*, FaHCSIA, Canberra, 2011, p. 37.

<sup>199</sup> Council of Australian Governments, *National Disability Strategy 2010-2020*, FaHCSIA, Canberra, 2011, p. 38.

<sup>200</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 13(2).

<sup>201</sup> See for example Assent 4 All, *Submission no. 53*, 10 September 2011, p. 25; Association for Children with a Disability, *Submission no. 42*, 7 October 2011, p. 4; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 12; John Burt, Principal, Ballarat Specialist School, *Transcript of evidence*, Ballarat, 17 November 2011, p. 16; Trevor Carroll, Executive Officer, Disability Justice Advocacy, *Transcript of evidence*, Melbourne, 21 February 2012, p. 52; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 10; Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 3; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 39; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 3; Jan Kennedy, Program Manager, Mildura Court Network, *Transcript of evidence*, Mildura, 16 November 2011, pp. 16-17; Dianne Leverett, Principal, Nelson Park School, *Transcript of evidence*, Geelong, 20 March 2012, p. 32; Office of Public Prosecutions,

The Strategy acknowledges that people with a disability often present with multiple disabilities, and suggests that specialist responses may be needed when people with multiple disabilities come into contact with the justice system.<sup>202</sup> The Strategy describes the use of court diversion programs in state and territory Magistrates' courts as an example of a specialised response. The use of diversion programs and specialist courts, particularly those targeted toward people with an intellectual disability or cognitive impairment, is discussed in Chapter Seven.

A number of actions for ensuring effective access to justice are identified in the Strategy. These include:

- promoting awareness and acceptance of the rights of people with a disability;
- monitoring and ensuring compliance with international human rights obligations;
- developing strategies to reduce violence, abuse and neglect of people with a disability;
- reviewing restrictive legislation and practices from a human rights perspective;
- improving the reach and effectiveness of all complaints mechanisms;
- providing greater support for people with a disability and with heightened vulnerabilities to participate in the legal process on an equal basis with others;
- ensuring that people with a disability leaving custodial facilities have improved access to support in order to reduce recidivism. This may include income and accommodation support, education, pre-employment training and employment services;
- supporting independent advocacy to protect the rights of people with a disability; and

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<sup>202</sup> *Submission no. 20*, 9 September 2011, p. 11; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 6; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 27-28; Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011, p. 2; Julie Phillips, Manager, Disability Discrimination Legal Service, *Transcript of evidence*, Melbourne, 24 October 2011, p. 34; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 1; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 2; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 5; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 5; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9; Youthlaw, *Submission no. 49*, 20 October 2011, p. 4. Council of Australian Governments, *National Disability Strategy 2010-2020*, FaHCSIA, Canberra, 2011, p. 39.



- ensuring supported decision-making safeguards are in place for those who need them, including in the context of guardianship and substitute decision-making.<sup>203</sup>

Many of these priority areas were identified in evidence received by the Committee.

#### 4.1.3.3 Disability Action Plans

The *Disability Act 2006* requires all public sector bodies to prepare a Disability Action Plan (DAP) for the purpose of:

- a) reducing barriers to persons with a disability accessing goods, services and facilities;
- b) reducing barriers to persons with a disability obtaining and maintaining employment;
- c) promoting inclusion and participation in the community of persons with a disability; and
- d) achieving tangible changes in attitudes and practices which discriminate against persons with a disability.<sup>204</sup>

Both the Department of Justice and the DHS have developed DAPs.<sup>205</sup> Victoria Police is in the process of developing its first DAP.<sup>206</sup> Other bodies that have developed DAPs include Victoria Legal Aid (VLA) and the Federation of Community Legal Centres.<sup>207</sup>

One of the key objectives of the Department of Justice DAP is to ensure that all Victorians have access to justice facilities, services, programs and information.<sup>208</sup> To achieve this, the DAP states that the Department of Justice needs to:

- ensure that its services and programs are accessible to everyone;<sup>209</sup> and
- ensure that standard business practices include the use of Auslan interpreters to communicate with people who are deaf

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<sup>203</sup> Council of Australian Governments, *National Disability Strategy 2010-2020*, FaHCSIA, Canberra, 2011, p. 41.

<sup>204</sup> *Disability Act 2006* (Vic), section 38(1).

<sup>205</sup> Department of Human Services, *You me and everyone: Our disability action plan 2009-2012*, DHS, Melbourne, 2009; Department of Justice, *Disability Action Plan 2009-2011*, Department of Justice, Melbourne, 2009.

<sup>206</sup> Victoria Police, *Submission no. 34*, 23 September 2011, p. 4.

<sup>207</sup> Federation of Community Legal Centres (Victoria) Inc., *Disability action plan for Federation of Community Legal Centres (Victoria) Inc.*, Federation of Community Legal Centres (Victoria) Inc., Melbourne, 2009; Victoria Legal Aid, *Disability Action Plan 2009-11*, VLA, Melbourne, 2009.

<sup>208</sup> Department of Justice, *Disability Action Plan 2009-2011*, Department of Justice, Melbourne, 2009, p. 13.

<sup>209</sup> Department of Justice, *Disability Action Plan 2009-2011*, Department of Justice, Melbourne, 2009, p. 20.

and that written information be available in a range of alternative formats including Braille, Easy English and audio formats.<sup>210</sup>

Although it is also covered by the Department of Justice DAP, Corrections Victoria has developed its own plan to address disadvantages faced by prisoners with a disability. As part of its DAP, Corrections Victoria outlines a number of initiatives that it aims to achieve in the next three years. These include:

- developing transitional accommodation and support options to assist the transition and integration of prisoners with a cognitive impairment in the community;<sup>211</sup>
- promoting the use of Easy English in written materials provided to prisoners and offenders including those with a disability;<sup>212</sup> and
- continuing disability specific training given to frontline prison and Community Corrections staff, and contributing to the development of disability training to non-custodial prison staff.<sup>213</sup>

## 4.2 Developments in the provision of disability services

Support for people with an intellectual disability has changed dramatically over time. Formerly treatment and support was provided in custodial settings. People with an intellectual disability were often placed with people with mental illnesses in institutions where they received care from specialised staff.

In Victoria, initial reforms to services and support for people with an intellectual disability were introduced following the passage of the *Mental Health Act 1959* (Vic). The Act recognised the need for legislation to distinguish between appropriate treatment for people with a mental illness and those with an intellectual disability.<sup>214</sup> From the 1970s increasing concerns were expressed about the lack of independence, privacy and choice experienced by people with an intellectual disability living in institutional settings. The 1977 *Report of the Victorian Committee on Mental Retardation* recommended a move away from the institutional care of people with an intellectual disability and stated that services for people with an intellectual disability needed to be based on the principle of 'normalisation'.

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<sup>210</sup> Department of Justice, *Disability Action Plan 2009-2011*, Department of Justice, Melbourne, 2009, p. 21.

<sup>211</sup> Corrections Victoria, *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*, Department of Justice, Melbourne, 2009, p. 5.

<sup>212</sup> Corrections Victoria, *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*, Department of Justice, Melbourne, 2009, p. 17.

<sup>213</sup> Corrections Victoria, *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*, Department of Justice, Melbourne, 2009, p. 18.

<sup>214</sup> *Mental Health Act 1986* (Vic), section 8(2)(j): For purposes of defining the treatment and care of persons with a mental illness, the Act specifies that a person is not to be considered as having a mental illness solely because they have an intellectual disability.

Over time a number of people with an intellectual disability moved from centralised institutions to smaller-scale community settings. In 1988, 2700 people with an intellectual disability were living in residential institutions and 685 were living in shared supported accommodation in the community. By 1998 there were 941 people with an intellectual disability living in residential institutions and 4365 living in shared supported accommodation.<sup>215</sup>

A series of important legislative changes occurred concurrently with the movement of people with an intellectual disability into independent or supported community-based accommodation. For example, the 1982 *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* foreshadowed the *Guardianship and Administration Act 1986* (Vic), which established the Guardianship and Administration Board<sup>216</sup> and the Office of the Public Advocate (OPA). The 1984 *Report of the Committee on a Legislative Framework for Services to Intellectually Disabled Persons* recommended replacing the *Mental Health Act 1959* (Vic) as it applied to people with an intellectual disability and culminated in the *Intellectually Disabled Persons' Services Act 1986*.

The principle of normalisation continues to inform the development of services for people with an intellectual disability. Services provided to people with an intellectual disability are now more person-centred, with funding made directly available to individuals rather than being provided by the Government through government-funded services. The individual, or his or her family or carer, is able to use funds in a flexible way to meet their particular needs. In 2011-12, 15 194 people were receiving individual support packages from the DHS.<sup>217</sup>

In 2011 the Productivity Commission conducted a comprehensive review of the funding for disability services. The Commission found that the current system for disability support services is underfunded, fragmented and inefficient, and recommended establishing a National Disability Insurance Scheme (NDIS).<sup>218</sup>

The Commission's NDIS is intended to provide insurance cover to all Australians who have a significant and permanent disability to fund their long-term care and support. The Commission recommended a staged rollout of the NDIS to allow legislation and resources to be put in place, and to facilitate a smooth transition from current funding arrangements. The Commonwealth committed \$1 billion to support the first stage of the scheme, and around 10 000 people with a disability, their families and carers are anticipated to benefit from the first stage of the scheme's

<sup>215</sup> Auditor General Victoria, *Services for people with an intellectual disability*, VAGO, Melbourne, 2000, p. 21.

<sup>216</sup> Note the functions of the Guardianship and Administration Board are now performed by the Victorian Civil and Administrative Tribunal.

<sup>217</sup> Department of Human Services, *Annual report 2011-12*, DHS, Melbourne, 2012, p. 47.

<sup>218</sup> Productivity Commission, *Disability care and support*, Productivity Commission, Canberra, 2011.

rollout.<sup>219</sup> A number of witnesses and submissions expressed support for the proposed NDIS.<sup>220</sup>

## 4.3 Government services

Federal and state governments have a role in the provision of disability services in Victoria. The Commonwealth Government is largely responsible for funding and developing policy directions for disability services. The Victorian Government is primarily responsible for providing, regulating and monitoring services.

In Victoria the DHS is responsible for providing and funding disability services, through the Disability Services division. The division provides funding for disability services through eight metropolitan and regional offices and oversees the provision of funding to a number of non-government community service organisations. However, services provided by the DHS only account for a part of the government services available to people with a disability. For example, funding is also made available through the Department of Education and Early Childhood Development for students with a disability.

Under the *Disability Act 2006*, a Register of Disability Service Providers identifies community organisations that receive funding from DHS to provide disability services. Currently 276 organisations are registered as disability service providers in Victoria.<sup>221</sup> The Committee received submissions and heard evidence from 15 of these organisations.<sup>222</sup>

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<sup>219</sup> Julia Gillard, MP and Jenny Macklin, MP, 'Funding the first stage of the National Disability Insurance Scheme' (Media Release, 8 May 2012).

<sup>220</sup> See for example Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 5; Rhonda Lawson-Street, State Manager, National Disability Services Victoria, *Transcript of evidence*, Melbourne, 7 November 2011, p. 17; Nick Rushworth, Executive Officer, Brain Injury Australia, *Transcript of evidence*, Melbourne, 21 February 2012, p. 43; Kerry Stringer, Former Chair, Victorian Coalition of ABI Service Providers Inc., *Transcript of evidence*, Melbourne, 21 February 2012, p. 12.

<sup>221</sup> Department of Human Services, 'Register of Disability Service Providers', viewed 15 February 2013, <<http://www.dhs.vic.gov.au/for-service-providers/disability/service-quality-and-improvement/disability-act-2006-for-service-provider/quality-services/related-resources-holder6/register-of-disability-service-providers-list>>.

<sup>222</sup> See for example Angela Alexander, *Submission no. 8*, 6 September 2011; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011; Helenmary Dingwall, Team Leader, Victims Assistance Counselling Program, St Luke's Anglicare, *Transcript of evidence*, Bendigo, 28 May 2012; George Gray Centre Inc, *Submission no. 3*, 18 August 2011; Inclusion Melbourne, *Submission no. 9*, 6 September 2011; Chris Jacksen, Coordinator, Victims Assistance and Counselling Program, St Luke's Anglicare, *Transcript of evidence*, Bendigo, 28 May 2012; Jesuit Social Services, *Submission no. 38*, 30 September 2011; Life Without Barriers, *Submission no. 32*, 19 September 2011; Sheree McCallum, Case Manager, Victims Assistance Counselling Program, St Luke's Anglicare, *Transcript of evidence*, Melbourne, 28 May 2012; Ian McLean, Chief Executive Officer, Golden City Support Services, *Transcript of evidence*, Bendigo, 28 May 2012; Merri Community Health Services, *Submission no. 4*, 5 September 2011; Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011; Radius Disability Services, *Submission no. 28*, 12 September 2011; Marilyn Sobkowiak, Service Co-coordinator, Sunraysia Residential Services, *Transcript of evidence*, Mildura, 16 November 2011; Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*,

The 2012-13 State Budget allocated \$1.477 billion for the provision of disability services – an increase of around \$357 000 from the 2011-12 Budget. Funding is allocated to the following areas:

- \$440.5 million to self-directed support, which includes funding for programs and resources to enable a person with a disability to exercise choice and control through the use of packages for individualised funding;
- \$292.4 million to support client services and capacity, to provide specialised support to people with a disability, and to provide resources and programs that build capacity to respond to the needs of people with a disability; and
- \$744.3 million for accommodation support for people with a disability in community-based settings and centre-based residential settings.<sup>223</sup>

### 4.3.1 Access to and eligibility for disability services and support

A person with a disability, or a person acting on their behalf, can make a request to access disability services from a disability service provider.<sup>224</sup> A person is eligible to access disability services if:

1. they meet the definition of 'disability' contained in the *Disability Act 2006*;
2. they are defined as requiring priority access; and
3. the disability service system is the most appropriate provider of support.<sup>225</sup>

Figure 4 illustrates the process for accessing disability services.

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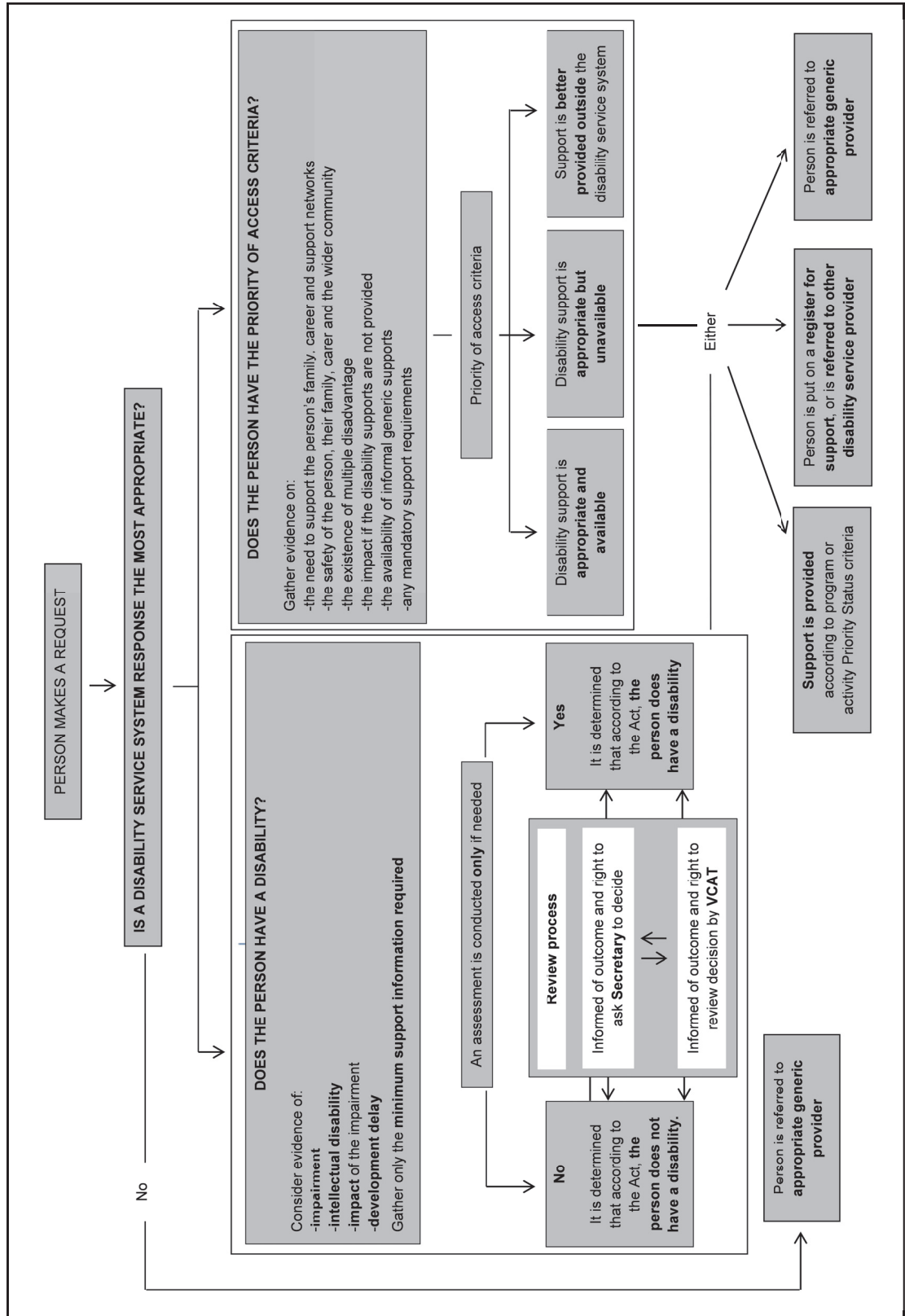
Mildura, 16 November 2011; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011.

<sup>223</sup> Department of Treasury and Finance, *Victorian Budget 2012-13 Service Delivery: Budget Paper No 3*, Department of Treasury and Finance, Melbourne, 2012, pp. 149-154.

<sup>224</sup> *Disability Act 2006* (Vic), section 49.

<sup>225</sup> *Disability Act 2006* (Vic), sections 3, 6, 8, 49, 51; Department of Human Services, *Disability Services access policy*, DHS, Melbourne, 2009, pp. 6-9, 18, 20-22.

**Figure 4: Process for applying for and determining access to disability services.**<sup>226</sup>



<sup>226</sup> Department of Human Services, *Disability Services access policy*, DHS, Melbourne, 2009, p. 17.



In order to meet the first criterion, the person seeking disability services must provide evidence in support of the application. This may include, for example: evidence of cognitive testing by a neuropsychologist or psychologist; information about the person's developmental milestones or education; specialist medical records and/or developmental assessments.

The DHS's *Disability Services Access Policy* offers some guidance to assist with determining a person's eligibility to receive services. Figure 5 lists questions from the policy document that can be asked to help determine whether a person has an intellectual disability.

**Figure 5: Questions to assist a disability service provider determine whether a person has an intellectual disability.<sup>227</sup>**

1. *Is the person over the age of five years?*
2. *What is the person's developmental history?*
  - *Description of their behaviour in their first 12 months (for example, settled, unsettled, difficulty feeding)?*
  - *At what age did the person talk, walk, become toilet trained?*
  - *Did the person attend kindergarten or other pre-school group?*
  - *Which primary and secondary school did the person attend and what educational level was achieved?*
  - *Has the person gained employment? What do they do?*
  - *Does the person have friends and other meaningful relationships?*
3. *What is the person's cognitive capacity? For example, can the person:*
  - *tell the time, understand the passage of time and/or understand schedules and timetables?*
  - *tell the value of money? Would they know how much money to give or how much change they should receive?*
  - *read? At what level? What type of books?*
  - *write? Do they copy written words or write independently? What words can they write?*
  - *follow simple or more complex instructions?*
  - *understand safety issues such as road safety and other hazards?*
  - *respond to visual signs such as a stop sign, pedestrian lights, male or female toilet sign?*
  - *remember names, days of the week, anniversaries? What is their long term and short-term ability to retain information?*
4. *What is the person's capacity in areas of daily living? For example, can the person:*
  - *cook a meal? Follow a recipe?*
  - *dress themselves appropriately for the weather? If it were hot would they take off their jumper?*
  - *shower or bath, attend to personal hygiene matters independently?*
  - *perform domestic duties such as cleaning, laundry and grocery shopping?*
  - *use public transport independently?*

<sup>227</sup> Department of Human Services, *Disability Services access policy*, DHS, Melbourne, 2009, pp. 29-30.

In order to assess whether a person requires priority access the disability service provider must consider:

- the need to strengthen or support the role of the family, carer or the person’s support network;
- whether support is required to ensure the safety and wellbeing of the person with a disability, their family or carer or the wider community;
- whether the person has multiple disadvantages in their personal, support or community context;
- the likelihood of immediate support reducing the need for more intensive assistance in the future;
- whether the individual’s wellbeing, living situation and quality of life would be adversely affected should the disability service be unavailable;
- the presence and availability of informal and generic support to complement disability services; and
- whether the provision of support is a mandatory requirement.<sup>228</sup>

A person who receives support from disability service providers can apply to be placed on the Disability Support Register. In order to be placed on the register a person must have support needs associated with their disability that are not currently being met, and can only be met through support from a disability service provider. Table 7 shows the number of people on the register as at 30 June 2012.<sup>229</sup>

**Table 7: Disability Support Register Requests as at 30 June 2012.**<sup>230</sup>

Disability Support Register Requests	Number of Requests
Disability Services Supported Accommodation	1265
Support to live in the community	2083
Support completing daytime activities	252
<b>Total</b>	<b>3600</b>

<sup>228</sup> Department of Human Services, *Disability Services access policy*, DHS, Melbourne, 2009, p. 21.

<sup>229</sup> As discussed in Chapter Two, statistics on the prevalence of intellectual disability in the community when compared to prevalence in the justice system often use figures of disability from the Disability Support Register. The Register is a voluntary registration system and therefore does not account for those who do not wish to be placed on the register and only accounts for those who have a diagnosed disability.

<sup>230</sup> Department of Human Services, 'Disability Support Register', viewed 1 February 2013, <<http://www.dhs.vic.gov.au/for-individuals/disability/start-here/disability-support-register>>.



### 4.3.2 Services provided

A range of disability services, including specialist disability services, are funded by the DHS. Support can be provided in the form of self-directed support, community support, accommodation support, and the provision of aids and equipment. The *Disability Act 2006* sets out a number of guiding principles for how to plan services for people with a disability, including that the services:

- must be individualised and directed by the person with a disability;
- consider and respect the role of the family, carers and other people who are significant in the life of the person with a disability;
- must be underpinned by the right of the person with a disability to exercise control over his or her life;
- advance the inclusion and participation of the person with a disability in the community;
- maximise the choice and independence of the person with a disability; and
- facilitate tailored and flexible responses to the individual goals and needs of the person with a disability.<sup>231</sup>

If a person with a disability requires ongoing support from a disability service provider then the provider must, in consultation with that person (or their representative), ensure that a support plan is developed.<sup>232</sup> A person with an intellectual disability must be given assistance to develop a support plan and it must be reviewed at least once a year.<sup>233</sup> The purpose of this consultation process is to maximise opportunities for people with a disability to participate in decisions affecting their lives. Sunraysia Residential Service, a disability service provider in Mildura, told the Committee that it takes a person-centred approach to the delivery of disability services. Ms Marilyn Sobkowiak, Service Coordinator at the Sunraysia Residential Service, stated that "... we [the service] really strive to make sure it's exactly what a person needs, we don't dictate to them: okay, you'll have two hours to do this, three hours to do that. It's all person centred."<sup>234</sup>

#### 4.3.2.1 Generalist services

A number of general services are available to a person with a disability including community health, early childhood and education services, and

<sup>231</sup> *Disability Act 2006* (Vic), section 52(2).

<sup>232</sup> *Disability Act 2006* (Vic), section 54.

<sup>233</sup> *Disability Act 2006* (Vic), section 55.

<sup>234</sup> Marilyn Sobkowiak, Service Co-coordinator, Sunraysia Residential Services, *Transcript of evidence*, Mildura, 16 November 2011, p. 27.

maternal and child health services. People who require assistance with daily living but are able to live independently may access individual support packages. This funding enables the person to choose support that best meets their needs. Funding can be used to purchase a range of disability-related services and aids, and to complement existing support arrangements.

While individual support packages give people greater control over the way their needs are met, the Coalition for Disability Rights noted that this funding method places "... greater responsibility on people with a disability and their families to make choices about how funding will be administered and who will provide services."<sup>235</sup>

Funding for individual support packages can be made available directly to the individual with a disability, a financial intermediary (who requires authorisation from the person with a disability to pay for approved services) or to a disability service provider. In 2011-12 funding was provided to 14 723 clients.<sup>236</sup>

Individual support packages may assist people by providing them with a range of resources to maintain their independence, keep them living in their own or family home, learn new skills, and encourage participation in their local community. Ms Rhonda Lawson-Street of National Disability Services Victoria told the Committee that:

... there are ways in which supporting people with everyday living skills makes a real difference: so that you're actually assisting people to be skilled in their daily endeavours around shopping and looking after themselves and budgeting, those sorts of features; that people are better skilled and better equipped and are less likely to get into altercations of one sort or another or into situations of major debt where something might actually send them down the wrong path.<sup>237</sup>

#### 4.3.2.2 Accommodation services

The *Convention on the Rights of Persons with Disabilities* outlines the requirement for provision of accommodation services for people with a disability:

State parties ... recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community including by ensuring that ... [p]ersons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and

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<sup>235</sup> Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, pp. 4-5.

<sup>236</sup> Department of Human Services, *Annual report 2011-12*, DHS, Melbourne, 2012, p. 47.

<sup>237</sup> Rhonda Lawson-Street, State Manager, National Disability Services Victoria, *Transcript of evidence*, Melbourne, 7 November 2011, p. 15.

inclusion in the community, and to prevent isolation or segregation from the community.<sup>238</sup>

Consistent with this, funding is provided by DHS to community services to provide accommodation options for people with a disability. Accommodation options include:

- support to allow the person with a disability to live in their own home or their family home through funding made available by individual packages;
- outreach support to assist people with a disability to live more independently in their own home;
- support to young people with a disability who are at risk of being admitted into residential aged care facilities; and
- shared supported accommodation for people with a disability who have very high support needs to live in the community.<sup>239</sup>

The *Disability Act 2006* places a number of obligations on disability service providers who provide residential services, including:

- taking reasonable measures to ensure that residents are treated with dignity and respect and with due regard to their entitlements to privacy;
- ensuring that the premises in which the residential service is provided and any fixtures, furniture and equipment are maintained and in good repair;
- not unreasonably limiting or interfering with a resident's access to his or her room or to the toilet, bathroom or other common areas in the premises which are available to the resident; and
- not unreasonably interfering with a resident's right to privacy or proper use and enjoyment of the premises.<sup>240</sup>

The Act also sets out a number of specific obligations for disability service providers. A disability service provider must give written information to the person about the services to be provided. This information should include costs associated with accessing and using the services, conditions that may apply, the procedure for making a complaint, and the person's legal rights and entitlements under the Act.<sup>241</sup>

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<sup>238</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 19.

<sup>239</sup> Department of Human Services, 'Accommodation', viewed 1 February 2013, <<http://www.dhs.vic.gov.au/for-individuals/disability/accommodation>>.

<sup>240</sup> *Disability Act 2006* (Vic), section 58(1).

<sup>241</sup> *Disability Act 2006* (Vic), section 89(2).

The Act places an obligation on disability service providers to establish systems and procedures for receiving and reporting complaints.<sup>242</sup> The Act requires that disability service providers report annually to the Disability Services Commissioner, specifying the number of complaints received and how those complaints were resolved.<sup>243</sup> When a complaint is received by a disability service provider, steps must be taken to resolve the complaint before it can be considered by the Disability Services Commissioner.<sup>244</sup>

Residents of accommodation facilities also have responsibilities under the Act, such as paying specified charges, not using the premises for illegal purposes, and not knowingly or intentionally damaging or destroying any part of the premises.<sup>245</sup>

In 2011-12 there were 5230 Disability Services clients living in shared supported accommodation facilities.<sup>246</sup>

Evidence received by the Committee suggested that the availability of services and supported accommodation facilities in the community is an important mechanism for ensuring that people with an intellectual disability or cognitive impairment do not unnecessarily become involved in the justice system.

In its evidence to the Committee, the OPA recognised that providing services to people with an intellectual disability is “fraught with challenges” and noted that there appears to be a connection between the shortage of appropriate accommodation options and the commission of crime by people with an intellectual disability.<sup>247</sup> The OPA provided the following Case Study to show how a person with a cognitive impairment can benefit from living in a supported accommodation facility.

*Case Study 2: Julia’s story.*<sup>248</sup>

*“Julia’ is a young woman known to OPA’s community visitors program. She resides in a supported accommodation with three older women. When Julia first moved into supported accommodation, she displayed concerning anger management and behavioural issues. The three older residents were threatened by Julia’s violent outbursts. Sometimes the police were contacted to help manage Julia, until she could be sedated.*

*The supported accommodation organised more support staff for Julia and linked her into a specialist psychiatric service in Melbourne. This service was able to treat Julia’s dual diagnoses. This level of health care was previously unavailable to Julia as she resided in a rural area.*

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<sup>242</sup> *Disability Act 2006* (Vic), section 104.

<sup>243</sup> *Disability Act 2006* (Vic), section 105.

<sup>244</sup> *Disability Act 2006* (Vic), section 114(3).

<sup>245</sup> *Disability Act 2006* (Vic), section 59(2).

<sup>246</sup> Department of Human Services, *Annual report 2011-12*, DHS, Melbourne, 2012, p. 47.

<sup>247</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 15. See also John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 23.

<sup>248</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 17.

*Julia is now integrated into her new home. She is well-adjusted and has formed close bonds with the older women in the house. They have come to enjoy Julia's company and rely upon her."*

In contrast to the above Case Study, the OPA also provided the Committee with an example to illustrate the consequences that follow if there is a lack of available support and accommodation options for a person with an intellectual disability.

*Case Study 3: Benjamin's story.<sup>249</sup>*

*"Benjamin' has an acquired brain injury, which significantly affects his executive functioning, and issues with substance abuse. He has complex support needs and has been in contact with the criminal justice system since he was charged with armed robbery as a teenager. Like many others with cognitive disability and high support needs, his parole from a youth detention centre was delayed when DHS disability services were unable to offer him appropriate supported accommodation, despite having been assigned a disability services case manager. In frustration Benjamin's case manager applied to VCAT [the Victorian Civil and Administrative Tribunal] for a guardian to be appointed.*

*On release Benjamin received no offer of accommodation and inadequate funding for services. Following advocacy pressure by his guardian, Benjamin was provided with a place to live in a disused DHS house with minimal outreach support. This arrangement broke down following property damage triggered by anger management and substance abuse issues. In the absence of another more appropriate accommodation and support option, an SRS [Supported Residential Service] agreed to take Benjamin after DHS offered additional funding to enable the appointment of extra support staff for Benjamin.*

*At the SRS Benjamin physically and sexually assaulted a staff member and was sentenced to around 5 years jail with a parole period of less than one year. The court acknowledged that his ABI reduced his moral culpability and indicated effective parole arrangements were preferable to incarceration. However, his first attempt at parole failed. The next attempt at parole was better planned and resourced. Benjamin was supported to live in a rental property by trained staff of a non-government residential support service. His support package included drug and alcohol counselling.*

*Benjamin is subject to an interim supervision order, put in place to enable the restrictive conditions of his parole to be continued after the end of his parole period."*

The connection between the shortage of accommodation options for people with an intellectual disability and their involvement in the justice system was also highlighted in evidence received from Life Without Barriers. Life Without Barriers stressed the importance of providing

<sup>249</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 16.

comprehensive support services to people with an intellectual disability and argued that the availability of these services is essential to prevent vulnerable people becoming involved in the justice system.<sup>250</sup>

The Coalition for Disability Rights argued that improving disability support in the community will help to improve outcomes for people with an intellectual disability who become involved in the justice system. The Coalition noted that disability service providers "... have the ability and knowledge to activate appropriate assessment and referral mechanisms, case management and advocacy ..." to assist people with an intellectual disability.<sup>251</sup> However, a number of submissions also suggested that disability service providers do not have the capacity to meet demand and therefore may be unable to fulfil a greater support role.<sup>252</sup>

The Committee notes that in the 2011-12 State Budget the Government allocated \$20.1 million over four years for community service organisations to establish 50 new supported accommodation facilities for people with a disability.<sup>253</sup> The Commonwealth Government's Supported Accommodation Innovation Fund will provide \$60 million over three years from 2011-12 for capital grants for community service organisations and state and territory governments to establish up to 150 new supported accommodation facilities or respite-focused places for people with a disability.<sup>254</sup> Furthermore, as part of the Supported Accommodation Innovation Fund, the Victorian Government announced in June 2012 that \$35.5 million would be provided to fund disability accommodation options for people with a disability in Victoria. This funding will establish 65 new supported accommodation places across the state, with 38 of these allocated to people with an intellectual disability or complex support needs. Eight further places will be set aside to provide support to people with a disability who are involved with, or are at risk of becoming involved with, the criminal justice system.<sup>255</sup>

This kind of accommodation and support can help prevent people with an intellectual disability or cognitive impairment becoming involved with the justice system. A proportion of people with these impairments will nevertheless commit crimes and come before the police or the courts. In its submission the Magistrates' Court of Victoria expressed concern about anecdotal accounts of accommodation shortages, and insufficient

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<sup>250</sup> Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 5.

<sup>251</sup> Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 4.

<sup>252</sup> See for example Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 8; Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 11; Dianne Hadden, *Submission no. 58*, 10 November 2011, p. 2; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 4; Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*, Mildura, 16 November 2011, p. 6; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 4; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 4.

<sup>253</sup> Department of Treasury and Finance, *Victorian Budget 2012-13 Service Delivery: Budget Paper No 3*, Department of Treasury and Finance, Melbourne, 2012, pp. 48, 221.

<sup>254</sup> Department of Families, Housing, Community Services, and Indigenous Affairs, *Services for people with disability: Program guidelines*, FaHCSIA, Canberra, 2011, p. 9.

<sup>255</sup> Mary Wooldridge, MP, '\$35.5 million disability accommodation boost for Victoria' (Media Release, 22 June 2012).



availability of support options for people with an intellectual disability in the justice system.<sup>256</sup> The Magistrates' Court stated that as a consequence engagement with the justice system by offenders with an intellectual disability may be prolonged:

If offenders with intellectual disabilities are unable to access adequate housing arrangements, this results in longer periods of incarceration whilst appropriately supported accommodation is located. For example, a common scenario in the court is when DHS will ask the court to remand an intellectually disabled offender for prolonged periods of time whilst the offender is waiting to be placed in suitable accommodation.<sup>257</sup>

Research suggests that even when offenders with intellectual disabilities are eligible for parole, parole may be denied on the grounds that support services, particularly accommodation services, are unavailable in the community.<sup>258</sup> A study commissioned by Corrections Victoria in 2007 examining the characteristics of offenders with an intellectual disability found that a lack of suitable accommodation was cited as the most common reason for parole being delayed or denied after offenders became eligible. The study found that 33.3 per cent of prisoners with an intellectual disability were denied parole due to insufficient suitable accommodation, whereas no prisoners without an intellectual disability were denied parole for this reason.<sup>259</sup> Parole was delayed for 50 per cent of prisoners with an intellectual disability, compared with 12.9 per cent of prisoners without an intellectual disability, on the grounds that suitable accommodation was not available.<sup>260</sup>

The DHS currently funds two short-term residential services – the Charlton and Furlong Houses – each housing a maximum of five people. The houses were established primarily to provide accommodation and support to people with an intellectual disability who have come into contact with the justice system, particularly those requiring a bail accommodation option.<sup>261</sup>

While some years have passed since the Corrections Victoria research was conducted, the Committee notes that anecdotal evidence it received during the course of this Inquiry suggests that there is still a need for increased accommodation options. The Committee recommends that the Victorian Government determine whether there are sufficient accommodation facilities for people with an intellectual disability who are to

<sup>256</sup> Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 4.

<sup>257</sup> Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 4.

<sup>258</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 21.

<sup>259</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 21.

<sup>260</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 21.

<sup>261</sup> Department of Human Services, 'Statewide short term accommodation and support-client information', viewed 1 February 2013, <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/statewide-short-term-accommodation-and-support-client-information>>.

be released on bail or parole. Given the important role that suitable accommodation plays in reducing recidivism, the Committee recommends that if the Victorian Government finds sufficient accommodation options are not available for people with an intellectual disability who are to be released on bail or parole such that people with these impairments are being denied the opportunity to be released from custody, that the development of suitable accommodation be prioritised by the Government.

**Recommendation 3:** That the Victorian Government review available accommodation options to ensure that people with an intellectual disability or cognitive impairment are not denied parole solely due to the unavailability of suitable accommodation.

#### **4.3.2.3 Specialist services**

In addition to general support and accommodation services provided by the DHS, a range of specialist disability supports are also available to assist people with a disability requiring case management, therapy or behavioural support. Case managers work with people with a disability and their support network to identify, link with, and organise support services that assist the person to live independently in the community. Behavioural intervention provides services to people with a disability who exhibit aggressive, self-injurious, anti-social and/or dangerous behaviours.

The DHS also funds and provides services specifically targeted at people with an intellectual disability who are at risk of becoming involved, or who are involved, in the justice system. The aim of these services is to prevent offending and minimise the risk of reoffending behaviour. If a person with an intellectual disability is charged with an offence, support may be provided to assist the person to prepare for court. This may include assistance to find a solicitor and provide him or her with a report outlining the person's history and circumstances, help finding a support person for court appearances, and exploring accommodation options before a bail application.

If the courts consider placing a person with an intellectual disability on a community corrections order, the DHS can prepare a justice plan for the sentencing court. The plan outlines services that will reduce the likelihood of the person reoffending. The DHS is responsible for monitoring the person's compliance with the plan. The use of community corrections orders and justice plan conditions are discussed in Chapter Nine.

#### **4.3.2.4 Services for people with a cognitive impairment**

A number of submissions and witnesses expressed concern that services for people with an intellectual disability are not available to people with other cognitive impairments.<sup>262</sup> As discussed in Chapter Three, a person with a cognitive impairment, such as an ABI, may experience similar

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<sup>262</sup> See for example Leadership Plus, *Submission no. 35*, 23 September 2011, pp. 6, 9-10; Glenn Rutter, Manager, Court Support and Diversion Services, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 20; Victorian Coalition of ABI Service Providers Inc., *Submission no. 42*, 7 October 2011, p. 6.



challenges when interacting with the justice system as a person with an intellectual disability.<sup>263</sup> A number of organisations recommended that an umbrella approach be adopted for the delivery of services to people with a cognitive impairment or intellectual disability who have become involved in the justice system.<sup>264</sup>

Services and supports specifically targeted to people with a cognitive impairment appear to be limited. The Committee notes one program provided by the DHS in partnership with the Departments of Health and Justice is the Multiple and Complex Needs Initiative (MACNI). The eligibility criteria and planning processes of MACNI are underpinned by the *Human Services (Complex Needs) Act 2009* (Vic). Unlike the other specialist services provided by DHS, services provided by MACNI include people with an intellectual disability and people with mental disorders, ABIs, and substance abuse disorders.<sup>265</sup> MACNI provides a time-limited response that aims to: stabilise housing, health and social connections; provide a framework for maintaining contact with the service system; and provides for the therapeutic treatment of people with multiple and complex needs.<sup>266</sup>

Despite the existence of the above program, people with a cognitive impairment are unable to access the range of specialist services that are available to people with an intellectual disability. The Committee notes that while a person with a cognitive impairment may have different lived experiences from a person with an intellectual disability, people with a cognitive impairment often experience similar disadvantages to those experienced by people with an intellectual disability when they interact with the justice system. The Committee believes that if similar supports and services were available for people with a cognitive impairment, less people with these impairments would commit offences or reoffend, and less would be sentenced and incarcerated. The Committee recommends that supports currently provided through case management services for people with an intellectual disability who interact with the justice system be extended to cover people with a cognitive impairment. The Committee believes that the provision of case management services to people with a cognitive impairment will assist to:

- provide continuing contact, support and information for the person;
- act as a point of liaison for police, lawyers, courts and corrections; and
- involve clients and service providers in the development of support plans that encompass supervision, accommodation and behaviour skills.

<sup>263</sup> See for example Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 21; Nick Rushworth, Executive Officer, Brain Injury Australia, *Transcript of evidence*, Melbourne, 21 February 2012, p. 40.

<sup>264</sup> See for example Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 2; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 11; Victorian Coalition of ABI Service Providers Inc., *Submission no. 42*, 7 October 2011, pp. 10, 12.

<sup>265</sup> *Human Services (Complex Needs) Act 2009* (Vic), section 7(a).

<sup>266</sup> *Human Services (Complex Needs) Act 2009* (Vic), section 4; Department of Human Services, *Getting it together: The multiple and complex needs initiative*, Melbourne, 2010, p. 1.

Recommendation 4: That the Victorian Government consider establishing case management services for people with a cognitive impairment who seek access to or are interacting with the justice system. The development of case management services should draw upon services that are currently provided to people with an intellectual disability, but also be reflective of the different support needs of a person with a cognitive impairment. The role of the case manager could include:

- providing continuing contact, support and information for the person;
- acting as a point of liaison for police, lawyers, courts and corrections; and
- being involved in the development of a support plan encompassing areas of supervision, accommodation and behaviour skills.

## 4.4 Advocacy services

Advocacy and self-advocacy play an important role in drawing attention to the human rights of people with an intellectual disability or cognitive impairment. Disability advocacy provides assistance and support to ensure that:

- the rights of people with a disability are upheld;
- people with a disability actively participate in decision-making processes; and
- the needs and views of people with a disability are incorporated and represented in Government policies.<sup>267</sup>

Advocacy services can enable people with an intellectual disability or cognitive impairment to:

- understand and exercise their rights;
- get access to services;
- develop social and support networks;
- gain self-confidence;
- maintain and build positive interests and skills, including access to paid employment; and
- develop life skills, including communication skills and knowledge about appropriate behaviours.<sup>268</sup>

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<sup>267</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 30.

<sup>268</sup> See, for example, Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, pp. 41, 46-47; Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist*

Leadership Plus, a community-based advocacy organisation, gave a number of examples of how an advocate can provide assistance to a person with an intellectual disability who has come into contact with the justice system. An advocate could:

- provide a context in which to understand the legal process;
- spend time explaining the legal process, what options are available, likely outcomes and, risks involved;
- provide information, including legal terms and concepts in an accessible format (for example, Easy English, audio formats, or in diagrams);
- provide information to legal representatives and others on the effect of the disability on the person and how to best engage with clients;
- ensure legal representatives understand clients' views and help facilitate communication between legal representatives and clients;
- prepare clients prior to meeting with legal representatives;
- attend appointments with legal representatives and court personnel;
- assist with gathering information for legal matters (for example, psychological assessments, signing statutory declarations and medical reports);
- provide a report to court outlining social welfare issues and the effect of disability; and
- attend court hearings.<sup>269</sup>

The National Disability Strategy states that advocacy services can "... enable and support people with disability to safeguard their rights and overcome barriers that impact on their ability to participate in the community."<sup>270</sup> The Committee received evidence from a number of organisations that agreed on the importance of advocacy services for people with an intellectual disability or cognitive impairment. For example, the Coalition for Disability Rights stated that:

Advocacy services provide essential support to people with a disability in defending and promoting their human rights, citizenship rights, and consumer rights as service users.

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*people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 30.

<sup>269</sup> Leadership Plus, *Submission no. 35*, 23 September 2011, p. 4.

<sup>270</sup> Council of Australian Governments, *National Disability Strategy 2010-2020*, FaHCSIA, Canberra, 2011, p. 40.

Advocacy services help to ensure the rights of all people are promoted and protected in areas including access to employment, education, health, housing and the legal process.<sup>271</sup>

Villamanta Disability Rights Legal Service, a specialist community legal centre working only on disability-related legal issues, expressed the view that:

An on-going relationship with an advocacy agency or a citizen advocate often helps the person who has an intellectual disability/cognitive impairment to navigate the service system, the justice system and other hazards that life throws up at them.<sup>272</sup>

Villamanta noted that it is important for people with an intellectual disability to have access to independent advocacy as “This will enable them to communicate their views, needs and wishes and will help to ensure their human and legal rights are protected.”<sup>273</sup>

**Finding 2: Disability advocacy plays an important role promoting the human rights of people with an intellectual disability or cognitive impairment. An ongoing relationship with a disability advocate is a positive mechanism for helping a person with an intellectual disability or cognitive impairment navigate through the justice system.**

The DHS provides funds for the delivery of disability advocacy services in the community through 32 organisations.<sup>274</sup> The Committee received evidence from nine of these organisations.<sup>275</sup>

In its submission to the Inquiry, Women with Disabilities Victoria told the Committee about the *Sexual Offences Advocacy Pilot Project*. The project aims to provide specialised support to sexual assault victims with a cognitive impairment and communication difficulties, in order to encourage them to report sexual assault crimes. The project was developed in collaboration with legal and disability service providers and sought input from people with a cognitive impairment or communication difficulties. During the pilot, the South Eastern Centre Against Sexual Assault, the Springvale Monash Legal Service, and other disability agencies will work together to provide victims with:

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<sup>271</sup> Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 4.

<sup>272</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 14.

<sup>273</sup> Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, p. 25.

<sup>274</sup> Note the program was initially delivered by the Office of Disability, which was transferred to the Department of Human Services on 1 January 2011.

<sup>275</sup> See for example Assert 4 All, *Submission no. 53*, 10 September 2011; Association for Children with a Disability, *Submission no. 42*, 7 October 2011; Communication Rights Australia, *Submission no. 13*, 8 September 2011; Disability Advocacy and Information Service Inc., *Submission no. 54*, 3 November 2011; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011; Regional Information and Advocacy Council, *Submission no. 51*, 2 February 2011; STAR Victoria, *Submission no. 12*, 8 September 2011; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011; Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011.

- advocacy and support during dealings with police and prosecutors;
- 24-hour crisis support;
- assistance to monitor, understand and participate in investigations, prosecutions and court processes;
- advice on criminal justice processes and the options and services available; and
- legal support to access victim compensation.<sup>276</sup>

A number of witnesses and organisations called for improvements to be made to the way advocacy organisations are funded in order to enhance their ability to meet the level of demand that is placed on them.<sup>277</sup>

Advocates play an important role ensuring that people with an intellectual disability or cognitive impairment understand and are able to exercise their legal rights. Increasing rights awareness by people with an intellectual disability or cognitive impairment will help minimise their involvement with the justice system. In order for this to occur, adequate resources must be provided to advocacy organisations. Consequently, the Committee recommends that the Victorian Government ensure disability advocacy organisations are sufficiently resourced to provide services to their clients.

Recommendation 5: That the Victorian Government ensure that clients with a disability who seek assistance from disability advocacy services have adequate access to those services.

## 4.5 External monitors

A number of independent statutory bodies and programs oversee the provision of disability services in Victoria – the Victorian Disability Advisory Council, the Disability Services Commissioner, the Senior Practitioner and the Community Visitor Program.<sup>278</sup> Statutory bodies provide a mechanism for receiving complaints, monitoring practices, and reporting service

<sup>276</sup> Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, p. 32. See also Ian McLean, Chief Executive Officer, Golden City Support Services, *Transcript of evidence*, Bendigo, 28 May 2012, p. 8; Eileen Oates, Chief Executive Officer, Loddon Campaspe Centre Against Sexual Assault, *Transcript of evidence*, Bendigo, 28 May 2012, p. 29: A similar project, *Living Safer Sexual Lives*, is being conducted by Loddon Campaspe CASA in collaboration with the Golden City Support Services.

<sup>277</sup> See for example Assert 4 All, *Submission no. 53*, 10 September 2011, p. 28; Association for Children with a Disability, *Submission no. 42*, 7 October 2011, pp. 6-7; Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 8; Dianne Hadden, *Submission no. 58*, 10 November 2011, p. 5; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 4; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 44; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 3; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 5; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 13.

<sup>278</sup> Note the Committee heard and received evidence from the Victorian Disability Advisory Council, the Disability Services Commissioner, and the Office of the Public Advocate which runs the Community Visitor program.

providers' compliance with regulations. They can also advocate on behalf of people with a disability to ensure they receive appropriate support from disability service providers.

### 4.5.1 The Victorian Disability Advisory Council

The Victorian Disability Advisory Council is established under the *Disability Act 2006*.<sup>279</sup> The principal purpose of the Council is to provide advice to the Minister for Community Services on whole-of-government policies and strategies that aim to:

- increase the participation of people with a disability in the community;
- remove barriers to their full participation in the community; and
- develop initiatives that seek to remove those barriers.<sup>280</sup>

The Council also has a role in raising community awareness about the rights of people with a disability, consulting with other disability advisory councils or bodies, and monitoring the implementation of strategies that promote the full inclusion and participation in the community of people with a disability.<sup>281</sup>

### 4.5.2 The Disability Services Commissioner

The Act also establishes the Disability Services Commissioner.<sup>282</sup> The role of the Commissioner is to work with people with a disability to resolve complaints about disability service providers and to work with disability service providers to improve outcomes for people with a disability. The Act gives the Commissioner a number of specific functions, which include:

- conciliating where a complaint has been made in relation to a disability service provider;
- maintaining a record and publishing information of all complaints received;
- considering ways to improve the disability services complaints systems;
- developing programs for people who handle complaints; and
- providing education and information about complaints about disability services.<sup>283</sup>

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<sup>279</sup> *Disability Act 2006* (Vic), section 11.

<sup>280</sup> *Disability Act 2006* (Vic), section 12(1)(a).

<sup>281</sup> *Disability Act 2006* (Vic), sections 13(1)(c)-(e).

<sup>282</sup> *Disability Act 2006* (Vic).

<sup>283</sup> *Disability Act 2006* (Vic), section 16.



The number of new enquiries and complaints made to the Commissioner has increased from 311 in 2007-08 to 832 in 2011-12.<sup>284</sup> Around 80 per cent of contact with the Commissioner is dealt with as enquiries, with the remainder handled as complaints.<sup>285</sup>

The largest number of complaints in 2011-12 concerned supported accommodation facilities, representing around 38 per cent of all enquiries and complaints.<sup>286</sup> In 2011-12 approximately 17 per cent of complaints related to cases of alleged assault, neglect or safety risks.<sup>287</sup>

Most enquiries and complaints received by the Commissioner were about services provided to people with an intellectual disability (approximately 62 per cent of complaints).<sup>288</sup> A further 17 per cent of complaints and enquiries concerned services to people with a neurological impairment and 11 per cent were about services for people with an ABI.<sup>289</sup> Approximately half of all complaints received by the Commissioner and disability service providers were made by parents or family members of people receiving support.<sup>290</sup>

The Committee received evidence from Villamanta Disability Rights Legal Service expressing concern that services provided by the Disability Services Commissioner were not effective. While acknowledging the important work undertaken by the Commissioner and his staff, Villamanta said that the Office is:

... hampered in their work by insufficient resources to cope with the many complaints they receive and by the fact that, under the *Disability Act 2006*, they cannot make recommendations or compel service providers to do anything. The process can be a long drawn out one due to insufficient staff numbers. They mainly conduct conciliation meetings with the hope that good outcomes may result from them, but ultimately the service providers retain the power to decide what to do about matters that have been brought to the Commissioner as complaints.<sup>291</sup>

Villamanta said that in its experience:

People who have an intellectual disability/cognitive impairment, and their relatives, are often afraid to make “a complaint” and, although the Disability Services Commissioner advertises that “It’s OK to Complain!”, it is our

<sup>284</sup> Disability Services Commissioner, *Our year in review 2012*, Disability Services Commissioner, Melbourne, 2012, p. 18.

<sup>285</sup> Disability Services Commissioner, *Our year in review 2012*, Disability Services Commissioner, Melbourne, 2012, p. 18.

<sup>286</sup> Disability Services Commissioner, *Our year in review 2012*, Disability Services Commissioner, Melbourne, 2012, p. 13.

<sup>287</sup> Disability Services Commissioner, *Our year in review 2012*, Disability Services Commissioner, Melbourne, 2012, p. 11.

<sup>288</sup> Disability Services Commissioner, *Our year in review 2012*, Disability Services Commissioner, Melbourne, 2012, p. 24.

<sup>289</sup> Disability Services Commissioner, *Our year in review 2012*, Disability Services Commissioner, Melbourne, 2012, p. 24.

<sup>290</sup> Disability Services Commissioner, *Our year in review 2012*, Disability Services Commissioner, Melbourne, 2012, p. 24.

<sup>291</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 12.

[Villamanta's] observation that some people refrain from doing so because they are not confident that they will not be victimised by service providers if they do so.<sup>292</sup>

Improved resourcing of disability advocacy groups and improved education about legal rights and responsibilities will help to empower people with an intellectual disability or cognitive impairment to maintain the quality and level of support that they receive from disability service providers.

### 4.5.3 Community Visitor Program

Under the *Disability Act 2006* the OPA established the Community Visitor Program. Under this program, Community Visitors may visit any premises where a disability service provider is providing residential services and:

- enquire into the quality of services and care provided to residents;
- talk with residents and staff to identify problems;
- ensure that the treatment and services given to residents maintains their dignity and respect; and
- assess whether residents are at risk from their living environment.<sup>293</sup>

A community visitor is entitled to visit any residential service within his or her designated area, with or without prior notice. A resident may also request that their disability service provider arrange for a community visitor to see them. At the end of each visit the community visitor will complete a report summarising findings and indicate any actions required.

In 2011-12 Community Visitors made 2821 visits to residential facilities in Victoria.<sup>294</sup> Most visits by community visitors were unannounced.<sup>295</sup> There were 79 visits performed in response to calls by individuals to the advice service provided by the OPA.<sup>296</sup> Most issues identified by community visitors concerned maintenance of residential facilities and the health care needs of residents.<sup>297</sup>

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<sup>292</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 12.

<sup>293</sup> *Disability Act 2006* (Vic), section 30.

<sup>294</sup> Office of the Public Advocate, *Promoting the human rights, interests and dignity of Victorians with a disability or mental illness: Community Visitors annual report 2011-2012*, OPA, Melbourne, 2012, p. 44.

<sup>295</sup> Office of the Public Advocate, *Promoting the human rights, interests and dignity of Victorians with a disability or mental illness: Community Visitors annual report 2011-2012*, OPA, Melbourne, 2012, p. 10.

<sup>296</sup> Office of the Public Advocate, *Promoting the human rights, interests and dignity of Victorians with a disability or mental illness: Community Visitors annual report 2011-2012*, OPA, Melbourne, 2012, p. 43.

<sup>297</sup> Office of the Public Advocate, *Promoting the human rights, interests and dignity of Victorians with a disability or mental illness: Community Visitors annual report 2011-2012*, OPA, Melbourne, 2012, p. 44.



#### 4.5.4 Office of the Senior Practitioner

The Office of the Senior Practitioner was created by the *Disability Act 2006*.<sup>298</sup> The Senior Practitioner ensures that the rights of a person subject to restrictive interventions and compulsory treatment are protected, and that appropriate standards are maintained in compulsory treatment.<sup>299</sup>

A restrictive intervention is used by an approved disability service provider to restrict freedom of movement of a person with a disability.<sup>300</sup> An intervention may take the form of chemical or mechanical restraint, or through the use of seclusion. Compulsory treatment may apply to people with an intellectual disability who have been admitted into treatment in a residential treatment facility.<sup>301</sup>

The Act sets out strict requirements for the use of restrictive interventions. These include:

- that the use of restraint or seclusion be included in a behaviour management plan,<sup>302</sup> and
- that an authorised officer ensure that an independent person has explained the use of the proposed form of restraint or seclusion to the person and that the person has a right to seek a review of this decision from the Victorian Civil and Administrative Tribunal (VCAT).<sup>303</sup>

A disability service provider must develop a behaviour management plan if it considers that the use of a restrictive intervention is necessary to:

- prevent the person from causing physical harm to themselves or any other person; or
- prevent the person from destroying property where to do so could involve the risk of harm to themselves or others.<sup>304</sup>

A behaviour management plan must state the circumstances in which the proposed form of restraint is to be used, explain why the restraint would benefit the person, and demonstrate that the use of the restraint is the least restrictive option.<sup>305</sup>

The Senior Practitioner monitors the use of restrictive interventions and compulsory treatment to ensure that the requirements of the Act are being satisfied. In 2010-11, 1911 people were reported to the Office of the Senior Practitioner as being subject to restrictive interventions, 32 people were the

<sup>298</sup> *Disability Act 2006* (Vic), section 23(1).

<sup>299</sup> *Disability Act 2006* (Vic), section 23(2).

<sup>300</sup> *Disability Act 2006* (Vic), sections 134-135: A disability service provider can only use a restrictive intervention if approval has been granted by the Secretary of the DHS.

<sup>301</sup> *Disability Act 2006* (Vic), section 152(1).

<sup>302</sup> *Disability Act 2006* (Vic), section 141.

<sup>303</sup> *Disability Act 2006* (Vic), section 143.

<sup>304</sup> *Disability Act 2006* (Vic), section 140(a).

<sup>305</sup> *Disability Act 2006* (Vic), section 141(2).

subject of supervised treatment orders, and 15 people were the subject of compulsory treatment orders.<sup>306</sup>

## 4.6 Families and carers

In recognising the challenges associated with providing support to people with a disability, the DHS funds organisations to provide support services to families and carers of people with a disability. Family Options allows families and carers to share responsibilities with volunteer carers on a short or long-term basis. The Respite Support program provides short-term breaks for carers of people with an ABI, an intellectual or physical disability or a degenerative neurological condition.<sup>307</sup>

Merri Community Health Services described a respite and carer support program that it provides to assist carers in its region. The program:

- provides immediate and short-term respite to carers of people with disabilities;
- facilitates access to information, respite care and other support or assistance appropriate to the individual needs and circumstances of both carers and care recipients;
- ...
- supports carers whose needs are not being met through existing Australian Government or State/Territory Government initiatives;
- aims to alleviate unmet demand for short-term and unplanned respite care that currently causes significant stress to carers.<sup>308</sup>

The provision of support services to families and carers acknowledges that families and carers are often the most committed advocates for, and supporters of, people with a disability.<sup>309</sup> In its submission to the Committee, the OPA stated:

The support provided by families and carers to many people with disability should not be understated. They are often the first to listen, advocate and empower. There is no way of quantifying the positive contribution they make to the lives of people with cognitive disability, or to society.<sup>310</sup>

This view was shared by the Coalition for Disability Rights, who stated that, with appropriate support, families and carers will often be well positioned to

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<sup>306</sup> Department of Human Services, *Senior Practitioner report 2010-11*, DHS, Melbourne, 2011, pp. 10, 22.

<sup>307</sup> Department of Human Services, 'Family options', viewed 1 February 2013, <<http://www.dhs.vic.gov.au/for-individuals/disability/carer-and-family-support/family-options-program>>; Department of Human Services, 'Respite support information', viewed 1 February 2013, <<http://www.dhs.vic.gov.au/for-individuals/disability/carer-and-family-support/respite-support-information>>.

<sup>308</sup> Merri Community Health Services, *Submission no. 4*, 5 September 2011, p. 2.

<sup>309</sup> See for example Carers NSW, *Submission no. 17*, 9 September 2011, p. 3; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 5; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 4.

<sup>310</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 13.

support and assist a person with an intellectual disability.<sup>311</sup> Carers NSW stated that information about the justice system and support to navigate through the system should be made available to carers or family members.<sup>312</sup>

It is possible for families and carers of children who are victims of violent crime to receive financial assistance from the Victims of Crime Assistance Tribunal as secondary victims. However, Ms Chris Jacksen, Coordinator for St Luke's Anglicare in Bendigo, expressed concern that as secondary victims, a parent or guardian of a person with an intellectual disability or cognitive impairment is only eligible to get support if the victim is under 18, despite the fact that support provided by carers may be similar to support provided to a child.<sup>313</sup>

Despite the positive role that the majority of families and carers play when advocating for a person with an intellectual disability or cognitive impairment, the Committee received evidence noting that the level of dependency on the family or carer can lead to a person with an intellectual disability or cognitive impairment being victimised by the person supporting them.<sup>314</sup> The following Case Study is illustrative of this.

*Case Study 4: Inadequate support provided by family members.*<sup>315</sup>

*“... a young man who inherited a house from the mother, a young man with a disability, was turfed out by his brother and their family. He was made to go and live in an SRS – Supported Residential Service. Bad enough that he got kicked out, but for the last five years he’s actually been paying their rent; it’s financial exploitation. Had he not actually contacted us after a long circuitous route to get to us, he would never have known that he actually had the right to do something about it. We’ve now involved the police, we’ve solved it, but it was more by luck than anything else.”*

Evidence presented by the OPA and Wesley Mission also suggested that some family members and carers can impede a person with an intellectual disability or cognitive impairment from seeking access to justice. For example, decision-making involving a person with an intellectual disability or cognitive impairment can often be deferred to families or carers rather than to the person they support.<sup>316</sup> The following Case Studies were highlighted by the OPA to illustrate this point.

<sup>311</sup> Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 5.

<sup>312</sup> Carers NSW, *Submission no. 17*, 9 September 2011, p. 3. See also STAR Victoria, *Submission no. 12*, 8 September 2011, p. 2.

<sup>313</sup> Chris Jacksen, Coordinator, Victims Assistance and Counselling Program, St Luke's Anglicare, *Transcript of evidence*, Bendigo, 28 May 2012, p. 22.

<sup>314</sup> See for example Patricia Malowney, Deputy Chair, Victorian Disability Advisory Council, *Transcript of evidence*, Melbourne, 24 October 2011, p. 8; Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, pp. 15-16.

<sup>315</sup> Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, p. 16.

<sup>316</sup> Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 7.

*Case Study 5: Sarah's story.*<sup>317</sup>

*"Sarah' is a fifty year old woman with cerebral palsy and a moderate intellectual disability. She requires a motorised wheelchair for mobility and is largely non-verbal. To communicate, Sarah uses some words and gestures. One day, Sarah was very distressed and confided to a staff member that as she was getting dressed in the morning, she was raped by a staff member. The police and Sarah's elderly parents were contacted.*

*Sarah's parents refused to consent to a police interview or forensic examination. When queried by an OPA advocate about why an adult woman's consent would not suffice, the police informed the advocate that it was "process". When police sought to meet Sarah, her parents were dismissive of the crime. Despite Sarah asserting herself with comments like 'Me talk, me talk', the police deferred to Sarah's parents for consent to proceed. Sarah's parents in turn suggested Sarah was lying and made comments like 'telling lies is not good'.*

*Although with OPA's advocacy, Sarah's matter was finally escalated to the Sexual Offences and Child Abuse Unit (SOCAU), it was too late to gather forensic evidence and there was no further investigation."*

*Case Study 6: Laura's story.*<sup>318</sup>

*"OPA was involved as an advocate for 'Laura', a sixteen year and eight month old girl, who had become pregnant to a forty-two year old friend of her father. An intervention order had been taken out against the father's friend because he had been violent towards Laura.*

*The OPA advocate sought the involvement of Child Protection staff who did not recognise Laura's rights to protection as a person under 18, but focussed instead on the perceived protective needs of Laura's unborn child and the young children in her home. OPA sought the involvement of a disability case manager but as this is a voluntary service it required the consent of Laura's father. As VCAT's jurisdiction on special procedures (e.g. sterilisations or terminations) only applies to people aged 18 and above, the decision on whether to terminate or keep the pregnancy also ultimately fell to Laura's father, who arguably failed to protect her. There were concerns that his decision for Laura to keep the pregnancy was motivated by the government's baby bonus payments."*

These Case Studies provide evidence to support the desirability of providing support and services directly to people with an intellectual disability or cognitive impairment, in order for them to exercise their legal rights independently of their families and carers.

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<sup>317</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 13.

<sup>318</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 14.

## 4.7 Coordination and collaboration

In its submission to the Inquiry, Women with Disabilities Victoria noted that a person with an intellectual disability or cognitive impairment may be subject to any one of a number of legislative regimes, including the *Disability Act 2006*, the *Mental Health Act 1986* and the *Guardianship and Administration Act 1986*.<sup>319</sup>

Often a number of specialist and generalist services provide services to people with an intellectual disability or cognitive impairment. These may include services for mental health, disability, child protection, juvenile justice, drug treatment, health, education, housing programs and aged care. For example, the Regional Information Advocacy Council, an advocacy organisation servicing central and northern parts of Victoria, noted that it supported a family of a person with an intellectual disability that received support from five agencies.<sup>320</sup>

The Committee received evidence that while a range of disability and advocacy services are available to people with an intellectual disability, in some circumstances it may be difficult to access those services.<sup>321</sup> Furthermore, some specialist services provided by the DHS to people with an intellectual disability are not available to people with other cognitive impairments.

The Committee also heard that access to services may be difficult because people with an intellectual disability or cognitive impairment may be unaware that they are eligible to access services and supports in the community.<sup>322</sup> The Committee was told by Mr Roger Steel of the Mallee Accommodation and Support Program, a disability service provider operating in Mildura, that awareness of its services is usually by “word of mouth”. For example, a person identified with an intellectual disability at a young age would often be directed to attend a specialist school rather than mainstream schools. Consequently, additional services are identified and utilised by the person, their family or carers through the specialist schools

<sup>319</sup> Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, p. 9.

<sup>320</sup> Regional Information and Advocacy Council, *Submission no. 51*, 2 February 2011, p. 4.

<sup>321</sup> See for example Dianne Hadden, Ballarat and District Law Association, *Transcript of evidence*, Ballarat, 17 November 2011, p. 50; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, pp. 16-17, 44; Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*, Mildura, 16 November 2011, p. 6; Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, p. 8; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 3; Victorian Coalition of ABI Service Providers Inc., *Submission no. 42*, 7 October 2011, p. 12; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 13. Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 8; Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 11; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 4; Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 26; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 4.

<sup>322</sup> See for example Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 4; Merri Community Health Services, *Submission no. 4*, 5 September 2011, p. 2; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 6.

in order to meet their needs.<sup>323</sup> The problem with this method for raising awareness of disability services is that it relies on a person having a diagnosed disability. People who are not diagnosed with an intellectual disability or cognitive impairment will not hear about, and therefore not receive, available support for meeting their needs.

#### 4.7.1 Consequences of poor coordination

The Committee also heard that collaboration between disability service providers is often disjointed, or does not occur.<sup>324</sup> Improved coordination and collaboration between the agencies that come into contact with people with an intellectual disability or cognitive impairment is critical to improving social outcomes and minimising contact with the justice system.<sup>325</sup>

The Committee heard that there was poor coordination and collaboration between the disability service providers and agencies that provide assistance in the justice system. In its experience in advocating for clients with an intellectual disability or cognitive impairment, the Victorian Advocacy League for Individuals with Disabilities (VALID) said that:

The job of providing support for people with an intellectual disability or cognitive impairment is the job of the whole Government, not just disability service providers. Yet different government departments and services often don't talk with each other about ways of making sure people with a disability are treated more fairly by the Police and the Courts.<sup>326</sup>

The Committee heard that three key problems emerge from poor coordination between the Government departments, agencies and community sector organisations who provide support to people with an intellectual disability or cognitive impairment.

The first problem arises from lack of coordination in transfers of information between various agencies that come into contact with a person. Radius Disability Services noted that:

Although the supports that exist in the lives of people with disabilities generally act with the best of intentions, they are often fragmented, acting in isolation and at times working entirely in the present, with limited understanding of the past history of the person they are supporting. It can

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<sup>323</sup> Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*, Mildura, 16 November 2011, p. 6.

<sup>324</sup> See for example Alf Francett, Program Director, Eastern Regional Mental Health Association, *Transcript of evidence*, Melbourne, 21 February 2012, p. 5; Keith Hitthen, Executive Director, Action on Disability within Ethnic Communities, *Transcript of evidence*, Melbourne, 21 February 2012, p. 7; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 29; Radius Disability Services, *Submission no. 28*, 12 September 2011, p. 3; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 3.

<sup>325</sup> See for example Eileen Oates, Chief Executive Officer, Loddon Campaspe Centre Against Sexual Assault, *Transcript of evidence*, Bendigo, 28 May 2012, p. 30; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 4.

<sup>326</sup> Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 5. See also Office of the Public Advocate, *Submission no. 29*, 13 September 2011, pp. 17-18.



be difficult to build on information or experiences people have had previously if you are unaware of it, and as such services/supports frequently find themselves 'starting back at the beginning'.<sup>327</sup>

Lack of coordination in information management constrains the already limited resources of disability support and advocacy organisations. Poor transfers of information between agencies also has consequences when people attempt to determine the most appropriate point of contact for accessing services, as they may not always be directed to the right service, which may result in a person going without support, increasing the chance that he or she will become involved in the justice system. The Ethnic Communities' Council of Victoria said that in its experience families and carers of people with an intellectual disability often face a "referral roundabout" when they seek access to support, as they can often be repeatedly referred from one service to another.<sup>328</sup>

The second problem arises when agencies do not have a systematic approach to working with clients with an intellectual disability. The Committee received evidence that appropriate procedures for identifying people with an intellectual disability or cognitive impairment are not used in a systematic way by the police, the courts, the legal profession or corrections services. Even when mechanisms to identify whether a person has an intellectual disability or cognitive impairment are employed, staff do not understand the needs of the person identified with the impairment, so they are not able to respond appropriately to that person's needs.

The third problem arises when there is insufficient continuity in the provision of supports, particularly for people who become involved in the justice system. Mr Stan Pappos of the Australian Community Support Organisation (ACSO) said that in his experience even when people with an intellectual disability are able to access disability support services, they may not be doing so in a systematic way – "... they live day by day and they access services when they feel the need to, it's far more reactive than proactive."<sup>329</sup> Some witnesses suggested that due to funding constraints, support provided to people with an intellectual disability or cognitive impairment tends to be delivered in a sporadic and reactionary manner that may increase the likelihood of those people becoming involved with the justice system.<sup>330</sup>

<sup>327</sup> Radius Disability Services, *Submission no. 28*, 12 September 2011, p. 2.

<sup>328</sup> Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 5. See also Anna Howard, Principal Solicitor, Loddon Campaspe Community Legal Centre, *Transcript of evidence*, Bendigo, 28 May 2012, p. 16.

<sup>329</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 29. See also Helenmary Dingwall, Team Leader, Victims Assistance Counselling Program, St Luke's Anglicare, *Transcript of evidence*, Bendigo, 28 May 2012, p. 26.

<sup>330</sup> See for example Autism Victoria, *Submission no. 16*, 9 September 2011, p. 7; Rhonda Lawson-Street, State Manager, National Disability Services Victoria, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 13-14; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 3.

Finding 3: Lack of coordination and collaboration between departments, agencies and community organisations that provide support to people with an intellectual disability or cognitive impairment can compromise the ability of a person with an intellectual disability or cognitive impairment to exercise his or her rights and seek access to justice.

## 4.7.2 Methods to improve coordination

Methods for improving coordination between key agencies include: improving the exchange of information and encouraging collaborative relationships between agencies to maximise the use of scarce resources; developing early intervention programs to address offending or challenging behaviours before they escalate; and improving knowledge within justice agencies to improve the identification and assessment of the needs of people with an intellectual disability.

### 4.7.2.1 Exchange of information

A number of departments and agencies may become involved when a person with an intellectual disability or cognitive impairment seeks access to the justice system. These may include the Department of Education and Early Childhood Development, the DHS, the Department of Justice, Corrections Victoria, the Disability Services Commissioner, the OPA, Victoria Police, VLA, the Legal Services Commissioner, the Office of Public Prosecutions and community service organisations. In this context it is crucial that departments and agencies develop mechanisms to enhance the exchange of information, minimise information duplication, and maximise opportunities to provide beneficial support to the person.

During the course of this Inquiry the Committee became aware of initiatives facilitating the exchange of information between agencies, departments and the community sector.

The Committee notes that two protocols – the *Protocol between Disability Services and Youth Justice and Guidelines for workers* and the *Protocol between Corrections Victoria, Department of Justice and Disability Services* – already exist that clarify the roles of the DHS, the Department of Justice and Corrections Victoria in the delivery of youth and adult correctional services to people with a disability.<sup>331</sup> The protocols promote effective communication between these departments regarding the delivery of services and supports. Mr Peter Persson, Manager of the Disability, Youth and Ageing portfolio at Corrections Victoria, said these protocols enhance the quality of care for persons with a disability who are in correctional facilities.<sup>332</sup>

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<sup>331</sup> Department of Human Services, *Protocol between Disability Services and Youth Justice and guidelines for workers 2009*, DHS, Melbourne, 2009; Department of Justice and Department of Human Services, *Protocol between Corrections Victoria, Department of Justice and Disability Services*, Department of Human Services, DHS, DoJ, Melbourne, 2008.

<sup>332</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 8.



The Committee also heard about positive initiatives taken by VLA, which has established formal and informal arrangements with various organisations, including the OPA, the State Trustees Office, Villamanta Disability Rights Legal Service and VCAT. These arrangements aim to reduce the need for a person with an intellectual disability or cognitive impairment to repeat his or her story for each agency, and so maximise the level of support that each of these agencies can provide.<sup>333</sup>

Finally the Committee notes the development of problem-solving models for justice in the Magistrates' Court, such as the Court Integrated Services Program (CISP). CISP was developed in 2006 as a joint initiative of the Magistrates' Court of Victoria and the Department of Justice. The program utilises multidisciplinary teams including justice sector staff, disability services and community support organisations, to develop programs that address underlying causes of offending. In its submission the Magistrates' Court noted positive outcomes from the CISP, and observed that "The collaborative nature of these multidisciplinary teams means that the court is improving dialogue and communication with agencies."<sup>334</sup>

The Committee regards the formal protocols developed by the DHS, the Magistrates' Court of Victoria and the Department of Justice, and the informal arrangements established by VLA as positive steps toward enhancing information exchange between agencies, which will ultimately result in improved support for people with an intellectual disability or cognitive impairment.

The Committee also received evidence calling for the development of similar referral mechanisms between Victoria Police and other agencies supporting people with an intellectual disability or cognitive impairment. For example, the ACSO stated that:

... police need to work closely together with service providers to manage situations. By forging a reciprocal relationship between the police and Disability Service providers information can be easily shared and police and service providers have a united and consistent response to the same issues faced by people with ID [intellectual disability].<sup>335</sup>

The Committee is encouraged by positive initiatives that some local Victoria Police stations have in place to increase its collaboration with other agencies to address mental health issues.<sup>336</sup> For example, in January 2011 the police at the Moorabbin police station commenced a trial of the Police and Community Triage (PACT) team in partnership with Southern Health. The police refer individuals to PACT clinicians who assess their needs and can act as a referral point with local health and community services. On a statewide basis Victoria Police is trialling the Police, Ambulance and Crisis Assessment Early Response (PACER) unit to improve referrals between Victoria Police and health and welfare services. The Committee welcomes

<sup>333</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 4.

<sup>334</sup> Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 10.

<sup>335</sup> Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, pp. 12-13. See also Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9.

<sup>336</sup> See for example Victoria Police, *Victoria Police annual report 2010-11*, Victoria Police, Melbourne, 2011, p. 49.

these steps taken by Victoria Police to improve its collaboration with other agencies to improve responses to mental health and other health issues.

The Committee notes that the New South Wales Government has established the Senior Officers Group on Intellectual Disability and the Criminal Justice System (SOG), in response to a report released by the New South Wales Law Reform Commission (NSWLRC) in 1996 which raised concerns about the way government departments and agencies coordinate to deliver services to people with an intellectual disability.<sup>337</sup> The SOG has representatives from the Attorney General's Department, the Department of Ageing, Disability and Home Care, the Department of Corrective Services, the Department of Education and Training, Housing NSW, NSW Health, the Department of Juvenile Justice, Justice Health and the NSW Police Force. The SOG was established to work collaboratively to reduce the incidence of people with an intellectual disability in the criminal justice system.

Questions have subsequently been raised about the effectiveness of the SOG, and in 2002 the Council for Intellectual Disability lodged a complaint with the NSW Ombudsman that the SOG had made insufficient progress in priority areas.<sup>338</sup> The NSW Ombudsman found that cross-agency services to offenders with an intellectual disability should be strengthened,<sup>339</sup> and noted that while a number of projects had been initiated by the SOG, timelines for implementation had not been established. The NSW Ombudsman also found that following the establishment of SOG a number of police priorities had changed which had an effect on the group's ability to complete proposed tasks.<sup>340</sup>

Although the NSW SOG experienced some historical challenges, the Committee believes that the intent to create a group comprised of senior representatives of agencies and organisations to overcome communication and service coordination issues has merit. Consequently, the Committee believes that a steering committee should be established in Victoria to oversee the coordination of service delivery to people with an intellectual disability or cognitive impairment who interact with or access the justice system. The Committee believes that with appropriate management a coordinated approach to the delivery of services to people with an intellectual disability or cognitive impairment could be developed, which would help to improve outcomes. The Committee recommends that the working group regularly and formally report to an appropriate Minister or Ministers, to ensure that its progress is monitored by the Executive.

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<sup>337</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system', viewed 11 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>>.

<sup>338</sup> Ombudsman New South Wales, *Report on Senior Officers Group for Intellectual Disability and the Criminal Justice System*, Ombudsman NSW, Sydney, 2004.

<sup>339</sup> Ombudsman New South Wales, *Report on Senior Officers Group for Intellectual Disability and the Criminal Justice System*, Ombudsman NSW, Sydney, 2004, p. 5.

<sup>340</sup> Ombudsman New South Wales, *Report on Senior Officers Group for Intellectual Disability and the Criminal Justice System*, Ombudsman NSW, Sydney, 2004, pp. 9-12.

Recommendation 6: That the Victorian Government consider establishing a steering committee for the purpose of coordinating Government agencies involved in the care and support of people with an intellectual disability or cognitive impairment who are involved in the justice system. The steering committee should be comprised of senior departmental staff, and report regularly to the responsible Minister or Ministers. The steering committee could:

- identify services, needs and support required by people with an intellectual disability when involved in the justice system;
- identify the roles of agencies responsible for meeting those needs;
- develop interagency guidelines for determining the responsibilities of agencies where there is an overlap in service delivery; and
- establish guidelines to ensure that departments and agencies involved in the justice system exchange information where appropriate. These guidelines should take into account relevant privacy and confidentiality considerations and be developed in consultation with the Privacy Commissioner.

#### 4.7.2.2 Early intervention

A number of submissions and witnesses strongly endorsed early intervention to improve the delivery of services to people with an intellectual disability or cognitive impairment.<sup>341</sup> Early intervention is recognised as an effective strategy to reduce people’s involvement with the criminal justice system. The Committee heard that there is a need to enhance existing early intervention programs and models to minimise or prevent involvement of people with an intellectual disability or cognitive impairment in the justice system. Early intervention initiatives can be triggered at key transition points in the life of a person with an intellectual disability. Transition points include from home to school, from school to work (or job-seeking), from the child protection system, and from custodial facilities.

VLA suggested that periodic legal “check-ups” for people with an intellectual disability or cognitive impairment who have had contact with the

<sup>341</sup> See for example Autism Victoria, *Submission no. 16*, 9 September 2011, p. 7; Vivian Avery, Lawyer, Villamanta Disability Rights Legal Service Inc., *Transcript of evidence*, Melbourne, 21 May 2012, p. 10; Julie Boffa, Policy Manager, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, pp. 36-37; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 4; Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 1; Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, p. 3; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 38-39; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 2; Rhonda Lawson-Street, State Manager, National Disability Services Victoria, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 13-14; Ian McLean, Chief Executive Officer, Golden City Support Services, *Transcript of evidence*, Bendigo, 28 May 2012, p. 10; Glenn Rutter, Manager, Court Support and Diversion Services, Magistrates’ Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 22; Danielle Rygiel, Coordinator, Youth Connections, Barwon Youth, *Transcript of evidence*, Geelong, 20 March 2012, p. 35; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 7; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 3; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 9.

justice system should be provided, arguing that this could help prevent a person's escalation toward further involvement in the justice system. Legal check-ups could help to identify outstanding fines and debts, consumer and contract issues, credit and financial issues, social security entitlements and debts, housing issues, issues with guardians and administrators and upcoming criminal matters, which if left unresolved could result in ongoing contact with the justice system.<sup>342</sup>

The Coalition for Disability Rights said that in its experience "Engagement in criminal activity can be a particular feature of the transition from school to adulthood if appropriate employment and support services are not available".<sup>343</sup> These views were echoed by Villamanta Disability Rights Legal Services, who stated:

It is vital that these people, when identified in childhood, are provided with appropriate early intervention, including much needed additional support in the education system, to enable them to learn and develop the additional skills and understanding of communication subtleties that other children usually develop with ease. If this input is provided the likelihood of many of these people entering the criminal justice system as young adults will be greatly reduced. At the same time, the likelihood of these people living fulfilling lives and contributing a great deal to the community will be increased.<sup>344</sup>

In this context the Committee was pleased to hear of the positive work of the Ballarat Specialist School. Mr John Burt, Principal of the school, said that in his experience a small cohort of at-risk young people between the ages of 18 and 21 do not access services and supports, and subsequently engage in inappropriate and sometimes criminal behaviour.<sup>345</sup> Mr Burt said that the school seeks to actively engage its students in community and training opportunities. He told the Committee about the school residential program, where young people with an intellectual disability live at the school five days a week for a maximum of ten weeks. While at the school they learn independent living and social skills with the intention that they will one day be able to live independently in the community. Assessments of the students take place before they start the program and immediately after the program to assess the skills students have been able to retain. Since 2005 Mr Burt said that approximately 86 per cent of students who had participated in the program had been assessed as being able to live independently.<sup>346</sup>

Evidence received by the Committee suggests that it is more cost-effective for funding to be directed toward prevention and support services than the

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<sup>342</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 8.

<sup>343</sup> Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 4.

<sup>344</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 9. See also Autism Victoria, *Submission no. 16*, 9 September 2011, p. 7.

<sup>345</sup> John Burt, Principal, Ballarat Specialist School, *Transcript of evidence*, Ballarat, 17 November 2011, p. 13.

<sup>346</sup> John Burt, Principal, Ballarat Specialist School, *Transcript of evidence*, Ballarat, 17 November 2011, pp. 13-14.

delivery of services for people already in the justice system.<sup>347</sup> A study conducted by Queensland Advocacy Incorporated in 2010 found that improving early intervention and diversion responses for people with impaired capacity is a more effective and efficient use of resource in terms of social and client outcomes.<sup>348</sup>

The study compared the costs of the lived experience of a person with an intellectual disability who had some contact with the justice system with three scenarios involving different transitions through the justice system. Costs were estimated for crime prevention and community safety, incident management, costs preparing for court and implementing court orders, costs of reintegrating the offender, and the cost of disability support, drug and alcohol services, education and skills programs and health and mental health services.<sup>349</sup>

Scenario one presented the costs of the individual's lived experience, which included attending a specialist school at a young age, periods of homelessness, inconsistent levels of support and engagement with the criminal justice system. The second scenario involved increased periods in correctional facilities as a consequence of court diversion programs not being activated. This scenario also included the need for the individual to receive mental health services as a result of being unable to cope with imprisonment. The third scenario, like the second, involved a period of time in prison, but was not combined with support from mental health services. The final scenario assumed transition from school to supported training and work experience and acknowledges the high level support needs of a person with an intellectual disability. The costs of each of these scenarios and the proportion of costs incurred as a result of involvement in the justice system are presented in Table 8.

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<sup>347</sup> See for example Autism Victoria, *Submission no. 16*, 9 September 2011, p. 6; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 4; Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 4; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 8; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 21; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 9.

<sup>348</sup> Queensland Advocacy Incorporated, *Preparing pathways to justice: Intervening early for vulnerable people with impaired capacity*, QAI Incorporated, Brisbane, 2010, p. 33.

<sup>349</sup> Queensland Advocacy Incorporated, *Preparing pathways to justice: Intervening early for vulnerable people with impaired capacity*, QAI Incorporated, Brisbane, 2010, pp. 29-32, Appendix 2.

**Table 8: Costs incurred in different pathways through the justice system.**<sup>350</sup>

Scenario	Estimated costs	Proportion of costs incurred in the criminal justice system
1 – Lived experience	\$300 000	24%
2 – Pathway with no diversion	\$326 000	27%
3 – Pathway with no diversion and limited support	\$270 000	47%
4 – Pathway with early intervention	\$205 000	3%

The final scenario, while requiring more ongoing support, results in substantial benefits in terms of fewer victims of crime and increased productivity through some level of employment.

#### 4.7.2.3 Knowledge base

The Committee also heard that outcomes could be improved if better instruments for identifying people with an intellectual disability or cognitive impairment were employed, and if the disadvantages experienced by these people, particularly in the context of the justice system, were better understood by the organisations, agencies and departments who may come into contact with them. Failure to identify people with an intellectual disability or cognitive impairment and failure to develop techniques for working with them was identified as a major cause for concern in evidence received by the Committee.<sup>351</sup>

The need for agencies to develop screening methods to identify intellectual disability or cognitive impairment was considered vital to improving service delivery.<sup>352</sup> Screening usually involves a series of tests or questions to

<sup>350</sup> Queensland Advocacy Incorporated, *Preparing pathways to justice: Intervening early for vulnerable people with impaired capacity*, QAI Incorporated, Brisbane, 2010, pp. 31-32, see also pp. 67-81.

<sup>351</sup> See for example Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 10; Nicole Fedyszyn, *Submission no. 37*, 27 September 2011, p. 4; Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 13; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 2; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 10; Tabitha O'Shea, Community Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Bendigo, 28 May 2012, p. 36; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, pp. 20, 25-26; Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 22; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 5.

<sup>352</sup> See for example Australian Psychological Society, *Submission no. 22*, 9 September 2011, pp. 5-6; Julie Boffa, Policy Manager, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, p. 35; Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 4; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 5; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 4; Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, pp. 22, 33; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 1.



identify the possibility of intellectual disability or cognitive impairment.<sup>353</sup> Screening processes should recognise that staff conducting the tests are not clinicians and are not formally trained to identify people with an intellectual disability or cognitive impairment. Screening is performed simply to identify the possible presence of an intellectual disability or cognitive impairment, and may indicate circumstances where further investigation by a medical professional or other appropriately qualified person is warranted.

The Committee heard that Corrections Victoria had trialled the use of a screening instrument for new inmates entering the correctional system.<sup>354</sup> The Committee is not aware of any other assessment tool used by other justice agencies such as the police, the courts or members of the legal profession. Instead, guidance material is available from some agencies that describes possible indicators of intellectual disability or cognitive impairments.<sup>355</sup> If the benefits of early intervention for people with an intellectual disability or cognitive impairment are to be realised, it is vital that all agencies that come into regular contact with them have adequate identification methods.

Specialist units or bodies within justice agencies could also assist to improve knowledge within agencies about how to identify, and how best to assist, people with an intellectual disability or cognitive impairment when they come into contact with the justice system.<sup>356</sup>

In its review of the *Criminal Justice System and People with an Intellectual Disability*, the NSWLRC presented a number of arguments in favour of establishing specialist units within agencies that regularly come into contact with people with an intellectual disability. The NSWLRC suggested that a specialist role would provide a point of contact for people outside the agency. A specialist unit or body would also be a source of expert knowledge on how to identify and interact appropriately with people with an

<sup>353</sup> See for example Susan Hayes, *Supplementary evidence*, 21 May 2012. The Committee will discuss the use of one particular screening test, the Hayes Ability Screening Index, in Chapter Five.

<sup>354</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 4.

<sup>355</sup> The Committee will discuss in the remainder of the report guidance materials, where available, that are used by the police, the courts, the legal profession and the corrections system to assist with the identification of people with an intellectual disability or cognitive impairment.

<sup>356</sup> See for example Association for Children with a Disability, *Submission no. 42*, 7 October 2011, p. 4; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 12; Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 7; Autism Victoria, *Submission no. 16*, 9 September 2011, p. 8; Children's Court of Victoria, *Submission no. 57*, 7 September 2011, p. 3; Dorota Cipusev, *Submission no. 26*, 12 September 2011, p. 1; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 9; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, pp. 4-5; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 26; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 5.

intellectual disability or cognitive impairment, and could help to develop training and guidance unique to the agency on these issues.<sup>357</sup>

The Magistrates' Court of Victoria suggested that the court would benefit from establishing a specialist role to assist with advocating for people with a disability. A specialist Disability Coordinator role previously existed within the Magistrates' Court, which was subsumed following the establishment of the CISP. Mr Glenn Rutter, the Manager of Court Support Services at the Magistrates' Court, said a similar coordinator role has recently been reintroduced into the Melbourne Magistrates' Court.<sup>358</sup> The Children's Court of Victoria also suggested that the establishment of a specialist role would be beneficial. The Children's Court considered that the role of such a coordinator could assist with ensuring:

... that parties appearing at court for the first time are fast-tracked within the duty lawyer scheme; the advocate might also be responsible for assisting parties to represent themselves if legal aid was not available. There would also be a role for the advocate to liaise with other professionals to ensure that all relevant material is put before the Court.<sup>359</sup>

Corrections Victoria told the Committee that it had a similar specialist role within the corrections system. Mr Persson told the Committee that the Prison Service Coordinator, among other functions, acts as a "conduit between the disability services system and the correctional system."<sup>360</sup> Case managers of clients who enter correctional facilities contact the Coordinator to ensure that the person is appropriately managed upon entry into the prison system.<sup>361</sup>

The Committee believes that specialist roles such as the Disability Coordinator role currently being trialled in the Magistrates' Court are a useful mechanism for pooling expertise about the issues experienced by people with an intellectual disability and enhancing the level of coordination and collaboration between agencies, which will ultimately improve outcomes of people with an intellectual disability or cognitive impairment.

In the following Chapters the Committee discusses which specialist roles and units would be beneficial.

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<sup>357</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system', viewed 11 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>>.

<sup>358</sup> Glenn Rutter, Manager, Court Support and Diversion Services, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 25. See also Magistrates' Court of Victoria, 'New role being piloted at the Melbourne Magistrates' Court', viewed 3 September 2011, <<http://www.magistratescourt.vic.gov.au/news/new-role-being-piloted-melbourne-magistrates-court>>.

<sup>359</sup> Children's Court of Victoria, *Submission no. 57*, 7 September 2011, p. 3. See also Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 10, who also supported investigating the provision of a specialist role within the Supreme Court.

<sup>360</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 8.

<sup>361</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 8.



## Chapter Five: Police and people with an intellectual disability or cognitive impairment

The apparent overrepresentation of people with an intellectual disability or cognitive impairment in the corrections system may suggest that people with these impairments are overrepresented in other parts of the justice system, such as in police settings.

Police officers routinely interact with people with an intellectual disability or cognitive impairment when carrying out their duties. Police play a crucial role in guiding a person's entry into and passage through the justice system. Interactions with police may include:

- intervening to protect a person with an intellectual disability from harm;
- linking people with an undiagnosed or unsupported disability to welfare or support services; and
- identifying substance abuse, homelessness and financial difficulties.<sup>362</sup>

This Chapter examines the role of the police when interacting with people with an intellectual disability or cognitive impairment. The Committee examines police arrest and interrogation processes, police decisions to charge or release a person on bail, and methods to improve the interactions that police have with people with an intellectual disability or cognitive impairment.

### 5.1 Policing functions

#### 5.1.1 Importance of the police role

Approximately 16 100 people are employed by Victoria Police to deliver services across 500 locations across the state.<sup>363</sup> The police are the most visible and accessible agents of the criminal justice system, and play a critical role in determining how complaints made by members of the community progress through the justice system.

<sup>362</sup> Victoria Police, *Submission no. 34*, 23 September 2011, p. 1.

<sup>363</sup> Victoria Police, 'About Victoria Police', viewed 1 February 2013, <[http://www.police.vic.gov.au/content.asp?Document\\_ID=3](http://www.police.vic.gov.au/content.asp?Document_ID=3)>.

In evidence received by the Committee, STAR Victoria, a community-based advocacy organisation, stated that:

... police are often at the coal-face of this interaction [with the justice system]. The way that the initial interaction is handled by police frequently sets the pattern for what follows and has an immediate and/or long-term impact on the quality and level of justice that people with an intellectual disability may obtain.<sup>364</sup>

A similar view was expressed by the Office of the Public Advocate (OPA), emphasising that “As police constitute the front-end of the justice system, they largely shape the nature, extent and effectiveness of people with disabilities’ interactions with the justice system.”<sup>365</sup>

The Committee heard that policing in the Victorian community often requires officers to assist vulnerable people who have come into contact with the police to access appropriate support services. Mr Stan Pappos, the Housing Services Manager of the Australian Community Support Organisation (ACSO), recognised the changing role of police officers, and told the Committee that “... we’re in a day and age at the moment where they’re not just about keeping law and order, there’s a welfare component to what police are now doing.”<sup>366</sup> It is critical in this context, therefore, that police possess skills and resources to provide appropriate responses to the needs of vulnerable people, as well as being able to undertake their core tasks to preserve law and order.

## 5.1.2 Police interactions with people with an intellectual disability or cognitive impairment

### 5.1.2.1 Police perspective

In its submission to the Inquiry, Victoria Police identified a number of challenges when responding to situations involving people with an intellectual disability, including:

- identifying individuals who may be vulnerable to harm and have limited ability or opportunity to request police assistance;
- responding to unpredictable or inappropriate behaviour;
- maintaining safety in situations involving multiple risks, such as intellectual disability, drug or alcohol use, and the presence of a weapon;
- having to make critical decisions without access to available information and expertise;
- identifying the appropriate referral agency within a complex service system; and

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<sup>364</sup> STAR Victoria, *Submission no. 12*, 8 September 2011, p. 2.

<sup>365</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 26.

<sup>366</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 30.

- accessing services that have limited hours of operation, limited geographic coverage, high thresholds for access to service, or lengthy response times to police referrals.<sup>367</sup>

### 5.1.2.2 Perspectives of people with an intellectual disability

The characteristics of a person with an intellectual disability or cognitive impairment may exacerbate their vulnerabilities if they come into contact with the justice system. For example, the Committee was told by the Coalition for Disability Rights that:

... many people with an intellectual disability or cognitive impairment are overly-compliant, easily intimidated and prone to confusion. Because they often face discrimination, exclusion and social injustice in their lives generally, their experience of the justice system is likely to be associated with an overwhelming sense of anxiety, fear and powerlessness. People with an intellectual disability, in particular, are likely to be highly susceptible to suggestion, influence and coercion.<sup>368</sup>

Similarly, Villamanta Disability Legal Rights services, a community legal centre which works primarily with people with a disability, told the Committee that:

People who have an intellectual disability, in particular those who have been institutionalised, are often compliant and have been taught that it is best to please those in authority and give them the answer they think is required. ... They also often have memory impairment which means that although they remember much, they may not remember some things, or may not recall precise times and dates that incidents occurred. They are often vulnerable to being confused if plain language, sufficient time and clear explanation are not used.<sup>369</sup>

Victoria Legal Aid (VLA) stressed that people with an intellectual disability or cognitive impairment often face particular difficulties when they are being questioned by the police "... because they are eager to appear compliant and/or do not want to reveal their cognitive impairment."<sup>370</sup>

The Committee's research found that:

- in comparison to the general population, a person with an intellectual disability or cognitive impairment is more likely to provide a response to leading questions;<sup>371</sup>

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<sup>367</sup> Victoria Police, *Submission no. 34*, 23 September 2011, p. 1.

<sup>368</sup> Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 2 (citations omitted).

<sup>369</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 3.

<sup>370</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 10.

<sup>371</sup> See for example Queensland Advocacy Incorporated, *Justice for all: People with an intellectual disability and the criminal justice system*, QAI Incorporated, Brisbane, 2001, p. 27.

- a person with an intellectual disability or cognitive impairment may have a poor understanding of questions they are asked and may not understand the implications of answers they give;<sup>372</sup> and
- communication difficulties experienced by people with an intellectual disability or cognitive impairment can mean that the use of unfamiliar language and concepts during police interviews can exacerbate their confusion.<sup>373</sup>

The Committee also found that police are often not aware of how to identify whether a person has an intellectual disability or cognitive impairment, and so may assume that these people have a greater understanding of their situation than is actually the case.<sup>374</sup>

Where the impact of an intellectual disability or cognitive impairment on a person is not properly understood, the effectiveness of police interviews can be undermined. The OPA told the Committee that the police often make incorrect assumptions about people with a cognitive impairment because they do not understand how this condition can affect people's behaviour. For example:

Behaviours like defensiveness, failure to make eye-contact or acquiescence are wrongly interpreted as signs of guilt in persons with cognitive disability. These behaviours, however, are often displayed by people with cognitive disability when encountering authority figures.<sup>375</sup>

These kinds of behaviours can also affect the way that police regard evidence from people with an intellectual disability or cognitive impairment who are victims of crime.<sup>376</sup> When these behaviours are misunderstood, officers may consider the victim's testimony to be unreliable or untrustworthy, and so regard accounts of an event not to be credible.<sup>377</sup>

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<sup>372</sup> Intellectual Disability Rights Service, *Enabling Justice: A report on problems and solutions in relation to diversion of alleged offenders with intellectual disabilities from the New South Wales court system*, IDRS, Sydney, 2008, p. 74.

<sup>373</sup> Office of the Public Advocate, *Silent victims: A study of people with intellectual disabilities as victims of crime*, OPA, Melbourne, Report prepared by Kelley Johnson, Ruth Andrew and Vivienne Topp, 1988, p. 52.

<sup>374</sup> Intellectual Disability Rights Service, *Enabling Justice: A report on problems and solutions in relation to diversion of alleged offenders with intellectual disabilities from the New South Wales court system*, IDRS, Sydney, 2008, p. 74.

<sup>375</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 25.

<sup>376</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 9; Margaret Camilleri, *Submission no. 46*, 10 October 2011, pp. 5-6; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 7; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 13; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 9; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 4.

<sup>377</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 9; Lois Bedson, Policy and Research Officer, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 25; Margaret Camilleri, *Submission no. 46*, 10 October 2011, pp. 4-6; CASA Forum, *Submission no. 33*, 21 September 2011, p. 3; John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p.

Concern was expressed by a number of witnesses that police often determine not to proceed with an investigation because they make incorrect assumptions about the credibility and reliability of evidence given by a person with an intellectual disability or cognitive impairment. Grampians disAbility Advocacy told the Committee that:

Police are often slow to act when a person with a cognitive impairment alleges a crime has been committed against them. ... The general opinion of Police is that people with a disability are unreliable witnesses or are not to be believed and therefore they won't be able to secure a conviction.

People with a cognitive impairment who are unable to communicate verbally or who have memory issues that prevent them from providing times, dates etc. are dismissed as being unable to give evidence and therefore no action is taken against the alleged perpetrator.<sup>378</sup>

The OPA provided the following Case Study highlighting a case where the police failed to take action although evidence existed that an assault had taken place against a person with a cognitive impairment.

*Case Study 7: Immanuel's story.*<sup>379</sup>

*"Two persons working in a supported accommodation witnessed a resident, 'Immanuel', being physically assaulted. There was a delay lodging a complaint to the police because of an internal workplace investigation. When the police finally became involved, they decided not to press charges. When OPA advocates pursued this matter with the police, the police were dismissive and suggested that because Immanuel had a mental illness and a criminal record, he was unlikely to be considered as a 'credible witness'."*

A 1987 report by the OPA – *Finding the way: The criminal justice system and the person with intellectual disability* – recognised that people with an intellectual disability are particularly vulnerable when interacting with the police,<sup>380</sup> and concluded that people with an intellectual disability would benefit from the provision of additional support as they move through the justice system.<sup>381</sup>

While the Committee heard anecdotal evidence suggesting that people with an intellectual disability are often disadvantaged when interacting with

26; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, pp. 11-12; Patricia Malowney, Deputy Chair, Victorian Disability Advisory Council, *Transcript of evidence*, Melbourne, 24 October 2011, p. 8; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 4; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 13; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 9; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 11; Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, pp. 17-18.

<sup>378</sup> Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 3.

<sup>379</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 26.

<sup>380</sup> Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987, p. 5.

<sup>381</sup> Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987, p. x.

the police, the Committee also heard examples of positive police interactions with people with an intellectual disability or cognitive impairment. Some of these are described in the Case Studies below.

*Case Study 8: A victim's perspective of police interactions.*<sup>382</sup>

*"... the police used an interpreter to work with the individual (victim). They worked hard to ensure that the individual understood what the process was, where things were up to and what was happening. They kept the person's key worker, family and program manager informed of progress without breaching privacy. This enabled the individual to make informed decisions about what they wanted, allowed the worker to provide appropriate support to that person, ensured that the family did not experience undue anxiety, and enabled the program management to manage the incident appropriately in terms of the needs of other residents and staff."*

*Case Study 9: A perpetrator's perspective of police interactions.*<sup>383</sup>

*"... the individual (perpetrator) was taken to the police station to provide a statement about what had happened. The interview took place in a private interview room, and the police officers went to some trouble to ensure that the individual understood what would happen as the case proceeded. This included taking them through a range of scenarios reflecting different possible outcomes, including a 'worst case' scenario if the case went to court. On the occasions when police visited the house where the individual lived with 4 other residents with intellectual disabilities in order to undertake their investigation, they came in plain clothes so as not to alarm the other residents. They also went to great lengths to ensure that the people they talked to about the incidents were comfortable and could provide informed consent to be interviewed."*

## 5.2 Police procedures

Arrest and interrogation procedures are principally laid out in the *Crimes Act 1958* (Vic) and the *Victoria Police Manual* (VPM). Police procedure and the legislative framework surrounding the operation of the police role recognises, to an extent, the disadvantages and challenges that may be experienced when vulnerable sectors of the community interact with the police.

The VPM, issued by the Chief Commissioner of Police under the *Police Regulation Act 1958* (Vic), guides the administration and effective management of the police force.<sup>384</sup> The VPM sets out operating procedures and administrative guidelines that, while they do not have the same authority as legislation, provide essential guidance for the police when carrying out their operations.

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<sup>382</sup> Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 4.

<sup>383</sup> Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 4.

<sup>384</sup> *Police Regulation Act 1958* (Vic), section 17.



The VPM may also be considered by the courts. Where a breach of a policy or procedure set out in the VPM has been found by the courts disciplinary action may be taken against the police officer in question. A breach of police procedures may also be raised in court as a basis for arguing against the admissibility of any evidence taken in breach of the VPM. The courts have found that where the police have obtained evidence by “improper methods”, which includes methods contrary to police operating procedures, it would be unfair to the accused for weight to be placed on this evidence.<sup>385</sup>

## 5.3 Identification of intellectual disabilities and cognitive impairments

### 5.3.1 Current practice

A number of witnesses drew the Committee’s attention to the need for the police to be able to identify people with an intellectual disability or cognitive impairment.<sup>386</sup> A number of recommendations from witnesses called for improvements to the methods employed by Victoria Police to identify these conditions.<sup>387</sup>

The current protocol established between Victoria Police and the Department of Human Services (DHS) requires the police to determine whether a person has a mental disorder by asking or observing the person directly, or by checking police records for previous interactions.<sup>388</sup>

This guidance is replicated in a section contained in the VPM, *Interviewing Specific Categories of Person*, which informs police that they are to identify whether a person has a mental disorder by:

... their words or actions, by asking the person directly, by checking police records of any previous interactions, or by contacting their nearest Mental

<sup>385</sup> See for example *McDermott v R* (1948) 76 CLR 501, 514-515; *R v Lee* (1950) 82 CLR 133, 154; *Van Der Meer v R* (1988) 82 ALR 10, 15.

<sup>386</sup> See for example Daniel Clements, Manager, Brosnan Centre, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, p. 31; Lynne Coulson Barr, Deputy Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 15; Nicole Fedyszyn, *Submission no. 37*, 27 September 2011, p. 3; Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 4; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 2; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 23.

<sup>387</sup> See for example Association for Children with a Disability, *Submission no. 42*, 7 October 2011, p. 4; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 5; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 3; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 6; Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, pp. 22, 23; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 11; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 7; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 5; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9; Youthlaw, *Submission no. 49*, 20 October 2011, p. 4.

<sup>388</sup> Department of Health, *Department of Health and Victoria Police: Protocol for mental health*, Department of Health, Melbourne, 2010, p. 10.

Health Triage to check whether the person is, or has been, a client of a mental health service.<sup>389</sup>

The definition in the VPM for ‘mental disorder’ includes people with an intellectual disability, acquired brain injury (ABI), or neurological condition. The VPM provides that a person with a mental disorder may be identified if he or she has been diagnosed by a medical practitioner, receives disability support, has used the defence of mental impairment in court, or has volunteered this information to the police.<sup>390</sup> There is no other guidance contained in the VPM on how to assess whether a person has an intellectual disability or cognitive impairment.

In its review into *Sexual Offences* in 2004, the Victorian Law Reform Commission (VLRC) noted that it was difficult for police officers to identify whether a person has a cognitive impairment, and to understand the effect of this impairment upon a person. The VLRC recommended that guidelines be developed to assist the police to identify cognitive impairment and that such guidance could:

... include a statement of the main types of cognitive impairment, possible indicators of each type of impairment, and key features of a person’s social information that may be suggestive, for example their social security entitlement and whether the person has a caseworker.<sup>391</sup>

The Law Institute of Victoria (LIV) suggested that guidance contained in the VPM was insufficient to assist the police to identify a person with an intellectual disability.<sup>392</sup> The LIV questioned “... whether police officers are adequately equipped to identify signs of intellectual disability through an individual’s ‘words or actions’ ...”<sup>393</sup>

Although no procedure for identifying a person with an intellectual disability or cognitive impairment is set out in the VPM, Victoria Police drew the Committee’s attention to initiatives it has in place to improve its interactions with people with an intellectual disability. For example, Victoria Police has worked with the OPA to develop a Ready Reckoner, *Responding to people with a cognitive impairment*. The Ready Reckoner:

- outlines procedures for dealing with people with a cognitive impairment;
- assists police to recognise indicators of cognitive impairment;
- assists police to communicate effectively with people with a cognitive impairment; and

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<sup>389</sup> Victoria Police, *Victoria Police Manual: Interviewing specific categories of person*, Victoria Police, Melbourne, 2012, p. 3.

<sup>390</sup> Victoria Police, *Victoria Police Manual: Person warning flags*, Victoria Police, Melbourne, 2012, p. 3.

<sup>391</sup> Victorian Law Reform Commission, *Sexual offences*, VLRC, Melbourne, Final report, 2004, p. 324.

<sup>392</sup> Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 5.

<sup>393</sup> Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 5.



- provides advice for police on how to contact agencies who may be of assistance.<sup>394</sup>

Potential indicators of cognitive impairment described in the Ready Reckoner include whether the person:

- has difficulty expressing themselves;
- is unable to read, write or tell the time;
- is distracted and unable to concentrate;
- fails to make eye contact;
- is confused or disorientated;
- is out of touch with reality;
- tends to be overwhelmed by the police presence, and may even want to run away;
- is over eager to please;
- uses repetitive language;
- has difficulty remembering facts or details;
- is unable to repeat the caution or their rights back to the police officer in their own words; and
- denies or does not accept that they have a disability although this may be apparent to others.<sup>395</sup>

### **5.3.1.1 Lack of police recognition of intellectual disabilities and cognitive impairments**

A significant issue affecting how a person with an intellectual disability or cognitive impairment interacts with the police is that the police often do not recognise that the person has an impairment. Police may fail to recognise an impairment for a number of reasons, including that:

- people with a disability may be reluctant to disclose their disability;<sup>396</sup>
- people with an intellectual disability or cognitive impairment may be unaware they have a disability;<sup>397</sup> and

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<sup>394</sup> Office of the Public Advocate, *Supplementary evidence*, 25 October 2011, p. 1.

<sup>395</sup> Office of the Public Advocate, *Supplementary evidence*, 25 October 2011, p. 2.

<sup>396</sup> See for example Brain Injury Australia, *Submission no. 2*, 18 August 2011, p. 2; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 5; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 23.

- the police have limited training or understanding of the behavioural characteristics of people with an intellectual disability or cognitive impairment.<sup>398</sup>

The following Case Study was highlighted by Leadership Plus in its submission to the Committee and is reflective of a number of stories the Committee heard of the police failing to recognise people with an intellectual disability.<sup>399</sup>

*Case Study 10: Michael's story.*<sup>400</sup>

*'Michael' is a 65 year old man living with an ABI. Michael was charged with being drunk in a public place and sought advocacy support for this. The charge sheet stated that Michael was 'consuming alcohol and being abusive to passengers and [a] bus driver'. Michael was fined \$478.*

*Michael has a medical certificate which states that he has trouble with his balance (due to brain injury, which is not uncommon). Michael was arrested and taken into the police station. Michael raised the following concerns regarding dealings with the police:*

- *Michael was not breathalysed or blood tested and has a condition which affects his balance, yet was still charged with drunken behaviour*
- *Michael was not allowed to see a Doctor despite requesting one when he arrived at the police station*
- *The police did not have a key to unlock the back of the divvy van and had to use an angle grinder. This took a long-time and made Michael anxious, overwhelmed and less able to deal with the situation*
- *Michael's name and details on the charge sheet were incorrect but police did not correct them.*

Evidence in public hearings and submissions stressed the importance of ensuring that people with an intellectual disability or cognitive impairment are identified at their first point of contact with the justice system, which would ordinarily be police contact.<sup>401</sup> For example, Ms Nicole Fedyszyn said:

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<sup>397</sup> See for example Brain Injury Australia, *Submission no. 2*, 18 August 2011, p. 9; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 5.

<sup>398</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 7; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 2; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 23; Jane Penberthy, Principal Lawyer, Central Highlands Community Legal Centre, *Transcript of evidence*, Ballarat, 17 November 2011, p. 25.

<sup>399</sup> See for example Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 25; Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 22.

<sup>400</sup> Leadership Plus, *Submission no. 35*, 23 September 2011, p. 8.

<sup>401</sup> See for example Daniel Clements, Manager, Brosnan Centre, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, p. 21; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 3.

Early and accurate identification of the presence of an intellectual disability is vital within the justice system, as many offenders with an intellectual disability enter the criminal justice system without having received appropriate services and supports, their disability is therefore undiagnosed. Therefore the police being the first contact people have with the criminal justice system are in the prime position to be able to identify a person as having an intellectual disability as they enter the system.<sup>402</sup>

The OPA noted that, where people with an intellectual disability or cognitive impairment are not identified, it is likely that they are "... not being linked into services and programs in the justice system that are tailored to meet their needs ...".<sup>403</sup>

In the 1980s, an OPA study on people with an intellectual disability as victims of crime found that the police had little knowledge of intellectual disability and the support needs that people with these impairments may require when interacting with the police.<sup>404</sup> This report found that the police often relied on misconceived assumptions of the characteristics of people with an intellectual disability, such as being prone to lying and giving unreliable evidence.<sup>405</sup> Another report by the OPA said that although police officers received some generic training about disability awareness, this training primarily addressed physical disabilities rather than intellectual disabilities.<sup>406</sup>

Despite the passage of time since those reports, evidence presented by the OPA suggested that some police still lack knowledge and awareness of how to identify cognitive impairment and how to accommodate the needs of the person.<sup>407</sup>

Life Without Barriers, an advocacy group working with disadvantaged people, stated that assumptions and stereotypes about people with an intellectual disability can affect the nature of their contact with the police. Life Without Barriers noted that stereotypes of people with an intellectual disability can incorrectly "... paint them as incompetent, untrustworthy and lacking in credibility."<sup>408</sup> Inclusion Melbourne shared a similar view, that:

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<sup>402</sup> Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 4.

<sup>403</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 23. See also Nicole Fedyszyn, *Submission no. 37*, 27 September 2011, p. 3; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 11; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 4.

<sup>404</sup> Office of the Public Advocate, *Silent victims: A study of people with intellectual disabilities as victims of crime*, OPA, Melbourne, Report prepared by Kelley Johnson, Ruth Andrew and Vivienne Topp, 1988, p. 53.

<sup>405</sup> Office of the Public Advocate, *Silent victims: A study of people with intellectual disabilities as victims of crime*, OPA, Melbourne, Report prepared by Kelley Johnson, Ruth Andrew and Vivienne Topp, 1988, p. 51. See also Mindy Sotiri and Jim Simpson, 'Indigenous people and cognitive disability: An introduction to issues in police stations', *Current Issues in Criminal Justice*, vol. 17, no. 3, pp. 431-443, 2006, pp. 439-440.

<sup>406</sup> Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987, pp. 33-34.

<sup>407</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 25.

<sup>408</sup> Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 7 (citations omitted). See also Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 3.

Often people with cognitive disabilities are confused with people who have mental illness or are seen as difficult, uncooperative or intoxicated. People with disabilities displaying characteristics of their disability (such as autism, epilepsy, cerebral palsy, et[c].) have at times been inappropriately arrested for drunken driving, drug abuse, voyeurism, assault and other crimes.<sup>409</sup>

To illustrate difficulties that may be faced by both the police and a person with an intellectual disability in police settings, Peninsula Access Support and Training (PAST), a disability service provider, noted the difficulties it experienced when providing support to a person with disabilities:

... due to spasms and the lack of control she had over her body and movements, there were times where it would appear that the plaintiff was not responding in the 'typical' way one would expect following a sexual assault or any assault for that matter. When she gets nervous her normal reaction is to laugh and at times this was perceived as her not being serious or worse, that what she was saying was not true.<sup>410</sup>

The following Case Study provides an example of police making incorrect assumptions about a person with a cognitive impairment and the consequences that followed.

**Case Study 11: Misconceived assumptions about a person with a cognitive impairment.**<sup>411</sup>

*"A few years ago [a young man I support] had been robbed and attempted to go to the police and report that. He knew his rights – he knew he had the right to go and do that. Because of his progressive neurological condition, his slurred speech and his uneven gait – whatever – he was perceived by the police as being drunk or drug affected and was basically told to bugger off and not worry about it – you know, 'Because you are obviously another druggie off the street'. Thankfully he rang his father and said, 'This is what has happened, Dad. I took my money out of the auto-bank and tried to report it to the police and got sent away'. His father came down to the police station with him and explained to the officers. That ultimately ended up in a formal apology from the police, but the fact was that they responded that way in the first place and made the assumption that he was another druggie off the street when he had a progressive neurological condition."*

Evidence from Ms Ursula Smith, Autism Victoria and the OPA acknowledged that although people with highly visible disabilities tend to be correctly identified as requiring additional support, this is not always the case for people with mild to moderate disabilities who may present with normal functioning abilities.<sup>412</sup> The Legal Services Commissioner also noted that "... the degree of disability that the client has is often not

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<sup>409</sup> Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 2.

<sup>410</sup> Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011, p. 2.

<sup>411</sup> Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 22.

<sup>412</sup> Autism Victoria, *Submission no. 16*, 9 September 2011, p. 5; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 23; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 9.

obvious. Lack of external symptoms does not necessarily mean that a person is capable of understanding what is going on.”<sup>413</sup> A similar view was expressed by the Disability Services Commissioner who said that people with less visible disabilities are often not identified as requiring any additional support or services and therefore are more disadvantaged and vulnerable when they interact with the police.<sup>414</sup>

Finding 4: Initial contact with the justice system by the public is usually with the police, and the circumstances of that contact will often affect subsequent interaction with the justice system. Consequently, it is essential that the police identify that a person has an intellectual disability or cognitive impairment as early as possible after contact, and provide appropriate support to ensure that he or she has fair and equitable access to the justice system.

### 5.3.2 Options for reforms

A number of options for improving the identification of people with an intellectual disability or cognitive impairment by the police were raised in evidence: the use of screening tests, improving police policy, creating specialist support roles within police stations and developing a disability identification card.<sup>415</sup> Improved training for police officers was also considered an important measure for not only improving the identification of intellectual disability or cognitive impairment, but for improving officers’ interactions when they come into contact with people with these impairments.<sup>416</sup>

<sup>413</sup> Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 2.

<sup>414</sup> Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 4.

<sup>415</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 12; Michael Bernard, *Transcript of evidence*, Ballarat, 17 November 2011, p. 4; Nicole Fedyszyn, *Submission no. 37*, 27 September 2011, p. 3; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 7; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 5; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 9; Dot Leigh, Geelong Parent Network, *Transcript of evidence*, Geelong, 20 March 2012, p. 12; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 26; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 28; Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, pp. 22, 23; Nick Rushworth, Executive Officer, Brain Injury Australia, *Transcript of evidence*, Melbourne, 21 February 2012, p. 43; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 1; Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*, Mildura, 16 November 2011, p. 7; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 7; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9.

<sup>416</sup> See for example Assert 4 All, *Submission no. 53*, 10 September 2011, p. 25; Association for Children with a Disability, *Submission no. 42*, 7 October 2011, p. 4; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 12; John Burt, Principal, Ballarat Specialist School, *Transcript of evidence*, Ballarat, 17 November 2011, p. 16; Trevor Carroll, Executive Officer, Disability Justice Advocacy, *Transcript of evidence*, Melbourne, 21 February 2012, p. 51; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 9; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 39; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 3; Office of the Disability Services Commissioner, *Submission no. 41*, 7

### 5.3.2.1 Victoria Police Manual definitions

As noted in Section 5.3.1, the VPM employs the blanket term ‘mental disorder’ to refer to a broad range of conditions, some with quite different causes and forms of expression, including intellectual disability, cognitive impairment, and mental illness. The Committee notes that in legislation the various conditions encompassed by the VPM’s term “mental disorder” are distinguished from one another – intellectual disabilities and cognitive impairment are defined and considered under the *Disability Act 2006* (see Chapter Three), whereas mental illness is considered under the *Mental Health Act 1986* (Vic). A ‘mental illness’ is defined in that Act as “a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.”<sup>417</sup>

The Committee heard evidence during the course of the Inquiry that intellectual disabilities and cognitive impairments were qualitatively different from mental illnesses – with different causes, effects, and expression – and that they therefore required different methods for identifying these conditions, and different responses to them.

Consequently, the Committee believes Victoria Police should review the VPM and consider developing separate sections for intellectual disability, cognitive impairment, and mental illness. This may assist police to disentangle methods for engaging with people suffering from a mental illness and people with an intellectual disability or a cognitive impairment such as an ABI. It may also facilitate a more nuanced response by the police when interacting with people who have difficulties understanding, comprehending, or responding due, not to a “disturbance in thought, mood, perception or memory”,<sup>418</sup> but to an ongoing disability.

Recommendation 7: That Victoria Police develop separate sections in the Victoria Police Manual for guidance on mental illness, intellectual disability, and cognitive impairment respectively, and define appropriate responses for each impairment.

### 5.3.2.2 Guidance on indicators of intellectual disability or cognitive impairment

Another method for improving identification of people with an intellectual disability or cognitive impairment is to describe methods for identifying intellectual disability in the VPM. As discussed above, the VPM contains

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October 2011, p. 6; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 26; Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011, p. 2; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 11; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9; Youthlaw, *Submission no. 49*, 20 October 2011, p. 4; Dianne Leverett, Principal, Nelson Park School, *Transcript of evidence*, Geelong, 20 March 2012, p. 32; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 2; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 5; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 5.

<sup>417</sup> *Mental Health Act 1986* (Vic), section 8(1A).

<sup>418</sup> *Mental Health Act 1986* (Vic), section 8(1A).



limited guidance on how police officers may identify intellectual disability or cognitive impairment. By providing information for identifying intellectual disability or cognitive impairment, the VPM may draw upon material available in the Ready Reckoner prepared by the OPA (see page 108).

The Committee believes that the Ready Reckoner should be available at all police stations across the state and police officers should be made aware of its content. In New South Wales, extensive guidance is contained in the New South Wales Police Force's *Code of Practice for CRIME*, which identifies possible indicators of intellectual disability, including:

Whether the person appears to:

- have difficulty understanding questions and instructions
- respond inappropriately or inconsistently to questions
- have a short attention span
- receives a disability support pension
- reside at a group home or institution, or be employed at a sheltered workshop
- be undertaking education, or to have been educated at a special school or in special education classes at a mainstream school
- have an inability to understand the caution.

Other indicators are when:

- the person identifies themselves as someone with impaired intellectual functioning
- someone else (carer, family member or friend) tells you the person is or may be someone with impaired intellectual functioning
- the person exhibits inappropriate social distance, such as being overly friendly and anxious to please
- the person acts much younger than their age group
- the person is dressed inappropriately for the season or occasion
- the person has difficulty reading and writing
- the person has difficulty identifying money values or calculating change
- the person has difficulty finding their telephone number in a directory
- the person displays problems with memory or concentration.<sup>419</sup>

In the United Kingdom the Ministry of Justice has also developed guidance on how police should conduct interviews with vulnerable and intimidated witnesses. The *Youth Justice and Criminal Evidence Act 1999* (UK) defines witnesses entitled to special protections to include someone whose

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<sup>419</sup> New South Wales Police Force, *Code of practice for CRIME (custody, rights, investigation, management and evidence)*, NSW Police Force, Sydney, 2011, pp. 144-145.

quality of evidence is likely to be diminished because the person has a “significant impairment of intelligence and social functioning”.<sup>420</sup> Guidance prepared by the Ministry is comparable to that contained in the Ready Reckoner and the NSW Code of Practice, and provides prompts that may assist police to determine whether they are dealing with a vulnerable witness.<sup>421</sup>

The Committee considers that the VPM should be amended to provide guidance as to how to identify whether a person has an intellectual disability or cognitive impairment.

**Recommendation 8:** That the Victoria Police Manual be amended, with the assistance of the Department of Human Services and the Office of the Public Advocate, to provide guidance on how to identify a person with an intellectual disability or cognitive impairment.

### 5.3.2.3 Screening tests

The Committee received evidence supporting the use of a screening test to help police to identify people with an intellectual disability or cognitive impairment.<sup>422</sup> Inclusion Melbourne suggested that because people with an intellectual disability typically have difficulties with literacy, comprehension, suggestibility, memory and acquiescence, a test incorporating these elements could help to determine whether a person has an intellectual disability.<sup>423</sup>

Some witnesses endorsed the use of the Hayes Ability Screening Index (HASI) for this purpose.<sup>424</sup> The HASI test was designed for use by professionals – police, solicitors, parole officers and corrections staff – working at all stages of the criminal justice system.<sup>425</sup> The test takes about five minutes to administer and consists of the following elements:

- self-report questions which ask the person to comment on specific learning or reading difficulties;
- a backward spelling test which requires the person to spell a five letter word backward;

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<sup>420</sup> *Youth Justice and Criminal Evidence Act 1999*, (UK), section 16(2)(a)(ii).

<sup>421</sup> Ministry of Justice (UK), *Vulnerable and intimidated witnesses: A police service guide*, Ministry of Justice (UK), London, 2011, pp. 9-10.

<sup>422</sup> See for example Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, pp. 5-6; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 5; Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 23; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 1.

<sup>423</sup> Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 5.

<sup>424</sup> See for example Nicole Fedyszyn, *Submission no. 37*, 27 September 2011, p. 3; Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, p. 6.

<sup>425</sup> Susan Hayes, 'Early intervention or early incarceration?', Paper presented at the *International Association for the Scientific Study of Intellectual Disabilities: 11th World Conference*, Seattle, 2000, p. 122. See also Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, p. 6.



- a join the dots puzzle which requires the person to join letters of the alphabet with corresponding numbers; and
- a clock drawing test which requires the person to draw a clock face and a particular time.<sup>426</sup>

The use of this, or a similar, test by police would help them identify whether a person may have an intellectual disability or cognitive impairment. In other settings, such as in interactions with the legal profession, the test would help to identify whether further diagnostic testing is warranted.<sup>427</sup> The results of these tests could also help to inform the case for the person should the matter proceed to court.

This test was designed to be over inclusive and may therefore identify people who have other types of learning difficulties, are functionally illiterate and innumerate, are intoxicated, are mentally ill, or who have poor English.<sup>428</sup> Over-inclusion may be preferable to under-inclusion, however, as many of these groups could also benefit from assistance when they come into contact with the justice system.<sup>429</sup>

The HASI test is not the only screening tool available to identify people with intellectual disabilities or cognitive impairment. Another is the K-BIT test (Kaufman Brief Intelligence Test), a brief, individually administered measure of verbal and non-verbal intelligence and can be used for people aged between four and 90 years. The test comprises both verbal and non-verbal components, and tests the ability to solve problems.<sup>430</sup>

Another tool to help identify people with ABIs is the *HELPS: Brain Injury Screening Tool* developed in the United States to aid the rehabilitation by health services of a person who is likely to have an ABI. The test is used to assess the possibility that a head injury causing an ABI has occurred, and therefore asks a series of simple health-related questions to determine whether the person has experienced a head injury.<sup>431</sup>

The Committee heard that the deleterious effects of not identifying an intellectual disability or cognitive impairment can be minimised by the use of a simple objective test, such as the HASI test. The use of these kinds of tests may help to ensure that people receive appropriate support to enable them to interact more effectively with the police. The Committee recognises that administering a complex test to all people who come into contact with the police and are suspected of having an intellectual disability would not be practical, and recommends that an appropriate test be employed to assist police to identify people who may require additional support and/or testing due to an intellectual disability or cognitive impairment.

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<sup>426</sup> Susan Hayes, *Supplementary evidence*, 21 May 2012.

<sup>427</sup> Susan Hayes, *Supplementary evidence*, 21 May 2012, p. 3.

<sup>428</sup> Susan Hayes, *Supplementary evidence*, 21 May 2012, p. 7.

<sup>429</sup> Susan Hayes, *Supplementary evidence*, 21 May 2012, p. 7.

<sup>430</sup> Susan Hayes, *Supplementary evidence*, 21 May 2012, p. 16.

<sup>431</sup> Jacqui Pierce, *Supplementary evidence*, 20 March 2012.

Recommendation 9: That Victoria Police identify and make available a simple indicative screening test for use by police officers when they suspect that they have come into contact with a person with an intellectual disability or cognitive impairment.

#### 5.3.2.4 Amending police procedure and practice

The Committee notes that recommendations to improve guidelines and improve police training for the identification of intellectual disability and cognitive impairment have been made by the VLRC on a number of occasions.<sup>432</sup>

The Law Enforcement Assistance Program (LEAP) is the primary information system used by Victoria Police. It records information on particular crimes as well as personal information about accused and convicted offenders, victims, witnesses and missing persons. Using LEAP, police officers can place a 'flag' against a person's name to indicate that they have a mental disorder. The purpose of the flag is to provide information to police officers to help determine their response and to highlight "... typical behaviours and triggers, effective communication strategies, any known risks, other relevant information (such as the person being subject to an order), appropriate contact person and the source of the information."<sup>433</sup> Victoria Police stated that a person with a mental disorder, their parent or guardian may choose to volunteer information for a flag and may request that this information be removed at any time.

The Committee is encouraged that this method for identifying people with a mental disorder is currently employed by Victoria Police. In its *Review of the Bail Act*, the VLRC noted that "Police databases must be able to capture cognitive impairment identification to ensure that police are alerted in any future contact with that person".<sup>434</sup> The VLRC suggested that placing a flag on LEAP whenever an independent third person (ITP) or other person assists during police interviews would improve the identification of people with a cognitive impairment.<sup>435</sup> A flag would suggest to a police officer that their interactions with a person should be modified to accommodate the possibility that he or she may have an intellectual disability or cognitive impairment.

Recommendation 10: That Victoria Police record all instances when an Independent Third Person provides assistance to a person during a police interview on the Law Enforcement Assistance Program.

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<sup>432</sup> See for example Victorian Law Reform Commission, *Sexual offences*, VLRC, Melbourne, Final report, 2004, recommendations 150, 151; Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Final report, 2007, recommendation 151.

<sup>433</sup> Victoria Police, *Submission no. 34*, 23 September 2011, p. 3.

<sup>434</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Final report, 2007, p. 201.

<sup>435</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Final report, 2007, pp. 202, recommendation 152.

### 5.3.2.5 Disability identification card

The Committee explored with witnesses the possibility of introducing an identification card which could be carried by a person with an intellectual disability. This card could be produced not only when a person has come into contact with the justice system but also when they are interacting with and accessing services more widely in the community.

In 1996, the New South Wales Law Reform Commission (NSWLRC) published a report about *People with an Intellectual Disability and the Criminal Justice System*. The NSWLRC noted the use of a 'Rights Assistance Card' in some parts of New South Wales. The text of the card is provided in Figure 6.

**Figure 6: Rights Assistance Card.**<sup>436</sup>

<p>Side 1</p> <p style="text-align: center;"><b>PLEASE STOP THIS INTERVIEW</b></p> <p>I MAY NOT FULLY UNDERSTAND YOUR QUESTIONS, OR MY RIGHTS</p> <p>MY NAME: _____</p> <p>MY ADDRESS: _____</p> <p style="text-align: center;">IF MY ADVOCATE IS UNAVAILABLE CONTACT:</p> <p style="text-align: center;"><b>DISABILITY ADVOCACY NETWORK</b></p> <p style="text-align: center;"><b>PHONE: (069) 21 9225</b></p> <p><i>Printed with assistance of the Independent Commission Against Corruption and NSW Police Service</i></p> <p>Side 2</p> <p style="text-align: center;"><b>PLEASE STOP THIS INTERVIEW</b></p> <p>I MAY NOT FULLY UNDERSTAND YOUR QUESTIONS, OR MY RIGHTS.</p> <p style="text-align: center;">IN MY INTEREST AND TO ENSURE ACCURACY DURING THIS INTERVIEW, PLEASE CONTACT AN ADVOCATE ON MY BEHALF.</p> <p>MY ADVOCATE IS: _____</p> <p>ADDRESS: _____</p> <p>PHONE: _____</p>
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<sup>436</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system: Policing issues', viewed 20 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp29TOC>>.

The NSWLRC found that this identification card would not be useful for most people with an intellectual disability. The reasons for the NSWLRC's view included:

- that many people with an intellectual disability are unlikely to want to carry such a card;
- there would be difficulties associated with deciding who should be able to have such a card and how such a card should be made available to them as some people with an intellectual disability are not connected to services; and
- when a card is not produced, police may conclude that a person does not have an intellectual disability, even though he or she may present with some characteristics of a person with an intellectual disability.<sup>437</sup>

During the course of the Inquiry, Mr Pappos, of the ACSO, stated that "A lot of the people we [the ACSO] work with and support don't like the label 'disability' and as much as possible they shy away from it."<sup>438</sup> Ms Colleen Pearce, the Public Advocate, said that "If you've got somebody with an intellectual disability there's the issue of stigmatisation; if they had a card they may not be prepared to use it."<sup>439</sup>

A similar view was expressed by Mr Kevin Stone of the Victorian Advocacy League for Individuals with Disability. Mr Stone shared his experience working with a young man with an intellectual disability who had repeated interactions with the police. Mr Stone asked this young man whether he thought it might be useful to carry an identification card to help him when he came into contact with police. The young man replied that "... he doesn't want anything that is going to identify him as having a disability, he is not a disability, he's a human being."<sup>440</sup>

Ms Kerry Stringer, the Chair of the Victorian Coalition of ABI Service Providers, told the Committee that:

... you would want it to be discreet ... I think people are very conscious of not being singled out. They want their lives to be as normal as possible. The rest of us do not carry a card saying, 'I laugh loudly' or whatever, or 'I

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<sup>437</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system: Policing issues', viewed 20 July 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp29TOC>>.

<sup>438</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 28.

<sup>439</sup> Colleen Pearce, Public Advocate, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 21.

<sup>440</sup> Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, p. 24. See also Anna Howard, Principal Solicitor, Loddon Campaspe Community Legal Centre, *Transcript of evidence*, Bendigo, 28 May 2012, p. 17.

use my phone incessantly, and it might drive you crazy'. If it was discreet and it was a choice, I think people would take that up ...<sup>441</sup>

Witnesses suggested that even if a person with an intellectual disability or cognitive impairment was willing to carry an identification card, he or she may forget to present the card to police, partly due to difficulties they may have in memory and recall, but also due to the stressful circumstances of a police interview. Ms Jacqui Pierce noted that:

With people with a brain injury the other thing to remember is that with short-term memory issues I could say to person X sitting here, 'Here is your card. Put it in your wallet'. In an hour's time they will have completely forgotten I even gave them that card.

... if their short-term memory is affected, they will not even remember they have got the card – literally in and out; some people 5 minutes. I could say, 'Can you show me that card?' and they will say, 'What card?'. I will say, 'The card I just gave you 5 minutes ago' ...<sup>442</sup>

The Committee also heard, however, that the use of a voluntary card may have some benefits.<sup>443</sup> The Committee was told about the *Geelong Community Support Register* currently used at Corio Police Station. This register is one of a number of registers throughout the state that have been established as part of the Community Register Initiative program.<sup>444</sup> The Register allows people in need of community support to volunteer personal or medical information to be placed on the Register. The information is maintained on a confidential database at the police station, which can be accessed, if requested, by an authorised volunteer or police officer. Following registration a person will receive an identification card that indicates the person has information placed on the Register.<sup>445</sup> The Register is not restricted to people with a disability, as it provides a means for members of the community with a wide range of support needs to inform police and emergency services of those needs.

Mr Pappos suggested that an identification card be trialled and evaluated on a voluntary basis.<sup>446</sup> However, Mr Pappos said that in the ACSO's experience people with an intellectual disability or cognitive impairment tend to live day by day and access services when they feel they need to. The success of the card may, therefore, depend on the level of contact the

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<sup>441</sup> Kerry Stringer, Former Chair, Victorian Coalition of ABI Service Providers Inc., *Transcript of evidence*, Melbourne, 21 February 2012, p. 13.

<sup>442</sup> Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, pp. 22-23.

<sup>443</sup> See for example Michael Bernard, *Transcript of evidence*, Ballarat, 17 November 2011, p. 4; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 7; Nick Rushworth, Executive Officer, Brain Injury Australia, *Transcript of evidence*, Melbourne, 21 February 2012, p. 43; Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*, Mildura, 16 November 2011, p. 7.

<sup>444</sup> Neighbourhood Watch Australasia, 'Community Register Initiative', viewed 11 January 2013, <[http://www.nhwa.com.au/index.php?option=com\\_lyftenbloggie&view=entry&year=2011&month=05&day=22&id=3:community-register-initiative&Itemid=112](http://www.nhwa.com.au/index.php?option=com_lyftenbloggie&view=entry&year=2011&month=05&day=22&id=3:community-register-initiative&Itemid=112)>.

<sup>445</sup> Geelong Parent Network, *Supplementary evidence*, 20 March 2012.

<sup>446</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 28.

person has with disability service providers who will be able to reinforce the need to produce the card in certain situations.<sup>447</sup>

Overall, evidence received by the Committee did not provide unequivocal support for or against the use of a disability identification card. However, the Committee believes there may be some merit in making some kind of identification available, on a voluntary basis, to people who may require assistance communicating their needs to the police. The Committee was interested in the Community Support Register being used in the Geelong area that provides a means for anyone (not just people with a disability) to lodge relevant information with the police. The Committee recommends that the Victorian Government monitor the performance of the Geelong Community Support Register with a view to considering whether it should be extended across Victoria Police.

**Recommendation 11:** That the Victorian Government evaluate the performance of the Geelong Community Support Register, and if benefits from the Register are demonstrated, consider introducing similar registers across Victoria.

## 5.4 Training

The *Convention on the Rights of Persons with Disabilities* affirms that:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedure and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>448</sup>

A recurrent theme in evidence received by the Committee was that police training to identify people with an intellectual disability or cognitive impairment needed to be improved.<sup>449</sup> Witnesses and submissions

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<sup>447</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 29.

<sup>448</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 13.

<sup>449</sup> See for example *Assert 4 All*, *Submission no. 53*, 10 September 2011, p. 28; Association for Children with a Disability, *Submission no. 42*, 7 October 2011, p. 4; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 12; Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 4; John Burt, Principal, Ballarat Specialist School, *Transcript of evidence*, Ballarat, 17 November 2011, p. 16; Carers NSW, *Submission no. 17*, 9 September 2011, p. 5; Trevor Carroll, Executive Officer, Disability Justice Advocacy, *Transcript of evidence*, Melbourne, 21 February 2012, pp. 51-52; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 9; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 39; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 23; Tabitha O'Shea,



suggested that more training opportunities needed to be made available to police officers, to give them a greater understanding of intellectual disability or cognitive impairment, and to provide them with information on how they could modify their interactions with people with such impairments.<sup>450</sup>

Mr Laurie Harkin, the Disability Services Commissioner, told the Committee that police officers often rely on misconceived assumptions about the capabilities of people with an intellectual disability because they lack an awareness of how intellectual disabilities may present.<sup>451</sup> Dr John Chesterman, Policy and Education Manager of the OPA, told the Committee that training should focus on "... alerting police to what they might find in the field and increasing their knowledge that they need to involve one of our volunteers [an ITP] where a person does have an apparent cognitive impairment."<sup>452</sup>

Some witnesses suggested that with improved training police will be better equipped to respond to people with an intellectual disability or cognitive impairment. Mr Harkin added that an officer who knows a person has an intellectual disability will often be more proactive in asking what assistance might be beneficial to that person. By contrast, if police officers are unaware a person has a disability, supports are unlikely to be used, which may have an adverse effect on the reliability and admissibility of evidence taken.<sup>453</sup>

## 5.4.1 Existing training

In its submission to the Committee, Victoria Police said that it is currently updating its training to incorporate information and education about disability. Victoria Police stated that it is also working with other agencies to develop in-depth training and education programs on specific forms of disability, such as autism spectrum disorders.

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Community Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Bendigo, 28 May 2012, p. 3; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 26; Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011, p. 2; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 1; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 11; Victorian Coalition of ABI Service Providers Inc., *Submission no. 42*, 7 October 2011, p. 6; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 5; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9; Youthlaw, *Submission no. 49*, 20 October 2011, p. 3.

<sup>450</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 7; Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011, p. 2; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 2.

<sup>451</sup> Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 13.

<sup>452</sup> John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 21. See also Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, p. 23.

<sup>453</sup> Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 16.

The OPA and ACSO told the Committee that they were working with Victoria Police to improve disability awareness.<sup>454</sup> Mr Pappos, of the ACSO, highlighted an initiative in Coburg, where police officers are informally involved with the ACSO's clients. Mr Pappos said regular contact between the ACSO, its clients, and the police "... builds up on that relationship so if there is contact further down the track with the police, then there already is that awareness."<sup>455</sup>

In the police training curriculum, the Diploma of Public Safety (Police) contains modules on recognising and responding to the needs of people with a disability. These modules are delivered by police instructors and experts from the OPA and disability services. As part of the program recruits are given the opportunity to interact with people from various sections of the community, including those with a disability.<sup>456</sup> Specific training is also provided to members of the Sexual Offences and Child Abuse Investigation Teams. This training involves a full day of working with people with a disability and includes practicing interviewing skills.<sup>457</sup>

Victoria Police stated that although policies and procedures are in place for working with people with disabilities, these procedures tend not to differentiate between different disabilities. Instead, Victoria Police stated that the focus of its education and policies is to make "... police members aware of the signs and behaviours that typically indicate that a person may have a form of mental illness or disability, and to understand how it may affect a person's capacity to process information, communicate and engage with police."<sup>458</sup>

The 2007 Victoria Police Mental Health Strategy, *Peace of mind: Providing policing services to people with, or affected by, mental disorders*, describes how police services are to be directed to people with a mental illness. Under the Strategy, Victoria Police aims to improve police training on mental health to equip officers to:

- detect the symptoms and behaviours of a range of mental disorders that impact upon a person's thoughts, perceptions and feelings;
- communicate effectively with people with these mental disorders;

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<sup>454</sup> John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 21; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 28-29.

<sup>455</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 28-29.

<sup>456</sup> Victoria Police, *Victoria Police annual report 2011-2012*, Victoria Police, Melbourne, 2012, p. 31: Note in 2011-12 Victoria Police operated the Community Encounters program with representatives from Victoria's Muslim, African and Aboriginal communities, the mental health sector, the gay/lesbian, bisexual and intersex communities and employment groups.

<sup>457</sup> Victoria Police, *Submission no. 34*, 23 September 2011, p. 4.

<sup>458</sup> Victoria Police, *Submission no. 34*, 23 September 2011, p. 5.



- display empathy when interacting with people with mental disorders; and
- utilise legislation, policy, procedures and partnerships to respond appropriately and effectively to people with a mental disorder.<sup>459</sup>

The Committee notes the development of this Strategy and the priorities that Victoria Police has identified to improve training in respect of mental disorders. However, and as noted above, the Committee believes that there is an opportunity to improve police policies and procedures by explicitly differentiating between intellectual disability, cognitive impairment, and mental illness.

## 5.4.2 What training is appropriate?

The Committee heard repeated calls for improvements to be made to encourage greater disability awareness in police training.<sup>460</sup> The Disability Services Commissioner told the Committee about:

- IV. The ongoing need for police induction and training to address stereotypical views of the capacity of people with an intellectual disability to provide evidence; and
- V. The need for specialist training, agreed methods and flexibility of police approaches to interviewing to ensure that people with an intellectual disability receive appropriate support to provide evidence in order to receive equal and fair access to justice.<sup>461</sup>

A number of witnesses suggested that one of the best means for improving disability awareness by police was through 'hands-on' training.<sup>462</sup> This training allows officers to work directly with people from different communities, to better inform police how they can respond to the needs of different groups in the community.<sup>463</sup> Mr Trevor Carroll, Executive Officer at Disability Justice Advocacy, suggested that hands-on training helps to

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<sup>459</sup> Victoria Police, *Peace of mind: Providing services to people with, or affected by, mental disorders: Strategy directions paper*, Victoria Police, Melbourne, 2007, p. 38; Victoria Police, *Victoria Police annual report 2010-11*, Victoria Police, Melbourne, 2011, p. 48.

<sup>460</sup> See for example Association for Children with a Disability, *Submission no. 42*, 7 October 2011, p. 4; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 12; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 39; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 3; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 6; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 1; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 5; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 5; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9; Youthlaw, *Submission no. 49*, 20 October 2011, p. 3.

<sup>461</sup> Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 6.

<sup>462</sup> See for example John Burt, Principal, Ballarat Specialist School, *Transcript of evidence*, Ballarat, 17 November 2011, p. 16; Dianne Leverett, Principal, Nelson Park School, *Transcript of evidence*, Geelong, 20 March 2012, p. 32; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9.

<sup>463</sup> John Burt, Principal, Ballarat Specialist School, *Transcript of evidence*, Ballarat, 17 November 2011, p. 16.

personalise the challenges that people with an intellectual disability experience when they come into contact with the police.<sup>464</sup> The ACSO suggested that police training should include:

- resource packages that include information about the nature of intellectual disability; its impact on offending and participation in the justice system; and information about human services and other supports which may benefit people with an intellectual disability;
- strategies on how to communicate effectively with people with an intellectual disability; and
- strategies on how to manage and effectively respond to situations involving people with an intellectual disability.<sup>465</sup>

Villamanta Disability Rights Legal Service expressed the view that police officers appear to lack understanding of how to interact with people with an intellectual disability, and stressed that adequate and appropriate training is urgently required. Villamanta suggested that its expertise in working with people with an intellectual disability could be utilised to assist Victoria Police in training its police officers.<sup>466</sup>

The Committee also received evidence in submissions and hearings that professional development training to educate police officers on how to identify people with an intellectual disability should be made compulsory and be an ongoing requirement of working in the police force.<sup>467</sup> While the Committee believes that all police officers should be aware of methods to identify people with an intellectual disability or cognitive impairment, the Committee also recognises that some police officers already have extensive experience in this matter, and should not be required to attend compulsory training.

The Committee recommends that Victoria Police make available training programs to its officers to improve awareness of, and sensitivity to, the needs of people with an intellectual disability or cognitive impairment. The Committee believes that training should include:

- techniques to improve identification of people with an intellectual disability or cognitive impairment;
- techniques to encourage effective communication with people with an intellectual disability or cognitive impairment;

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<sup>464</sup> Trevor Carroll, Executive Officer, Disability Justice Advocacy, *Transcript of evidence*, Melbourne, 21 February 2012, p. 52.

<sup>465</sup> Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 12.

<sup>466</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 5.

<sup>467</sup> See for example Trevor Carroll, Executive Officer, Disability Justice Advocacy, *Transcript of evidence*, Melbourne, 21 February 2012, p. 52; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 2.

- a component to raise awareness of challenges experienced by people with an intellectual disability or cognitive impairment when they become involved in the justice system;
- a component outlining the services available to people with an intellectual disability or cognitive impairment; and
- a component outlining existing operational procedures that aim to provide support to people with an intellectual disability or cognitive impairment during police interviews, such as the Independent Third Persons program.

Recommendation 12: That Victoria Police make available to police officers regular revision training on issues surrounding interaction with people with an intellectual disability or cognitive impairment. Training could encompass:

- techniques to improve identification of people with an intellectual disability or cognitive impairment;
- techniques to encourage effective communication with people with an intellectual disability or cognitive impairment;
- a component to raise awareness of challenges experienced by people with an intellectual disability or cognitive impairment when they become involved in the justice system;
- a component outlining the services available to people who have an intellectual disability or cognitive impairment; and
- a component outlining existing operational procedures that aim to provide support to people with an intellectual disability or cognitive impairment during police interviews, such as the Independent Third Persons program.

### 5.4.3 Support services for police officers

While improved awareness and training for all police officers is desirable, witnesses also told the Committee that improved outcomes for people with an intellectual disability or cognitive impairment could be obtained with the introduction of a specialist unit within Victoria Police, or if appropriately trained designated officers were available in each region or station.<sup>468</sup>

Mr Pappos, of the ACSO, observed that while increased training would be potentially beneficial, police resources are currently stretched. He noted that the role of police is not restricted to maintaining law and order, and that police involvement in social welfare issues puts further constraints on resources.<sup>469</sup> Some witnesses suggested that a more effective use of resources would be to establish a specialist Disability Liaison Officer within

<sup>468</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 12; Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 7; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 9; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 26; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9.

<sup>469</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 30.

Victoria Police.<sup>470</sup> The ACSO suggested that the role of a Disability Liaison Officer should be comparable to that of the Mental Health Liaison Officer and could include:

- providing support to police with the development of a management plan for people with an intellectual disability;
- conducting initial assessments of suspects, victims or witnesses to identify if they have an intellectual disability; and
- providing advice to police on effective strategies to manage and respond to situations involving a person with an intellectual disability.<sup>471</sup>

In the United Kingdom a senior level Custody Officer reviews the lawfulness and propriety of a person's arrest upon arrival at a police station. The Custody Officer is responsible for the suspect's treatment and wellbeing while detained, and also for the maintenance of custody records. The Custody Officer also plays an important role in identifying whether the suspect has an intellectual disability and arranging for appropriate supports to be present during the interview. This role, or one based upon it, could be implemented to assist people generally upon their arrest in Victoria.

The Committee notes that as part of Victoria Police's commitment to engaging with Victoria's diverse communities, specialist units and roles have been established to interact with the community. At present there is a specialist Aboriginal Policy and Research Unit, a Multicultural Advisory Unit and Gay and Lesbian Liaison Officers. The Committee believes there is an opportunity to examine whether specially trained police officers, who act independently of police investigations, could be appointed to ensure vulnerable people, including people with an intellectual disability or cognitive impairment, are recognised and managed when interacting with the police. These officers could be supported by a designated Disability Liaison Officer, to ensure best practice is maintained across Victoria Police.

**Recommendation 13: That Victoria Police consider establishing a Disability Liaison Officer position across major metropolitan and major regional police service areas to provide expertise in identifying and appropriately interacting with people with an intellectual disability or cognitive impairment.**

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<sup>470</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, pp. 5, 12; Dorota Cipusev, *Submission no. 26*, 12 September 2011, p. 1; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 9; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 26.

<sup>471</sup> Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 12. See also Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 9; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 9; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 26; Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011, p. 3.

## 5.5 Police investigation

### 5.5.1 Standard police investigation procedure

The *Crimes Act 1958* (Vic) sets out police powers of arrest in Victoria.<sup>472</sup> A person cannot be detained in custody, and is not obliged to accompany police to a police station for questioning, unless he or she has been arrested. Children under the age of ten are presumed to be incapable of forming the necessary intent to commit a crime, and therefore they cannot be held in custody.<sup>473</sup>

Once a person has been taken into custody he or she must be:

- released either on bail or unconditionally; or
- brought before a Magistrate within a reasonable time.<sup>474</sup>

Determining what is a reasonable time to be detained in custody includes consideration of:

- the number and complexity of the offences to be investigated;
- any need for the investigating officer to read and collate material that is necessary for questioning the suspect;
- the number of other people who need to be questioned during the period of custody;
- any need to visit the place where the offence is believed to have been committed; and
- any time taken to communicate with a lawyer, friend or relative.<sup>475</sup>

All people have a common law right to remain silent during police questioning. The right is based on the presumption that a person is innocent until proven guilty, and that therefore a suspect should not be forced to say or do anything that could be used in evidence against him or her. Suspects are usually informed of this right by means of a caution, which typically will be of the form:

Before you say anything further about this matter, I must warn you that you are not obliged to say anything unless you wish, as anything you say will be

<sup>472</sup> *Crimes Act 1958* (Vic), sections 457-459, 461.

<sup>473</sup> *Children, Youth and Families Act 2005* (Vic), section 344.

<sup>474</sup> *Crimes Act 1958* (Vic), section 464A(1).

<sup>475</sup> *Crimes Act 1958* (Vic), section 464A(4).

recorded and may later be used in evidence against you. Do you understand that?<sup>476</sup>

In *Petty v R* the High Court held that where the police have reasonable grounds to believe that a person is suspected of having committed a criminal offence, the suspect can rely on the right to remain silent when questioned about the offence. At trial no adverse inferences can be drawn from the fact that a person chose to exercise his or her right. Neither the trial judge nor the prosecution can comment to the jury on the accused's silence.<sup>477</sup>

Some statutory exceptions to the rule of a suspect not being forced to do anything that could be used in evidence include circumstances in which a suspect is required to:

- be fingerprinted if reasonably suspected of having committed an indictable or specified summary offence;<sup>478</sup> or
- undergo a court ordered forensic procedure.<sup>479</sup>

Before questioning, a suspect must be informed that they have a right to communicate with a relative, friend or lawyer, and that anything said or done during the interview can be used in evidence against the person.<sup>480</sup> The presence of a lawyer is not a right, although a suspect has the right to be able to communicate with a lawyer. Questioning of a suspect should be deferred to allow the suspect a reasonable amount of time to be able to communicate with his or her lawyer. When police have been informed that a lawyer can be present during an interview, questioning should not be initiated until the lawyer arrives. However, communication with a lawyer is not allowed if the investigating officer reasonably believes communication would:

- result in the escape of an accomplice;
- result in the fabrication or destruction of evidence; or
- undermine the safety of others.<sup>481</sup>

If during initial communication it is apparent the suspect does not have adequate knowledge of English to understand and respond to police questioning, the police must arrange for an interpreter to be present and must not continue to question the person until the interpreter arrives.<sup>482</sup>

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<sup>476</sup> Australian Human Rights, 'The rights of people with disabilities: Areas of need for increased protection', viewed 24 July 2012, <[http://www.hreoc.gov.au/disability\\_rights/hr\\_disab/areas/ch.5.htm#evidence](http://www.hreoc.gov.au/disability_rights/hr_disab/areas/ch.5.htm#evidence)>.

<sup>477</sup> *Petty v R* (1991) 102 ALR 129, 130.

<sup>478</sup> *Crimes Act 1958* (Vic), section 464K.

<sup>479</sup> *Crimes Act 1958* (Vic), section 464CR.

<sup>480</sup> *Crimes Act 1958* (Vic), sections 464C(1), 464A(3).

<sup>481</sup> *Crimes Act 1958* (Vic), section 464C(1).

<sup>482</sup> *Crimes Act 1958* (Vic), section 464D(1).



When a person is in custody for an indictable offence, if practicable the police must record any warnings that have been given, such as the right to be able to communicate with a lawyer.<sup>483</sup> When a confession has been made by a suspect in relation to an indictable offence, the police must make an audio or audio-visual recording of the confession.<sup>484</sup> Under common law, a copy of this recording must be made available to the suspect or the suspect's lawyer, and can be used in evidence against the accused.<sup>485</sup>

For suspects under the age of 18 years police must not conduct an interview unless the suspect's parents, guardians, or an independent person is present and the suspect has been allowed to communicate with that person.<sup>486</sup> The support person need not be present if communication would result in the escape of an accomplice, the destruction of evidence, or undermine the safety of others.

The role of the parent, guardian or independent person in police interviews involving children is very important. The VPM states that their role is to:

- ensure the child's evidence is accurately recorded;
- provide emotional support to the child; and
- provide an independent account of the interview during court proceedings.<sup>487</sup>

The support person also ensures that the child understands their rights and can make an informed decision on how to exercise those rights. The support person is not responsible for asking the child questions about the offence, whether he or she is guilty, or determining how the child will exercise his or her rights.

## 5.5.2 Police investigations and people with an intellectual disability or cognitive impairment

A number of witnesses expressed concern about the conduct of police interviews with a person with an intellectual disability or cognitive impairment.<sup>488</sup> Witnesses noted difficulties associated with communication

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<sup>483</sup> *Crimes Act 1958* (Vic), section 464G(1).

<sup>484</sup> *Crimes Act 1958* (Vic), section 464H.

<sup>485</sup> *Driscoll v the Queen* (1971) 137 CLR 517.

<sup>486</sup> *Crimes Act 1958* (Vic), section 464E(1).

<sup>487</sup> Victoria Police, *Victoria Police Manual: Interviewing specific categories of person*, Victoria Police, Melbourne, 2012, p. 3.

<sup>488</sup> See for example Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, pp. 5-6; Michael Holcroft, President, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 16; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 3; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 5; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 11; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 11; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 7; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 10.

between police and people with an intellectual disability or cognitive impairment, the length of time taken to conduct an investigation, difficulties associated with understanding and comprehending police instructions, and the use of an ITP.

For example, VLA stated that:

Police questioning and interviews pose particular problems for people with intellectual disabilities, both as complainants and accused persons. People with intellectual disabilities often acquiesce to what is suggested to them by people in authority, such as police, because they are eager to appear compliant and/or do not want to reveal their cognitive impairment. They may agree with suggestions or statements put to them regardless of whether or not:

- they understand the question
- the suggestion is true, or
- they are compelled by law to do so.<sup>489</sup>

Similar views were expressed by Inclusion Melbourne, which said:

... when placed under pressure, and often at the whim of an expert investigator, people with intellectual disabilities are significantly disadvantaged and prone to producing self-incriminating evidence. In some circumstances this may merely be a product of the environment, and not a product of truth.<sup>490</sup>

The following Case Study was provided to the Committee by VLA to illustrate a case where the police inappropriately interviewed a person with an intellectual disability. VLA stated that this was one of a number of similar situations lawyers have identified.

*Case Study 12: Nathan's story part I.*<sup>491</sup>

*"Nathan' is a young adult who has an intellectual disability and an IQ of 64. He is illiterate, has long-term homelessness, drug and alcohol problems and a history of family abuse. He was charged with three armed robberies and a number of other offences.*

*Each time Nathan was charged he was interviewed by police and answered questions, contrary to legal advice and even when he was supported by an independent third person. On at least one occasion, he was extremely intoxicated at the time of arrest but, in spite of this, the police proceeded with the interview."*

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<sup>489</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 10.

<sup>490</sup> Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 3.

<sup>491</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 11.



### 5.5.2.1 Police conduct of interviews

The Committee heard that the amount of time it takes for police investigations to be conducted may adversely affect the ability of a person with an intellectual disability or cognitive impairment to recall events. For example, the Disability Services Commissioner said that if there was a significant delay between an event occurring and a statement being recorded, a person with an intellectual disability may be unable to accurately recall events. If this occurs, evidence taken may be subsequently assessed as unreliable.<sup>492</sup>

The Committee heard that police are motivated, when considering whether to lay charges, by the prospect of a case succeeding should it proceed to trial. This affects the manner in which the police obtain evidence. Ms Fiona Tipping, an advocate with Grampians disAbility Advocacy, said “The way they [the police] investigate things, it’s all with a focus on convict, convict, convict.”<sup>493</sup> Mr Harkin, the Disability Services Commissioner, shared this view, and said that in his experience:

... police are moved by the need to think about the likelihood of success of taking a brief of evidence to a court and would be influenced by the prospect of its success or failure, given the law as it’s currently before them.<sup>494</sup>

Similar views were expressed by Dr Chesterman, who said that “Even when police attend and take time to collect evidence, their concerns about the ability of the person to testify compellingly in court will often deter the police from taking the matter further.”<sup>495</sup> Evidence from both the Disability Services Commissioner and the OPA suggested that the police may view evidence from a person with an intellectual disability as less credible than similar evidence taken from a person without an impairment.<sup>496</sup>

Some submissions also suggested that inadequate training compounds the communication difficulties police may have when communicating with people with an intellectual disability or cognitive impairment.<sup>497</sup> The Ready Reckoner, discussed earlier, contains some guidance to assist the police to communicate with a person with a cognitive impairment. Some suggestions include:

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<sup>492</sup> Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 15. See also Ursula Smith, *Submission no. 11*, 8 September 2011, p. 5; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9.

<sup>493</sup> Fiona Tipping, Advocate, Grampians disAbility Advocacy, *Transcript of evidence*, Ballarat, 17 November 2011, p. 8.

<sup>494</sup> Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 12.

<sup>495</sup> John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 22.

<sup>496</sup> Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 5; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 25.

<sup>497</sup> See for example Inclusion Melbourne, *Submission no. 9*, 6 September 2011, pp. 3-4; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 5; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 5; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 9.

- identifying yourself repeatedly if necessary;
- using the person's name at the beginning of sentences and making eye contact;
- speaking directly to the person, and not to the person who is supporting them;
- breaking complicated series of instructions or information into smaller parts;
- checking regularly the person's understanding of information and questions asked; and
- repeating questions more than once or asking them in a different way.<sup>498</sup>

While the Committee believes the Ready Reckoner, or a comparable instrument, should be made extensively available across the state, the Committee also believes there may be merit in amending the VPM to provide guidance on how to communicate with people with an intellectual disability or cognitive impairment. At present guidance contained in the VPM simply provides that when conducting an interview with a suspect with a mental disorder officers should "Take particular care to ask questions which are understood by the person being interviewed".<sup>499</sup>

The Committee believes that more detailed guidance would assist police officers to communicate more effectively with people with an intellectual disability or cognitive impairment, and help ensure that the best available evidence is obtained from people with an intellectual disability or cognitive impairment. Guidance could cover matters such as:

- the need to pitch language and concepts at a level that can be understood;
- the need to take extra time in interviewing;
- the risks of the person's susceptibility to authority figures, including a tendency to give answers that the person believes are expected;
- the dangers of leading or repetitive questions;
- the need to allow the person to tell his or her story in their own words;
- the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers; and
- the need to ask the person to explain back what was said.

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<sup>498</sup> Office of the Public Advocate, *Supplementary evidence*, 25 October 2011, p. 2.

<sup>499</sup> Victoria Police, *Victoria Police Manual: Interviewing specific categories of person*, Victoria Police, Melbourne, 2012, p. 3.

Recommendation 14: That the Victoria Police Manual be amended, with the assistance of the Department of Human Services and the Office of the Public Advocate, to provide enhanced guidance on how to improve communications with people with an intellectual disability or cognitive impairment. Guidance could cover:

- the need to pitch language and concepts at a level that can be understood;
- the need to take extra time in interviewing;
- the risks of the person's susceptibility to authority figures, including a tendency to give answers that the person believes are expected;
- the dangers of leading or repetitive questions;
- the need to allow the person to tell his or her story in their own words;
- the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers; and
- the need to ask the person to explain back what was said.

### 5.5.2.2 Police cautions and the right to silence

In Victoria, while police must inform a suspect of his or her right to silence, there is no requirement for police to ensure a suspect understands this right. Given that a person with an intellectual disability or cognitive impairment may find it difficult to understand complex language, there may be occasions when he or she will be unable to understand this right, and its implications in their interactions with police should they chose not to exercise this right.

VLA told the Committee that:

People being questioned in relation to an alleged criminal offence have the right to remain silent or refuse to answer questions without any adverse inferences being drawn from their silence. They are informed of this right, and the right to contact a lawyer, before a formal police interview commences. However, if these rights and the consequences of choosing whether or not to exercise them are not fully understood by the person being interviewed then they are effectively denied those rights.<sup>500</sup>

Finding 5: Police are obliged to inform all suspects that they have a right to silence and the consequences should they choose not to exercise this right. People with an intellectual disability may need assistance to understand the right to silence, in order to make an informed choice on whether to exercise it.

Inclusion Melbourne conducted research on the comprehension by people with an intellectual disability of 25 common legal words and phrases, including those contained in the police caution, and found that words such as 'inform' and 'oblige' were not understood by the majority of participants. Inclusion Melbourne found that "... less than 1 in 5 people with an intellectual disability demonstrate a thorough level of understanding of

<sup>500</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 11.

these common legal terms, and only 1 in 4 people demonstrated a partial understanding of these terms.”<sup>501</sup>

Justice Sholl, in *R v Buchanan*, considered that all accused must understand the right to silence and be capable of exercising that right. In that case the accused had suffered a head injury from a car accident, but took part in police interviews after a caution was given.<sup>502</sup> The voluntary nature of the statement was subsequently called into question, on the basis that the defendant did not have sufficient intellectual capacity at the time of the interview to determine whether to exercise the right.<sup>503</sup> In another case in New South Wales, a man with an intellectual disability was acquitted of charges after the judge excluded alleged confessional material. The judge said the caution should have been given in terms likely to be understood by the accused, and not one phrased in the customary terms.<sup>504</sup>

It is probable that a large proportion of people with an intellectual disability or cognitive impairment who come before police will not understand the caution and the consequences of failing to exercise their right to silence. The Committee believes that with appropriate training and guidance on how to give the caution, the admissibility of evidence may be improved.

In New South Wales the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) provides that if a vulnerable person, which includes a person with impaired intellectual functioning, is given a caution, appropriate steps must be taken to ensure the detained person understands the caution.<sup>505</sup> Guidance contained in the *Code of Practice for CRIME* by the New South Wales Police Force expands on this by establishing guidance for police officers when issuing the caution. The Code states that:

Before questioning suspects be satisfied they understand the caution and implications of actions following it.

Where you feel they do not understand the caution, ask clarifying questions and record answers in full:

e.g. What do you understand by what I have just said?

Do not presume people understand even the most simple questions. If you believe suspects do not understand your questions ask them what they understand by them.

... It is essential you communicate to people they do not have to say or do anything in response to your questions and that anything they say or do may be used in evidence. Take into account their apparent intellectual capacity, age, background, level of intoxication, language skills etc when cautioning.<sup>506</sup>

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<sup>501</sup> Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 4.

<sup>502</sup> *R v Buchanan* [1996] VR 9.

<sup>503</sup> *R v Buchanan* [1996] VR 9, 15.

<sup>504</sup> 'Man acquitted of hotel murder after judge upheld objection', *The Newcastle Herald*, 22 February 1994.

<sup>505</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), clause 34(1).

<sup>506</sup> New South Wales Police Force, *Code of practice for CRIME (custody, rights, investigation, management and evidence)*, NSW Police Force, Sydney, 2011, pp. 66-68.

In Queensland the *Police Powers and Responsibilities Act 2000* (Qld) provides that when a police officer reasonably suspects that the person to whom they have given the caution does not understand the caution, the officer may ask the person to explain the meaning of the caution in his or her own words and if necessary the officer may be required to further explain the caution to the person.<sup>507</sup>

In the United Kingdom the *Police and Criminal Evidence Act 1984* (UK) sets out general guidance for police officers when issuing a caution. Guidance set out in that Act includes that:

- after a break in questioning, the caution should be restated;<sup>508</sup>
- a caution issued to a person who is mentally vulnerable in the absence of a support person should be readministered in the presence of the support person;<sup>509</sup> and
- the arrested person should be given sufficient information to enable them to understand the reasons why they have been arrested. Technical and vague language should be avoided when this information is given.<sup>510</sup>

The New Zealand Law Reform Commission conducted an *Inquiry into Police Questioning* in 1994. The Commission recommended that certain classes of people, including those suspected of having a mental illness or mental handicap, should be entitled to special protections when the caution is being given. The Commission stated that protections could include the caution being given in a language in which the person is able to communicate with reasonable fluency, in order to assist the person's understanding of the caution.<sup>511</sup>

Currently the VPM requires officers interviewing people with mental disorders to:

Ensure that any person being interviewed understands the purpose of the interview. Where the person is a suspect ensure that they clearly understand their rights prior to an interview commencing. Ask the suspect to explain in their own words what the caution means and what their rights are.<sup>512</sup>

The Committee believes that guidance should be incorporated in the VPM to assist police to sufficiently administer a caution for a person with an intellectual disability or cognitive impairment. This guidance would be beneficial on two grounds. First, it will assist to ensure that people with an intellectual disability or cognitive impairment understand the consequences of speaking after the caution has been given. Second, it will assist to

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<sup>507</sup> *Police Powers and Responsibilities Act 2000* (Qld), section 431.

<sup>508</sup> *Police and Criminal Evidence Act 1984* (UK), section 10.8.

<sup>509</sup> *Police and Criminal Evidence Act 1984* (UK), section 10.12.

<sup>510</sup> *Police and Criminal Evidence Act 1984* (UK), note 10B.

<sup>511</sup> New Zealand Law Reform Commission, *Police questioning*, NZLRC, Wellington, Final report, 1994, p. 68.

<sup>512</sup> Victoria Police, *Victoria Police Manual: Interviewing specific categories of person*, Victoria Police, Melbourne, 2012, p. 5.

minimise the potential for the courts to make adverse findings on the admissibility of evidence taken after a caution had been administered. Guidance material could cover matters such as:

- comprehension difficulties that a person with an intellectual disability or cognitive impairment may experience in comprehending the right to silence and police cautions;
- possible evidentiary consequences of failing to understand the caution; and
- the need for the person to be reminded of the caution during the interview process.

Recommendation 15: That the Victoria Police Manual be amended to provide enhanced guidance on how to administer a caution to a person with an intellectual disability or cognitive impairment. Guidance could describe:

- the comprehension difficulties that a person with an intellectual disability or cognitive impairment may experience in comprehending the right to silence and police cautions;
- the possible evidentiary consequences of failing to understand the caution; and
- the need for the person to be reminded of the caution during the interview process.

### 5.5.2.3 Support during police interviews

People with an intellectual disability or cognitive impairment experience a number of difficulties when interacting with police. For example, the eagerness of some people with an intellectual disability or cognitive impairment to please authority figures could contribute to them giving false or incriminating evidence. A further difficulty is that people with an intellectual disability or cognitive impairment may act to conceal their disability, which exacerbates the disadvantages they ordinarily experience when interacting with the justice system as supports, where they do exist, may not be made available to them.

The OPA's 1987 report, *Finding the Way: The Criminal Justice System and the Person with an Intellectual Disability*, conducted a detailed examination of the challenges experienced by people with an intellectual disability when interacting with the justice system, including interaction with police. The OPA recommended that guidance material be incorporated into the then *Police Standing Orders* on how police should conduct interviews with a person with an intellectual disability.<sup>513</sup> The OPA also recommended that where a police officer believes that a person may have an intellectual

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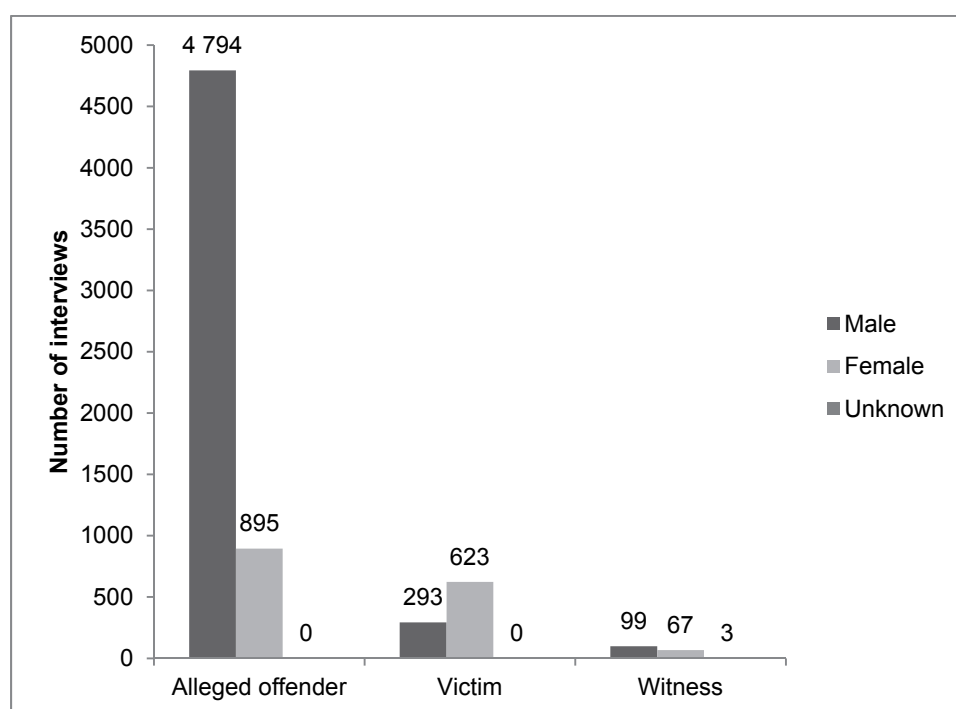
<sup>513</sup> Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987, p. 31.

disability, an advocate should be present during police interviews involving that person.<sup>514</sup>

Consequently, the Police Standing Orders were amended to require that when it is clear that an interviewee has an intellectual disability, mental illness, ABI or dementia, an independent person should be present for the interview. The ITP program was subsequently established in 1988 by the OPA.

The use of an ITP during police interviews aims to alleviate or overcome some of the difficulties that people with an intellectual disability or cognitive impairment have in understanding and exercising their legal rights when being interrogated by the police. An ITP can either be a relative or close friend of the interviewee, or can be a trained volunteer from the OPA. In the year to June 2012, 2237 ITPs attended police interviews.<sup>515</sup> From its establishment to June 2010, the ITP program has assisted 6774 accused, victims or witnesses during police interviews. Figure 7 illustrates the composition of people supported by an ITP in police interviews during this period.

**Figure 7: Interview type by victim, offender or witness supported by an Independent Third Person during police interviews.<sup>516</sup>**



<sup>514</sup> Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987, p. 31.

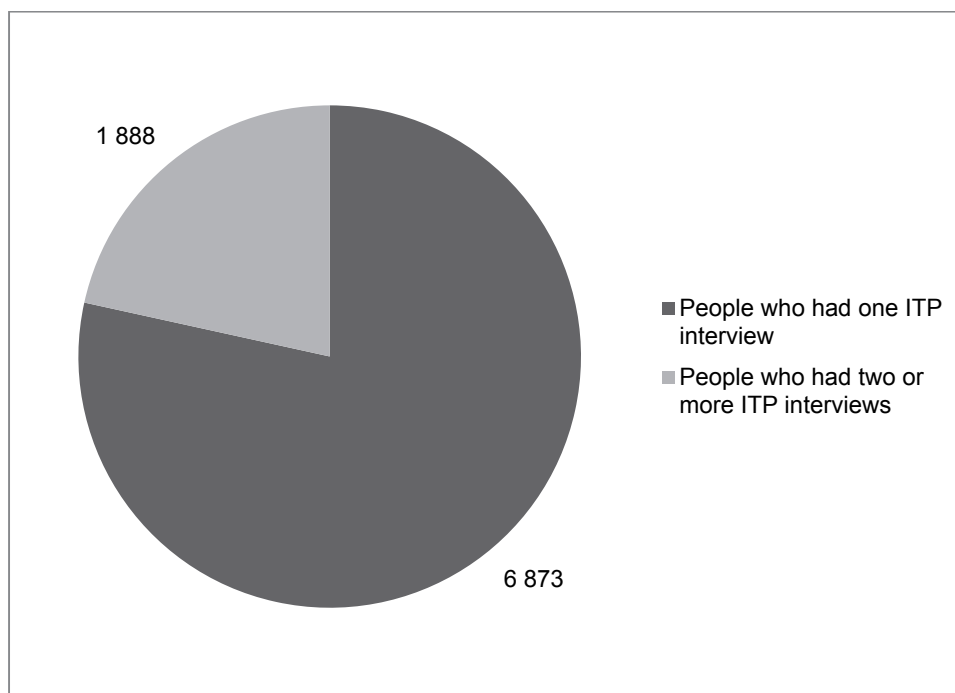
<sup>515</sup> Office of the Public Advocate, *Annual report 2011-12*, OPA, Melbourne, 2012, p. 34.

<sup>516</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 105.



The OPA report on the ITP program suggested that there are a large number of people who are repeat users of the program. The research found that between July 2000 and June 2012, ITPs assisted a total of 6872 people in police interviews. Of this group 1888 people had been previously assisted by an ITP. Figure 8 illustrates the numbers of repeat users of the ITP program compared to those who had used an ITP on one occasion.

**Figure 8: Repeat versus single users of the Independent Third Person program.<sup>517</sup>**



Ms Pearce expressed the view that measures could be taken to record information about people using the ITP program, as this could help identify people with an intellectual disability or cognitive impairment who are at risk of future involvement with the justice system, and could assist in directing the person to supports that may prevent or minimise future involvement.<sup>518</sup>

### The role of an Independent Third Person

Prior to the interview an ITP meets with the interviewee to explain their role and the interviewee's rights during the interview. The ITP will provide support and assistance to the interviewee throughout the interview. Supports may include:

- providing assistance to contact a lawyer, relative or friend if requested;

<sup>517</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 99.

<sup>518</sup> Colleen Pearce, Public Advocate, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 23.

- ensuring the person understands the questions asked by police; and
- asking police to rephrase questions if they believe the interviewee had difficulty understanding the question asked.<sup>519</sup>

Many other jurisdictions allow for a support person during police questioning of a person with an intellectual disability. These include Western Australia,<sup>520</sup> New South Wales,<sup>521</sup> Queensland,<sup>522</sup> Tasmania,<sup>523</sup> Northern Territory,<sup>524</sup> and England and Wales.<sup>525</sup>

### Experiences of using an Independent Third Person

A report by the OPA in 2012 on the ITP program found that people generally had positive experiences when an ITP was involved in the police interview.<sup>526</sup> The OPA found that where an ITP was not present during the interview, people feared for their safety, experienced increased communication difficulties, and felt a heightened sense of conflict between them and the police.<sup>527</sup> The following Case Studies were set out in the OPA's report, highlighting positive experiences that people with a cognitive impairment had when an ITP was involved in police interviews.

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<sup>519</sup> Office of the Public Advocate, *Supplementary evidence*, 25 October 2011, pp. 3-4.

<sup>520</sup> *Criminal Investigation Act 2006* (WA); Western Australia Police, *Questioning children and people with special needs*, Perth, cited in Lorana Bartels, *Police interviews with vulnerable suspects*, Australian Institute of Criminology, Canberra, 2011, p. 9.

<sup>521</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), clause 27; New South Wales Police Force, *Code of practice for CRIME (custody, rights, investigation, management and evidence)*, NSW Police Force, Sydney, 2011, pp. 26-28.

<sup>522</sup> *Police Powers and Responsibilities Act 2000* (Qld), section 422; Queensland Police Service, *Operational police manual: Special needs groups*, Brisbane, 2010, cited in Lorana Bartels, *Police interviews with vulnerable suspects*, Australian Institute of Criminology, Canberra, 2011, p. 9.

<sup>523</sup> Tasmania Department of Police and Emergency Management, *Tasmania police manual: Orders, instructions and operational guidance for members of Tasmania Police*, Hobart, 2010, cited in Lorana Bartels, *Police interviews with vulnerable suspects*, Australian Institute of Criminology, Canberra, 2011, p. 10.

<sup>524</sup> Northern Territory Police, *General order Q2 - Questioning people who have difficulties with the English language - The 'Anunga' guidelines*, Darwin, 1998, cited in Lorana Bartels, *Police interviews with vulnerable suspects*, Australian Institute of Criminology, Canberra, 2011, p. 10.

<sup>525</sup> *Police and Criminal Evidence Act 1984* (UK), section 1.4 and note 1G.

<sup>526</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 45.

<sup>527</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 48.

*Case Study 13: Angela's story.*<sup>528</sup>

*"My ITP was just wonderful. I've used an ITP twice and I had the same woman both times. I told her, 'We have to stop meeting like this'.*

*My ITP met with me before the interview commenced. She was very reassuring and comforting. Her demeanour was very soothing. She made sure that my rights were protected. She actually did more than what the job description requires. She did little things, I suppose, like get you coffee, tea and ask: 'Is there anything else I can get you?' She was very professional and was welcomed at the police station, which was nice to see.*

*I think ITPs should be there every time someone gets interviewed. I think it's wonderful and people can only benefit from the service. There's an assurance, basically, that the person will be cared for because the ITP is there ... The police will get a more accurate and correct and calmer statement if the ITP is there.*

*I've had interviews without an ITP. I'll be a realist here, anything can happen. Anything can happen. You don't care what side of the table you're sitting on, but anything can happen. It's hard to answer things sometimes, especially after you've been arrested and have to go and have the interview. Conducting the interview can be traumatic too, depending on what the circumstances are. The ITP can certainly sort that matter out on the spot. You're not completely alone and isolated. It's nice to have an extra support person there that will ensure that both parties are going to behave. So the ITP's play a role for the police force too, because it saves them a lot of trouble."*

*Case Study 14: Luke's story.*<sup>529</sup>

*"I reckon I've had more than 40 police interviews. It started when I was 13. I was mainly driving cars without a licence. I went to jail over driving charges. As soon as I turned 18 they locked me up. I was in prison for six months.*

*Sometimes you get the nice coppers, sometimes you get the real prick ones. When you get the nice ones they talk to you a lot better. The prick ones ... well, they are pretty rough. It's a bit wrong what they do. Fair enough, they're out to do their job, but they do it the wrong way. The worst thing is, you can't do nothing about it. What are you supposed to do about it? Go see your solicitor and say 'They just bashed me?' Your solicitor is not going to do nothing. If there's no proof or evidence of it, there's nothing you can do about it.*

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<sup>528</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 47 (emphasis in original).

<sup>529</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 50.

*When you've got the Third Person in there, it does make it a lot better. It's a different situation. When I got that person in the room, the interview just goes so smooth, you know, without no roughness and without no tape getting turned off, no going out and coming back in the room. It's just one interview, straight up.*

*With the Third Person, it was really good. I wasn't yelling at the coppers. I wasn't getting aggressive, like I normally would. 'Cos I've had interviews where coppers get real cranky and that. And when they get cranky, it just sends me cranky. If they speak to me like crap, I'm gonna speak to them like crap, and that's when it gets out of hand. With a Third Person there, they just seem to snap out of it. They snap out of their little roughness, or whatever you want to call it.*

*If a Third Person offered me help I'd take it for sure. 'Cos you don't really come across help like that. You've got to go looking for it, and I'm not a person to go looking for help. I reckon that most of the people who get targeted by the police probably do need help. They're probably just like me and don't want to go out looking for help."*

The ITP ensures that as far as possible, an interview proceeds in a way that the interviewee understands. The ITP does not provide legal advice to the interviewee. An ITP can also be requested to be present during a forensic procedure or fingerprinting of the interviewee.

### **Admissibility of evidence taken without an Independent Third Person**

The court must be informed if an ITP should have been present during an interview, but was not. An accused who did not have an ITP present during an interview could argue that their rights were infringed. The court could also determine that evidence taken during the interview is inadmissible. In *R v Warrell*, for example, the Court found that certain admissions made by the accused in the absence of an ITP should be excluded on the grounds that it would be unfair to the accused to allow the use of the evidence.<sup>530</sup>

The fact that an ITP is not present does not automatically make evidence obtained during the interview inadmissible. Instead the courts will exercise their discretion to determine admissibility of the evidence. The Court in *R v Lee* stated that it is up to the courts to assess the circumstances of each case in determining whether improper or unfair conduct during police interviews warrants the need for evidence taken during the interview to be deemed inadmissible.<sup>531</sup> VLA recounted its experience of court determinations on the admissibility of evidence taken in the absence of an ITP:

If a person with an intellectual disability has been interviewed by the police without an independent third person (ITP) present, it can nevertheless be very difficult to persuade a court to remove the interview from the evidence if the police can show that no coercion occurred. However, absence of coercion on the part of the police does not mean that the interview was fair

<sup>530</sup> *R v Warrell* [1993] 1 VR 671, 672.

<sup>531</sup> *R v Lee* (1950) 82 CLR 133, 150.

and reliable given the significant power disparity and the subtleties involved in understanding the consequences of participating in the interview.<sup>532</sup>

### **Awareness of the Independent Third Person program**

To help ensure an ITP is involved during interviews, and protect the admissibility of evidence, it is essential that police understand the ITP program. At present ITP staff deliver a one-hour training program to new police officers. The program outlines:

- the requirement for police to call an ITP;
- the benefits of arranging an ITP to be present during an interview;
- how to arrange an ITP to attend an interview;
- the role of the ITP; and
- the consequences of not calling an ITP.<sup>533</sup>

The OPA told the Committee that it has made a DVD for Victoria Police on the ITP program which it has circulated to every police station throughout the state.<sup>534</sup>

Commander Ashley Dickinson of Victoria Police noted that knowledge and awareness of the ITP program in the police force appears to be expanding. He said:

When I started as the liaison officer between the police and the OPA I would get anything from three to four to a dozen calls a week about people trying to understand what this [the ITP program] was about. Now I do not get any, and I attribute that to just that slow burn of knowledge across the state. Members start to realise that using an ITP is not a negative thing, it can be a positive thing because you get the best evidence ...<sup>535</sup>

The OPA expressed positive views on the increased use of ITPs and said:

... in the past five years, there has been almost a 40 per cent increase in the number of OPA ITPs requested to attend police interviews. OPA sees this as indicative of growing disability-awareness in the police force. ... they tend to “err on the side of caution” when assessing people’s support needs.<sup>536</sup>

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<sup>532</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 11.

<sup>533</sup> Office of the Public Advocate, *2009-2010 annual report*, OPA, Melbourne, 2010, p. 31.

<sup>534</sup> Colleen Pearce, Public Advocate, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 25.

<sup>535</sup> Ashley Dickinson, Commander, Operations and Coordinations Department, Victoria Police, *Transcript of evidence*, Melbourne, 30 April 2012, p. 12.

<sup>536</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 24 (citations omitted).

However, as highlighted earlier, the apparent lack of awareness and training of police officers of how to identify a person with an intellectual disability or cognitive impairment has contributed in a number of instances where an ITP has not been involved during an interview. For example, the Victorian Disability Advisory Council stated that in its experience:

... 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<sup>537</sup>

Mr Carroll, of Disability Justice Advocacy, told the Committee that often an ITP has not been engaged for a victim when one should have been, and that organisations such as his:

often find out about this after the incident has happened and the police have been involved, and by then of course the action has already been taken and the decision has been made not to follow through with it.<sup>538</sup>

Ms Pearce, the Public Advocate, noted that the number of people being assisted by an ITP would be greater if people with a cognitive impairment were correctly identified as requiring support.<sup>539</sup> In its report on the use of the ITP program, the OPA also found that identifying the need for an ITP was a significant issue, and that several disability workers indicated that they had clients who needed an ITP but had been interviewed without one present.<sup>540</sup>

The following Case Studies illustrate occasions when a person with a cognitive impairment has come into repeated contact with the police and an ITP has not been involved.

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<sup>537</sup> Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 20. See also Trevor Carroll, Executive Officer, Disability Justice Advocacy, *Transcript of evidence*, Melbourne, 21 February 2012, p. 52; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 4; Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, p. 3; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 24; Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disabilities Inc., *Transcript of evidence*, Melbourne, 21 February 2012, p. 20; Wesley Mission Victoria, *Submission no. 36*, 23 September 2011, p. 8.

<sup>538</sup> Trevor Carroll, Executive Officer, Disability Justice Advocacy, *Transcript of evidence*, Melbourne, 21 February 2012, p. 52.

<sup>539</sup> Colleen Pearce, Public Advocate, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 21.

<sup>540</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 87. See also Colleen Pearce, Public Advocate, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 21.



*Case Study 15: Samuel's story.*<sup>541</sup>

*"An ITP was supporting 'Samuel', a man with an acquired brain-injury at a police interview. During the interview the police mentioned that Samuel had numerous outstanding charges and priors. However, OPA's ITP database revealed that no calls had been logged for any of those interviews."*

*Case Study 16: Marty's story.*<sup>542</sup>

*"Marty' is an Indigenous man who lives in rural Victoria. When Marty was at school, he was a really good rugby player. Lots of people said that there was a good chance that, one day, he could play football professionally. However, at the age of 16, Marty was hit by a truck and acquired a brain injury. Marty started drinking heavily after his accident and stopped playing rugby.*

*Marty is now in his 40s and is an alcoholic. Marty is linked in with services in his region but apparently 'they don't do much for him'. Marty has never received compensation for his accident. It is now too late to apply for TAC funding.*

*The police repeatedly pick Marty up and charge him with being drunk and disorderly. On one occasion, Marty tried to buy alcohol from a bottle shop, but was refused service. The proprietor said that Marty got aggressive after being refused alcohol, so he called the police. When the police arrived they tried to handcuff Marty and he spat at them. After this incident, Marty spent three months in prison.*

*Marty has now been released from prison and has an OPA Advocate Guardian. Although Marty has had numerous police interviews, OPA's records indicate that he has never had an OPA ITP. Marty's Advocate Guardian believes that Marty appears to have attended his police interviews alone, without any support from his family or anyone else.*

*The Advocate Guardian is now trying to work with Marty to put together the pieces of his life and figure out how best to help him. His Advocate Guardian says that:*

*'The ITP Program as it is now would really have assisted Marty because it's another set of eyes, another watchdog making sure his rights are upheld. But if the ITP Program had been used for Marty, and had also had that extra referral component, that would have been great. It would have meant that our office could have become involved with Marty at a much earlier stage. We might have been able to get him TAC funding and the services he needs. It could have put his life on a different course.'*"

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<sup>541</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 24.

<sup>542</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 89.



It is essential for an ITP to be involved in all cases where it is reasonable to suspect that the person being interviewed has an intellectual disability or cognitive impairment. The VPM makes clear the obligation for a police officer to obtain an ITP, and the steps to be taken by officers for obtaining an appropriate ITP, whether that is a relative, friend or OPA volunteer.<sup>543</sup> The Committee believes training programs currently delivered to new officers should be available to all police officers to ensure that officers are mindful of the requirements to involve an ITP during an interview, the benefits to all parties of obtaining an ITP, and the consequences of failing to do so. The Committee also encourages the OPA to continue to provide educational material about the ITP program to all police stations across Victoria.

**Recommendation 16:** That guidance contained in the Victoria Police Manual be enhanced to clarify an officer's obligation to obtain an Independent Third Person during an interview with a person suspected of having an intellectual disability.

### **Legislative basis for Independent Third Persons**

A number of submissions to the Inquiry recommended that, in order to ensure that an ITP is involved during police interviews with people with an intellectual disability or cognitive impairment, the requirement for an ITP should be articulated in legislation.<sup>544</sup> A legislative requirement for a support person to be present during police interviews with people with an intellectual disability or cognitive impairment exists in both New South Wales and Queensland.

In New South Wales a person with an intellectual disability is defined as a 'vulnerable person' for the purposes of the *Law Enforcement (Powers and Responsibilities) Regulation 2005*.<sup>545</sup> Under the Regulations 'vulnerable' people are entitled to a support person during the interview.<sup>546</sup> The police manual in New South Wales sets out guidance for arranging a support person to be present during an interview. A support person can be arranged through the Criminal Justice Support Network, a service run by the Intellectual Disability Rights Service. The model of support is comparable to the ITP program in Victoria.

In Queensland the *Police Powers and Responsibilities Act 2000* provides that where it is apparent that an offender has 'impaired capacity' a support person must be present both before and during an interview.<sup>547</sup> The Act

<sup>543</sup> Victoria Police, *Victoria Police Manual: Interviewing specific categories of person*, Victoria Police, Melbourne, 2012, p. 4.

<sup>544</sup> Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, p. 3; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 24; Colleen Pearce, Public Advocate, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 21.

<sup>545</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), clauses 24, 27(1): A 'vulnerable person' is defined to include a person with impaired intellectual functioning.

<sup>546</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), clause 27.

<sup>547</sup> *Police Powers and Responsibilities Act 2000* (Qld), section 422(2).

does not define 'impaired capacity' – instead, guidance on how the police conduct interviews with vulnerable people indicates that a person with impaired capacity could include a person with a mental illness or intellectual disability.<sup>548</sup> Where practical the interviewee should be allowed to speak to the support person before the interview starts, and the support person should be present during the interview.

Legislative provisions contained in the *Crimes Act 1914* (Cth) provide that an 'interview friend' should be present when police are interviewing a suspect who is an Aboriginal or Torres Strait Islander (ATSI).<sup>549</sup> A discussion paper published by the Commonwealth Department of Justice and Community Safety, *Review of Police Criminal Investigative Powers*, suggested that it might be appropriate for other vulnerable suspects, such as those with an intellectual disability, to be provided with additional support when interviewed by police.<sup>550</sup>

In other Australian jurisdictions, as in Victoria, the grounds for support during police interviews is provided through guidance contained in police operating manuals and instructions, rather than in legislation.<sup>551</sup>

In the United Kingdom the *Police and Criminal Evidence Act 1984* provides that where police are interviewing a 'mentally vulnerable' person an appropriate adult must be present during the interview.<sup>552</sup> The Act also describes the role of the appropriate adult and establishes the circumstances in which an appropriate adult should be involved. The National Appropriate Adult Network is the national body that represents all organisations around the United Kingdom that provide appropriate adult services. This model of support is very similar to the ITP program in Victoria.

A report by the Intellectual Disability Rights Legal Service in New South Wales on the diversion of offenders with an intellectual disability from local courts found that most people who were supported by a person from the Criminal Justice Support Network during court proceedings had not been supported while in police custody. This was the case although volunteers were available 24 hours a day, 7 days a week.<sup>553</sup> Similarly, studies in the United Kingdom have found that the use of a support person during police interviews is not consistent. For example, one study found that while prevalence rates in one community of mental illness were seven per cent, learning disabilities were three per cent and language problems were five per cent, an appropriate adult was only called in four per cent of these

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<sup>548</sup> Queensland Police Service, 'Queensland Police Service vulnerable persons policy', viewed 22 August 2011, <<http://www.police.qld.gov.au/>>.

<sup>549</sup> *Crimes Act 1914* (Cth), section 23H(2).

<sup>550</sup> Department of Justice and Community Safety (ACT), *Review of police criminal investigative powers*, Department of Justice and Community Safety (ACT), Canberra, Discussion paper, 2010, p. 50.

<sup>551</sup> See Lorana Bartels, *Police interviews with vulnerable suspects*, Australian Institute of Criminology, Canberra, 2011, pp. 9-10 for discussion about support during police interviews in Tasmania, the Northern Territory and South Australia.

<sup>552</sup> *Police and Criminal Evidence Act 1984* (UK), section 11.15.

<sup>553</sup> Intellectual Disability Rights Service, *Enabling Justice: A report on problems and solutions in relation to diversion of alleged offenders with intellectual disabilities from the New South Wales court system*, IDRS, Sydney, 2008, p. 73.

cases. Another study found that, based on conservative estimates of the prevalence of mental illness, in one community an appropriate adult should have been called to 1.9 per cent of police interviews, but was instead only used in 0.016 per cent of police interviews. Another study in 2005 examined 20 805 custody records and found that an appropriate adult provided assistance in only 38 of 448 instances when police were interviewing a person who was vulnerable or had a mental disorder.<sup>554</sup>

Amending legislation to mandate the requirement for an ITP will place greater legal weight on the need for an ITP during interviews, compared to current guidance set out in the VPM. However, given the experience of other jurisdictions that have legislated for the use of ITPs or their equivalent, the Committee believes that mandating for the use of ITPs is inappropriate, as it appears that legislation is unlikely to improve compliance. The Committee believes its recommendations to increase training opportunities and improve guidance for police to identify people with an intellectual disability or cognitive impairment will more effectively encourage greater use of ITPs in police interviews.

### **Training for Independent Third Persons**

Some witnesses and submissions expressed concern about the level of training that is provided to ITPs.<sup>555</sup> In 2009-2010 the OPA conducted 27 induction training days leading to the appointment of 52 new ITPs.<sup>556</sup> During the early stages of the program ITPs did not always provide appropriate support to people with an intellectual disability. Some ITPs encouraged suspects with an intellectual disability to talk to police, assisted police to put questions to people accused of an offence, and led the accused in stating their account of events.<sup>557</sup> Further anecdotal evidence during the early stages of the establishment of the program suggested that ITPs found it difficult to define their role, and they lacked knowledge of police procedures.<sup>558</sup>

The OPA's report on the use of the ITP program recommended that volunteers undergo an initial interview with the OPA to assess their interest in, and eligibility for, taking part in the program. Before applying to become an ITP, volunteers are asked to consider:

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<sup>554</sup> Research cited in Bradley, Rt Hon Lord, *The Bradley Report: Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system*, Department of Health (UK), London, 2009, p. 43.

<sup>555</sup> See for example Michael Bernard, *Transcript of evidence*, Ballarat, 17 November 2011, p. 9; Richard Coverdale, Director, Centre for Rural and Regional Law and Justice, Deakin University, *Transcript of evidence*, Geelong, 20 March 2012, p. 5; Luke Docherty, President, Bendigo Law Association, *Transcript of evidence*, Bendigo, 28 May 2012, p. 40; Inclusion Melbourne, *Submission no. 9*, 6 September 2011, p. 2; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 9; Name withheld, *Submission no. 6*, 6 September 2011, p. 3; Fiona Tipping, Advocate, Grampians disAbility Advocacy, *Transcript of evidence*, Ballarat, 17 November 2011, p. 8.

<sup>556</sup> Office of the Public Advocate, *2009-2010 annual report*, OPA, Melbourne, 2010, p. 31.

<sup>557</sup> Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, p. 70.

<sup>558</sup> Office of the Public Advocate, *Silent victims: A study of people with intellectual disabilities as victims of crime*, OPA, Melbourne, Report prepared by Kelley Johnson, Ruth Andrew and Vivienne Topp, 1988, p. 58.

- whether their own personal values would affect their ability to objectively interpret proceedings during the interview;
- that they must understand that the person might have a disability but that this is only one aspect of the person being interviewed;
- that they must be committed to maintaining the rights of the person with a disability during the police interview; and
- their availability to participate in the program, particularly given the on-call nature of the role.<sup>559</sup>

Following this interview, prospective volunteers are required to undergo a two-day training program, which includes taking part in mock interviews with police officers and people with a disability. At the end of this training, volunteers need to be able to demonstrate that they can:

- apply their knowledge of disability to the ITP role;
- facilitate communication between people with a disability and the police;
- identify and resolve issues arising from the police interview;
- collect and record information associated with the police interview; and
- work within the justice system.<sup>560</sup>

The OPA said that regular forums and ongoing training sessions are provided to give ITPs an opportunity for further learning and information exchange. ITPs are required to attend at least one session every two years.

Some submissions also suggested that relying on volunteers can result in 'burnout' by ITPs, given that they are drawn from a relatively small group of people. The OPA told the Committee that, in order to address the issue of burnout and ensure that ITPs are adequately supported, ITPs are provided with immediate support, advice and debriefing from a 24-hour service provided by the OPA.<sup>561</sup> The OPA also advises potential ITPs that they can be expected to be called on average four to six times a year, but that this may vary depending on their location, availability and the particular demands of their region.<sup>562</sup>

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<sup>559</sup> Office of the Public Advocate, *Supplementary evidence*, 25 October 2011.

<sup>560</sup> Magdalena McGuire, *Breaking the cycle: Using advocacy-based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate, Melbourne, 2012, p. 20.

<sup>561</sup> Office of the Public Advocate, *Supplementary evidence*, 25 October 2011.

<sup>562</sup> Office of the Public Advocate, *Supplementary evidence*, 25 October 2011.

### **Reimbursement of expenses incurred as an Independent Third Person**

The OPA told the Committee that volunteers receive a small honorarium that is calculated on a scale according to the number of interviews they attend. The reimbursement is intended to reflect the expenses an ITP may incur undertaking their role, such as travel costs, phone calls, postage and purchasing resources. However, as the payment is limited to a maximum of \$150 per year, the OPA argued that the reimbursement does not accurately reflect the level of time and resources that an ITP may invest.<sup>563</sup>

Some submissions also suggested that the OPA required more funds in order to adequately supply ITP services and to enhance training for ITP volunteers. Evidence from the ACSO expressed concern that delays in securing an ITP may compromise the ability of a person with an intellectual disability or cognitive impairment to recall events, understand their situation, and exercise their rights.<sup>564</sup> The Disability Advocacy and Information Service also expressed concern that the OPA has limited capacity to provide services to regional Victoria.<sup>565</sup>

The Committee believes that sufficient resources should be provided to ensure that ITPs are adequately reimbursed and supported while carrying out their valuable role. The Committee notes that the ITP program provides an important service to the community, and that opportunities to recruit, train and retain volunteers for the program should be explored and pursued.

**Recommendation 17:** That the Victorian Government promote the Independent Third Person program, and review incentives for participation in the program to ensure that enough suitably qualified people are able to perform the duties of an Independent Third Person.

### **Quality of support provided by Independent Third Persons**

Another issue raised regarding the ITP program focused on the quality of support offered by ITPs. VLA noted that, in some cases, although an ITP may be present during the interview, their presence and assistance may not always assist the person to understand the process and make informed decisions.<sup>566</sup> The following Case Study was provided by VLA in its submission to illustrate this point.

<sup>563</sup> Colleen Pearce, Public Advocate, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, pp. 21, 27.

<sup>564</sup> Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, pp. 7-8.

<sup>565</sup> Disability Advocacy and Information Service Inc., *Submission no. 54*, 3 November 2011, p. 3.

<sup>566</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 11.

*Case Study 17: Alan's story part I.*<sup>567</sup>

*"Alan' was charged with a large number of repetitive, nuisance type offences such as begging, as well as charges of theft and damage to property. Alan participated in 18 separate, recorded interviews with police and [he] agreed with all allegations put to him by the police. The police lacked evidence linking Alan to some of the offences that were put to him in the interviews and they would not have secured convictions for these had Alan not made admissions to the offences in the interview.*

*There was an ITP present for each of the 18 police interviews but Alan never once exercised his rights to access legal advice or to remain silent. He later explained that he did not think it was important and did not understand why it would have made a difference."*

Despite the support that may be provided by an ITP, evidence received by the Committee suggested that in some cases people with an intellectual disability or cognitive impairment may be better supported by a nominated person, such as a family member or carer.<sup>568</sup> Some witnesses suggested that a truly independent ITP, unknown to all parties in an interview, may actually add to the trauma of the situation for the person with an intellectual disability or cognitive impairment.

The Committee heard evidence that although relatives or friends are likely to be more effective at communicating with the person, they are not necessarily the best choice as an ITP for a number of reasons, such as:

- they may not be experienced or trained in the care of people with an intellectual disability or cognitive impairment;
- they may lack the necessary objectivity or be too eager to assist police, to the possible detriment of the interviewee, or they may interfere excessively in the interview;
- their presence may suggest to the person being questioned that their friend or relative supports the police's actions, or that their friend or relative is acting as a 'translator', therefore suggesting to the interviewee that they are being asked questions posed by their family member rather than the police officer who is seeking to gather evidence;
- the person may be reluctant to discuss the matter in front of a family member or may be affected by other family dynamics; and

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<sup>567</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 11-12.

<sup>568</sup> See for example Brian Donovan, Geelong Parent Network, *Transcript of evidence*, Geelong, 20 March 2012, p. 17; Michael Holcroft, President, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 17; Dot Leigh, Geelong Parent Network, *Transcript of evidence*, Geelong, 20 March 2012, p. 17; Ian McLean, Chief Executive Officer, Golden City Support Services, *Transcript of evidence*, Bendigo, 28 May 2012, p. 9; Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 25.



- there may be instances where the family or carer is the cause for the person coming into contact with police.<sup>569</sup>

Villamanta Disability Rights Legal Service said that, on occasion, an ITP may be a staff member of a supported accommodation facility or of some other disability service provider that provides services to the person being interviewed. Villamanta noted that in these circumstances:

... the support worker, unaware of the nature of the police questioning process, actually ceases to be an “independent” third person and volunteers information about the accused person which can then be used against the accused.<sup>570</sup>

The following Case Study illustrates negative consequences that may flow from a person with an intellectual disability or cognitive impairment being supported by a family member or carer rather than an ITP.

*Case Study 18: Absence of an independent support person.*<sup>571</sup>

*“An individual with cerebral palsy and little speech alleged sexual abuse and sought access to the criminal justice system. The absence of an independent communication support worker meant that the individual’s first statement to the police was made with their parent providing the communication support. Due to the individual’s embarrassment over the subject matter, incomplete evidence was given which then became problematic, requiring further statements to be made and explanations to be given in court.”*

In the United Kingdom the *Police and Criminal Evidence Act 1984* provides criteria for who may be considered an appropriate adult for the purpose of providing support during police interviews. The legislation provides that an appropriate adult can be a relative, guardian, or other person who is either responsible for the care or custody of the person or who has expertise in dealing with mentally disordered or mentally vulnerable people.<sup>572</sup> The legislation allows that even in situations where it might be preferable for a person experienced or trained in the care of people with a mental disorder to be present, if the person prefers to be supported by a person of their choice then their wishes should be respected.<sup>573</sup> In New South Wales a vulnerable person is entitled to the support of a parent, guardian, or other person responsible for their care during an interview.<sup>574</sup> If this person is not

<sup>569</sup> See for example Disability Advocacy and Information Service Inc., *Submission no. 54*, 3 November 2011, p. 2; Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, p. 6; Jacqui Pierce, *Transcript of evidence*, Geelong, 20 March 2012, p. 25.

<sup>570</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 4.

<sup>571</sup> Communication Rights Australia, *Submission no. 13*, 8 September 2011, p. 7.

<sup>572</sup> *Police and Criminal Evidence Act 1984* (UK), section 1.7(b).

<sup>573</sup> *Police and Criminal Evidence Act 1984* (UK), note 1D.

<sup>574</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), clauses 26(b)(i), 26(b)(ii).



available then an independent person with expertise in dealing with people with an intellectual disability may attend.<sup>575</sup>

In many cases a person with an intellectual disability or cognitive impairment may be better supported by a parent, carer or other person responsible for their care. However, reasonable steps must be taken to ensure that this person is able to provide appropriate support, and that there is no conflict of interest or reason why that person should not be allowed to attend the interview. In some circumstances it is preferable for a person with an intellectual disability or cognitive impairment to be supported by an ITP who is independent of the situation.

The Committee notes that guidance contained in the VPM is clear as to the matters that should be considered by police officers when obtaining an ITP, whether the ITP is a relative, friend, or OPA volunteer. For example, the VPM states that:

- as objectivity of these interviews is of paramount importance to their success, consider the appropriateness of having a relative or close friend to fulfil the function of the ITP. It may be beneficial to have a parent, relative or close friend present for support, and a trained ITP to ensure the objectivity of the interview.
- investigators should not discourage parents or relatives wishing to be present or suggest they are not suitable as ITP. Indicate that a trained ITP may remain more objective, because of their independence.<sup>576</sup>

The Committee believes that Recommendation 17 of this report, regarding resourcing for the OPA to recruit and train ITPs, will assist in ensuring that ITPs are suitably qualified to support a person with an intellectual disability or cognitive impairment.

## 5.6 Decision to charge

Prior to charging a person with an offence police can either caution a person or put that person through a diversionary program that aims to address their offending behaviour.

There are a number of reasons why police may choose not to charge a person with an intellectual disability or cognitive impairment, including that:

- the effect of the offender's reduced capacity would make it unfair for the offender to face the full effect of the law and its penalties;
- the offender's culpability may be diminished by co-existing social disadvantages they may experience such as mental illnesses, homelessness or drug and alcohol use; or

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<sup>575</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), clause 26(b)(iii).

<sup>576</sup> Victoria Police, *Victoria Police Manual: Interviewing specific categories of person*, Victoria Police, Melbourne, 2012, p. 4.

- the social disadvantages experienced by a person with an intellectual disability may minimise the deterrent and rehabilitative effect that the conventional justice system and its processes are intended to provide.<sup>577</sup>

Once the police have decided to charge an accused they have two options – to send the accused a summons to appear at court, or to arrest and charge the accused.

A summons issued by the court directs a person to appear in court to answer the charge. A summons is typically issued for less serious offences. The *Magistrates Court Act 1989* (Vic) provides a presumption in favour of issuing a summons over arresting an individual,<sup>578</sup> and the *Children, Youth and Families Act 2005* (Vic) provides that in proceedings against children a summons is preferable, except if there are exceptional circumstances.<sup>579</sup> As a further protection for children, the *United Nations Convention on the Rights of the Child* provides that a child should be arrested as a last resort and where arrested this should be for the “shortest appropriate period of time”.<sup>580</sup> Figure 9 illustrates the process that follows once a person has been charged with an offence.

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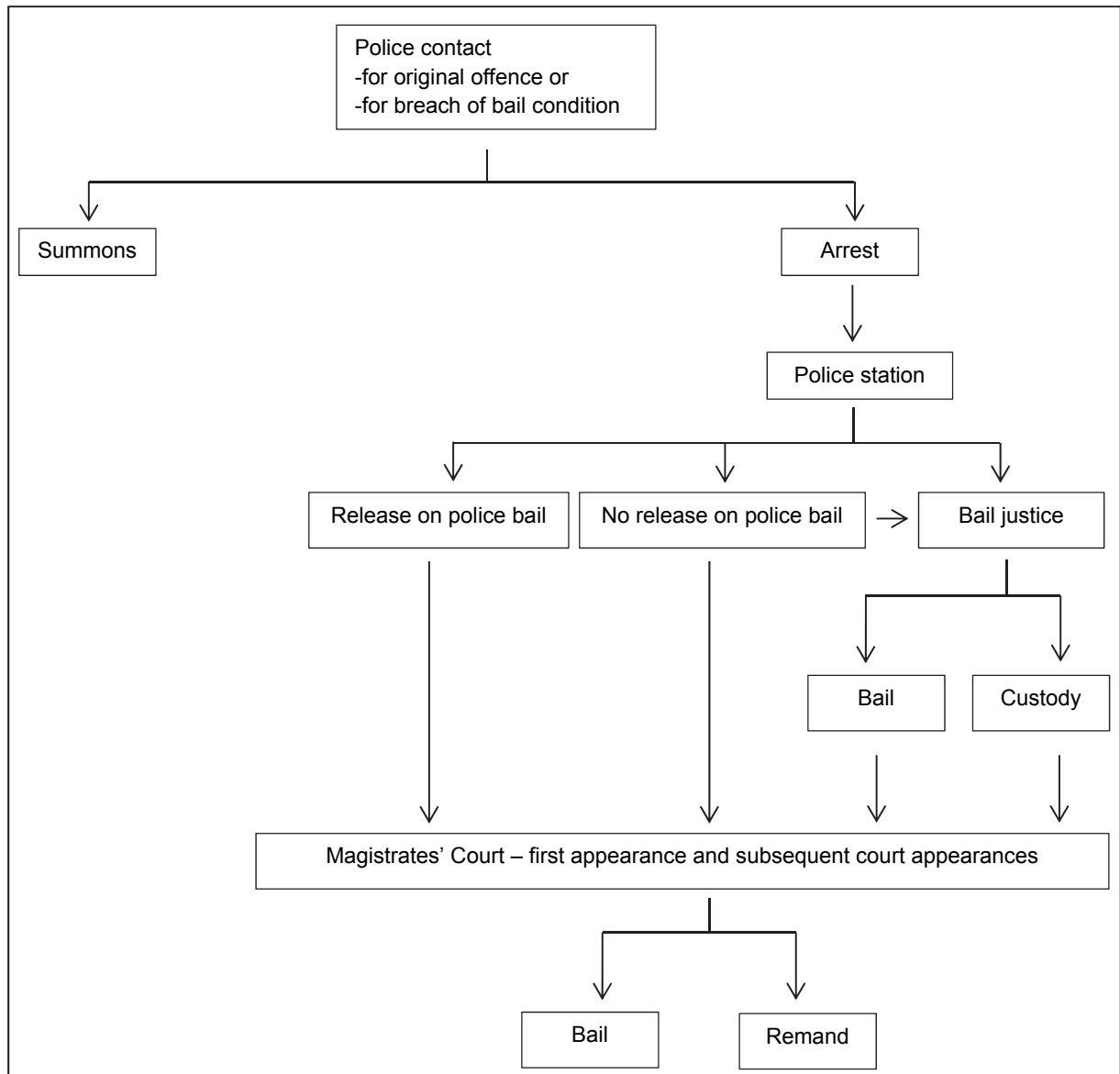
<sup>577</sup> New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, NSWLRC, Sydney, Consultation paper 7, 2010, pp. 4-5.

<sup>578</sup> *Magistrates' Court Act 1989* (Vic), section 43.

<sup>579</sup> *Children, Youth and Families Act 2005* (Vic), section 345.

<sup>580</sup> *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), article 37(b).

**Figure 9: Remand and custody process following a police interview.**<sup>581</sup>



Once an accused is charged the Office of Public Prosecutions is responsible for preparing and conducting prosecutions for offences heard in the County and Supreme Courts of Victoria. Victoria Police prosecute less serious crimes in the Magistrates' Court.

Policy guidelines issued by the Director of Public Prosecutions describe prosecutorial ethics and duties, including circumstances in which to proceed with a prosecution. Where it is in the public interest to proceed with a charge against a person then the prosecution must be pursued.<sup>582</sup>

<sup>581</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Consultation paper, 2005, p. 6.

<sup>582</sup> Director of Public Prosecutions, *Prosecution guidelines*, Office of Public Prosecutions, Melbourne, 2011, guideline 2.1.6.

Whether it is in the public interest to proceed with a prosecution will involve consideration of a range of factors, such as:

- the seriousness of the offence;
- any mitigating or aggravating factors;
- the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, victim or witness;
- the background of the alleged offender;
- the degree of culpability of the alleged offender in connection with the offence;
- the prevalence of the alleged offence and the need for deterrence;
- whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- whether the alleged offence is of considerable public concern;
- the attitude of the victim of the alleged offence toward prosecution;
- the likely expense and length of a trial;
- whether the offender is likely to cooperate in the investigation or prosecution of others; and
- special circumstances that would prevent a fair trial from being conducted.<sup>583</sup>

## 5.7 Bail

### 5.7.1 Current practice

In its *Review of the Bail Act*, the VLRC found that between 2000 and 2005 the police decided about 93 per cent of all bail applications in Victoria.<sup>584</sup> The VLRC found that while only five per cent of bail applications were decided by the courts, these decisions helped to inform the decisions made by the police about bail.<sup>585</sup>

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<sup>583</sup> Director of Public Prosecutions, *Prosecution guidelines*, Office of Public Prosecutions, Melbourne, 2011, guideline 2.1.10.

<sup>584</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Final report, 2007, p. 56.

<sup>585</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Final report, 2007, p. 100.

The *Bail Act 1977* (Vic) contains a presumption in favour of granting bail, unless the prosecution proves there is an 'unacceptable risk' should the accused be released on bail. An 'unacceptable risk' would be if the accused posed the risk of:

- failing to appear in court;
- committing an offence while on bail;
- endangering the safety or welfare of members of the public; or
- interfering with a witness or otherwise obstructing the course of justice.<sup>586</sup>

In considering whether one of the above circumstances would constitute an unacceptable risk, the court takes into account:

- the nature and seriousness of the offence;
- the accused's character, any prior convictions, associations and home environment;
- previous grants of bail against the accused; and
- the strength of evidence against the accused.<sup>587</sup>

The *Bail Act 1977* also contains two classes of offences for which bail is not granted. For these offences the onus is on the accused to establish that bail should be granted.

For the first class of offences bail is not granted unless the accused can show why detention would not be justified – this is commonly referred to as the accused having to 'show cause' why detention would not be warranted.<sup>588</sup> The offences for which the accused is required to 'show cause' include committing an offence while on bail, breaking an intervention order, aggravated burglary and some drug offences of a less serious nature. Although a list of circumstances for which this exception is available is not set out in the Act, the VLRC's research found that factors taken into account by bail decision-makers when determining whether the accused has 'shown cause' to grant bail include:

- the existence of permanent employment;
- the existence of permanent and stable accommodation;
- the likely conditions in custody;
- ill health of the accused or a member of his or her family; and

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<sup>586</sup> *Bail Act 1977* (Vic), section 4(2)(d)(i).

<sup>587</sup> *Bail Act 1977* (Vic), section 4(3).

<sup>588</sup> *Bail Act 1977* (Vic), section 4(4).

- the criminal history of the accused.<sup>589</sup>

In the second class of offences an accused must establish that there are 'exceptional circumstances' why bail should be granted.<sup>590</sup> It is generally accepted that while this is a higher threshold to satisfy, it would include a combination of factors that have been taken as the accused having 'shown cause'.<sup>591</sup> The offences for which an accused is required to show the existence of exceptional circumstances include murder, trafficking commercial quantities of drugs, or other similar serious offences.<sup>592</sup>

There are two main forms of bail. For most bail decisions a person is released on bail on their own undertaking. Otherwise, another person may be required to act as surety for the accused, by putting up security such as money or property to ensure that an accused will appear at court on the required date.

Once bail has been granted conditions may be placed on the offender's release. Bail conditions must be reasonable having regard to the nature of the alleged offence and the circumstances of the accused.<sup>593</sup> Conditions may only be imposed in order to reduce the likelihood that the accused may:

- fail to attend their court hearing;
- commit an offence while on bail;
- endanger the safety or welfare of the public; or
- interfere with witnesses or otherwise obstruct the course of justice.<sup>594</sup>

The Act does not specify what conditions may be imposed when granting bail. Common conditions include directing the accused to reside at a particular address, regularly reporting to a police station, not having contact with certain individuals, surrendering a passport, abiding by a curfew, or not going to certain areas.<sup>595</sup>

Bail conditions are usually designed to control the accused's behaviour or restrict his or her freedom, as opposed to facilitating rehabilitation. However, the courts are now frequently imposing special bail conditions on the grant of bail that order an accused to use support services.

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<sup>589</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Consultation paper, 2005, p. 79.

<sup>590</sup> *Bail Act 1977* (Vic), section 4(2).

<sup>591</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Consultation paper, 2005, p. 80.

<sup>592</sup> *Bail Act 1977* (Vic), section 4(2)(aa).

<sup>593</sup> *Bail Act 1977* (Vic), section 5(4).

<sup>594</sup> *Bail Act 1977* (Vic), section 5(3).

<sup>595</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Consultation paper, 2005, pp. 103-104.

An example of such a program in Victoria is the CREDIT (Court Referral and Evaluation for Drug Intervention and Treatment)/Bail Support Program. Initially this program was established to work with drug-addicted offenders to assist their compliance with bail conditions that required treatment for drug addiction. The program was merged in 2004 with the Bail Support Program. Now the CREDIT/Bail Support Program assists offenders not only with support in overcoming drug related issues but also with accommodation, disability support, anger management and job training.<sup>596</sup> The program aims to:

- achieve the successful completion of bail by an accused who would have otherwise been remanded in custody;
- reduce the number of accused people remanded in custody due to a lack of accommodation, treatment or support in the community;
- achieve the successful placement of an accused in drug treatment or rehabilitation programs; and
- achieve a long term reduction in the involvement of an accused in the criminal justice system.<sup>597</sup>

Once released on bail police will monitor the accused's compliance with bail conditions. The fact that an accused did not comply with a bail condition does not automatically result in the person being arrested, provided the person has an acceptable reason why they had to breach the particular condition.

The *Bail Act 1977* applies to children in the same way that it applies to adults. However, there are some additional protections for children contained in the *Children, Youth and Families Act 2005*. These protections include that:

- a parent, guardian or independent person must be present when a police officer is considering whether to grant bail to a child,<sup>598</sup>
- children must not be refused bail solely on the basis that they do not have adequate accommodation,<sup>599</sup> and

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<sup>596</sup> Magistrates' Court of Victoria, *Guide to court support and diversion services*, Melbourne, 2011, p. 6.

<sup>597</sup> Magistrates' Court of Victoria, *Guide to court support and diversion services*, Melbourne, 2011, p. 6.

<sup>598</sup> *Children, Youth and Families Act 2005* (Vic), section 346(7): Note that the independent person in situations involving children in police settings is different from an ITP. Although the independent person is present during a police interview like the ITP, the independent person is also responsible for ensuring that evidence taken is accurately recorded during an interview with a child. The independent person may also be required to present an independent account of the interview process during any court proceeding involving the child.

<sup>599</sup> *Children, Youth and Families Act 2005* (Vic), section 346(9).



- if children do not have the capacity or understanding to enter into an undertaking of bail then they can be released on bail by a parent or guardian entering into an undertaking to bring them to court.<sup>600</sup>

The same bail conditions imposed on adults can be imposed on children and young people.

## 5.7.2 Bail practice and people with an intellectual disability

The fact that a person has an intellectual disability or cognitive impairment can affect whether a person will be granted bail and their ability to comply with bail conditions. The VLRC found that there were instances where unrealistic conditions were placed on the grant of bail to a person with an intellectual disability or cognitive impairment, so that the person was consequently unable to understand, and comply with, the conditions. The VLRC also found that the ways in which a person with an intellectual disability presents (such as being agitated or confused) might be incorrectly interpreted as the accused posing an unacceptable risk to the community, meaning that bail is not granted.<sup>601</sup>

The *Bail Act 1977* requires that before bail is granted, the accused must understand the “nature and extent of the conditions” of bail and the consequences of failing to comply with them.<sup>602</sup> A person with an intellectual disability or cognitive impairment may have difficulty understanding conditions surrounding a grant of bail. The *Bail Act 1977* does not contain any guidance on how bail decision-makers are to assess whether the accused has understood the conditions he or she has been placed under. Villamanta Disability Rights Legal Service expressed concern with practices surrounding the imposition of bail conditions on a person with an intellectual disability, and said that a person with an intellectual disability:

... may be unable to understand the requirements of their bail; have a history of failing to meet bail undertakings due to inferior memory or organisational skills; or may have insufficient family or community support to assist them in complying with bail conditions.<sup>603</sup>

The OPA provided the following Case Study of inappropriate bail conditions imposed on a person with a cognitive impairment:

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<sup>600</sup> *Children, Youth and Families Act 2005* (Vic), section 346(10).

<sup>601</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Final report, 2007, p. 204.

<sup>602</sup> *Bail Act 1977* (Vic), section 17.

<sup>603</sup> Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, p. 31 (citations omitted).

*Case Study 19: Thomas's story.*<sup>604</sup>

*“Thomas’ is a man with acquired brain injury, dementia and alcohol-dependency. He had spent his entire life in a regional town and had had troubled contact with the local authorities and his parents. Despite his guardian providing documentary evidence to the court of Thomas’s attachment to his home and his inability to connect action with consequence, a judge created bail conditions that prohibited Thomas from returning to his town. As a result, Thomas was constantly found to be in breach of his bail conditions.”*

The VLRC explored the possibility of including a provision in the *Bail Act 1977* to require bail decision-makers to consider the interests of the accused including any special interests arising from the person’s intellectual disability.

In Queensland the *Bail Act 1980* (Qld) provides that an accused can be released without bail if they:

- have, or appear to have, an impairment of the mind, which includes an impairment attributable to a psychiatric, cognitive or neurological impairment;
- do not understand, or appear not to understand, the requirements of bail; and
- would be released on bail if they did have an understanding of the requirements of bail.<sup>605</sup>

In New South Wales the *Bail Act 1978* (NSW) sets out that when deciding whether to grant bail, bail decision-makers must take into account the interests of the accused, including any special needs arising from an intellectual disability.<sup>606</sup> Further to this the Act requires that the bail decision-maker must be satisfied that the conditions are appropriate having regard to the capacity of the accused to understand the conditions, and that reasonable steps must be taken to ensure that any person, including the accused, who enters into a bail undertaking is aware of their obligations and the consequences of failing to comply.<sup>607</sup>

The VLRC concluded that Victoria’s *Bail Act* should not be amended to require bail decision-makers to take into account an accused’s capacity when setting bail conditions. Instead, it recommended that bail conditions must be determined such that they must not be more onerous than necessary, and are reasonable having regard to the nature of the alleged offence and the circumstances of the accused. These conditions were subsequently enacted in the *Bail Act 1977*.<sup>608</sup> In the VLRC’s opinion, if bail conditions were developed having regard to the ‘circumstances of the

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<sup>604</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 29.

<sup>605</sup> *Bail Act 1980* (Qld), section 11A.

<sup>606</sup> *Bail Act 1978* (NSW), section 32(1)(b)(v).

<sup>607</sup> *Bail Act 1978* (NSW), sections 37(2A), 39, 39B.

<sup>608</sup> *Bail Act 1977* (Vic), section 5(4).

accused', the circumstances of people with an intellectual disability or cognitive impairment would be adequately provided for. The VLRC also recommended that bail decision-makers receive ongoing training about cognitive impairments to improve their awareness of the impacts of cognitive impairments on a person's understanding of processes.<sup>609</sup>

On review, the Committee believes that provisions of the *Bail Act 1977* are appropriate, and that improving police training will likely improve awareness of intellectual disability or cognitive impairment and how police decisions, including bail decisions, may impact upon them.

The *Bail Act 1977* does not contain provisions to enable consideration to be given to the circumstances of an accused with an intellectual disability. However, case law has developed in such a way to allow the courts to have regard to the particular circumstances of an accused when they are considering a bail application. For example, in *Re Walker* the Court granted bail to an accused with an intellectual disability on the grounds that the accused would be more vulnerable in custody because of his intellectual disability. The accused's prior history of failing to answer bail was seen as a consequence of his disability as opposed to deliberate evasion.<sup>610</sup>

In order for people with an intellectual disability or cognitive impairment to be able to comply with bail, support may be required, either in the form of legal advice or advocacy, to understand the nature of bail and the consequences of non-compliance. They may also require support services such as accommodation, drug and alcohol treatment and counselling.

The DHS Disability Services Division has client service workers who work with people with an intellectual disability attending bail hearings. Client service workers can provide information to bail decision-makers regarding available services and support for an accused to participate in while they are released on bail.<sup>611</sup> The DHS also funds two facilities in Victoria that provide an accommodation option for people with an intellectual disability involved in the justice system, particularly those requiring bail. The facilities were established in 1990 and are located in North and Western Metropolitan areas (Furlong house) and in the Eastern Metropolitan Region (Charlton House). These two facilities provide statewide accommodation to a total of ten people at a time.<sup>612</sup>

As discussed in Chapter Four, the Committee received anecdotal evidence that people with an intellectual disability are denied bail because there is a lack of appropriate accommodation and support services available in the

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<sup>609</sup> Victorian Law Reform Commission, *Review of the Bail Act*, VLRC, Melbourne, Final report, 2007, p. 205.

<sup>610</sup> *Re Walker* [2007] VSC 129, [7.10].

<sup>611</sup> Department of Human Services, *Criminal justice practice manual 2007*, DHS, Melbourne, 2007, pp. 10-11.

<sup>612</sup> Department of Human Services, 'Statewide short term accommodation and support-client information', viewed 1 February 2013, <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/statewide-short-term-accommodation-and-support-client-information>>.

community.<sup>613</sup> This evidence suggested that an accused with an intellectual disability or cognitive impairment could be held in custody while their non-disabled counterparts who present with similar offending, are released on bail.<sup>614</sup> Mr Jacob Torney, a senior lawyer in criminal law at VLA's regional office in Ballarat said:

Our colleagues have found that there are situations where a person would either have a prima facie right to bail and have bail refused because of a lack of accommodation and therefore might be a flight risk or an unacceptable risk of committing a further offence, or it might be a situation where they could show cause but for appropriate accommodation being available.<sup>615</sup>

*Case Study 20: Inadequate or inappropriate support when released on bail.*<sup>616</sup>

*"... a young man who is 29 years of age who is in adult custody with an IQ of around 56 who had been released on bail, went to family members and that was unsuitable, he was remanded in custody, we got him some accommodation in supported type accommodation, however that had a lot of people with other criminal problems and he left there feeling unsafe and then he was remanded in custody by the police after he was picked up being in breach of his bail conditions and he is still in custody awaiting trial because there's just no other accommodation available for him."*

As discussed in Chapter Four, research conducted by Corrections Victoria also supported the assertion that people with an intellectual disability or cognitive impairment are held in custody longer than their non-disabled counterparts, in part as a consequence of inadequate support and accommodation options available in the community.<sup>617</sup> Consequently, a number of submissions recommended increasing the number of supported

<sup>613</sup> See for example Life Without Barriers, *Submission no. 32*, 19 September 2011, pp. 5-7; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 4.

<sup>614</sup> See for example Dianne Hadden, Ballarat and District Law Association, *Transcript of evidence*, Ballarat, 17 November 2011, p. 50; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 26; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 7; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 5; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 5; Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 32; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, pp. 16-17; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 5; Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, pp. 30-32; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 8-9; Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, p. 32.

<sup>615</sup> Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 30.

<sup>616</sup> Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 30.

<sup>617</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 21.

accommodation facilities available to people with an intellectual disability, particularly those being considered for bail or parole.<sup>618</sup>

The Committee notes Recommendation 3 in Chapter Four regarding the potential development of dedicated accommodation facilities for people with an intellectual disability or cognitive impairment who have come into contact with the justice system. The Committee believes this step will help ensure people with an intellectual disability or cognitive impairment are not disproportionately denied bail as a result of a lack of accommodation options.

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<sup>618</sup> See for example Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 8; Dianne Hadden, Ballarat and District Law Association, *Transcript of evidence*, Ballarat, 17 November 2011, p. 50; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 3; Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 32; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, pp. 16-17; Ursula Smith, *Submission no. 11*, 8 September 2011, p. 4; Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, pp. 30, 32.



## Chapter Six: Lawyers and the judiciary

For most people, irrespective of whether they have an intellectual disability or cognitive impairment, becoming involved in the justice system can be a confronting and intimidating experience. Given the complexities of the justice system it is conceivable that a person's rights could be undermined if he or she does not understand his or her legal rights or cannot get access to legal advice. For example, a suspect who does not understand his or her legal right to silence may inadvertently present self-incriminating evidence to the police. A victim or witness who is unable to accurately recall events may compromise an investigation, and the consequent prosecution of the offence.

Because the justice system is so complex, most people who seek access to it will need to obtain legal advice and assistance from specialists trained in the law. While a range of government agencies, community and private organisations exist to provide legal advice, people with an intellectual disability or cognitive impairment may experience a range of obstacles when they seek access to these services. These could include:

- inadequate access to affordable community legal centres;
- ineligibility for publicly funded legal assistance such as legal aid;
- insufficient access to legal service providers familiar with the issues and challenges experienced by people with an intellectual disability or cognitive impairment;
- difficulties having their impairment identified, and inadequate support mechanisms being put in place as a consequence;
- difficulties associated with obtaining and giving instructions;
- difficulties associated with the extended time and resources required to deal with the legal problems of a person with an intellectual disability or cognitive impairment; and
- ethical issues associated with determining the capacity of a person with an intellectual disability or cognitive impairment to give legal instructions.<sup>619</sup>

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<sup>619</sup> Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, pp. 75-76.



This Chapter will examine awareness of disability issues by members of the legal profession, and knowledge of legal rights by people with an intellectual disability or cognitive impairment, and their families and carers. Avenues for accessing legal advice, representation, and information by people with an intellectual disability or cognitive impairment are also considered, as well as barriers to accessing legal advice and information and strategies to alleviate these barriers. Finally, the Committee considers interactions that people with an intellectual disability or cognitive impairment have with the judiciary and court personnel.

## 6.1 Disability awareness and knowledge of legal rights

Effective interaction with the justice system depends on access to accurate information, and education about legal rights. During the course of this Inquiry the Committee received evidence expressing concern at the apparent lack of awareness people with an intellectual disability or cognitive impairment have of their legal rights and responsibilities.<sup>620</sup> Consequently, the Committee heard that it was vital that efforts are made to ensure that people with an intellectual disability or cognitive impairment are aware of their rights and responsibilities, and that the education and training they receive is appropriate and effective.<sup>621</sup> The Committee also heard that the ability of people with an intellectual and cognitive impairment to exercise their legal rights and responsibilities could be enhanced if members of the legal profession were more aware of, and were able to modify practice to suit, their needs.<sup>622</sup>

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<sup>620</sup> See for example Autism Victoria, *Submission no. 16*, 9 September 2011, p. 4; Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, pp. 3-4; Loddon Campaspe Community Legal Centre, *Supplementary evidence*, 28 May 2012, p. 7; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 2; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 4; Radius Disability Services, *Submission no. 28*, 12 September 2011, p. 1; Regional Information and Advocacy Council, *Submission no. 51*, 2 February 2011, p. 2; Victorian Coalition of ABI Service Providers Inc., *Submission no. 42*, 7 October 2011, p. 4.

<sup>621</sup> See for example CASA Forum, *Submission no. 33*, 21 September 2011, p. 2; George A.R. Faulkner, *Submission no. 10*, 7 September 2011, p. 1; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 4; Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011, p. 4; Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, pp. 15, 16; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 3.

<sup>622</sup> See for example Association for Children with a Disability, *Submission no. 42*, 7 October 2011, p. 4; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 6; Daniel Clements, Manager, Brosnan Centre, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, p. 32; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 10; Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 3; Jan Kennedy, Program Manager, Mildura Court Network, *Transcript of evidence*, Mildura, 16 November 2011, pp. 16-17; Dariane McLean, Advocate, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, p. 23; Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 11; STAR Victoria, *Submission no. 12*, 8 September 2011, pp. 2-3.

## 6.1.1 Disability awareness by the legal profession

The legal profession in Victoria is regulated by the *Legal Profession Act 2004* (Vic), which also describes the process for making complaints against lawyers. The Act establishes the Legal Services Board, which is responsible for regulating the legal profession, and the Legal Services Commission, which is responsible for complaints and disciplinary procedures.<sup>623</sup>

### 6.1.1.1 Current legal education and training

All lawyers are required to complete a basic Bachelor of Laws (LLB) degree. The Council of Legal Education and the Board of Examiners jointly regulate entry into the legal profession in Victoria. The Council of Legal Education is responsible for determining admission requirements, approving law courses, and assessing the qualifications of overseas lawyers.<sup>624</sup> The Board of Examiners is responsible for determining applications for admission to practice.<sup>625</sup>

The *Legal Profession (Admission) Rules 2008* (Vic) sets out requirements for a person seeking admission to practice as a lawyer in Victoria. A student must first complete an approved course of study provided by an approved institution.<sup>626</sup> Upon completing the course, the student must be able to demonstrate understanding of academic areas of criminal law and procedure, torts, contract, property, equity, company law, administrative law, federal and state constitutional law, civil procedure, evidence, and ethics and professional responsibility.<sup>627</sup>

After completing the academic course, a person seeking admission to practice must also complete practical training. Practical training must be one of the following:

- the equivalent of one year full-time experience as an articled clerk in a law firm;
- the equivalent of one year full-time experience gained through supervised workplace training; or
- completion of an approved practical training course at either the College of Law Victoria, the Leo Cussen Institute, or Monash University.<sup>628</sup>

Practical legal training comprises both coursework and practical components. The objectives of the coursework component are to provide a person with an understanding of the:

<sup>623</sup> *Legal Profession Act 2004* (Vic), sections 6.2.3, 6.3.2.

<sup>624</sup> *Legal Profession Act 2004* (Vic), section 6.5.2.

<sup>625</sup> *Legal Profession Act 2004* (Vic), section 2.3.10.

<sup>626</sup> *Legal Profession (Admission) Rules 2008* (Vic), rule 2.01.

<sup>627</sup> *Legal Profession (Admission) Rules 2008* (Vic), Schedule 2.

<sup>628</sup> *Legal Profession (Admission) Rules 2008* (Vic), Part 3.

- structure and purpose of the legal profession;
- legal and ethical obligations governing lawyers in the practice of the law; and
- procedures for either administrative, criminal, family, consumer, industrial or environmental law practice.

Once practical and academic requirements have been completed, a person must obtain a practising certificate in order to be allowed to practice in Victoria. The Board of Examiners is responsible for determining eligibility and provides the certificate that the Supreme Court refers to when admitting an applicant to practice.<sup>629</sup>

A certificate will only be approved if the Board is satisfied that the person is a fit and proper person, after taking the following matters into account:

- whether the applicant has been found guilty of an offence in Australia or a foreign country;
- whether the applicant provided incorrect or misleading information in their application for a practising certificate;
- whether the applicant contravened a condition of an Australian practising certificate;
- whether the applicant contravened an order of a tribunal or a corresponding disciplinary body; or
- whether the applicant has become the subject of current disciplinary actions, unresolved complaints, investigations or charges under the *Legal Profession Act 2004*.<sup>630</sup>

All lawyers who have been granted their first practising certificate are subject to a period of supervised legal practice for either 18 months or two years before they are allowed to practice as principals in a legal practice.<sup>631</sup>

Practical and academic requirements for becoming a practising lawyer do not cover in detail issues relevant to people with an intellectual disability or cognitive impairment. The Committee heard, however, that more training and awareness should be provided to lawyers on the needs of people with an intellectual disability or cognitive impairment.<sup>632</sup> Lawyers practising in

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<sup>629</sup> *Legal Profession Act 2004* (Vic), section 2.3.10.

<sup>630</sup> *Legal Profession Act 2004* (Vic), sections 1.2.6(1), 2.4.4(i); *Legal Profession Act 2004* (Vic), section 1.2.6(1).

<sup>631</sup> *Legal Profession Act 2004* (Vic), section 2.4.18(1).

<sup>632</sup> See for example Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 10; Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 3; Jan Kennedy, Program Manager, Mildura Court Network, *Transcript of evidence*, Mildura, 16 November 2011, pp. 16-17; Philip Lynch, President, Ballarat and District Law Association, *Transcript of evidence*, Ballarat, 17 November 2011, p. 42; Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 11; Julie Phillips, Manager,

criminal defences and guardianship matters are more likely to have clients with intellectual disabilities or cognitive impairments than those practising in other fields.

Evidence suggested that undergraduate and post graduate law courses should include a practical unit on how to provide legal advice and services to people with an intellectual disability, their families and carers.<sup>633</sup> STAR Victoria noted that:

... it is important for legal practitioners at all levels to have access to training and education about the challenges faced by people with an intellectual disability and their families and carers when they become involved with the justice system.<sup>634</sup>

STAR Victoria endorsed increased mentoring and training opportunities for lawyers to encourage greater understanding of the experiences of people with an intellectual disability.<sup>635</sup>

The Office of the Public Advocate (OPA) offers information and advice on a range of topics affecting people with a disability. The OPA responds to more than 13 000 requests for information and assistance every year on topics such as the rights of people with a disability, and the care and treatment of people with disabilities.<sup>636</sup> The OPA noted that the number of requests they receive from lawyers for information suggests that there are "... gaps in disability-awareness with some lawyers."<sup>637</sup> The OPA said that while it was encouraging that lawyers sought its advice, the volume of requests for information suggests that there is limited understanding of disability rights and issues among some lawyers.

Victoria Legal Aid (VLA) told the Committee that it delivers a mental health and disability training program to all of its new lawyers, paralegals and administrative workers, and aims to equip VLA staff with skills to identify clients with an intellectual disability when they present to VLA.<sup>638</sup> Ms Kristen Hilton, the Director of Civil Justice Access and Equity, told the Committee that VLA runs professional legal education programs that are

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Disability Discrimination Legal Service, *Transcript of evidence*, Melbourne, 24 October 2011, p. 34; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 1.

<sup>633</sup> See for example Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 10; Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 3; Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 11.

<sup>634</sup> STAR Victoria, *Submission no. 12*, 8 September 2011, p. 1.

<sup>635</sup> STAR Victoria, *Submission no. 12*, 8 September 2011, pp. 2-3. See also Association for Children with a Disability, *Submission no. 42*, 7 October 2011, p. 4; Chris Atmore, Policy Officer, Federation of Community Legal Centres (Victoria) Inc., *Transcript of evidence*, Melbourne, 24 October 2011, p. 31; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 10; Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 3.

<sup>636</sup> Office of the Public Advocate, 'Advice service', viewed 9 August 2012, <<http://www.publicadvocate.vic.gov.au/services/102/>>.

<sup>637</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 20.

<sup>638</sup> Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 43.

open to other lawyers working in the community, but noted that uptake of these programs by lawyers working in the private sector is low.<sup>639</sup>

### 6.1.1.2 Obligations of the legal profession

The legal profession in Victoria is divided into two distinct roles: solicitors and barristers. Solicitors are typically the first to engage with clients and deal with all types of legal work, whereas barristers work principally with clients attending court. Prior to admission to practice as a barrister, a lawyer must undertake a three month course focussing on advocacy skills and evidence, followed by a period of apprenticeship to a senior barrister.

Both barristers and solicitors are regulated under the *Legal Profession Act 2004* which sets out standards of conduct and professional responsibility. Under the Act both the Law Institute of Victoria (LIV) and the Victorian Bar are allowed to make rules about legal practice in Victoria.<sup>640</sup> In cases where rules made by the Legal Services Board and the LIV or the Victorian Bar are inconsistent, the rules of the Legal Services Board prevail.<sup>641</sup> Rules made under the Act are applicable to all lawyers. A failure to comply with the rules could make lawyers liable for professional misconduct.<sup>642</sup>

The *Law Institute Continuing Professional Development Rules 2008* require a lawyer to complete ten continuing professional development (CPD) units each year, including at least one unit in each of the following four fields: ethics and professional responsibility, professional skills, substantive law and practice management, and business skills.<sup>643</sup> The rules specify that a CPD activity must:

- (a) be of significant intellectual or practical content and must deal primarily with matters related to the practitioner's practice of law;
- (b) be conducted by persons who are qualified by practical or academic experience in the subject covered; and
- (c) seek to extend the practitioner's knowledge and skills in areas that are relevant to the practitioner's practice needs.<sup>644</sup>

Barristers are required to complete the same CPD requirements under the rules issued by the Victorian Bar.<sup>645</sup>

In its evidence the LIV noted that it has hosted a number of CPD activities that were relevant to the current Inquiry, including *Incapacity and representing your client* in 2009 and *Capacity: Clients' instructions and lawyers' skills and duties* in 2011. The LIV also operates an Accredited Specialisation Program, with more than 900 Accredited Specialists providing advice in 15 areas of specialisation. These include children's law,

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<sup>639</sup> Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 42-43.

<sup>640</sup> *Legal Profession Act 2004* (Vic), section 3.2.9.

<sup>641</sup> *Legal Profession Act 2004* (Vic), section 3.2.17(1).

<sup>642</sup> *Legal Profession Act 2004* (Vic), section 3.2.17.

<sup>643</sup> *Law Institute Continuing Professional Development Rules 2008*, rules 5.1, 5.2.

<sup>644</sup> *Law Institute Continuing Professional Development Rules 2008*, rule 4.1.

<sup>645</sup> *Victorian Bar Continuing Professional Development Rules 2010*, rule 6.

criminal law, environment and planning law, and mediation.<sup>646</sup> The LIV noted that topics surrounding 'mental impairment' in relation to sentencing are available under its criminal law specialisation program.

The LIV also noted that the *Law Institute Continuing Professional Development Rules 2008* provide a non-exhaustive list of examples of topics that would satisfy a CPD unit. Some of these may be relevant to lawyers who work with clients with an intellectual disability or cognitive impairment, such as effective communication skills, client interviewing principles and techniques, plain English letter writing, advice, drafting and interviewing and the use of interpreters.<sup>647</sup>

The Legal Services Commissioner also convenes CPD workshops on the ethical responsibilities of lawyers.<sup>648</sup> These workshops allow the Legal Services Commissioner to discuss key issues that have been identified during its complaint handling process. The Legal Services Commissioner also conducts lectures at Victorian universities to both undergraduate and post-graduate law students on the regulation and ethical responsibilities of the legal profession in Victoria.<sup>649</sup>

In addition to these CPD requirements there are obligations set out in the *Legal Profession Act 2004* and associated rules and regulations. Under the *Law Institute Professional Conduct and Practice Rules 2005* and the *Victorian Bar Incorporated Practice Rules 2009* issued by the LIV and the Victorian Bar respectively, a lawyer's professional obligations include that:

- a lawyer must, in the course of engaging in legal practice, act honestly and fairly in their client's best interests and maintain the client's confidence;<sup>650</sup>
- a lawyer who agrees to work for a client is under a duty to serve the client honestly and fairly and to attend to the work required with reasonable promptness;<sup>651</sup>
- a lawyer must avoid conflicts of interest between a client who they are acting for and their own personal interests;<sup>652</sup>
- lawyers must advance their client's interests to the best of their abilities without being influenced by their own personal views about the client's actions;<sup>653</sup>

<sup>646</sup> Law Institute of Victoria, 'Accredited specialisation', viewed 18 January 2013, <<http://www.liv.asn.au/Professional-Development/Accredited-Specialisation.aspx>>.

<sup>647</sup> *Law Institute Continuing Professional Development Rules 2008*, appendix A.

<sup>648</sup> Legal Services Commissioner, *Annual report 2012*, Legal Services Commissioner, Melbourne, 2012, p. 26.

<sup>649</sup> Legal Services Commissioner, *Annual report 2012*, Legal Services Commissioner, Melbourne, 2012, p. 26.

<sup>650</sup> *Professional Conduct and Practice Rules 2005*, rule 1.1; *Victorian Bar Incorporated Practice Rules 2009*, rule 3.

<sup>651</sup> *Professional Conduct and Practice Rules 2005*, rule 2; *Victorian Bar Incorporated Practice Rules 2009*, rule 3.

<sup>652</sup> *Professional Conduct and Practice Rules 2005*, rules 8.2, 9.1; *Victorian Bar Incorporated Practice Rules 2009*, rule 72.



- a lawyer must seek to assist the client to understand the issues in the case and the client's possible rights and obligations in order to allow the client to give proper instructions;<sup>654</sup>
- a lawyer must (unless the circumstances warrant otherwise) advise a client who is charged with a criminal offence about any law, procedure or practice, which could be used to the client's advantage if the client pleads guilty to the offence;<sup>655</sup> and
- a lawyer must communicate effectively and promptly with clients.<sup>656</sup>

The *Victorian Bar Incorporated Practice Rules 2009* also require that a barrister representing an accused person who suffers some form of mental or physical disability, or who appears to be disadvantaged because of a lack of education, familiarity with the English language, or ability to communicate, must take special care to ensure that those factors do not prejudice the accused's case.<sup>657</sup>

Given the nature and number of obligations that lawyers have when delivering legal services it is foreseeable that complaints against them might arise. The Legal Services Commissioner is responsible for receiving and handling complaints about lawyers' services.<sup>658</sup> Complaints are primarily considered by the Commissioner, but may also be referred to the Victorian Bar or the LIV for consideration.

The *Legal Profession Act 2004* sets out procedures for dealing with complaints and disputes against lawyers. There are two forms of complaints set out in the Act:

- a civil complaint for disputes about legal costs not exceeding \$25 000 or a claim for pecuniary loss as a consequence of a lawyer's actions;<sup>659</sup> or
- disciplinary conduct that would amount to unsatisfactory professional conduct or professional misconduct.<sup>660</sup> Unsatisfactory professional conduct includes conduct that falls short of the standards of competence and diligence that a reasonably competent lawyer would exercise.<sup>661</sup> Conduct constituting unsatisfactory professional conduct or misconduct includes any contraventions under the Act, charging excessive

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<sup>653</sup> *Professional Conduct and Practice Rules 2005*, rule 12.1; *Victorian Bar Incorporated Practice Rules 2009*, rule 11.

<sup>654</sup> *Professional Conduct and Practice Rules 2005*, rule 12.2; *Victorian Bar Incorporated Practice Rules 2009*, rule 12.

<sup>655</sup> *Professional Conduct and Practice Rules 2005*, rule 12.4; *Victorian Bar Incorporated Practice Rules 2009*, rule 151.

<sup>656</sup> *Professional Conduct and Practice Rules 2005*, rule 39.1.

<sup>657</sup> *Victorian Bar Incorporated Practice Rules 2009*, rule 152.

<sup>658</sup> *Legal Profession Act 2004* (Vic), section 6.3.2.

<sup>659</sup> *Legal Profession Act 2004* (Vic), section 4.2.2.

<sup>660</sup> *Legal Profession Act 2004* (Vic), section 4.2.3.

<sup>661</sup> *Legal Profession Act 2004* (Vic), section 4.4.2.



costs, and conduct in which there is a finding of guilt for a serious offence, a tax offence or an offence involving dishonesty.<sup>662</sup>

In the year to 30 June 2012 the Commissioner received 1982 new complaints, most of which (83%) related to services from solicitors.<sup>663</sup> While over 39 per cent of complaints related to legal costs, a number also related to service issues. These included complaints of negligence on the part of lawyers (17%), communication issues (5%), and dishonesty or misleading conduct (8%).<sup>664</sup>

Many problems can also arise as a consequence of poor communication between a lawyer and his or her client. Communication is an essential part of the client-lawyer relationship particularly when the client has an intellectual disability or cognitive impairment. In order to avoid these problems there are things that both a lawyer and client can do. For example: clear lines of communication should be maintained between a client and a lawyer; the client should be informed of all key decision-making steps; and the lawyer should explain all legal matters in a manner that can be understood by a client. For people with an intellectual disability or cognitive impairment, clear communication between themselves and their lawyer is essential and will be discussed in greater detail later in this Chapter.

## 6.1.2 Legal education for the community

### 6.1.2.1 Lack of awareness of legal rights and responsibilities

The Committee heard that people with an intellectual disability or cognitive impairment experience challenges understanding, and interacting with, the justice system from the point of their initial contact with the justice system onward. For example, the Victorian Disability Advisory Council noted that:

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 ...<sup>665</sup>

A number of organisations and witnesses told the Committee that people with an intellectual disability or cognitive impairment often lack understanding of particular legal rights, and in some cases are unaware they are even entitled to certain legal rights and protections.<sup>666</sup> In its

<sup>662</sup> *Legal Profession Act 2004* (Vic), section 4.4.4.

<sup>663</sup> Legal Services Commissioner, *Annual report 2012*, Legal Services Commissioner, Melbourne, 2012, pp. 8-9.

<sup>664</sup> Legal Services Commissioner, *Annual report 2012*, Legal Services Commissioner, Melbourne, 2012, p. 8.

<sup>665</sup> Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 20.

<sup>666</sup> See for example Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 4; Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21

evidence to the Committee, Autism Victoria noted that people with a cognitive impairment such as an autism spectrum disorder "... may well know the words 'I have the right not to answer questions etc.' [and] be able to express themselves well however this does not in itself ensure that the person actually has the capacity to put into practice this right."<sup>667</sup>

Loddon Campaspe Community Legal Centre stated that:

People with an intellectual disability are likely to face difficulty in comprehending legal procedure and process. Indeed, legal procedure and process is foreign and difficult to navigate for people who do not have an intellectual disability. Legal process is inherently complex, language is foreign and there is a strong reliance on documentation, particularly by courts. Together, these factors may work to alienate people with an intellectual disability from the legal system.<sup>668</sup>

The Loddon Campaspe Community Legal Centre noted that people with an intellectual disability or cognitive impairment may be less inclined to pursue a legal matter because they do not understand their legal rights. For example, the Loddon Campaspe Community Legal Centre said that it had:

... seen clients who have a cognitive impairment who have learnt too late that a legal remedy may have been available to them. Often, a friend or carer will recognise that an injustice has occurred, but by the time they assist the person to seek legal advice the limitation period has expired.<sup>669</sup>

As an illustration of understanding about legal rights, Ms Angela Alexander said that in consultations with people with an intellectual disability who had had some involvement with the justice system:

When the group was asked what they knew about their rights there was a long confused silence.

Eventually one person muttered "no idea". Everyone nodded and agreed. After a while someone ventured "right to talk to a lawyer?"

Therefore, despite the fact that everyone in the room had been involved with police, child protection and the court system there was almost no response to this query. ...

There was a very strong agreement that a major issue was not knowing what was going to happen and lack of accessible information.<sup>670</sup>

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May 2012, p. 3; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 2; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 4; Radius Disability Services, *Submission no. 28*, 12 September 2011, p. 1; Regional Information and Advocacy Council, *Submission no. 51*, 2 February 2011, p. 2; Victorian Coalition of ABI Service Providers Inc., *Submission no. 42*, 7 October 2011, p. 4.

<sup>667</sup> Autism Victoria, *Submission no. 16*, 9 September 2011, p. 4.

<sup>668</sup> Loddon Campaspe Community Legal Centre, *Supplementary evidence*, 28 May 2012, p. 5.

<sup>669</sup> Loddon Campaspe Community Legal Centre, *Supplementary evidence*, 28 May 2012, p. 7.

<sup>670</sup> Angela Alexander, *Submission no. 8*, 6 September 2011, p. 1.

Grampians disAbility Advocacy expressed the view that:

People with disability do not have access to information about their rights in the justice system. They are not referred to someone who can assist them. There is no consistent effort made to ensure that people with a disability understand the documentation before them, especially when they are asked to sign paperwork. They are read their rights by police but few know what any of this means or how to access a lawyer or advocate.<sup>671</sup>

A number of groups expressed concern that people with an intellectual disability or cognitive impairment were not aware of their legal rights and responsibilities. The Coalition for Disability Rights and the Ethnic Communities' Council of Victoria described the negative consequences that can arise from having insufficient access to information. For example:

- lack of understanding about legal rights can undermine the ability of a person with an intellectual disability to seek redress;<sup>672</sup> and
- lack of understanding about legal rights can lead to a person having inadvertent contact with the justice system.<sup>673</sup>

The following Case Study is illustrative of the consequences that may follow should a person with an intellectual disability be unable to access legal advice and information.

*Case Study 21: Alan's story part II.*<sup>674</sup>

*“Alan’ is a young adult with an intellectual disability. He has been a ward of the state since he was a teenager and has had significant involvement with Disability Services since then. He has poor self-care, hygiene and life skills and needs to live in fully staffed, supported accommodation.*

*When Alan was in custody, he signed a consent form to convert a large number of fines into imprisonment in lieu of payment. The paperwork and procedural information was provided to him by prison staff including disability workers and he did not seek legal advice before proceeding. The imprisonment in lieu application proceeded before a magistrate and Alan was unrepresented during the hearing. The fines were converted into several weeks of imprisonment. Alan’s lawyer (assisting him with other matters) only became aware of this by chance.*

<sup>671</sup> Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 3.

<sup>672</sup> Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, pp. 5-6.

<sup>673</sup> Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 3.

<sup>674</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 7.

*When his expected parole date passed and Alan was not released, Disability Services contacted his lawyer. It was discovered that a clerical error had led to the imprisonment in lieu orders being dated incorrectly and commencing later than they were meant to. This had the potential to cause Alan to be held in custody for months beyond his scheduled release date. Alan instructed that he had not thought he needed legal advice regarding this matter as it did not seem important, and he had not realised that signing imprisonment in lieu orders had the potential to cause him to be imprisoned for longer.”*

### **6.1.2.2 Barriers to accessing legal information**

One of the biggest barriers to accessing legal advice and information highlighted in evidence to the Committee was the complexity of the legal language used. The Legal Services Commissioner expressed the view that:

One of the biggest barriers to participation in the justice system is that of language. The most common criticism of the legal system encountered is the nature of the legal language used by lawyers and the courts. Legal terms are often incomprehensible to people with disabilities, especially for those who have received less formal education and are therefore unable to understand or follow longwinded conversations. This can often leave them feeling disempowered, inferior and intimidated, and less likely to want to participate in the process without a support person.<sup>675</sup>

Under the *Convention on the Rights of Persons with Disabilities*, Australia must:

- (a) provid[e] information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- (b) accept[] and facilitat[e] the use of sign language, Braille, augmentative and alternative communication and other accessible means ...<sup>676</sup>

The challenges experienced by people with an intellectual disability or cognitive impairment while accessing information could be reduced if information was available in simple and Easy English formats. Easy English formats typically use clear, simple and direct language and pictures, logos or photos to add to the meaning of the text.

Mr Kevin Stone, the Executive Officer at the Victoria Advocacy League for Individuals with Disability (VALID) said that when producing information for people with an intellectual disability, it is important to remember that people with an intellectual disability learn at a different rate from people without a disability, and that alternative approaches for the delivery of information

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<sup>675</sup> Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 4. See also Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 3.

<sup>676</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 21.

are therefore needed.<sup>677</sup> Life Without Barriers also highlighted the importance of providing legal information in a form and manner that is appropriate. Life Without Barriers said that because this information was not often provided in an appropriate form, people with an intellectual disability may not understand that their actions have legal consequences.<sup>678</sup>

In 1987 a report by the OPA into the criminal justice system and people with an intellectual disability recommended that legal rights information could be improved if:

- a legal rights guide for people with an intellectual disability was produced;
- the community services sector in Victoria developed resource information and material for people with an intellectual disability as to their rights; and
- the then Legal Aid Commission designed information in a direct and non-complex form that was suitable for people with an intellectual disability on what to do if they were questioned by the police, summoned by court, or if they were seeking advice as a victim of crime.<sup>679</sup>

The Committee received evidence, however, that appropriate information was still not available for people with an intellectual disability or cognitive impairment.<sup>680</sup>

For example, consultations conducted by the Legal Services Commissioner with disability service and advocacy groups found that these groups were concerned with the:

... distinct lack of information made available for people with intellectual and cognitive disabilities. For example few government websites have translated their usual public information into simplified English, which uses larger font type, white space, more headings and pictorial representations of themes to help explain complex concepts ...<sup>681</sup>

<sup>677</sup> Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, p. 16. See also Radius Disability Services, *Submission no. 28*, 12 September 2011, p. 2.

<sup>678</sup> Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 4.

<sup>679</sup> Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987, p. 51. Note the Legal Aid Commission was established under the *Legal Aid Commission Act 1978* (Vic). When the Legal Aid Commission was established it took over the functions of the three existing legal aid bodies – the Legal Aid Committee, the Public Solicitors Office and the Australian Legal Aid Office. The Legal Aid Commission was replaced by Victoria Legal Aid in 1995.

<sup>680</sup> See for example Assert 4 All, *Submission no. 53*, 10 September 2011, p. 28; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 6; Coalition for Disability Rights, *Submission no. 45*, 10 October 2011, p. 6; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 3; Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 6.

<sup>681</sup> Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 2.

This view was shared by the Victorian Disability Advisory Council, which suggested that:

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.<sup>682</sup>

The Ethnic Communities' Council of Victoria noted that information is not readily available in community languages, and stated that "... many people come to rely on other sources of information, such as friends and other community members".<sup>683</sup> The Council considered that this may not be sufficient as "Information from such sources may not be reliable and may not be in keeping with the individual's best interest."<sup>684</sup>

While acknowledging the importance of providing legal information in a range of alternative formats, VALID stressed that:

... it is not enough to simply provide pamphlets or brochures to explain people's rights and responsibilities. People with intellectual disability and cognitive impairment need time to process the information and the opportunity to talk it through – to make it relevant.<sup>685</sup>

Despite the existence of a range of legal instruments that acknowledge the legal rights of people with a disability, the Committee heard that knowledge and awareness of these legal rights is lacking. The complex language and processes employed are a significant barrier to the participation of a person with an intellectual disability or cognitive impairment in the justice system. Consequently, it is essential that information sources are developed that are particularly targeted toward this group of people to assist them to understand their legal rights.

**Finding 6: A significant barrier affecting the ability of people with an intellectual disability or cognitive impairment to access the justice system is the complexity of legal language used and the processes of the justice system. Lack of knowledge and understanding of the justice system can inadvertently result in a person with an intellectual disability or cognitive impairment having contact with the justice system and can exacerbate the challenges that they may experience.**

Research by the Australian Bureau of Statistics (ABS) shows that many Australians have limited literacy skills, so that the development of information about the justice system in alternative formats may benefit a larger group of people than just those who have an intellectual disability or cognitive impairment. In 2006 the ABS completed the *Adult Literacy and*

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<sup>682</sup> Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 15.

<sup>683</sup> Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 3.

<sup>684</sup> Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 3.

<sup>685</sup> Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 3.

*Life Skills Survey* as part of an international study of knowledge and skills in the following areas:

- Prose literacy – the ability to understand and use information from various kinds of narrative texts, including texts from newspapers, magazines and brochures;
- Document literacy – the knowledge required to locate and use information contained in various formats including job applications, payroll forms, transportation schedules, maps, tables and charts;
- Numeracy – the knowledge and skills required to effectively manage and respond to the mathematical demands of diverse situations; and
- Problem solving – goal directed thinking and action in situations for which no routine solution is available.<sup>686</sup>

People were given scores from one to five, with a score of one measuring the lowest level of literacy, and a score of three representing the minimum level for individuals to meet the complex demands of everyday life. The study found that approximately 7 million Australians (46%) aged 15-74 had scores at level 1 or 2 for prose and document literacy. Approximately 7.9 million (53%) of Australians were assessed as level one or two for numeracy, and approximately 10.6 million (70%) were assessed at level one or two on the problem-solving scale.<sup>687</sup> Figure 10 illustrates these findings across all skill levels and functions.

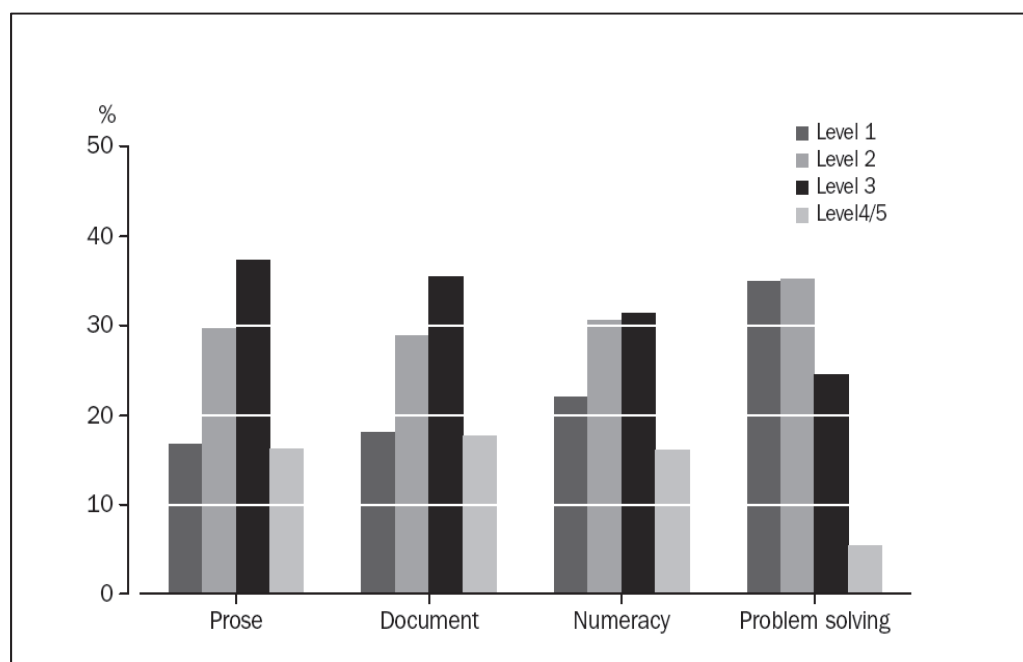
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<sup>686</sup> Australian Bureau of Statistics, *Adult literacy and life skills: Summary results*, ABS, Canberra, 2006, p. 4.

<sup>687</sup> Australian Bureau of Statistics, *Adult literacy and life skills: Summary results*, ABS, Canberra, 2006, p. 5.



**Figure 10: Skill level across adult literacy and life skill functions.**<sup>688</sup>



### 6.1.2.3 Available programs and information sources

Victoria Legal Aid, the Legal Services Commissioner, the Disability Services Commissioner, the OPA, the Courts, the Department of Justice and community legal centres produce a wide range of legal information for the Australian public.

#### Victoria Legal Aid

VLA produces a range of free publications and provides community legal education services to Victorians to help them understand their legal rights and responsibilities, and where people can access legal advice and information. In 2011-12 VLA delivered 907 community legal education projects.<sup>689</sup> In 2011-12 VLA also produced its first series of Easy English resources and delivered specifically tailored legal education sessions to Warringa Park School, a specialist school in Melbourne.<sup>690</sup>

VLA's pamphlets contain basic information on a number of areas of law, such as debt, money and fines, relationships and children, family violence, intervention orders, sexual assault, police and the courts, disability and mental health and victims of crime. VLA also produces a number of substantial booklets containing detailed information about specific areas of the law. For example, VLA was involved in the production of a plain English and pictorial legal help card for people experiencing money

<sup>688</sup> Australian Bureau of Statistics, *Adult literacy and life skills: Summary results*, ABS, Canberra, 2006, p. 5.

<sup>689</sup> Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, p. 26.

<sup>690</sup> Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, p. 25.

problems, relationship breakdowns, unfair treatment, or contact with the criminal justice system.<sup>691</sup> Most of the information produced by VLA is available on its website. Some materials are also available in alternative formats.

### **Victorian Equal Opportunity and Human Rights Commission**

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) produces a range of publications outlining people's rights and responsibilities under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Equal Opportunity Act 2010* (Vic). Information about discrimination is available in Easy English, online formats that use videos with sign language interpreters, and in a range of community languages.

### **Office of the Public Advocate**

The OPA produces information primarily focused on administration, guardianship, powers of attorney, and programs that the OPA administers. This information is available on the OPA's website, and factsheets are available in a range of community languages and in alternative formats.

### **Legal Services Commissioner**

The Legal Services Commissioner is responsible for managing complaints about members of the legal profession, and also has a role educating the community about legal issues and the rights and obligations that flow from the client-lawyer relationship.<sup>692</sup> The Commissioner has published a brochure to assist consumers to develop and maintain a positive relationship with their lawyer. These brochures are available on the Commissioner's website in a number of community languages. This material offers guidance on what clients should consider during their first and subsequent conversations with their lawyer. The Commissioner advises that before meeting with a lawyer, a client should:

- check the cost of the initial consultation and how long it will take;
- check that the lawyer has experience or specialises in the area of their legal matter;
- write down questions to ask the lawyer;
- arrange for a friend, relative or support person to be present if it would be helpful; and
- arrange for an interpreter to be available if one is needed.<sup>693</sup>

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<sup>691</sup> Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, p. 25.

<sup>692</sup> *Legal Profession Act 2004* (Vic), section 6.3.2.

<sup>693</sup> Legal Services Commissioner, 'Working with your lawyer', viewed 13 August 2012, <<http://www.lsc.vic.gov.au/cms.php?user=legalservicesvic;doc+Home;pages+;pageID+185>>.

The brochure suggests that clients take notes of advice given by the lawyer, tell the lawyer about any changes in circumstances relevant to the legal matter, ask for more information if any matter is raised that the client does not understand, and ask if costs are likely to increase since the initial cost estimate was given.

The Legal Services Commissioner also conducts an Outreach Program, through which it engages with community support groups and distributes information about consumer rights and responsibilities when engaging a lawyer. In 2011-12 the Commissioner met with 65 community support services, including crisis support organisations, information referral services, disability support groups, multicultural services, Indigenous services and services for youth and the elderly.<sup>694</sup>

### **Disability Services Commissioner**

The Disability Services Commissioner is responsible for working with people with a disability and disability service providers to resolve complaints about service provision. Resources on the Commissioner's website describe the complaints process in a number of community languages. Information on the complaints process is based on the premise that "It's OK to complain". This motto is intended to encourage people with a disability to exercise their rights.<sup>695</sup>

### **Other organisations**

The Disability Services Commissioner also drew the Committee's attention to rights awareness information produced by other advocacy groups in the community. For example, VALID delivers a *My Rights Training Program*. Mr Stone, from VALID, told the Committee that through this program:

... we [VALID] try to get out there and teach people about their rights. They are very fundamental human rights – the right to be free, the right to be respected and those sorts of things – and we link that to the Charter of rights and responsibilities. We are out there talking to people about what it is to be a responsible citizen. It is not just about having rights; it is about the responsibility to follow the law and obey the rules ...<sup>696</sup>

Despite the wide range of information currently available to the public, the Committee was told that not enough people with an intellectual disability or cognitive impairment, or their families and carers, are aware of this information.

Other Australian states also provide comparable education material about legal rights and processes for handling complaints. The Department of the Attorney-General and Justice in New South Wales provides a resource kit specifically developed for people with a cognitive impairment, called So

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<sup>694</sup> Legal Services Commissioner, *Annual report 2012*, Legal Services Commissioner, Melbourne, 2012, p. 27.

<sup>695</sup> Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 17.

<sup>696</sup> Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disabilities Inc., *Transcript of evidence*, Melbourne, 21 February 2012, pp. 18-19.

*you have to go to court!*<sup>697</sup> The resource kit includes a 25 minute plain English video that describes the process for going to court, including how to be a witness or defendant, and is available online and in hard copy formats. The principal actors in the video have intellectual disabilities. The resource kit has been distributed to disability services and advocacy organisations across New South Wales, to courts and tribunals, legal aid offices, community legal centres, New South Wales Police, and to local public libraries.

A specialist legal information service is also provided by the State Library of New South Wales, which aims to make legal information more accessible to members of the community, although it is not specifically directed toward people with an intellectual disability or cognitive impairment. Specialist librarians in the Legal Information Access Centre (LIAC) assist members of the public to access legal resources available at the library. LIAC also publishes a series of four plain language booklets on recent developments in the law. Information provided by LIAC is based on a tiered access model, with resources intended for non-lawyers at the base level and resources written for lawyers at the top tier.<sup>698</sup>

It is essential that information regarding legal rights and responsibilities and complaints processes be made readily available in a range of alternative formats to assist people with an intellectual disability or cognitive impairment to understand their legal rights. Multimedia resources specifically directed toward people with an intellectual disability or cognitive impairment, such as those provided by the Department of Attorney-General and Justice in New South Wales, are a valuable tool for assisting people to understand court processes and legal rights. The Committee recommends that the Victorian Government develop and distribute educational resources, in a range of audio and visual formats, to assist people with an intellectual disability or cognitive impairment to understand their legal rights and responsibilities. Online and electronic versions of these resources should be provided in computer and mobile-device friendly formats, including for example, apps for iPhone, Windows, and Android devices. This education campaign should:

- provide easy to understand information about legal rights;
- use a variety of different media formats including websites, apps, DVDs, newsletters, pamphlets, factsheets and posters;
- include a community engagement component with information sessions provided through a range of existing community forums; and

<sup>697</sup> Department of Attorney-General and Justice (NSW), 'So you have to go to court!', viewed 13 August 2012, <[http://www.lawlink.nsw.gov.au/lawlink/corporate/ll.corporate-nsf/pages/attorney\\_generals\\_department\\_going\\_to\\_court](http://www.lawlink.nsw.gov.au/lawlink/corporate/ll.corporate-nsf/pages/attorney_generals_department_going_to_court)>.

<sup>698</sup> State Library of New South Wales, *Legal information access centre*, State Library of NSW, Sydney, 2011.

- include descriptions of:
  - what a person's legal rights are;
  - what to do when questioned by the police and who to contact if assistance is required;
  - how to contact a lawyer and what assistance can be provided by the lawyer;
  - what to do when summonsed by the court; and
  - court procedure.

Recommendation 18: That the Victorian Government develop a comprehensive community education campaign to increase awareness of legal rights, court processes, and legal assistance and support by people with an intellectual disability or cognitive impairment, their families and carers. The education campaign should be delivered in disability, community and education settings, and online.

## 6.2 The legal profession and people with an intellectual disability or cognitive impairment

While all people may benefit from obtaining legal advice and representation when interacting with the justice system, obtaining legal and procedural advice is particularly important for people with an intellectual disability or cognitive impairment, as they may lack the basic awareness of court practice and procedures possessed by most members of the community.

Legal advice and assistance may be available through:

- legal counselling and assistance provided by community legal centres and advocacy groups;
- legal aid and advice provided by VLA; and
- private solicitors.

People with an intellectual disability or cognitive impairment may experience a number of difficulties accessing legal representation, such as lacking knowledge about available services, costs associated with accessing services, and accessibility of legal services in the community. Even when a person with an intellectual disability or cognitive impairment is able to overcome these barriers, it is likely they may experience a number of difficulties when interacting with their lawyer.

In 2011-12 the Legal Services Commissioner identified the following issues when seeking feedback from community groups about client-lawyer relationships:

- the language used by lawyers is inaccessible to many people;

- rural communities face difficulties accessing lawyers;
- a lack of legal information in languages other than English;
- legal aid duty lawyers are often unable to spend time with clients before a court appearance; and
- communication with clients is often not managed effectively, leading to unrealistic expectations by clients, a poor understanding of court and settlement processes, and perceptions of conflicts of interest when lawyers from opposing sides are friendly toward each other.<sup>699</sup>

## 6.2.1 Accessing legal representation

Villamanta Disability Rights Legal Service succinctly described some of the difficulties experienced by people with an intellectual disability or cognitive impairment when accessing legal advice. Villamanta said:

... access to legal advice and representation for People who have an intellectual disability/cognitive impairment is difficult to gain, as it is for most disadvantaged people, due to insufficient sources of legal help. Victoria Legal Aid is unable to assist with many types of legal matters due to its own limited resources. Community Legal Centres are even less well resourced. Private law firms are beyond the financial reach of most people who have an intellectual disability. In addition to this, people who have an intellectual disability may not be aware of what sources of legal assistance are available or even that the problem they have is a legal one. People in rural and regional areas are often even more disadvantaged in this regard than those who live in larger cities.<sup>700</sup>

Ms Julie Phillips, the Manager at the Disability Discrimination Legal Centre, told the Committee that the cost of legal representation often puts access to private lawyers out of bounds for people with an intellectual disability. She said:

... access to the law costs lots of money and most people don't have it, but particularly [as] this group is a low socioeconomic group and they're going to be the least able to afford it, and really some of them just don't go ahead because of that. Even if the law itself you thought was really good, and I'm not saying it is, you can't afford to use it so it's actually quite useless sometimes because if you can't afford to use the law because of the structure that's required for you to use it, then there's no point.<sup>701</sup>

<sup>699</sup> Legal Services Commissioner, *Annual report 2011*, Legal Service Commissioner, Melbourne, 2011, p. 24; Legal Services Commissioner, *Annual report 2012*, Legal Services Commissioner, Melbourne, 2012, p. 27.

<sup>700</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 13.

<sup>701</sup> Julie Phillips, Manager, Disability Discrimination Legal Service, *Transcript of evidence*, Melbourne, 24 October 2011, p. 33.

Consequently, people with an intellectual disability or cognitive impairment are often unable to afford legal services.<sup>702</sup> Instead they tend to access legal advice and representation through community legal centres, VLA, and pro bono legal services (where available).

### **6.2.1.1 Community legal centres**

Community legal centres are independent, not-for-profit organisations which provide a range of legal services to people with limited financial means. In Victoria, the Victorian Aboriginal Legal Service and the Fitzroy Legal Service, each established in 1972, were the first community legal centres in Australia. Centres in Springvale, St Kilda and Broadmeadows were established in 1973. There are now 52 community legal centres in Victoria, including 25 specialist community legal centres.

The National Association for Community Legal Centres (NACLC) is the peak national body for community legal centres in Australia, representing 200 community legal centres around the country. The NACLC supports community legal centres by:

- advocating nationally for the interests of the sector and its clients;
- lobbying for funding for community legal centres, primarily through the federal government, but also at a state level;
- representing the sector in forums and collaborations with other key national bodies;
- developing a national quality assurance program for community legal centres;
- assisting with the identification and development of opportunities for projects that will produce tools and resources to assist and improve community legal centres' service delivery and operations; and
- obtaining funding grants for projects that will support community legal centres in their work.<sup>703</sup>

Services provided by community legal centres vary, but typically include information and referrals, advice, casework and advocacy. As well as providing legal assistance, some legal centres also participate in community legal education initiatives, preventative law and law reform initiatives.

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<sup>702</sup> Bradley Roberts, Education and Outreach Adviser, Legal Services Commissioner, *Transcript of evidence*, Melbourne, 7 November 2011, p. 4.

<sup>703</sup> National Association of Community Legal Centres, 'NACLC', viewed 15 August 2012, <[http://www.nacalc.org.au/cb\\_pages/nacalc.php](http://www.nacalc.org.au/cb_pages/nacalc.php)>.



There are a range of specialist community legal centres in Victoria that may provide services particularly directed toward people with an intellectual disability or cognitive impairment, including:

- the Disability Discrimination Legal Service, which provides legal advice and assistance about the *Disability Discrimination Act 1992* (Cth) and the *Equal Opportunity Act 1995*;
- the Mental Health Legal Centre, which provides people with a mental health condition with advice and representation for a legal matter related to their illness. The centre also provides a mental health related referral service and legal education; and
- Seniors Rights Victoria, which provides information and referral, legal advice, legal casework and individual advocacy services on matters specifically related to ageing.

As well as these specialist community legal centres, Villamanta Disability Rights Legal Service is a statewide community legal centre that works solely on disability-related legal issues. Villamanta aims to make sure that people with a disability know their legal rights, and are able to use the law to exercise their rights.<sup>704</sup> Villamanta provides the following services:

- a free telephone information and referral service;
- community education;
- policy and law reform; and
- legal assistance on disability-related legal issues.<sup>705</sup>

In its submission to the Inquiry, Villamanta said that most of its legal casework revolves around guardianship and administration matters, access to disability services and complaints, abuse and neglect of people living in supported accommodation and child protection matters involving parents with an intellectual disability.<sup>706</sup>

As part of its community legal education work, Villamanta has been working on a guide for professionals in the criminal justice system such as police, corrections staff, court staff and lawyers who come into contact with people with an intellectual disability.<sup>707</sup> The Committee believes that documents, such as the Villamanta manual, may help personnel in the justice sector in their interactions with people with an intellectual disability.

<sup>704</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 1.

<sup>705</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 1.

<sup>706</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, pp. 1-2.

<sup>707</sup> Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012.

VLA administers funding to 40 community legal centres around Victoria, and to the Federation of Community Legal Centres. Funding to community legal centres is comprised of a proportion of the Commonwealth's Community Legal Service program and state funding. Approximately \$19.9 million was distributed to these community legal centres in 2011-12.<sup>708</sup> Some community legal centres also receive funding from other sources, such as local government, tertiary institutions and trusts.

While community legal centres do not employ formal means testing, such as the testing used by VLA to determine eligibility for legal aid, centres will typically only take on cases for which no legal assistance is available. Each community legal centre has different eligibility criteria to determine who assistance can be provided to, what legal issues they will help with, and how much assistance will be provided. As a general rule, when assessing eligibility a community legal centre will look at issues including:

- the type of the legal matter;
- the availability of further assistance;
- the merits of the matter; and
- the capacity of the centre to provide assistance.<sup>709</sup>

Before work is undertaken by a community legal centre the client will usually be required to demonstrate financial need. Where a person requires court representation but cannot afford this, the community legal centre may arrange for a lawyer to appear on behalf of that person. The financial arrangement entered into to compensate the acting lawyer will depend on the financial situation of the client, the urgency of the case, the resources of the legal centre that took initial instructions, the terms of the barrister who is briefed to carry out the appearance, and the outcome of any application for legal assistance made to VLA.

Dr Chris Atmore, the Policy Officer at the Federation of Community Legal Centres, told the Committee that clients to community legal centres are:

... predominantly low income, often multi disadvantaged, so ... that means we have a fairly broad gamut of clients – young people; elderly people; Aboriginal people; people from culturally and linguistically diverse backgrounds; recent migrants; refugees and asylum seekers ...<sup>710</sup>

The *Review of the Commonwealth Community Legal Services Program* found that "... 58% of [the community legal sector] clients received some form of income support, [and] 82% of clients earned less than \$26,000 per

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<sup>708</sup> Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, p. 26.

<sup>709</sup> Federation of Community Legal Centres (Victoria) Inc, 'Getting legal help', viewed 1 February 2013, <[http://www.fclc.org.au/cb\\_pages/getting\\_legal\\_help.php](http://www.fclc.org.au/cb_pages/getting_legal_help.php)>.

<sup>710</sup> Chris Atmore, Policy Officer, Federation of Community Legal Centres (Victoria) Inc., *Transcript of evidence*, Melbourne, 24 October 2011, p. 29.

annum ...".<sup>711</sup> Dr Atmore said that although the Federation does not collect statistics on the number of people with an intellectual disability or cognitive impairment who come to community legal centres, "just under nine per cent of our clients have some kind of disability", which is approximately 900 people across the state given that community legal centres see approximately 10 000 clients per year.<sup>712</sup>

**Finding 7:** People with an intellectual disability or cognitive impairment often rely on social welfare payments as their primary source of income. As a consequence they often rely on community legal centres when seeking legal advice and representation.

Services provided by community legal centres are a critical source of legal assistance for people with an intellectual disability or cognitive impairment. However, services provided by community legal centres are also often constrained by the high demand placed upon them.

For example, the OPA acknowledged that while community legal centres provide good legal advice, they also tend to be under-resourced. As a result any person who has limited financial means, irrespective of whether they have an intellectual disability or cognitive impairment, is often unable to pursue a legal matter due to difficulties manoeuvring through the justice system without legal assistance.<sup>713</sup>

Similar sentiments were expressed by the Legal Services Commissioner in its consultations with disability service providers and advocacy groups:

There are limited specialist legal support services available specifically to assist people with disabilities. Conversations with advocate groups indicated that clients had great difficulty in accessing community legal services as the case load capacity of those services is often very limited, meaning that some people miss out. Legal bodies which are dedicated to supporting people with disabilities are significantly underfunded for the demand placed upon them, leading to clients missing out on specialist support.<sup>714</sup>

The Committee heard evidence supporting increased funding for community legal centres, in order to ensure that people with an intellectual disability or cognitive impairment are able to access legal advice or representation.<sup>715</sup> The Committee believes that this source of community

<sup>711</sup> Attorney-General's Department, *Review of the Commonwealth Community Legal Services Program*, Attorney-General's Department, Canberra, 2008, p. 6.

<sup>712</sup> Chris Atmore, Policy Officer, Federation of Community Legal Centres (Victoria) Inc., *Transcript of evidence*, Melbourne, 24 October 2011, pp. 29-30.

<sup>713</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 2. See also Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 14.

<sup>714</sup> Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 3. See also Bradley Roberts, Education and Outreach Adviser, Legal Services Commissioner, *Transcript of evidence*, Melbourne, 7 November 2011, p. 7.

<sup>715</sup> See for example Lee Ann Basser, Victorian Disability Advisory Council, *Transcript of evidence*, Melbourne, 24 October 2011, p. 4; Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 11; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 17.

legal education, advice and information should be supported through increased financial support, and recommends that VLA be supported to ensure that community legal centres, particularly specialist community legal centres, are adequately resourced to meet the level of demand that is placed on them.

**Recommendation 19:** That the Victorian Government ensure that specialist community legal centres and other agencies that provide services directly to people with a disability are able to adequately meet demand.

The Committee also heard that there is a need to improve awareness of the services provided by community legal centres to people with an intellectual disability or cognitive impairment. The Committee anticipates that awareness of community legal centres will be improved following implementation of the community education program described in Recommendation 18.

### **6.2.1.2 Victoria Legal Aid**

VLA is an independent statutory body established under the *Legal Aid Act 1978* (Vic). The objectives of VLA are:

- a) to provide legal aid in the most effective, economic and efficient manner;
- b) to manage its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state;
- c) to provide to the community improved access to justice and legal remedies;
- d) to pursue innovative means of providing legal aid directed at minimising the need for individual legal services in the community.<sup>716</sup>

In addition to these objectives, VLA also has the power to undertake a number of other activities including:

- arranging measures and taking steps that may be conducive to meeting the legal aid needs of the community;
- making recommendations to the Attorney-General with respect to law reform;
- initiating and carrying out education programs designed to promote an understanding by the public of their rights, privileges and duties under the law; and
- undertaking research into all aspects of legal aid including new methods of financing and providing legal aid.<sup>717</sup>

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<sup>716</sup> *Legal Aid Act 1978* (Vic), section 4.

<sup>717</sup> *Legal Aid Act 1978* (Vic), section 6(2).

Recognising its obligations under the *Legal Aid Act 1978* to improve access to justice for marginalised or disadvantaged people, VLA noted that its *Strategic Plan 2011-14* identifies people with a disability as one of its priority groups for access to legal services.<sup>718</sup> VLA also developed a *Disability Action Plan 2009-2011* in 2009. Actions outlined in the plan include:

- revisiting VLA's approach to community education;
- checking whether VLA phone lines are accessible to people with speech or hearing impairments;
- reviewing the accessibility of its duty lawyer services; and
- encouraging private lawyers to act for people with a disability through VLA grants of assistance.<sup>719</sup>

Ms Hilton from VLA told the Committee that in the 2010-11 year VLA provided assistance to more than 85 000 clients, and that approximately one in five of those clients had a disability. She suggested that this figure could underrepresent the proportion of people with intellectual disability and cognitive impairment who actually approach VLA, as many do not identify themselves as having a disability.<sup>720</sup>

VLA offers legal assistance, duty lawyer services, advice and information and community legal education, and also administers funding to community legal centres. VLA also provides financial legal aid services to people who:

- are socially and economically disadvantaged;
- cannot get help from a private lawyer; and
- are unable to get any other legal assistance.

### **Advice and information**

Any person can contact VLA's free legal advice helpline. Lawyers are available to talk to a person about how the law applies to them and what a person can do about it. Free legal advice can be given on a range of matters, but priority is given to people who need legal advice on:

- criminal matters (especially those who are in custody or facing serious criminal charges, or when a young person has been charged);

<sup>718</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 2. See also Victoria Legal Aid, *Strategic plan 2011-2014*, VLA, Melbourne, 2011, p. 4.

<sup>719</sup> Victoria Legal Aid, *Disability Action Plan 2009-11*, VLA, Melbourne, 2009, pp. 14-19. See also Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, p. 7: In 2011-12, 91 000 clients were assisted, with approximately 1 in 6 of those identified as having a disability.

<sup>720</sup> Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 35.

- family breakdown matters (especially matters involving children);
- family violence;
- some civil and human rights matters (including social security, debt, mental health, immigration and refugee, guardianship and anti-discrimination matters); and
- serious traffic offences and infringement fines.

Legal advice can be provided in person, by video conference, or over the telephone, and the amount of time a person spends with a lawyer will depend on the nature of the legal matter. For people with an intellectual disability or cognitive impairment, the provision of legal advice that is not time-limited is very beneficial. The Committee received evidence noting that people with an intellectual disability or cognitive impairment often require more time in order to understand complex material and may have difficulty concentrating for sustained periods of time.<sup>721</sup>

During 2011-12 more than 81 000 Victorians received assistance through VLA's legal information services.<sup>722</sup> A further 43 113 cases of legal advice, minor work or advocacy services were provided by VLA's early intervention services.<sup>723</sup> In 2011-12, 50 829 external client referrals were made.<sup>724</sup>

### Legal aid

If a person requires ongoing legal assistance then a grant of legal assistance may be provided. Legal aid can be used to pay a VLA lawyer or a private lawyer to help provide legal representation, reach an agreement, prepare legal documents, or provide assistance in court. A grant of legal assistance is generally provided for criminal or family law matters but can be used in some civil cases.<sup>725</sup> When determining eligibility for a grant of

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<sup>721</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 13; Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 4; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 5; Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 2; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 3; Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, p. 28; Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, p. 24.

<sup>722</sup> Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, p. 27.

<sup>723</sup> Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, pp. 33, 39, 45.

<sup>724</sup> Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, p. 9.

<sup>725</sup> Note for criminal matters a grant of legal assistance may be provided for summary and indictable criminal offences, bail applications in the Magistrates', County or Supreme Courts, criminal appeals, stays in application under the *Criminal Procedure Act 2009* (Vic), hearings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), breach of proceeding in the Magistrates' and County Courts and proceedings under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

legal aid, VLA will consider what the legal assistance is required for and whether it is likely the case will succeed.

In order to determine whether assistance will be provided, a reasonableness test is employed to examine:

- the nature and extent of any benefit for which a grant of legal assistance might give to the person, the public or any section of the public;
- the nature and extent of any detriment which a refusal of a grant of legal assistance might cause to the person, the public or any section of the public;
- in the case of assistance in relation to a proceeding in a court other than a criminal appeal, whether the proceeding is likely to terminate in a manner favourable to the person; and
- in a criminal appeal, whether there are reasonable grounds for the appeal.<sup>726</sup>

VLA will also conduct a means and income test to assess the financial situation of the person applying for legal aid, and to determine whether the anticipated full costs of private legal services are affordable. The initial grant of legal assistance will only be made if VLA considers that the person is unable to afford the full costs him- or herself. When assessing whether a person qualifies for a grant of legal assistance under the means test, VLA will consider:

- the income of the person applying for the grant of legal assistance (including any person supported by or supporting the person seeking assistance);
- the assets of the person applying for a grant of legal assistance (including the assets of any person supported by or supporting the person seeking assistance); and
- the estimated cost of obtaining private legal services.<sup>727</sup>

If a person seeks legal aid for matters outside the Commonwealth and state guidelines for assistance, VLA may still grant legal assistance if the person or the legal matter comes within either the:

- Commonwealth's Special Circumstances – where the application is for a criminal offence under Commonwealth law and the person meets one of the state's special circumstances

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<sup>726</sup> Victoria Legal Aid, 'State reasonableness test', viewed 1 February 2013, <<http://www.legalaid.vic.gov.au/handbook/257.htm>>.

<sup>727</sup> Victoria Legal Aid, 'Means test', viewed 1 February 2013, <<http://www.legalaid.vic.gov.au/handbook/232.htm>>.



criteria, or the matter is for a non-urgent Commonwealth family law matter;<sup>728</sup> or

- State's special circumstances – where the application is for legal assistance for a state matter and the applicant is under 18 years old, has a language or literacy problem, or has an intellectual or psychiatric disability.<sup>729</sup>

In 2011-12 VLA provided 44 641 grants of legal assistance across its civil justice, criminal law and family law programs, and \$67.4 million was expended on privately assigned legally aided cases.<sup>730</sup> These figures provide evidence that VLA does grant a lot of financial assistance. Despite this, however, Ms Phillips of the Disability Discrimination Legal Centre expressed some concerns about the ability of a person with a disability to get legal aid. She said that when a person with a disability seeks legal aid they often do not satisfy the means and income tests because they are supported by parents whose assets or income are over the threshold.<sup>731</sup>

The Committee notes the challenges that a person with an intellectual disability or cognitive impairment may experience in seeking access to legal aid. The Committee believes that further exploration of constraints faced by VLA to meet demand for legal aid is warranted, in order to examine measures to improve access to and availability of legal aid in the community.

**Recommendation 20: That the Victorian Government examine whether financially disadvantaged sectors of the intellectually disabled and cognitively impaired community are able to access sufficient legal aid.**

The Committee further notes that in January 2012 a review of Commonwealth funded legal services was announced. The review will examine the quality, efficiency and cost-effectiveness of Commonwealth funded legal aid services.<sup>732</sup> Matters funded solely by state governments, for example legal matters concerning state law, will not be examined by the

<sup>728</sup> Victoria Legal Aid, 'The Commonwealth's special circumstances', viewed 1 February 2013, <<http://www.legalaid.vic.gov.au/handbook/261.htm>>: A non-urgent Commonwealth family law matter is one in which: there is, or is a likelihood of, a domestic violence; there are concerns as to the safety, welfare and psychological wellbeing of a child, which requires further investigation; the applicant has a language or literacy problem; the applicant has an intellectual, psychiatric or physical disability; or it is difficult for the applicant to obtain legal assistance because the applicant lives in a remote location or the child is an Aboriginal or Torres Strait Islander as defined under section 4 of the *Family Law Act 1975* (Vic).

<sup>729</sup> Victoria Legal Aid, 'The State's special circumstances', viewed 1 February 2013, <<http://www.legalaid.vic.gov.au/handbook/262.htm>>: A person has an 'intellectual disability' if they are defined as being an eligible person under the *Disability Act 2006* (Vic).

<sup>730</sup> Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, pp. 33, 39, 45.

<sup>731</sup> Julie Phillips, Manager, Disability Discrimination Legal Service, *Transcript of evidence*, Melbourne, 24 October 2011, p. 33. See also Lee Ann Bassar, Victorian Disability Advisory Council, *Transcript of evidence*, Melbourne, 24 October 2011, p. 4; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 2.

<sup>732</sup> Nicola Roxon, MP, 'Review of legal assistance services' (Media Release, 20 January 2012).

review.<sup>733</sup> The results of the review are expected in June 2013. The Committee anticipates that this review will shed some light as to whether improvements can be made to the Commonwealth's funding of legal aid services and by extension whether improvements could be made at a state level.

In addition to grants of legal aid to allow for legal representation, VLA can provide grants for assistance to allow a psychological or psychiatric assessment to be undertaken. For clients with an intellectual disability or cognitive impairment, the provision of such a grant will allow evidence of their impairment to be gathered, which may be of benefit to their case. Before applying for such a grant, the solicitor must have a clear indication from either the client's medical or personal history that the report will support their belief that the client has an undiagnosed condition. The solicitor must be of the view that evidence of their client's psychological state:

- directly relates to the plea;
- provides exculpatory material likely to lead to a significantly reduced sentence; and
- is material that cannot be presented to the court without obtaining the report.<sup>734</sup>

The LIV expressed concern with the current formulation of guidelines for obtaining such a grant. The LIV suggested that the current emphasis on the relevance of an intellectual disability to the particular charge before a grant of assistance is made is overly restrictive. The LIV was also of the view that current guidelines assume that a lawyer has access to evidence that their client has sought relevant medical treatment or that the client has been willing to provide personal information which indicates the presence of an intellectual disability.<sup>735</sup> As has been highlighted previously, the stigma associated with having an intellectual disability or cognitive impairment often acts as a disincentive for disclosing a disability. It may also be the case that a person is unaware that they have a disability.

The identification of the presence of intellectual disability or cognitive impairment is critical to ensuring that clients are given appropriate support during their interaction with the justice system. For this reason the Committee suggests that VLA review its current guidelines for grants of legal aid to allow a psychological or psychiatric report to be undertaken. The Committee also recommends that funding made available for this purpose be increased.

<sup>733</sup> Attorney-General's Department, *Terms of reference: Review of the National Partnership Agreement on Legal Assistance Services*, Attorney-General's Department, Canberra, 2012, p. 1.

<sup>734</sup> Victoria Legal Aid, 'Medical/psychologist/psychiatrist report worksheet', viewed 1 February 2013, <<http://www.legalaid.vic.gov.au/handbook/754.htm>>.

<sup>735</sup> Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 6.

**Recommendation 21:** That the Victorian Government ensure that psychological or psychiatric reports are available to determine whether individuals that come into contact with the justice system have an intellectual disability or cognitive impairment in all appropriate cases.

### **Duty lawyers**

VLA also provides duty lawyers in courts and tribunals around the state to help people who do not have a lawyer on the day of their hearing. Duty lawyers are either lawyers employed by VLA or are private lawyers paid by VLA. VLA duty lawyers assisted 75 170 cases and private lawyers assisted 7123 cases in 2011-12.<sup>736</sup>

Access to a duty lawyer is prioritised according to: the seriousness of the charge, such as whether the client is in custody or is at risk of going into custody; whether the matter involves children; whether the person cannot afford legal help; and for people who cannot afford legal help prior to their hearing date.<sup>737</sup>

VLA has recently introduced changes to the way summary criminal duty lawyers provide services to Magistrates' Court in Victoria. The new approach gives priority to people facing the most serious charges and who also have complex needs, such as those with an intellectual disability, acquired brain injury (ABI) or mental illness, those experiencing homelessness, Indigenous Australians, and those who cannot speak effectively in English. The new approach is being trialled in four courts around Melbourne and is intended to be implemented across Victoria.<sup>738</sup>

A duty lawyer can:

- give a person advice about their legal matter;
- explain what might happen during a hearing;
- help the person to get an adjournment to put off the hearing to a later date, so that they have time to get legal advice;
- talk to the court or tribunal or other parties on the person's behalf;
- speak on behalf of the person in court to help them get bail for criminal matters; or

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<sup>736</sup> Victoria Legal Aid, *Seventeenth statutory annual report 2011-12*, VLA, Melbourne, 2012, pp. 33, 39, 45.

<sup>737</sup> Victoria Legal Aid, 'Lawyers at court', viewed 15 August 2012, <<http://www.legalaid.vic.gov.au/lawyeratcourt.htm>>.

<sup>738</sup> Victoria Legal Aid, 'Changes to duty lawyer services will target those most in need', viewed 15 August 2012, <<http://www.legalaid.vic.gov.au/4478.htm>>.

- speak for the person in court if they intend to plead guilty for criminal matters.<sup>739</sup>

Table 9 illustrates the areas in which duty lawyers can typically provide assistance in the following courts.

**Table 9: Duty lawyers' services in courts.**<sup>740</sup>

Court, tribunal or board	Type of legal matter
Magistrates' Court of Victoria	Criminal law, serious traffic offences, family violence, intervention orders and infringements
Children's Court	Criminal law and child protection applications
Family Court	Family law
Federal Magistrates' Court	Family law, child support and some immigration matters
Victorian Civil and Administrative Tribunal (VCAT)	Some civil claims, guardianship and administration matters, residential tenancy matters (tenants only) and anti-discrimination matters
Administrative Appeals Tribunal	Veterans affairs, social security matters and some immigration matters
Mental Health Review Board	Involuntary security patient orders and community treatment orders

A duty lawyer provides limited help to a person on the day of his or her hearing. If the matter is complicated then the duty lawyer may be able to help the person seek an adjournment to allow further legal advice to be obtained.

While the duty lawyer service operates throughout Victoria, people with an intellectual disability or cognitive impairment may be unaware that the service is available. This is further compounded if a person with an intellectual disability or cognitive impairment has not sought legal advice prior to appearing in court. It is therefore essential that people are made aware of the service.

The Committee recognises the valuable role that duty lawyers play in improving access to and interactions with the court system by people with an intellectual disability or cognitive impairment. The Committee believes that the production of material on the availability of duty lawyer services, as well as other assistance provided by VLA, will assist to enhance awareness of services provided by VLA. The Committee anticipates that the community education campaign proposed in Recommendation 18 will incorporate information about the services offered by VLA, including the

<sup>739</sup> Victoria Legal Aid, 'Duty lawyers at court for criminal charges', viewed 1 February 2013, <<http://www.legalaid.vic.gov.au/3637.htm>>.

<sup>740</sup> Victoria Legal Aid, 'Lawyers at court', viewed 15 August 2012, <<http://www.legalaid.vic.gov.au/lawyeratcourt.htm>>.

duty lawyer service, and that this will be made available in a range of accessible formats.

Even when a person is aware of the duty lawyer service at court, if he or she relies on the duty lawyer to provide ongoing legal assistance, he or she may find that due to the arrangement of court duty rosters their case may be dealt with by more than one lawyer over the course of their legal matter. This problem was highlighted in consultations conducted by the Legal Services Commissioner with clients with a disability who used a duty lawyer. These clients told the Commissioner that they felt frustrated because they had to repeat their story to every duty lawyer they saw over the course of their legal matter. This can lead to clients becoming discouraged from participating in the legal process.<sup>741</sup> If a person requires ongoing assistance then that person will need to apply for a grant of legal aid and meet the eligibility requirements.

Further evidence stressed that many duty lawyers lack the time to be able to communicate with people with an intellectual disability or cognitive impairment. For example, Women with Disabilities Victoria stated that:

- Duty lawyers often have a list of up to 10 clients to see in a morning. They usually have to explain the nature of the proceedings and the legal process and provide legal advice to each client. They may also represent the client in Court. Where the woman has a cognitive disability it is likely to take much more time for the lawyer to obtain instructions, and give the necessary advice and explanations.
- Lawyers may not have the time to obtain proper instructions from a client with a disability.<sup>742</sup>

A similar view was shared by the Legal Services Commissioner, who said that when dealing with VLA duty lawyers, "... the solicitor's time is very limited and the client can be disadvantaged by an inability to take the time they need to tell their story."<sup>743</sup>

### **Community legal education**

In addition to the grant of legal aid and the provision of the duty lawyer service, VLA also works with a number of service providers and community groups to deliver legal information on a variety of legal topics and issues to vulnerable sectors of the community. Community legal education sessions delivered by VLA are tailored to the needs of particular groups.

For example, a project entitled, *What's the law? Australian law for new arrivals* has been designed for use by teachers, educators and community workers who work with migrants and refugees. The kit can be used to assist new arrivals to improve their English language skills while informing

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<sup>741</sup> Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 2; Bradley Roberts, Education and Outreach Adviser, Legal Services Commissioner, *Transcript of evidence*, Melbourne, 7 November 2011, p. 6.

<sup>742</sup> Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, p. 24. See also Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 4.

<sup>743</sup> Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 2.

them about common legal issues, how to avoid legal problems and where to get legal help. The kit also includes a DVD of 10 simple photo stories about common legal problems that people newly arrived to Australia have experienced, and activity sheets to reinforce messages.

In 2010-11 VLA delivered over 70 community legal education sessions with 1160 participants, and distributed 540 674 publications throughout the community.<sup>744</sup> The Committee encourages VLA to examine ways in which community legal education can be delivered to people in the community who experience a disability, particularly an intellectual disability or cognitive impairment, as well as their family and support structures.

## 6.2.2 Difficulties in the lawyer-client relationship

Lawyers are generally central to helping their clients to access justice. But their role is more significant in relation [to] clients with intellectual disability – their cognitive difficulties mean that any access to justice is *meaningful access*. The lawyer must provide information and advice that the client can understand and take appropriate account of the intellectual disability with respect to the conduct of any court hearing, the nature of the submissions made to the court and the court orders sought ...

a lawyer for a client with an intellectual disability has an important role in ensuring that the client can enjoy his or her socio-economic rights.<sup>745</sup>

Despite the important role that lawyers may play in ensuring that a person with an intellectual disability or cognitive impairment can effectively access, and interact with, the justice system, both parties may experience a number of unique difficulties that are not ordinarily experienced in the client-lawyer relationship.

### 6.2.2.1 Identification and assessment

As lawyers interact with clients on an individual level they are in an ideal position to ensure that clients with an intellectual disability or cognitive impairment are correctly identified as such, and are therefore provided with appropriate supports and assistance.<sup>746</sup>

However, as noted earlier in this report, it is not always possible to identify whether a person has an intellectual disability or cognitive impairment merely by their appearance or demeanour. The LIV acknowledged the important role that lawyers play in identifying intellectual disability, but also noted how difficult it could be to do so. In its submission to the Committee, the LIV said:

<sup>744</sup> Victoria Legal Aid, *Sixteenth annual report 2010-11*, VLA, Melbourne, 2011, p. 14.

<sup>745</sup> Linda Steele, 'Representing clients with intellectual disability', *Precedent*, vol. 83 November/December, pp. 10-14, 2007, p. 11.

<sup>746</sup> Phillip French, Julie Dardel and Sonya Price-Kelly, *Rights denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairments*, People with Disability Australia, Redfern, 2009, p. 36; Peter McGhee and Siobhan Mullany, 'Keeping people with intellectual disability out of jail', *Precedent*, vol. 83 November/December, pp. 16-21, 2007, p. 18.



Lawyers have an important role to play in identifying clients who might have an intellectual disability, to ensure that appropriate legal advice and representation is given. Under the *Professional Conduct and Practice Rules 2005*, lawyers are required to seek to assist their clients to understand the issues of their case to enable them to provide proper instructions. However, while lawyers are required to assess their client's capacity to give instructions on any particular legal matter or transaction, they are unlikely to be able to identify intellectual disability without expert assistance.<sup>747</sup>

Villamanta Disability Rights Legal Service articulated a similar view:

Many lawyers, like many people in society, have had little to do with people who have an intellectual disability. Lawyers are not trained at law school in relation to taking instructions from people who have an intellectual disability or any other disability.<sup>748</sup>

A lawyer's ability to identify a client with an intellectual disability or cognitive impairment is also complicated because some clients may not want their lawyer to know that they have an intellectual disability, in part because of the stigma associated with having a disability, or because the client may be unaware that they have a disability.<sup>749</sup>

VLA highlighted the consequences of failing to identify disability and said that "failure to identify a person's intellectual disability may lead to inappropriate incarceration or unjust sentencing. It may also miss an opportunity to prevent further interaction with the justice system."<sup>750</sup>

Despite these difficulties, the Committee heard some positive stories about lawyers being alert to indicators of intellectual disability or cognitive impairment and taking appropriate precautionary action.<sup>751</sup> The following Case Study was illustrated by VLA.

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<sup>747</sup> Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 5.

<sup>748</sup> Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, p. 24. See also Dianne Hadden, Ballarat and District Law Association, *Transcript of evidence*, Ballarat, 17 November 2011, pp. 46-47; Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 2; Carrie O'Shea, Senior Criminal Lawyer, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 36; Jane Penberthy, Principal Lawyer, Central Highlands Community Legal Centre, *Transcript of evidence*, Ballarat, 17 November 2011, p. 22; Lachlan Singe, Treasurer, Bendigo Law Association, *Transcript of evidence*, Bendigo, 28 May 2012, p. 39.

<sup>749</sup> Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 3.

<sup>750</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 5. See also Carrie O'Shea, Senior Criminal Lawyer, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 36.

<sup>751</sup> See for example Dianne Hadden, Ballarat and District Law Association, *Transcript of evidence*, Ballarat, 17 November 2011, p. 46; Carrie O'Shea, Senior Criminal Lawyer, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 26.



**Case Study 22: Con's story.**<sup>752</sup>

*“Con was drug dependant and had been involved in the criminal justice system since he was a teenager, serving a number of lengthy sentences in custody. He had struggled to complete orders supervised by Community Corrections in the past.*

*Con faced new charges of burglary and theft, which were likely to result in a lengthy prison term. VLA obtained a psychological report from a previous court case stating that Con's IQ was in the 60s and commissioned a full neuropsychological report that indicated that he was eligible to be registered with Disability Service.*

*Con's lawyer asked the Magistrate to order an assessment for a justice plan and consequently Disability Services became involved. Con was ultimately registered with Disability Services, placed on a justice plan and released from custody. He has not been in custody since that time (approximately 18 months ago). However, had his intellectual disability not been recognised by his lawyer, he would in all likelihood have continued to serve periods of imprisonment without receiving the services and supports he actually required.”*

In recognising that lawyers are not clinically qualified to diagnose an intellectual disability, Mr Michael Holcroft, President of the LIV, suggested that a professional checklist of common indicators of intellectual disability or cognitive impairment could be developed to aid identification of these impairments.<sup>753</sup> In this sense the professional checklist could be similar to the Ready Reckoner, *Responding to people with a cognitive impairment*, developed by the OPA for use by Victoria Police to assist them to identify the presence of cognitive impairment, discussed in Chapter Five.

A quick reference guide produced by the New South Wales Law Society, *Client capacity guidelines: civil and family law matters*, provides some indicators of common conditions, such as ABIs and intellectual disabilities, that impair capacity. These include:

- difficulty with reading and writing;
- short attention span or easily distracted;
- inability to hold complex instructions and make a decision based on those instructions;
- inability to express in one's own words an understanding of information provided;
- difficulty understanding questions about instructions;

<sup>752</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 6.

<sup>753</sup> Michael Holcroft, President, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, pp. 15-16.

- responding inappropriately or inconsistently to questions in an effort to cover up a lack of understanding or from an eagerness to please;
- has attended a special school or was in a special class;
- has been in supported employment (for example, in a sheltered workshop); and
- is in receipt of a disability support pension due to intellectual disability.<sup>754</sup>

These guidelines suggest that where a number of these signs are present the Hayes Ability Screening Index, discussed in Chapter Five, should be applied.

It is essential for lawyers to identify the possibility that a client may have an intellectual disability or cognitive impairment, to ensure that they obtain instructions in an appropriate manner, and to ensure that appropriate matters are presented as evidence in court should it proceed further. The Committee notes that law students and lawyers receive very little formal training about disability awareness and the issues experienced by people with an intellectual disability or cognitive impairment. The Committee therefore recommends that the LIV and the Victorian Bar develop and distribute information to members on how to identify clients with an intellectual disability or cognitive impairment. The Committee also notes the review of guidelines for grants of legal assistance to obtain psychological reports, described in Recommendation 21, will complement the provision of this information, and provide lawyers with improved opportunities to identify clients with intellectual disability and cognitive impairment. The Committee recommends that the LIV and the Victorian Bar develop and distribute information to members on:

- how to identify intellectual disability or cognitive impairment;
- issues involved in prosecuting and representing clients with an intellectual disability or cognitive impairment;
- disadvantages experienced by people with an intellectual disability or cognitive impairment; and
- organisations that can provide information to assist both lawyers and clients.

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<sup>754</sup> New South Wales Law Society, 'Client capacity guidelines: Civil and family law matters', viewed 22 January 2013, <<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Protocolsguidelines/Clientcapacityguidelines/index.htm>>.

Recommendation 22: That the Victorian Government support the Law Institute of Victoria and the Victorian Bar to develop and distribute information to their members containing information on how to better interact with, and appropriately respond to, clients with an intellectual disability or cognitive impairment. This information could include:

- how to identify intellectual disability or cognitive impairment;
- issues involved in prosecuting and representing clients who have an intellectual disability or cognitive impairment;
- disadvantages experienced by people with an intellectual disability or cognitive impairment; and
- organisations that can provide information to assist both practitioners and clients.

### 6.2.2.2 Communication during interviews

In the year to June 2012, around five per cent of complaints received by the Legal Services Commissioner focused on communication issues.<sup>755</sup> The primary challenge experienced by lawyers when working with clients with an intellectual disability or cognitive impairment is that clients often lack the ability to provide effective and adequate instructions. Conversely, a lawyer may lack experience working with people with intellectual disabilities or cognitive impairments, and may not communicate effectively with the client.

Clear communication is essential for people with an intellectual disability or cognitive impairment. Mr Bradley Roberts, Education and Outreach Advisor for the Legal Services Commissioner, said that:

... people with disabilities don't understand some of the legal jargon, they don't understand the terms. Often, as I've been told, they don't want to appear naive or stupid so they don't ask questions, they feel intimidated so they don't want to show that they don't understand so they will just nod and they will say: yes. But afterwards when they talk to the support service they will say: I don't understand what happened, what do I have to do?<sup>756</sup>

Mr Roberts went on to say that when people with an intellectual disability have signed a document that they have not understood and subsequently make a complaint about the lawyer to the Commissioner, the Commissioner's capacity to respond to those complaints can be limited. The Commissioner is unable to tell whether the complainant read and understood the document, or had the content of the document explained to him or her.<sup>757</sup> Therefore failing to adequately and appropriately communicate can have consequences on the ability of the person to seek redress should they wish to make a complaint.

<sup>755</sup> Legal Services Commissioner, *Annual report 2012*, Legal Services Commissioner, Melbourne, 2012, p. 9.

<sup>756</sup> Bradley Roberts, Education and Outreach Adviser, Legal Services Commissioner, *Transcript of evidence*, Melbourne, 7 November 2011, p. 7.

<sup>757</sup> Bradley Roberts, Education and Outreach Adviser, Legal Services Commissioner, *Transcript of evidence*, Melbourne, 7 November 2011, p. 7.

When working with a client with an intellectual disability or cognitive impairment, the lawyer must make every effort to ensure their client is adequately supported and given the opportunity to make an informed decision. This is consistent with the obligations outlined above in respect of a lawyer's obligation to ensure that a client is able to make an informed decision.

Finding 8: A client with an intellectual disability or cognitive impairment may, as a consequence of their disability, experience difficulties understanding and communicating with others. Lawyers can enhance their clients' ability to understand and participate in the legal process by modifying their approaches to communication.

The Committee received evidence expressing concern that a proportion of lawyers lack the ability to modify their communication styles when interacting with clients with an intellectual disability or cognitive impairment.<sup>758</sup> For example, Life Without Barriers expressed the view that "lawyers have a varied ability to be able to communicate effectively with people with disability, and most are not provided with any specific training to do so."<sup>759</sup> The following is one example of a lawyer's communication with a client with an intellectual disability that was highlighted to the Committee:

The lawyers did not take into account the fact that the client had an intellectual disability. They spoke quickly with the clients and did not make the time to ensure that the client understood what was being said. During the meeting, the client was showing signs of acquiescence and at the end of the meeting, the client asked me [staff member at the ACSO] to explain to her what was said in the meeting.<sup>760</sup>

Ms Dariane McLean, an advocate at VALID, said that when communicating with clients with an intellectual disability it is important for lawyers to be careful how they phrase questions.<sup>761</sup>

Mr Roberts told the Committee that lawyers who deal with clients with an intellectual disability or cognitive impairment on a regular basis learn to modify their communication style appropriately, as "they know more things to look for, they know what to ask, how to express themselves to make sure they're understood."<sup>762</sup> Mr Roberts also said that despite this one of

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<sup>758</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 6; Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 3; Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*, Mildura, 16 November 2011, p. 8.

<sup>759</sup> Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 7.

<sup>760</sup> Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 6. See also Jane Penberthy, Principal Lawyer, Central Highlands Community Legal Centre, *Transcript of evidence*, Ballarat, 17 November 2011, p. 24.

<sup>761</sup> Dariane McLean, Advocate, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, p. 23. See also Daniel Clements, Manager, Brosnan Centre, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, p. 32.

<sup>762</sup> Bradley Roberts, Education and Outreach Adviser, Legal Services Commissioner, *Transcript of evidence*, Melbourne, 7 November 2011, p. 5.

the most common barriers he heard when people access legal advice was the issue of poor communication. He said that poor communication was seen to create power imbalances between the lawyer and clients and said that this led to "... unintentional intimidation ... that's brought on by communication difficulties, language that is used in discussions by lawyers, and the complexity of the justice system ..."<sup>763</sup>

In its 1996 report on *People with an intellectual disability and the criminal justice system*, the New South Wales Law Reform Commission suggested a number of communication techniques could be adopted by lawyers when they are communicating with clients with an intellectual disability. These included:

- using simple, direct language free of abstract concepts and unnecessary information, paced to allow understanding (but not too slow as to be patronising)
- being clear and mindful of the tendency of people with an intellectual disability to take words literally;
- using non-leading questions, short and free of multiple concepts and double negatives;
- using non-verbal clues (such as facial and hand expressions) carefully. The use of role plays, pictures and other alternative communication techniques may be beneficial;
- reassuring and encouraging the client to overcome his or her fear and anxiety about the situation; and
- not assuming the client understands merely because they do not ask questions; instead, the client should be asked periodically to explain matters in his or her own words.<sup>764</sup>

Villamanta Disability Rights Legal Service similarly provided the Committee with an extensive number of suggestions to assist communications between a lawyer and a client:

- the interview should be conducted where it is quiet and there are few distractions;
- extra time should be scheduled for the interview;
- the lawyer should identify themselves, repeatedly if necessary, and that they are there to help the person, protect their rights and assist them to tell their version of events;

<sup>763</sup> Bradley Roberts, Education and Outreach Adviser, Legal Services Commissioner, *Transcript of evidence*, Melbourne, 7 November 2011, p. 3.

<sup>764</sup> New South Wales Law Reform Commission, 'People with an intellectual disability and the criminal justice system: Courts and sentencing', viewed 15 August 2012, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP35TOC>>.

- the interview should be kept calm and be as natural as possible;
- the lawyer should use the person's name often, particularly at the beginning of questions;
- the client should be encouraged to use their own terminology;
- the lawyer should meet with the client alone to gain their instructions before allowing a support person or carer to assist;
- the lawyer should speak to the person directly if there is a support person assisting, and ask the person with the intellectual disability permission to ask the support person questions;
- instructions and advice should be broken into small parts and the lawyer should continually check the person's understanding;
- the lawyer should allow the client plenty of time to respond;
- the lawyer should be patient and repeat themselves if necessary;
- the lawyer should check the person's understanding by asking them to repeat the advice that has been given to them in their own words;
- the lawyer should take a break if the person is getting distressed or tired;
- the lawyer should ask the client to tell them if they do not understand;
- the lawyer should try not to ask questions in such a way as to suggest an answer;
- if the lawyer is unsure as to what the client has said then they should go back over the information and ask the question in another way; and
- using communication by alternative means such as picture boards or electronic forms of assisted communication.<sup>765</sup>

The Committee considers that the suggestions provided by Villamanta Disability Rights Legal Service offer useful guidance for lawyers on how to communicate with clients with an intellectual disability or cognitive impairment. The Committee therefore recommends that the LIV and the Victorian Bar develop and distribute information to members containing

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<sup>765</sup> Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, pp. 28-29.

guidance on how to communicate effectively with clients with an intellectual disability or cognitive impairment.

Recommendation 23: That the Victorian Government assist the Law Institute of Victoria and the Victorian Bar to develop and distribute information to members on appropriate communication techniques when interviewing a person with an intellectual disability or cognitive impairment. Communication techniques could include that:

- the interview be conducted where it is quiet and there are few distractions;
- extra time be scheduled for the interview;
- advice be given in clear, brief sentences and spoken clearly and slowly;
- plain English, short words and sentences be used;
- the client be encouraged to use their own terminology;
- communication by alternative means, for example, using picture boards, be encouraged;
- one piece of information and advice be provided at a time; and
- questions be open ended.

When a client lacks the ability to adequately and effectively instruct their lawyer, the lawyer may find him or herself in a position of conflict when determining how to act in the client's best interests.

The presence of an intellectual disability or cognitive impairment does not always mean that a client's instructions to a lawyer will be compromised. External factors such as the presence of a support person and the willingness of a lawyer to take into account the needs of a client with an intellectual disability or cognitive impairment may assist the client to form appropriate and informed instructions.<sup>766</sup> A lawyer should therefore take reasonable steps to modify their communication style to assess whether this will assist the client to give instructions before assuming that the client lacks the capacity to provide instructions.

Ms Carrie O'Shea, a Senior Criminal Lawyer with VLA, discussed issues around determining whether clients have the capacity to give legal instructions. Ms O'Shea said that:

In terms of capacity to give instructions, it's definitely a really complex and difficult area that we have to deal with and there is no easy answer to it, but if we think somebody is not capable of giving instructions we are ethically obliged to make those enquiries and satisfy ourselves that they are able to participate and to give instructions, so that's when we rely on psychiatric reports and to get assessments so that happens frequently. Often it will come back that they are but we can't proceed if we think the person is not

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<sup>766</sup> Linda Steele, 'Representing clients with intellectual disability', *Precedent*, vol. 83 November/December, pp. 10-14, 2007, p. 12.



capable, and we won't, regardless of whether that would be the best or the worst outcome for the client.<sup>767</sup>

The Ballarat and District Law Association also described this approach in its submission to the Committee, noting that where it is clear that the client lacks the capacity to instruct, a guardian or other authorised representative may be needed to assist with obtaining instructions. The Ballarat and District Law Association went on to say that:

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.<sup>768</sup>

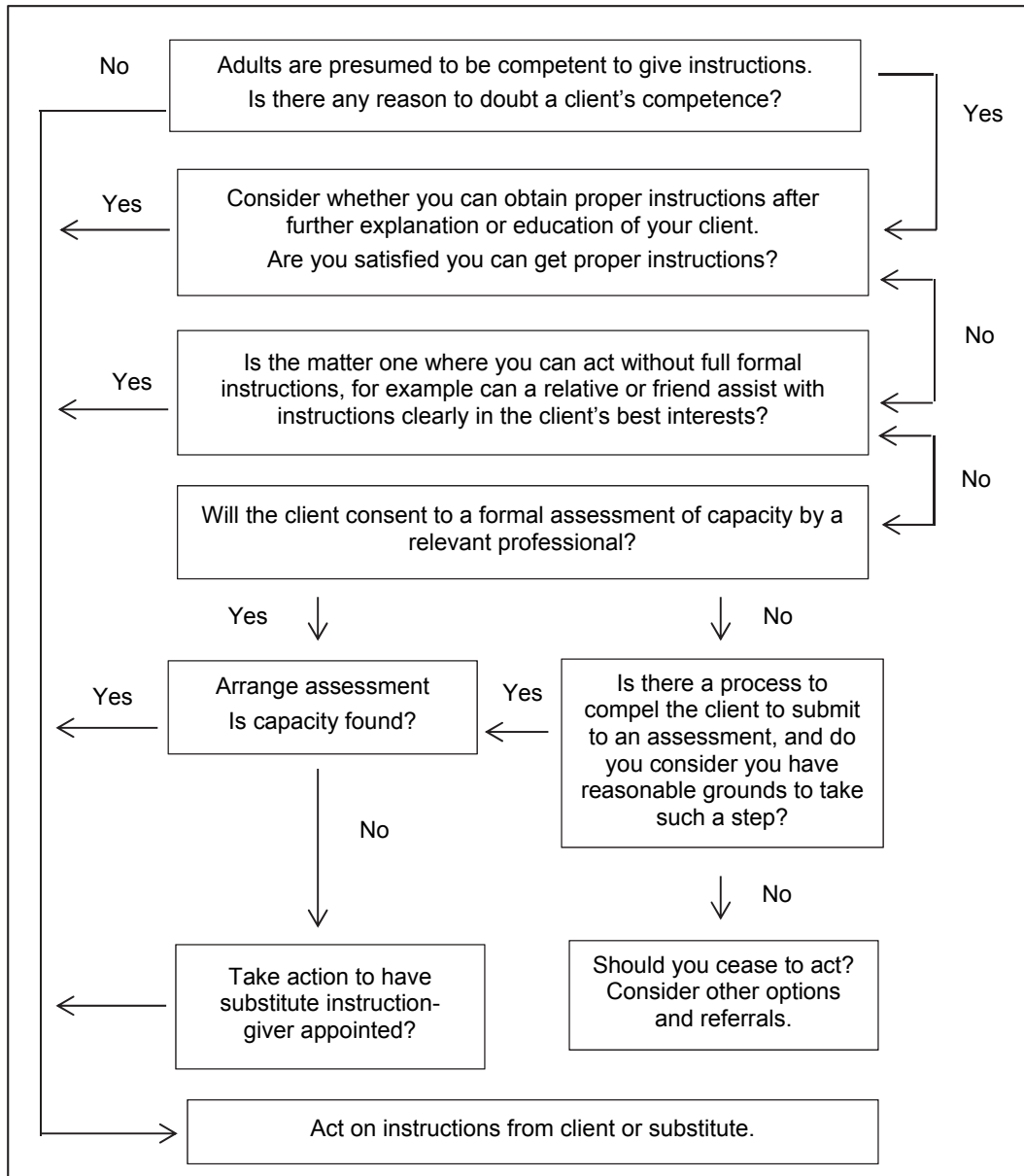
The capacity of a person with an intellectual disability or cognitive impairment to give instructions to their lawyer is of paramount importance for encouraging effective access to and interaction with the justice system. The New South Wales Law Society has produced the following guidance for its members on how to assess whether clients, in general, have the capacity to give instructions.

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<sup>767</sup> Carrie O'Shea, Senior Criminal Lawyer, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 44.

<sup>768</sup> Ballarat and District Law Association, *Submission no. 59*, 16 November 2012, p. 4. See also Jane Penberthy, Principal Lawyer, Central Highlands Community Legal Centre, *Transcript of evidence*, Ballarat, 17 November 2011, p. 26.

**Figure 11: How to assess capacity of a client.**<sup>769</sup>



This kind of guidance may be useful to lawyers who do not have regular contact with clients with an intellectual disability or cognitive impairment, and may be unaware of difficulties that may be encountered. The Committee therefore recommends that as part of Recommendation 22 guidance produced by the Victorian Bar and the LIV should also discuss issues that may be experienced when determining a client's capacity to give instructions, and steps that should be taken to overcome these difficulties and ensure that appropriate instructions can be taken.

<sup>769</sup> New South Wales Law Society, 'Client capacity guidelines: Civil and family law matters', viewed 22 January 2013, <<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Protocolsguidelines/Clientcapacityguidelines/index.htm>>.

### 6.2.2.3 Role of the support person

To assist lawyers to communicate with clients with an intellectual disability or cognitive impairment, or where the client has been found to lack the capacity to give instructions, lawyers may receive assistance from a guardian appointed to make decisions on behalf of the client.

Under the *Guardianship Act 1986* (Vic) any person can make an application to the Victorian Civil and Administrative Tribunal (VCAT) to be appointed as a guardian for a person with a disability.<sup>770</sup> A guardianship order will be granted where:

- a person has a disability and is over the age of 18;
- the person is unable by reason of the disability to make reasonable judgements in respect of all or any of the matters relating to his or her personal circumstances; and
- the person is in need of a guardian.<sup>771</sup>

A guardianship order will not be made unless it is in the person's best interests for a guardian to be appointed, and only if the person's needs cannot be met by less restrictive means.

Usually a friend, relative, or someone familiar with the person will be appointed as a guardian. When deciding who to appoint as a guardian, VCAT must take into account the wishes of the represented person as far as they can be ascertained, as well as family members and other interested parties. If no one is available, or the court has determined the need for an independent person because of disagreement between the parties, the Public Advocate can be appointed as guardian.

A guardian must act in the best interests of the represented person.<sup>772</sup> The powers conferred on a guardian are equivalent to all the powers and responsibilities that a parent has over a child. This means they must:

- protect the represented person from abuse, exploitation and neglect;
- consider the represented person's wishes;
- advocate for the represented person; and
- encourage the represented person to make their own decisions where possible.<sup>773</sup>

Guardians act as substitute decision-makers for people who, due to their disability, need assistance making decisions. For example, a guardian may

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<sup>770</sup> *Guardianship and Administration Board Act 1986* (Vic), section 19.

<sup>771</sup> *Guardianship and Administration Board Act 1986* (Vic), section 22(1).

<sup>772</sup> *Guardianship and Administration Act 1986* (Vic), section 28(1).

<sup>773</sup> *Guardianship and Administration Board Act 1986* (Vic), section 28.

consent to hospitalisation or medical treatment on behalf of a person with an intellectual disability. In the context of a lawyer's interactions with clients with an intellectual disability, if the client has a guardian then the lawyer may be able to communicate more effectively with the assistance of a guardian.

In the absence of a legally appointed guardian, the Committee explored the possibility of allowing a parent, friend or carer to attend any interactions that a lawyer may have with a client, similar to the provision of an Independent Third Person during police interviews. A support person's role at interviews would be to provide aid and comfort to the person with an intellectual disability or cognitive impairment and to ensure that the client's rights and wishes can be exercised. A support person could also play a limited interpretive role, if appropriate.

Ms McLean stated that unless training is provided to lawyers on how to work with clients with an intellectual disability, a support person should be present during lawyers' consultations with a client.<sup>774</sup> Life Without Barriers was of the view that "Support persons can be vital in assisting lawyers to effectively communicate with people with intellectual disability and effectively advocate for services".<sup>775</sup>

While there may be some benefits from allowing a support person to be present during a lawyer's interactions with clients, there may be occasions when the presence of a support person does not assist with that interaction. This may occur when, for example:

- a friend or family member is biased or unable to remain neutral, which may inhibit communications between the lawyer and the client;<sup>776</sup>
- a person with an intellectual disability or cognitive impairment does not have a friend or family member who is able to act as a support person, or when the lawyer does not know that a support person may be available to assist the person;<sup>777</sup>
- there is a conflict of interest between what is best for the client and what is in the support person's interests,<sup>778</sup> and
- a support person discloses discussions conducted under client-lawyer confidentiality.<sup>779</sup>

<sup>774</sup> Dariane McLean, Advocate, Victorian Advocacy League for Individuals with Disability Inc., *Transcript of evidence*, Melbourne, 7 November 2011, p. 22. See also Bradley Roberts, Education and Outreach Adviser, Legal Services Commissioner, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 7-8.

<sup>775</sup> See for example Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 8. See also Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 21.

<sup>776</sup> Philip Lynch, President, Ballarat and District Law Association, *Transcript of evidence*, Ballarat, 17 November 2011, p. 43.

<sup>777</sup> See for example Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 2; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 22.

<sup>778</sup> Ballarat and District Law Association, *Submission no. 59*, 16 November 2012, pp. 3-4.

In most circumstances, the Committee believes that communication between lawyers and clients with an intellectual disability or cognitive impairment could be improved if a support person were able to be present during interviews. The Committee recognises that there may be instances in which it may be inappropriate for a support person to be present, such as where the matters discussed involve allegations against the support person. In those instances an independent mechanism for accessing a support person should be available, and the lawyer should take all reasonable steps to discuss available support for clients during their consultations.

**Recommendation 24:** That the Victorian Government consider establishing a mechanism to allow appropriately qualified independent support people to attend interviews between lawyers and clients with an intellectual disability or cognitive impairment.

**Recommendation 25:** That the Victorian Government liaise with the Law Institute of Victoria and the Victorian Bar to consider amending the *Professional Conduct and Practice Rules 2005* and the *Victorian Bar Incorporated Practice Rules 2009* to require lawyers to discuss with a client with an intellectual disability or cognitive impairment whether the client wishes to have a support person present. If the client does wish to have a support person present, the lawyer should make enquiries as to whether a nominated or independent support person could provide appropriate support for the person.

### 6.3 The judiciary and people with an intellectual disability or cognitive impairment

A number of different personnel are involved in court hearings. The functions of personnel typically involved in court hearings are set out in Figure 12 below.

**Figure 12: Participants in court hearings.**

*Magistrate/Judges – the role of the Magistrate/Judge is to decide matters of fact and law and to reach a verdict or final decision in each case. In criminal cases the Magistrate/Judge is responsible for determining the defendants punishment should they be found guilty. In the Magistrates’ Court, Magistrates alone are responsible for determining cases, juries are not involved.*

*Judicial Registrar – the role of the Judicial Registrar is to hear and determine civil matters and less serious criminal matters such as council and minor traffic prosecutions.*

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<sup>779</sup> Legal Services Commissioner, *Submission no. 30*, 13 September 2011, p. 2.

*Registrar – the Registrar is responsible for the general administration of the court which involves a variety of tasks including organising and coordinating court proceedings, maintaining court records, preparing and issuing documents in both civil and criminal jurisdictions and swearing affidavits. Registrars also perform quasi-judicial functions such as making instalment orders and conducting pre-hearing conferences.*

*Bench Clerk – each court room has a Bench Clerk sitting in court to assist the Magistrate with documentation, administration and recording the outcome of the case. The Clerk also swears in witnesses.*

Whether a person with an intellectual disability or cognitive impairment appears before the court as an offender, victim or witness, court personnel must be mindful of their special needs. VLA commented that:

People with intellectual disabilities may not appreciate the importance of personally attending court at a designated time or may readily forget bail conditions and may find attending court quite distressing. Accordingly, it is important for courts to recognise and be sensitive to the challenges that people with intellectual disabilities (and other vulnerabilities) face when interacting with the justice system.<sup>780</sup>

Evidence received by the Committee noted that attending court can be intimidating for people with an intellectual disability or cognitive impairment, and that procedures adopted in courts can present a number of challenges for them.<sup>781</sup>

Evidence received from the OPA highlights the experience a person with an intellectual disability had when appearing before the courts:

Most of them [court appearances] I can't really remember. I try not to remember them because they're just like bullshit. [Why?] Because they yak, saying the section a, b. What the hell are they talking about? So I basically just sit there and look around the room. And eventually they get around to me and say 'Do you have any input on this?' I say 'not really, because I don't understand a word you say' ...<sup>782</sup>

<sup>780</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 14.

<sup>781</sup> See for example Angela Alexander, *Submission no. 8*, 6 September 2011, p. 3; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 88; Daniel Clements, Manager, Brosnan Centre, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, pp. 31-32; Richard Coverdale, Director, Centre for Rural and Regional Law and Justice, Deakin University, *Transcript of evidence*, Geelong, 20 March 2012, pp. 2-3; Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 9; Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 11; Nadine Hantke, Team Leader, Eastern Regional Mental Health Association, *Transcript of evidence*, Melbourne, 21 February 2012, pp. 7-8; Leadership Plus, *Submission no. 35*, 23 September 2011, p. 5; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 27; Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 10; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 18.

<sup>782</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 28.

The Legal Services Commissioner found that one barrier affecting people with an intellectual disability when they come before the courts was:

Stressful environments, such as a court waiting area where there are many other people milling about and lots of background noise, can limit the capacity of a client to understand what their lawyer is telling them. Quiet spaces away from the hustle and bustle are more conducive to good communication and comprehension by the client, however these quiet spaces are often unavailable, especially in older regional courthouses.<sup>783</sup>

Grampians disAbility Advocacy said that irrespective of whether a person has an intellectual disability, the justice system is a complex area. The organisation went on to say that:

For someone with a cognitive impairment it is, at times, unfathomable. Plain English is generally not used, and written documents are inaccessible to many of our clients who are unable to read at all. The courts themselves are alien environments where our clients are unable to feel comfortable due to the formality of the proceedings and all the dos and don'ts of courtroom etiquette.<sup>784</sup>

These anxieties can be even more pronounced for people from culturally and linguistically diverse (CALD) communities. The Ethnic Communities' Council of Victoria expressed the view that the legal language used in courtrooms can make proceedings even more difficult for people from CALD communities to understand.<sup>785</sup> The Council noted that in its experience people from CALD communities attending courts report a shortage of non-English signage and support personnel, which would assist in alleviating the anxieties that they have about the court process.<sup>786</sup>

### 6.3.1 Role of the judiciary in overcoming complexity

Members of the judiciary have an important role to play in ensuring that people are able to effectively participate in the court process. In part, this requires the judiciary to recognise that the complexity of court processes can make it difficult for people to understand their role when attending court, regardless of whether or not they have an intellectual disability or cognitive impairment.

#### 6.3.1.1 Disability awareness amongst members of the judiciary

The Committee heard contrasting accounts about the level of awareness by members of the judiciary about disadvantages experienced by people with an intellectual disability or cognitive impairment when appearing before court.

The Office of Public Prosecutions (OPP) accepted that while the court environment can be foreign to most members of the public, the courts have

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<sup>783</sup> Legal Services Commissioner, *Submission no. 30*, 13 September 2011, pp. 2-3.

<sup>784</sup> Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 2.

<sup>785</sup> Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 9.

<sup>786</sup> Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 10.



improved the way prosecutions involving people with an intellectual disability are managed.<sup>787</sup> The OPP said that it has seen a greater insistence by members of the judiciary on the use of expert reports to address the extent of a witness's disability and to identify strategies the court might adopt to accommodate the needs of witnesses.<sup>788</sup> A Case Study provided by the OPA illustrates positive modifications the courts have made in cases involving people with an intellectual disability.

*Case Study 23: Lisa's story.*<sup>789</sup>

*"Lisa' is a woman from a CALD background who at the time of the trial had an undiagnosed mental illness. Her ex-husband sought custody of their child who had developmental delay. Lisa's language barriers, lack of familiarity with a Western legal system/family law, experience of domestic abuse and undiagnosed schizophrenia all impacted on her interaction with the legal system. She had difficulties retaining solicitors and sent the court large volumes of often unintelligible written materials. The matter came before the court on numerous occasions and the judge presiding over the matter was reluctant to proceed unless Lisa had the opportunity of having a litigation guardian. The Office of the Public Advocate acted as Lisa's litigation guardian.*

*During the trial, Lisa would often interrupt the court proceedings demanding for her perspective to be heard. As unorthodox as that was, the judge engaged Lisa and sought to understand her concerns."*

However, the OPP also noted that not all members of the judiciary intervene during court proceedings when a particular line of questioning is inappropriate given the witness' disability.<sup>790</sup> This observation was also illustrated in a Case Study provided by the OPA.

*Case Study 24: Catherine's story.*<sup>791</sup>

*"Catherine' is a young woman in her 20s with a mild to moderate intellectual disability. Her matter is known to OPA through the Advice Service, who received a call from her mother for guidance.*

*Catherine has a supportive family and lives independently in a flat and is well resourced. Catherine was in an "on again off again" relationship with Craig, who also has an intellectual disability. Craig was physically, psychologically and financially abusive towards Catherine.*

<sup>787</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 11.

<sup>788</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 11.

<sup>789</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 30.

<sup>790</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 11.

<sup>791</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 29. See also Tabitha O'Shea, Community Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Bendigo, 28 May 2012, p. 4.

*Catherine told her mother, who is also her plenary guardian, about the ongoing abuse. After all other attempts to resolve the abuse were unsuccessful, Catherine's guardian sought an intervention order against Craig. Being supportive of her daughter's right to choose relationships, Catherine's guardian requested an intervention order that allowed her to have contact with Craig so long as they did not reside together.*

*The Magistrate only granted an interim intervention order and demanded that Catherine be present at the next hearing. He challenged the guardian's authority to make such a decision and did not seem to have an understanding of the role and authority of an appointed guardian.*

*The Magistrate would not rely on the information about Catherine having an intellectual disability. He fluctuated between a position of suggesting Catherine was unreliable because of her intellectual disability and suggesting that as an adult was capable of making decisions herself. Her guardian was concerned about how Catherine would be treated when she appeared before this Magistrate for a decision about a final intervention order."*

These Case Studies and the evidence received by the Committee highlight the importance of judicial education to ensure that people with an intellectual disability or cognitive impairment receive fair and equal treatment when they come before the courts.<sup>792</sup>

Finding 9: Members of the judiciary have an important role to play ensuring that people with an intellectual disability or cognitive impairment receive fair and equal treatment when they come before the courts. There is an increasing trend for the judiciary to recognise that people with an intellectual disability or cognitive impairment experience unique difficulties when involved in court processes. The needs of a person with an intellectual disability or cognitive impairment should be taken into account by all members of the judiciary.

### **6.3.1.2 Training and experience of judiciary**

Most Judges and Magistrates in Victoria are appointed based on their legal experience, and therefore enter the judiciary with extensive experience as lawyers in court. Members of the judiciary are appointed by federal and state governments on the recommendation of the Attorney-General.

The National Judicial College of Australia was established in 2002 as an independent entity to provide professional development programs for all

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<sup>792</sup> See for example Loddon Campaspe Community Legal Centre, *Supplementary evidence*, 28 May 2012, p. 6; Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 11; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 33; Julie Phillips, Manager, Disability Discrimination Legal Service, *Transcript of evidence*, Melbourne, 24 October 2011, p. 34; Regional Information and Advocacy Council, *Submission no. 51*, 2 February 2011, p. 3; Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, p. 24.

judicial officers in Australia. It receives funding from both Commonwealth and state governments.

In Victoria, the Judicial College of Victoria is responsible for providing judicial education and professional development opportunities for members of the judiciary. Established by the *Judicial College of Victoria Act 2001* (Vic), the functions of the College include:

- assisting with the professional development of judicial officers;
- providing continuing education and training of judicial officers; and
- providing professional development services, continuing judicial education and training services to people who are not judicial officers.<sup>793</sup>

As part of the College's work a *Framework of Judicial Abilities and Qualities* has been developed. The framework defines the standards and expectations for Victoria's judicial officers. The framework also identifies the knowledge, skills, behaviours and attitudes that the Victorian judiciary are expected to demonstrate when performing their judicial role.<sup>794</sup> The framework is divided into six areas:

- Knowledge and technical skills;
- Communication and authority;
- Decision making;
- Professionalism and integrity;
- Efficiency; and
- Leadership and management.

For each of these areas, examples are provided describing how judicial officers are expected to conduct themselves to satisfy particular skill requirements. For example, communication and authority skills include:

- appropriately dealing with parties, witnesses, victims, representatives, the public, press and court/tribunal staff; and
- adopting approaches with unrepresented parties that ensures own and party's understanding by explanation and checking.<sup>795</sup>

<sup>793</sup> *Judicial College of Victoria Act 2001* (Vic), section 5(1).

<sup>794</sup> Judicial College of Victoria, *Framework of judicial abilities and qualities of Victorian Judicial Officers*, Judicial College of Victoria, Melbourne, 2008, p. 1.

<sup>795</sup> Judicial College of Victoria, *Framework of judicial abilities and qualities of Victorian Judicial Officers*, Judicial College of Victoria, Melbourne, 2008, p. 9.

The Framework requires judicial officers to communicate “empathically with adults and children, with people with cognitive and physical impairments, and with those from diverse ethnic and cultural groups”.<sup>796</sup> Mr Roger Steel, Coordinator of Disability Services at the Mallee Accommodation and Support Program, was of the view that members of the judiciary do have the skills to be able to communicate with a range of different people, but sometimes lack the ability to recognise when different communication methods are needed.<sup>797</sup>

The *National Standard for Professional Development for Australian Judicial Officers* outlines some reasons for encouraging professional development by members of the judiciary, including that:

- the context of society, social attitudes and values in which the judiciary carries out its work is constantly changing;
- disputes presided over by the judiciary reflect expanding and changing knowledge, developments in technology, changing social attitudes and the increasing complexity of modern society;
- the ability of judicial officers to perform their function depends on judicial officers having the necessary knowledge, judicial skills and social insight; and
- the duty of judicial officers to decide each case justly and according to law imposes a duty to ensure that he or she has the knowledge, skills and insights reasonably necessary to make such decisions.<sup>798</sup>

The standard requires that each judicial officer spend at least five days each calendar year participating in professional development activities related to their responsibilities. Consistent with this standard the Judicial College of Victoria runs a CPD scheme for judicial officers. The scheme ensures judicial officers are up to date with substantive and procedural areas of the law, that judicial skills are enhanced, and that awareness of social and community needs is promoted.<sup>799</sup> The scheme provides judicial officers with the opportunity to participate in ten hours of professional development each year. In 2011-12 the College delivered 40 programs.<sup>800</sup>

One program delivered in the 2010-11 financial year was a series of workshops aimed at providing judicial officers with greater understanding of the prevalence and symptoms of common mental disorders, and the

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<sup>796</sup> Judicial College of Victoria, *Framework of judicial abilities and qualities of Victorian Judicial Officers*, Judicial College of Victoria, Melbourne, 2008, p. 4.

<sup>797</sup> Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*, Mildura, 16 November 2011, p. 8.

<sup>798</sup> National Judicial College of Australia, *A national standard for professional development for Australian judicial officers*, National Judicial College of Australia, Canberra, 2006, p. 4.

<sup>799</sup> Judicial College of Victoria, 'Continuing professional development', viewed 1 February 2013, <<http://www.judicialcollege.vic.edu.au/judicial-education/continuing-professional-development>>.

<sup>800</sup> Judicial College of Victoria, *Annual report 2011-2012*, Melbourne, 2012, p. 9.

relationship between mental illness and offending.<sup>801</sup> In 2012 the CPD scheme included workshops on providing judicial officers with techniques and skills to communicate effectively in court, with victims, defendants, witnesses, children and young people and the media, and assessing whether witnesses need additional support.<sup>802</sup> In 2012-13 workshops will also be convened for judicial officers to learn more about cognitive impairments, including how ABIs may affect a person's functioning.<sup>803</sup>

Mr Harkin suggested that there may be a role for the judiciary to be provided with more training and awareness about the issues and challenges experienced by people with an intellectual disability.<sup>804</sup>

The OPP recommended that the Judicial College of Victoria provide training to the judiciary about the special needs of witnesses with an intellectual disability or cognitive impairment. The OPP said that "Judges and magistrates should receive appropriate training before they are involved in the management of these proceedings, this may result in better outcomes for intellectually disabled witnesses."<sup>805</sup>

Ms O'Shea from VLA suggested that guidelines be developed to provide the courts, and particularly Magistrates and Judges, with strategies and actions to make hearings more appropriate for clients with an intellectual disability.<sup>806</sup>

The Judicial Commission of New South Wales has created the *Equality before the Law Benchbook*, which provides New South Wales judicial officers with statistics and information about different cultures, lifestyles, socioeconomic disadvantage and potential barriers to people's participation in court proceedings. This guidance sets out measures that judicial officers can take when a person with a disability is before the court, such as what language should be adopted by the courts and what adjustments could be made to ensure that people with a disability are still able to participate in the hearing.<sup>807</sup> The document states that many

<sup>801</sup> Judicial College of Victoria, *2010 prospectus*, Judicial College of Victoria, Melbourne, 2010, pp. 32-33.

<sup>802</sup> Judicial College of Victoria, *Prospectus 2012*, Judicial College of Victoria, Melbourne, 2011, pp. 20, 44, 59; Judicial College of Victoria, *Annual report 2011-2012*, Melbourne, 2012, pp. 16-17.

<sup>803</sup> Judicial College of Victoria, *JCV prospectus 2013*, Judicial College of Victoria, Melbourne, 2012, p. 9.

<sup>804</sup> Laurie Harkin, Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 14. See also Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 10; Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 11; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 2; Tabitha O'Shea, Community Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Bendigo, 28 May 2012, p. 4; Regional Information and Advocacy Council, *Submission no. 51*, 2 February 2011, p. 4; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 5.

<sup>805</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 11.

<sup>806</sup> Carrie O'Shea, Senior Criminal Lawyer, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 42.

<sup>807</sup> Judicial Commission of New South Wales, *Equality before the law benchbook*, Judicial Commission of New South Wales, Sydney, 2009, pp. 5401-5413. Note the Committee will discuss in detail in Chapter Eight modifications suggested in the manual that may

barriers experienced by people with a disability when involved in court hearings can be mitigated if judicial officers make appropriate adjustments to court proceedings.

The Committee believes that in order to enhance awareness and understanding of the disadvantages experienced by people with an intellectual disability or cognitive impairment it is important that judicial officers be given greater guidance and training opportunities to ensure that this group of people can interact appropriately with the court.

Recommendation 26: That the Victorian Government support the Judicial College of Victoria to provide more training opportunities for members of the judiciary about best practice management in proceedings involving a person with an intellectual disability or cognitive impairment.

Recommendation 27: That the Victorian Government support the Judicial College of Victoria to develop, in consultation with members of the judiciary and the disability sector, guidance material on how the needs of people with an intellectual disability or cognitive impairment can be identified and appropriately met, including with modifications to court proceedings.

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be used when a person with an intellectual disability or cognitive impairment is involved in court proceedings.

## Chapter Seven: Criminal responsibility and court processes

Offenders with an intellectual disability or cognitive impairment face a number of unique challenges when interacting with the courts. These challenges can affect the courts' determination of criminal responsibility and whether the person is fit to stand trial.

The model for justice in Victoria is largely adversarial, encompassed by the Magistrates' Court, the County Court, and the Supreme Court. For people with an intellectual disability or cognitive impairment the court environment and its proceedings can be intimidating and present a number of daunting challenges for them, which may inhibit their ability to effectively interact with the courts.<sup>808</sup>

The Magistrates' Court has responded to some of the challenges experienced by particular groups in the community by developing a number of specialist court programs and services which aim to achieve positive outcomes for particular court users.<sup>809</sup> These specialist jurisdictions operate on principles of therapeutic jurisprudence, attempting to address the underlying causes of offending with the aim of reducing reoffending in particular disadvantaged groups.

This Chapter will begin by discussing the processes and procedures for determining criminal responsibility of defendants, and will then explore alternative approaches developed by the Magistrates' Court to improve interactions and outcomes that people have when they become involved in the courts.

### 7.1 Determining criminal responsibility

For most criminal offences the prosecution must prove both that the defendant carried out the alleged act or omission and that the defendant intended to do so. However, in the case of some accused with an intellectual disability or cognitive impairment, the court may also determine

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<sup>808</sup> Louis Schetzer and Judith Henderson, *Access to justice and legal needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, Law and Justice Foundation of New South Wales, Sydney, Stage 1: Public consultations, 2003, p. 146.

<sup>809</sup> For example the Assessment and Referral Court List, the Criminal Justice Diversion Program, the Drug Court, the Koori and Children's Koori Courts, the Court Integrated Services Program, the Enforcement Review Program and the Neighbourhood Justice Centre.



that their impairment makes them incapable of forming the required mental state to have committed the offence, or that they are unfit to stand trial in answer to the charges. In such cases it may be possible to rely on the framework established by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

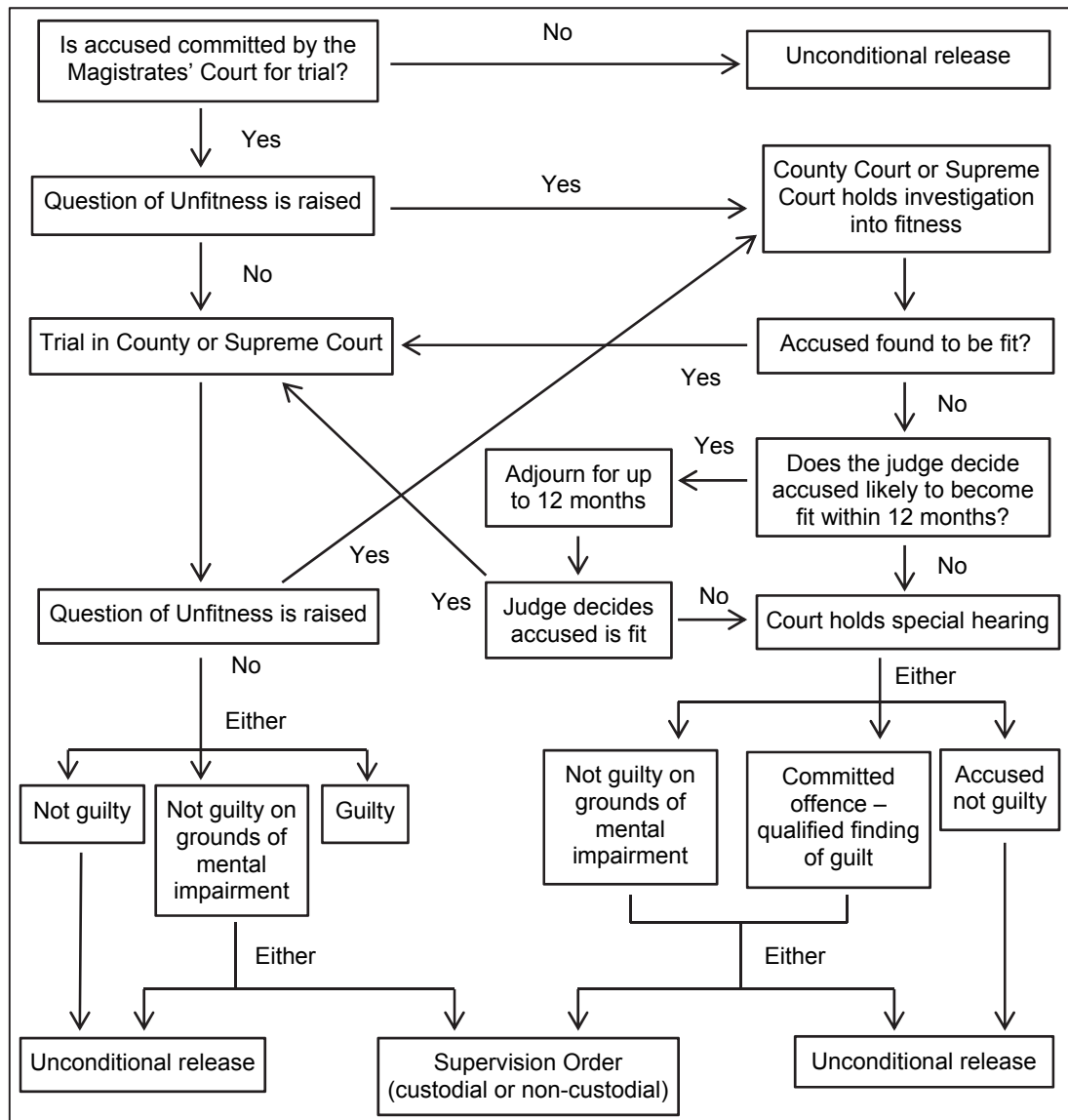
The Act sets out provisions for the detention, management and release of an accused who has been found either unfit to stand trial or not guilty of an offence on the grounds of mental impairment. Relevant processes triggered by the Act are illustrated in Figure 13. The Act replaces the common law insanity defence with the statutory defence of mental impairment.

The Committee did not receive extensive evidence on the application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* to people with an intellectual disability or cognitive impairment. The Committee notes that in August 2012 the Victorian Law Reform Commission (VLRC) received a reference from the Attorney-General to conduct a review of the Act. As part of this review the Commission will examine the operation of the Act and consider whether changes are needed to ensure the Act operates justly, effectively and consistently with the principles that underlie it.<sup>810</sup>

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<sup>810</sup> Victorian Law Reform Commission, 'Crimes (Mental Impairment): Terms of reference', viewed 3 September 2012, <<http://www.lawreform.vic.gov.au/projects/crimes-mental-impairment/crimes-mental-impairment-terms-reference>>.

**Figure 13: Application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*.<sup>811</sup>**



## 7.1.1 Fitness to stand trial

### 7.1.1.1 When and how fitness can be questioned

At common law a person is presumed fit to stand trial.<sup>812</sup> The Courts have said that a person is presumed fit to stand trial if they are able to comprehend the nature of the trial, rather than if they understand the

<sup>811</sup> Department of Human Services, *Crimes (Mental Impairment and Unfitness to be Tried) Act practice guidelines 2007*, DHS, Melbourne, 2007, p. 19.

<sup>812</sup> The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*, section 7(1) maintains this common law presumption.

applicable law.<sup>813</sup> For a statement of when the question can be raised, the Court in *Eastman v R* said that:

Unless there is material to suggest otherwise, a person is presumed fit to plead. And that is so both at trial and on appeal. At trial however, that presumption is displaced if there is material which raises a question as to that person's fitness to plead. Moreover, if there is a question as to the accused person's fitness to plead, the trial must stop unless and until the appropriate body determines that he or she is fit to plead.<sup>814</sup>

Most defendants with an intellectual disability or cognitive impairment will be fit to stand trial when information is given in simple terms and support is available to help them understand court proceedings. However, there may be occasions when the degree of impairment experienced by a person with an intellectual disability or cognitive impairment could find them unfit to stand trial.

The question of whether a defendant is fit to stand trial can be raised at any time during the course of a trial and can be raised by any party to the proceedings.<sup>815</sup> The party raising this question must prove that the defendant is unfit to stand trial.<sup>816</sup> The fact that the question has been raised does not preclude it from being raised again in the same proceeding.<sup>817</sup> Where the question of fitness has been raised during the course of a trial, the trial judge must determine whether there is a real and substantial question to be answered, and if so, hold an investigation into the accused's fitness to stand trial.<sup>818</sup>

A specially appointed jury determines the question of fitness. The jury is empanelled solely for the purpose of determining the accused's fitness to stand trial and cannot decide any other matter in relation to court proceedings, such as the accused's guilt.<sup>819</sup> Referring the question of whether an accused is fit to stand trial to a jury raises questions of whether a jury is appropriately placed to determine such a question.

In other Australian jurisdictions, where defence and prosecution counsel agree that an accused is unfit to stand trial, the court has the power to record this finding and proceed with inquiring into whether the accused committed the offence charged.<sup>820</sup> The benefit of this for the accused is that it avoids the stress of undergoing a lengthy and complex court process.<sup>821</sup> This finding also saves the court the time and expenses

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<sup>813</sup> *Ngatayi v R* (1980) 30 ALR 27, 29.

<sup>814</sup> *Eastman v R* [2000] HCA 29, [86] (citations omitted).

<sup>815</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 9.

<sup>816</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 7(4).

<sup>817</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 9(3).

<sup>818</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 9(2).

<sup>819</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 11(6).

<sup>820</sup> See for example *Criminal Law Consolidation Act 1935* (SA), sections 269M(a)(5), 269N(B)(5); *Criminal Code Act 1983* (NT), section 43T(1); *Criminal Justice (Mental Impairment) Act 1999* (Tas), section 19.

<sup>821</sup> See for example Angela Alexander, *Submission no. 8*, 6 September 2011, p. 2; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 8; Lynne Coulson Barr, Deputy Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October

associated with conducting an inquiry into an accused's fitness to stand trial.

The Committee believes that in some circumstances all parties may benefit from allowing the court to commence with unfitness to be tried procedures where both defence and prosecution counsel agree the defendant is unfit to stand trial, thereby avoiding the need to appoint a jury. The Committee notes that in other Australian jurisdictions, except the Northern Territory and Tasmania, fitness determinations are made by the trial judge or a specialist division of the court. For example, in Western Australia the trial judge determines whether an accused is fit to stand trial and if not whether the accused is likely to become fit within six months.<sup>822</sup> In Queensland, by comparison, a specialist Mental Health Court exists to investigate issues concerning fitness to be tried.<sup>823</sup>

The main arguments for removing the requirement that the investigation into an accused's fitness be conducted before a jury include:

- fitness investigations primarily involve technical matters and therefore it is more suitable for a hearing to be conducted by a judge alone;
- a fitness hearing is not designed to be adversarial and no decisions are made about the person's criminal responsibility;
- a judge hearing evidence alone may be quicker, less formal and less confusing or stressful for the accused with an intellectual disability or cognitive impairment, particularly if experts from both sides agree that the accused is clearly unfit to be tried.<sup>824</sup>

The Committee notes that this is a matter that could be examined in greater detail by the VLRC. However, there appear to be compelling arguments in favour of allowing the trial judge to investigate an accused's fitness to stand trial. The requirement to conduct fitness investigations before a jury, where in other jurisdictions these matters are considered by judges alone, may place an unnecessary burden on the community from which jurors are drawn and could exacerbate the stress and anxiety that people with an intellectual disability or cognitive impairment ordinarily experience when in court. The Committee believes that there is an opportunity for current legislation to be reviewed, to allow the trial judge to consider fitness to stand trial matters, rather than assembling juries specifically for that purpose.

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2011, pp. 14-15; Disability Advocacy and Information Service Inc., *Submission no. 54*, 3 November 2011, p. 5; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 42; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 5; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 5.

<sup>822</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), sections 12, 19.

<sup>823</sup> *Mental Health Act 2000* (Qld), section 270.

<sup>824</sup> New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, NSWLRC, Sydney, Consultation paper 6, 2010, p. 16.

Recommendation 28: That the Victorian Government consider amending the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to allow the trial judge to investigate an accused's fitness to stand trial.

### 7.1.1.2 The meaning of 'fitness to stand' trial

The *Crimes (Mental Impairment and Unfitness to Stand Trial) Act 1997* states that an accused person is unfit to stand trial if his or her mental processes are so disordered that he or she is unable to:

- understand the nature of the charge;
- enter a plea to the charge;
- exercise the right to challenge jurors;
- follow the course of the trial;
- understand the substantial effect of any evidence that may be given in support of the prosecution; or
- give instructions to his or her lawyer.<sup>825</sup>

A failure to meet any of these standards will render the accused unfit to stand trial.

This test replicates the common law position for determining whether or not an accused has sufficient intellect to understand the course of proceedings. Justice Smith in *R v Presser* said that when determining fitness to stand trial the question to be answered "... is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him".<sup>826</sup> Justice Smith went on to define minimum standards for determining whether an accused is fit to stand trial:

He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity

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<sup>825</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 6(1).

<sup>826</sup> *R v Presser* [1958] VR 45, 48.

to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.<sup>827</sup>

In articulating standards set out by Justice Smith the courts have said the standards are not intended to "... ensure that an accused person understands the law applicable in his trial" or that the accused be conversant in court procedure.<sup>828</sup> The courts have also said that inevitably there will be cases where an accused could have conducted a better defence "... had they possessed a more attractive personality, greater intelligence or education, improved communication skills, a deeper appreciation of the factual and legal issues, or even a better appreciation of the trial process," however, so long as the minimum standards of fitness have been met, these considerations should not form part of the court's determination.<sup>829</sup>

A person can be found unfit to plead for reasons other than mental illness, and the courts have said that physical disabilities could also cause a person's mental processes to be disordered or impaired. For example, in *Eastman v R* Justice Gaudron said:

A number of matters should be noted with respect to what was said in *Presser*. The first is that the question whether a person is fit to plead may arise for reasons other than mental illness. It may arise, for example, because a person is deaf and dumb or, more generally, because language difficulties make it impossible for him or her to make a defence.<sup>830</sup>

The Court in *R v Sexton* said that an accused's ability to comprehend and participate in proceedings may be compromised by physical difficulties as well as intellectual and mental disabilities, or a combination of them.<sup>831</sup> The fitness to stand trial test has been applied in cases other than those involving a defendant with a mental illness – for example, in *R v Miller* the defendant's charge for attempted rape was dismissed on the grounds that he was mentally unfit to stand trial, as a result of an acquired brain injury (ABI).<sup>832</sup> The court found that the ABI impaired the defendant's mental processes to the extent that he was unable to understand or respond to the charges against him.

A more recent example of the use of fitness to stand trial procedures is a case involving two boys charged with lighting a fatal fire in Victoria on 7 February 2009. Evidence from a forensic psychologist and other mental health experts found that the two accused had low intellects, which would never improve. The jury found both of the accused unfit to stand trial.<sup>833</sup>

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<sup>827</sup> *R v Presser* [1958] VR 45, 48.

<sup>828</sup> *Ngatayi v R* (1980) 30 ALR 27, 29.

<sup>829</sup> *R v Rivkin* (2004) 59 NSWLR 284, 297.

<sup>830</sup> *Eastman v R* [2000] HCA 29, [59] (citations omitted).

<sup>831</sup> *R v Sexton* (2000) 77 SASR 405, 416.

<sup>832</sup> *R v Miller (No 2)* [2000] SASC 152.

<sup>833</sup> Andrea Petrie, 'Black Saturday arson accused found mentally unfit for trial', *The Age*, 9 August 2011, p. 2. Note the case did not proceed to a special hearing as the charges were later dropped by the Director of Public Prosecutions on the grounds that there

The Supreme Court of Victoria observed that identifying that an accused has an intellectual disability, and investigating the impact of that disability on their fitness to stand trial, is not always easy for the courts to determine.<sup>834</sup> In making its determination on whether an accused is fit to stand trial, the court can:

- call evidence of its own initiative; and
- require the accused to undergo an examination by a registered medical practitioner or psychologist, the results of which can be presented to the court.<sup>835</sup>

In other jurisdictions different and sometimes additional considerations to those set out in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* form the test for determining whether a defendant is fit to stand trial.

The standards articulated in Victoria focus on the ability of the accused to understand court processes and give instructions to a lawyer. The standards do not refer to the capacity of the accused to make rational decisions based on his or her understanding of the evidence. By comparison the test for determining fitness to stand trial in South Australia states that the accused is mentally unfit to stand trial if his or her mental processes are so disordered or impaired that he or she is unable to:

- understand, or respond rationally to, the charge or allegations on which the charge is based; or
- exercise (or to give rational instructions about the exercise of) procedural rights (such as the right to challenge jurors).<sup>836</sup>

The capacity of a person with an intellectual disability or cognitive impairment to make rational decisions may be affected by a number of considerations, such as their desire to please authority figures, or to remove themselves from stressful situations with insufficient regard for long-term consequences. It could be argued, therefore, that the test set out in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* sets a low threshold for determining the fitness of an accused with an intellectual disability or cognitive impairment. Evidence received by the Committee suggested the provision of court support services could provide a mechanism for overcoming barriers that a person with an intellectual disability or cognitive impairment may experience when interacting with the courts,<sup>837</sup> and may therefore minimise the potential for findings of unfitness to be made against them.

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was insufficient evidence against the two accused and that it would not be in the public interest for the case to proceed.

<sup>834</sup> Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 2.

<sup>835</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 11(1).

<sup>836</sup> *Criminal Law Consolidation Act 1935* (SA), section 269H.

<sup>837</sup> See for example Angela Alexander, *Submission no. 8*, 6 September 2011, p. 2; Matthew Andison, Senior Solicitor, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 30 April 2012, p. 6; John Chesterman, Manager, Policy and



Although the courts have interpreted the common law test for determining fitness to stand trial widely to incorporate an examination into an accused's ability to make rational decisions, the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* is unclear as to whether juries determining fitness have a similar flexibility. The Committee believes that, in addition to the matters it urges the Government to consider in Recommendation 30, provisions of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* should be examined with a view to articulating the need to determine the ability of an accused person to make rational decisions when considering fitness to stand trial.

Recommendation 29: That the Victorian Government consider amending the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to require the court to determine, when considering fitness to stand trial:

- 1) the ability of the accused to understand, or respond rationally to, the charge or allegations on which the charge is based; or
- 2) the ability of the accused to exercise, or to give rational instructions about the exercise of, procedural rights.

The Committee anticipates that the VLRC will examine in detail whether alternative and additional considerations for determining a defendant's fitness to stand trial should be incorporated into the Act.

### 7.1.1.3 Fitness proceedings in the Magistrates' and Children's Court

The Act applies to trials for indictable offences in the Supreme or County Courts and can also apply to proceedings, such as committal hearings, connected with those offences.<sup>838</sup>

While the defence of mental impairment may be raised in the Magistrates' Court, the Magistrates' Court cannot investigate an accused's fitness to stand trial.<sup>839</sup> If an accused's fitness is questioned during a committal hearing, the accused will not merely be discharged. Instead the Magistrates' Court will determine whether to commit the accused to trial and the trial judge of the Supreme or County Courts will investigate fitness.<sup>840</sup> However, for summary proceedings where evidence exists that an accused is unfit to stand trial the Magistrates' Court has no power but to discontinue the case. This results in an accused being released into the community without any court order being imposed, despite the existence of

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Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 4; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 4; Dianne Hadden, *Submission no. 58*, 10 November 2011, p. 5; Loddon Campaspe Community Legal Centre, *Supplementary evidence*, 28 May 2012, p. 5; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 2; Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, pp. 9-10; Regional Information and Advocacy Council, *Submission no. 51*, 2 February 2011, p. 2; Villamanta Disability Rights Legal Service Inc., *People who have an intellectual disability and the criminal justice system*, Villamanta Disability Rights Legal Service Inc., Melbourne, 2012, p. 28; Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, p. 30.

<sup>838</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 4.

<sup>839</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 5.

<sup>840</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 8(1).

evidence that may suggest the accused poses a threat to the community.<sup>841</sup> The Act does not apply to matters within the jurisdiction of the Children's Court.

The Committee heard concerns about the consequences of the Magistrates' and the Children's Courts not having jurisdiction to investigate an accused's fitness to stand trial.<sup>842</sup>

The Office of Public Prosecutions (OPP) suggested that it is an inefficient use of the County Court's resources to commit a person to trial where evidence existed in the Magistrates' Court questioning their fitness.<sup>843</sup> The OPP further considered that denying the Children's Court the opportunity to examine fitness is contrary to one of the principles of the *Children, Youth and Families Act 2005* (Vic), which requires that where possible children should be dealt with within the jurisdiction of the Children's Court, which adopts special procedures in acknowledgement of the vulnerabilities of children in court to minimise the formality of court proceedings.<sup>844</sup>

In the case of summary offences in the Magistrates' Court, the OPP suggested that in the interests of preventing further offending, there may be instances where it would be inappropriate for the Court to simply discontinue proceedings against the accused.<sup>845</sup> However, because of the way the Act is currently framed, the Court has no option but to do that.

For minor offences this position may be justified. But, as outlined by the VLRC into its review of *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, it may be inappropriate for a Magistrates' Court to discharge an accused "... if the person is in need of care and is acting violently or dangerously, and may do so again in the future if he or she does not receive appropriate care ..."<sup>846</sup> However, because the Magistrates' Court does not have the power to make an order against an accused person in these circumstances, discontinuance of proceedings may compound the offending behaviour of some accused people, and

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<sup>841</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 4.

<sup>842</sup> See for example Matthew Andison, Senior Solicitor, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 30 April 2012, p. 3; Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 35; Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, pp. 3-4; Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 36; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 17-18.

<sup>843</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 3. See also Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 36.

<sup>844</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 3. See also Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 9; Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 35.

<sup>845</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 3.

<sup>846</sup> Victorian Law Reform Commission, *People with intellectual disabilities at risk: A legal framework for compulsory care*, VLRC, Melbourne, Final report, 2003, p. 123.

ultimately lead to more serious outcomes for the offender and the community at large.<sup>847</sup>

Victoria Legal Aid (VLA) expressed concern that the Magistrates' Court lacked powers to make orders for summary offences. VLA stated that, due to the Act's wording, prosecutors have objected to a hearing proceeding summarily or have arranged for additional equivalent indictable common law charges to be laid, in order to avoid the person being discharged.<sup>848</sup> VLA suggested that current arrangements are time-consuming and resource-intensive, and provided the following Case Study to illustrate their argument.

*Case Study 25: Sam's story.*<sup>849</sup>

*"Sam' is 37 years old and has a moderate intellectual disability with an IQ in the low 40s. Despite his disability, he is able to take short trips on public transport by himself, along familiar routes. However, if people made fun of him or he became frustrated, he lacked communication and other skills to handle the situation and would resort to pulling down his pants and exposing his genitals to make other people leave him alone.*

*On a couple of occasions, he was charged with wilful and indecent exposure (a statutory, summary offence). The charges were dismissed in the Magistrates' Court on the basis of his mental impairment.*

*On the next occasion the behaviour occurred, rather than charging him with the same statutory offence, the police charged him with an archaic common law offence of 'exposing his naked person', which was not triable summarily. The police admitted this was done because they did not want the Magistrates' Court to simply dismiss the matter. They wanted a supervision order imposed which could only be made in the County Court. As a result, the matter proceeded in the County Court, where Sam was found unfit to be tried and was ultimately placed on a non-custodial supervision order (NCSO), under which services were provided to him by Disability Services.*

*The lengthy County Court process was extremely confusing and distressing to Sam, who was completely unable to follow what was happening and feared being locked up every time he attended court. VLA provided an additional lawyer to sit with him and reassure him throughout the proceedings."*

<sup>847</sup> Alexander Zammit, *Disability and the courts: An analysis of problem solving courts and existing dispositional options: The search for improved methods of processing defendants with a mental impairment through the criminal courts*, OPA, Melbourne, 2004, p. 42.

<sup>848</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 17-18. See also Matthew Andison, Senior Solicitor, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 30 April 2012, pp. 3-4.

<sup>849</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 17-18. See also Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, pp. 35-36.

The Committee notes that in its review of compulsory care the VLRC did not recommend that the jurisdiction of the Magistrates' Court be extended to consider investigations into fitness to stand trial. The Commission expressed concern that this approach could result in supervision orders being made for people who had been charged with very minor offences, and that human services resources could be directed away from managing offenders with higher support needs.<sup>850</sup>

However, as noted above, during the course of this Inquiry the Committee heard evidence calling for the jurisdiction of the Magistrates' Court to be extended.<sup>851</sup> As discussed in Chapter Two, the types of crimes committed by a person with an intellectual disability or cognitive impairment tend to be minor offences ordinarily determined in the Magistrates' Court. However, because of the current provisions in the Act these matters are elevated above the Magistrates' Court. Mr Matthew Andison, a Senior Solicitor with the OPP, described the complexities that arise when a matter is ordinarily dealt with in the Magistrates' Court but where a question about the accused's fitness has been raised:

Our options are, in circumstances where a person is unfit to stand trial and the case would normally be dealt with in the Magistrates' Court or the Children's Court, to run two jury trials or to withdraw the charges. It is an entirely unsatisfactory state of affairs in our view. ... we would say that the process to which they are subject is a more formal one – two jury trials and a County Court judge – and it is a more drawn-out process. It is arguably tantamount to discriminating against the person on the basis of their intellectual disability.<sup>852</sup>

In further support of extending the jurisdiction of certain courts, the Committee's attention was drawn to a statement by Justice Lasry in *CL v Tim Lee and Ors* who considered that the jurisdiction of the Children's Court should be extended to avoid the need for the defendant to stand trial.<sup>853</sup> The Committee also heard from Judge Paul Grant, President of the Children's Court, who said that the Children's Court has written to the Attorney-General asking that the matter of the Children's Court's jurisdiction to consider fitness to stand trial be examined.<sup>854</sup>

The Committee believes that costs associated with expanding the jurisdictions of both courts to deal with these matters should be further

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<sup>850</sup> Victorian Law Reform Commission, *People with intellectual disabilities at risk: A legal framework for compulsory care*, VLRC, Melbourne, Final report, 2003, pp. 123-124.

<sup>851</sup> See for example Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 35; Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 4; Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 36; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 18.

<sup>852</sup> Matthew Andison, Senior Solicitor, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 30 April 2012, p. 3.

<sup>853</sup> *CL v Tim Lee and Ors* [2010] VSC 517, [81], cited in Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 4.

<sup>854</sup> Paul Grant, President, Children's Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 31.

explored. In this context, the Committee notes evidence from the Magistrates' Court of Victoria, stating that:

... any increase in the court's jurisdiction will require proportionate and adequate funding to enable the court to implement the necessary changes. Historically, increases in the jurisdiction of the court's work has equated in practice to more demanding caseload volumes, increasing numbers of matters before the court, and further pressures on existing resources.<sup>855</sup>

The Committee believes it is appropriate that the Magistrates' and Children's Courts be empowered to investigate fitness to stand trial, as well as for those determinations to be made either by some or all of the judicial officers presiding in those courts, as described in Recommendation 28. It appears to the Committee that there are likely to be considerable administrative inefficiencies from requiring investigations into fitness to stand trial to be referred from the court in which they are raised to another court. This course of action is likely to extend the engagement of all participating parties with the court system longer than may be necessary.

Consequently, the Committee believes that current legislation should be reviewed to enable the Magistrates' and Children's Courts to consider fitness to stand trial.

**Recommendation 30:** That the Victorian Government consider amending the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to allow investigations into an accused's fitness to stand trial to be considered in the Magistrates' and Children's Courts.

The OPP highlighted a further difficulty associated with committal proceedings in the Magistrates' Court where fitness to stand trial has been raised. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* provides that where a question of fitness has been raised during a committal proceeding for an indictable offence, proceedings must be in accordance with the *Criminal Procedure Act 2009* (Vic).<sup>856</sup> The *Criminal Procedure Act 2009* sets out procedures that the court should adopt when committing a person to trial. Procedures include:

- asking whether the accused pleads guilty or not guilty to the offence; and
- informing the accused of the provisions relating to alibis and the cross-examination of victims of sexual offences.<sup>857</sup>

It is possible that some accused with an intellectual disability or cognitive impairment may not understand these directions. The *Criminal Procedure Act 2009* does not contain any guidance as to how and if committal proceedings should be modified where a fitness to stand trial question has been raised. This has resulted, according to the OPP, in Magistrates adopting different procedures when determining how to commit an

<sup>855</sup> Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 13.

<sup>856</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 8(1).

<sup>857</sup> *Criminal Procedure Act 2009* (Vic), section 144.

accused to trial where fitness has been questioned.<sup>858</sup> The OPP suggested the *Criminal Procedure Act 2009* be amended to provide for appropriate committal procedures for people whose fitness has been questioned.<sup>859</sup> The Committee believes that there should be a degree of uniformity in such committal proceedings.

**Recommendation 31:** That the Victorian Government consider amending the *Criminal Procedure Act 2009* (Vic) to ensure that uniform committal procedures are employed when fitness to stand trial is considered by the courts.

## 7.1.2 Special hearing

### 7.1.2.1 Purpose and procedure of a special hearing

When an accused is found to be unfit to stand trial, and likely to remain unfit for a period of 12 months, the court must conduct a special hearing to determine his or her criminal responsibility.<sup>860</sup>

During indictable proceedings, if both defence and prosecution counsel agree that evidence supports the proposition that the accused was suffering from a mental impairment, a jury will not be called. Instead the court will, if satisfied by the evidence presented, record that the accused is not guilty on the grounds of mental impairment.<sup>861</sup> If the court is not satisfied then it will order the accused to be tried before a jury.<sup>862</sup>

At a special hearing the accused is presumed to have pleaded not guilty to the offence and is allowed to raise defences available at an ordinary criminal trial.<sup>863</sup> Ordinary rules of evidence apply and the accused's legal representative is allowed to exercise the accused's right to challenge jurors.<sup>864</sup>

A special hearing is held before a jury. Before the special hearing the judge must explain to the jury:

- a) that the defendant is unfit to be tried in accordance with the usual procedures of a criminal trial; and
- b) the meaning of being unfit to stand trial; and
- c) the purpose of the special hearing; and
- d) the findings that are available; and

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<sup>858</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 5.

<sup>859</sup> Matthew Andison, Senior Solicitor, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 30 April 2012, p. 5.

<sup>860</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 15.

<sup>861</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 21(4)(a).

<sup>862</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 21(4)(b).

<sup>863</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), sections 16(2)(a), 16(2)(c).

<sup>864</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), sections 16(2)(b), 16(2)(d).



- e) the standard of proof required for those findings.<sup>865</sup>

Special hearing procedure resembles standard criminal trial procedure for determining the accused's guilt.<sup>866</sup> Where the accused person has been found not guilty of the offence because of mental impairment, or guilty of the offence, the court is empowered to make one of a number of orders.<sup>867</sup>

### 7.1.2.2 Origin of the special hearing procedure

Prior to the introduction of the special hearing, the *Crimes Act 1958* (Vic) provided that defendants found unfit to plead and not guilty of the offence on the grounds of mental impairment should be detained indefinitely until the Governor (on the advice of the Adult Parole Board) determined that they be released. The practical effect of this was that people found not guilty on the grounds of mental impairment could be detained for periods that far exceeded the need to protect society.<sup>868</sup> Consideration was not given to whether the accused had committed the offence he or she was charged with. For people with an intellectual disability or cognitive impairment this system of detention placed them at a significant disadvantage, because as a consequence of their disability they would be unlikely to become fit to enter a plea to their charge.

Where a person was detained at the Governor's pleasure, they remained in custody in either a psychiatric institute as a security patient or security resident (if they had an intellectual disability), or they could be placed in mainstream correctional facilities.

In 1995 the Community Development Committee (CDC) of the Parliament of Victoria conducted a *Review of legislation under which persons are detained at the Governor's pleasure in Victoria*.<sup>869</sup> The CDC made extensive recommendations for reforms to the detention of people found not guilty or unable to plead by reason of mental impairment. These recommendations culminated in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

The CDC recommended that a trial procedure be established to determine the criminal responsibility of a person found unfit to stand trial. At that time the CDC found that the process for dealing with people found unfit to stand trial was neither procedurally fair nor socially just, and consequently recommended that a special hearing procedure be developed.<sup>870</sup> The Committee was also of the view that, given that people with an intellectual disability were unlikely to become fit to stand trial, a process was required

<sup>865</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 16(3).

<sup>866</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 16(1).

<sup>867</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 23.

<sup>868</sup> C R Williams, 'Development and change in insanity and related defences', *Melbourne University Law Review*, vol. 24, pp. 711-736, 2000, p. 734.

<sup>869</sup> Community Development Committee, *Review of legislation under which persons are detained at the Governor's pleasure*, Parliament of Victoria, Melbourne, 1995.

<sup>870</sup> Community Development Committee, *Review of legislation under which persons are detained at the Governor's pleasure*, Parliament of Victoria, Melbourne, 1995, p. 120.



to test the evidence against the accused.<sup>871</sup> Establishing such a system would also be consistent with the principle that the prosecution bears the onus for establishing its case.<sup>872</sup>

The special hearing procedure in Victoria has its origin from the *Crimes Act 1914* (Cth), which provides that where the court determines that an accused is unfit to stand trial the court must determine whether prima facie the accused committed the offence charged.<sup>873</sup> A prima facie case is one where there is evidence that would (except for the circumstance that the accused is unfit to be tried) provide sufficient grounds to put the accused on trial.

The Commonwealth legislation provides that where a prima facie case against the accused is not established the charges are dismissed, or the accused is released if they had been detained pending the court's determination.<sup>874</sup> The court also has the option to find that although a prima facie case against the accused exists, the existence of mitigating factors means that it would be inappropriate for the court to inflict punishment, and instead would dismiss the charges or release the accused from custody. Relevant considerations under this legislation pertain to the:

- character, antecedents, age, health or mental condition of the person;
- extent (if any) to which the offence committed was trivial; or
- extent (if any) to which the offence committed was due to extenuating circumstances.<sup>875</sup>

### 7.1.2.3 Findings available at a special hearing

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* provides that the following findings are available to the jury at a special hearing:

- not guilty of the offence charged;
- not guilty of the offence because of mental impairment; or
- the accused committed the offence charged or an offence available as an alternative.

The effect of a not guilty finding, whether or not on the grounds of mental impairment, is the same as a finding of not guilty in an ordinary criminal trial. A finding of guilt, however, constitutes a qualified finding of guilt.<sup>876</sup>

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<sup>871</sup> Community Development Committee, *Review of legislation under which persons are detained at the Governor's pleasure*, Parliament of Victoria, Melbourne, 1995, p. 126.

<sup>872</sup> Community Development Committee, *Review of legislation under which persons are detained at the Governor's pleasure*, Parliament of Victoria, Melbourne, 1995, p. 126.

<sup>873</sup> *Crimes Act 1914* (Cth), section 20B(3).

<sup>874</sup> *Crimes Act 1914* (Cth), section 20BA(1).

<sup>875</sup> *Crimes Act 1914* (Cth), section 20BA(2).

<sup>876</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 18(3).

Following a finding of not guilty because of mental impairment, the judge must declare either that the accused be liable to supervision or order that person's unconditional release.<sup>877</sup>

#### **7.1.2.4 Special hearings and people with an intellectual disability or cognitive impairment**

VLA expressed the following concerns about the delays in court proceedings and the consequences for an accused with an intellectual disability:

There is almost always a significant delay between an incident with legal consequences occurring and the court hearing to determine its resolution (whether it is a criminal or civil matter). Such delays may even be a number of years. The passage of time following the critical incident makes it difficult, particularly for a person with an intellectual disability, to remember the incident, provide their lawyer with meaningful instructions, give evidence and, in many cases, actually link the incident in question to the court proceedings.<sup>878</sup>

Given the effect that delay may have on the ability of a person with an intellectual disability or cognitive impairment to participate in court hearings, the Committee explored whether deferring the fitness investigation could resolve court determinations more expeditiously.

In the United Kingdom two procedures may be adopted by the courts where a question of fitness has been raised, which may minimise the negative experiences that people with an intellectual disability or cognitive impairment may have when interacting with the courts, and which are compounded when a special hearing or investigation into fitness is required.

In the first instance the *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* (UK) provides that where a question of fitness has been successfully raised, then the trial shall not proceed further. Instead the Act provides that a jury shall determine:

- a) on the evidence (if any) already given in the trial; and
- b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence

whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence.<sup>879</sup>

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<sup>877</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 18(4).

<sup>878</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 14.

<sup>879</sup> *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* (UK), section 4A(2).

There is no investigation into whether the accused intended to commit the offence. If the jury is not satisfied that the accused committed the relevant offence then the accused will be acquitted.<sup>880</sup>

The second procedure provides that:

If, having regard to the nature of the supposed disability, the court are of opinion that it is expedient to do so and in the interests of the accused, they may postpone consideration of the question of fitness to be tried until any time up to the opening of the case for the defence.<sup>881</sup>

If the accused is acquitted at this stage then the fitness question will not be investigated.<sup>882</sup> The question of fitness will only be examined if the accused is not acquitted. The court then proceeds to determine the accused's fitness and criminal responsibility.

The Committee believes there is significant merit in considering the alternative procedures adopted in the United Kingdom for considering fitness to stand trial. There are likely to be circumstances in which it will be in the interests of an accused, particularly where he or she has an intellectual disability or cognitive impairment, for the courts to defer the fitness investigation and proceed to examine the accused's criminal responsibility. Postponing investigations into fitness in this way could minimise the complexity of and time involved in convening a special hearing. This process may provide an expeditious method for working through cases involving people with an intellectual disability or cognitive impairment where both the question of fitness and the defence of mental impairment are raised.

Recommendation 32: That the Victorian Government investigate procedures adopted in the United Kingdom for determining fitness to stand trial, with a view to examining whether these procedures could provide for opportunities to resolve determinations of fitness to stand trial in Victoria more expeditiously.

## 7.1.3 Defence of mental impairment

### 7.1.3.1 Origin of the defence

A fundamental principle of the justice system is that two elements of a criminal offence – *actus reus* (the physical elements of the offence) and *mens rea* (the state of mind of the accused) – have to be proven in order for a person to be found guilty of an offence. However, the law recognises, with the defence of mental impairment, that people suffering from a mental impairment can sometimes lack the capacity to form intent, and this may qualify their criminal responsibility.

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<sup>880</sup> *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* (UK), section 4A(4).

<sup>881</sup> *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* (UK), section 4(2).

<sup>882</sup> *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* (UK), section 4(3).

The defence of mental impairment can be raised during an ordinary criminal trial or during a special hearing where the accused is found unfit to stand trial.<sup>883</sup>

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* provides that the defence of mental impairment is established if the effect of the impairment on the accused is such that:

- he or she did not know the nature and quality of the conduct; or
- he or she did not know that the conduct was wrong.<sup>884</sup>

This statutory defence replicates the common law insanity defence as formulated in the case of Daniel M'Naghten in 1843.<sup>885</sup> In that case Chief Justice Tindal articulated the following principles:

... jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.<sup>886</sup>

There are two rationales for the defence. The first is founded on the premise that offenders with impaired mental functioning are not capable of forming malicious intent and therefore are not blameworthy. The second is based on the need to protect the community by detaining a person who, because of their mental impairment, poses a threat to the community and themselves. For example, Lord Denning in *Bratty v Attorney-General* defined this second rationale of the defence as:

... any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.<sup>887</sup>

Under the Act an accused person is presumed not to have been suffering from a mental impairment, unless the contrary can be proven.<sup>888</sup> If the

<sup>883</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 22(1).

<sup>884</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 20(1).

<sup>885</sup> *M'Naghten* (1843) 8 ER 718, quoted in *R v S* [1979] 2 NSWLR 1: In this case Mr M'Naghten, who was mentally ill, believed that the Tory party led by the then Prime Minister of England Sir Robert Peel was persecuting him. Mr M'Naghten tried to kill Sir Robert Peel but accidentally killed the then Prime Minister's secretary Edward Drummond instead. M'Naghten was found not guilty by reason of insanity and there was a public outcry to the acquittal. The House of Lords put certain questions to the judges about the scope of their acquittal. It was from these responses that the definitive statement of the insanity defence was established.

<sup>886</sup> *M'Naghten* (1843) 8 ER 718, 722.

<sup>887</sup> *Bratty v Attorney-General* [1963] AC 386, 410, quoted in *R v Falconer* (1990) 96 ALR 545.

<sup>888</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 21(1).

defence of mental impairment has not been raised by the defence it is open to the prosecution, with leave of the trial judge, to raise it.<sup>889</sup> It is also possible for the trial judge to raise the question of mental impairment if there is evidence to suggest this might be relevant.<sup>890</sup>

If a person can show they were suffering from a mental impairment at the time of the offence, it is most likely that they would be considered unfit to stand trial. Therefore the defence is most commonly raised during a special hearing rather than in ordinary criminal trials.

The *M’Naghten* formulation of the insanity defence has been defined by the courts to include major mental illnesses or psychoses such as schizophrenia or severe mood disorders as well as physical diseases such as epilepsy and cerebral tumours.<sup>891</sup> The defence has also been used in cases where offenders have an intellectual disability.<sup>892</sup> Although intellectual disability differs from mental illness, as it is not an illness itself, it has been suggested that as intellectual disability was regarded medically as a form of insanity when the defence was formulated, it was intended to be included within the legal definition. The difficulty in applying the defence to people with an intellectual disability or cognitive impairment is that they may not be able to give an account of their mental state at the time of the offence, and this may impede their ability to prove they did not know the nature and quality of the wrongfulness of the act.

### 7.1.3.2 The meaning of ‘mental impairment’ within the Act

In its review of people held at the Governor’s pleasure the CDC was mindful of defining ‘mental impairment’ restrictively, but provided some parameters as to what should be considered a mental impairment. The CDC concluded that ‘mental impairment’ should be defined to include “mental illness, intellectual disability, acquired brain injury (including senility) and severe personality disorders”.<sup>893</sup> Despite this recommendation, the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* does not define mental impairment.

In evidence presented to the current Inquiry, the OPP expressed concern that the courts have interpreted ‘mental impairment’ in accordance with the common law defence of insanity and the notion of a “disease of the mind”.<sup>894</sup> The OPP argued that because of this, only people suffering from a mental illness are able to rely on the defence. Mr Anderson outlined the dilemma posed by the lack of clarity in the Act as to the meaning of ‘mental impairment’:

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<sup>889</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 22(1).

<sup>890</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 22(2).

<sup>891</sup> See for example *R v Kemp* [1957] 1 QB 399; *Bratty v Attorney-General* [1963] AC 386; *R v Falconer* (1990) 96 ALR 545.

<sup>892</sup> See for example *Walton v R* [1978] AC 788.

<sup>893</sup> Community Development Committee, *Review of legislation under which persons are detained at the Governor’s pleasure*, Parliament of Victoria, Melbourne, 1995, pp. 171-172.

<sup>894</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 2.

... if a mental impairment does not include an intellectual disability, there is a risk that intellectually disabled offenders will simply be acquitted without any supervision order being imposed because the prosecution cannot prove mens rea.

On the other hand, there is a risk that intellectually disabled offenders who did not understand that their conduct was wrong will be found to have committed offences because they cannot establish a defence of mental impairment.<sup>895</sup>

Mr Andison went on to say that in the opinion of the OPP, where a person does not understand that the nature of their conduct was wrong due to an intellectual disability, they should be found not guilty because of mental impairment and an appropriate court order should be made.<sup>896</sup> The OPP recommended that the Act be amended to clarify the meaning of 'mental impairment' – either by adopting a narrow definition confined to mental illness, or a definition that encompasses mental illness, intellectual disability, ABIs and severe personality disorders.<sup>897</sup>

The Committee recognises that there is some ambiguity as to the meaning of 'mental impairment' contained in the Act, and considers there would be merit in defining 'mental impairment' to remove this ambiguity. The Committee notes that defining 'mental impairment' would be consistent with most other Australian jurisdictions and some international jurisdictions, where legislation expressly recognises intellectual disability and other cognitive impairments such as ABIs and senility as conditions that may qualify a defendant for the defence of mental impairment.<sup>898</sup> Consequently, the Committee recommends that the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* be amended to better define the range of conditions that may be considered 'mental impairment'.

Recommendation 33: That the Victorian Government consider introducing legislation to provide a definition of 'mental impairment' in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to encompass mental illness, intellectual disability, acquired brain injuries and severe personality disorders, while maintaining criteria for determining fitness to stand trial described in section 6 of that Act and Recommendation 29 above.

### 7.1.3.3 Powers of the court following a finding of the defence

Historically a defendant found not guilty due to mental impairment was detained indefinitely. This treatment was ordered on the presumption that it

<sup>895</sup> Matthew Andison, Senior Solicitor, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 30 April 2012, p. 5.

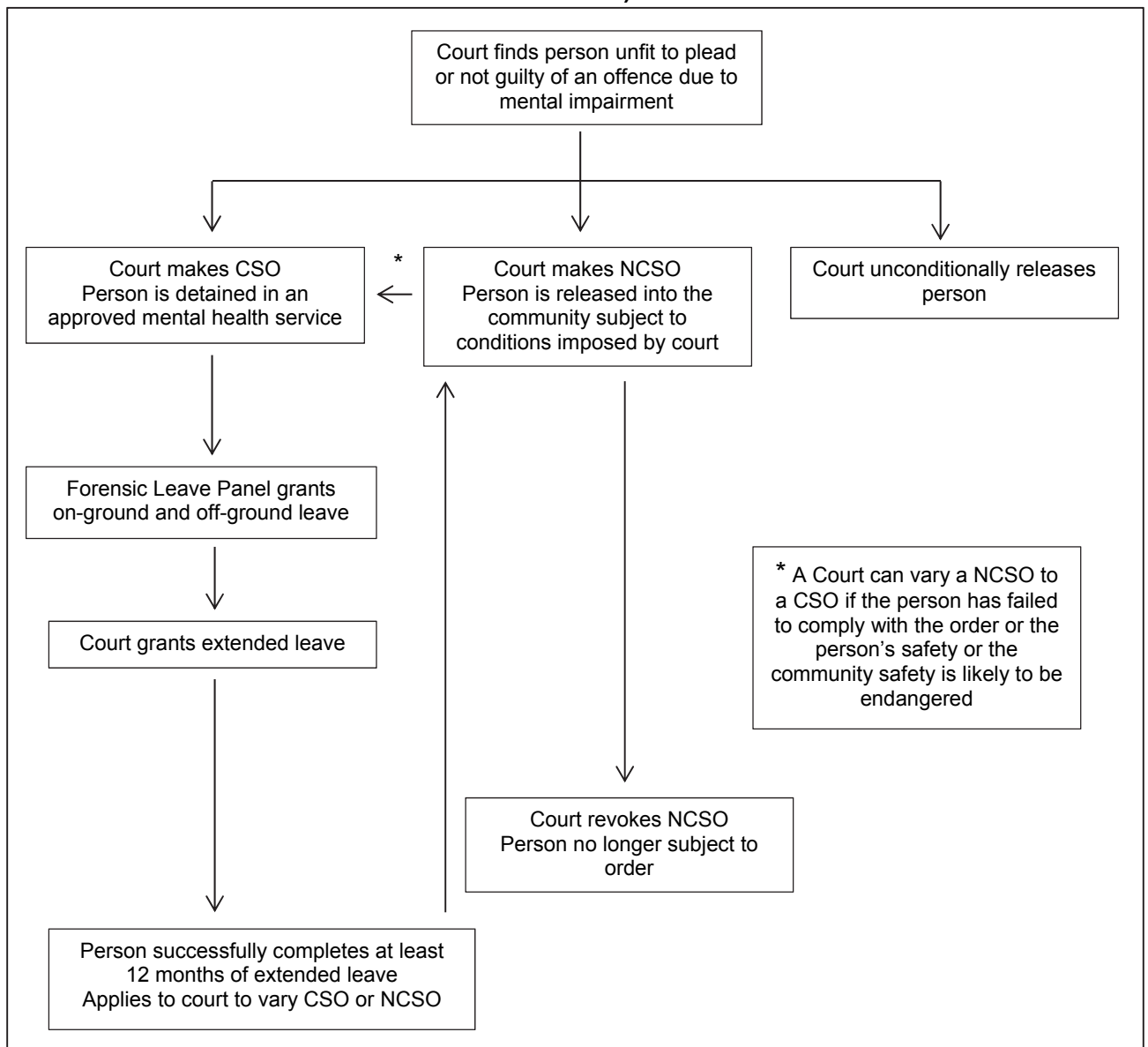
<sup>896</sup> Matthew Andison, Senior Solicitor, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 30 April 2012, p. 5.

<sup>897</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 3.

<sup>898</sup> See for example *Criminal Code Compilation Act 1913* (WA), section 1; *Criminal Law Consolidation Act 1935* (SA), section 269A; *Crimes Act 1961* (NZ), section 23(2); *Criminal Code Act 1983* (NT), section 43A; *Criminal Code RSC 1985* (Can), section 16(1); *Criminal Code Act 1995* (Cth), section 7.3(8); *Criminal Code 2002* (ACT), section 27(1).

was not possible to treat people with a mental impairment, and that as they were considered dangerous at the time of their trial it was likely they would remain so. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* recognises that it was unjust to allow this circumstance to continue and gives the court a number of different powers following a finding of not guilty due to mental impairment. Figure 14 illustrates the progression under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* following a finding that an accused is unfit to stand trial and not guilty because of mental impairment.

**Figure 14: Progression under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997.<sup>899</sup>**



<sup>899</sup> Department of Human Services, *Non-custodial supervision orders: Policy and procedures manual*, DHS, Melbourne, 2009, p. 10.



The court can either declare that the person is liable to supervision under the Act, or that they be released unconditionally.<sup>900</sup> In deciding whether to make, review or revoke an order made under the Act the court must have regard to:

- the nature of the accused's mental impairment, other condition or disability;
- the relationship between the impairment, condition or disability and the offending conduct;
- whether the accused is or would be likely to endanger themselves or another person because of their mental impairment and the need to protect people from such danger;
- whether there are adequate resources for the treatment and support of the accused in the community; and
- any other matters the court considers relevant.<sup>901</sup>

The court cannot order that a defendant be released unconditionally or significantly alter their sentence of detention unless the court has:

- received a report from at least one medical practitioner or psychologist who has examined the accused's condition and the likely effect of the proposed order;
- ensured the accused's family members or victims of the offence have received reasonable notice of the hearing regarding the proposed sentence reduction; and
- considered any report of a family member or victim outlining the conduct of the accused and the impact of that conduct on the family member or victim.<sup>902</sup>

A supervision order made by the court can be either:

- a custodial supervision order (CSO) committing the person into custody in either an 'appropriate place' or prison.<sup>903</sup> A person cannot be committed into custody in an appropriate place unless the person is assessed as having an intellectual disability as defined under the *Disability Act 2006* (Vic) or a mental illness as defined under the *Mental Health Act 1986* (Vic);<sup>904</sup> or

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<sup>900</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 23.

<sup>901</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 40(1).

<sup>902</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 40(2).

<sup>903</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 6(2)(a).

<sup>904</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 3: The Act defines an 'appropriate place' as an approved mental health service or residential service. Where a person has been sentenced to a supervision order in an approved mental health service the *Mental Health Act 1986* (Vic) sets the framework for the care

- a non-custodial supervision order (NCSO) releasing the person from custody on conditions decided by the courts and specified in the order.<sup>905</sup>

If the court is considering a CSO for a person with an intellectual disability there is currently only one option available to the court. The Long Term Residential Program at Plenty Residential Services provides the only option for the placement of a person with an intellectual disability on a custodial supervision order. If no placement is available, placement at Thomas Embling Hospital – a forensic mental health hospital – may be appropriate.<sup>906</sup>

A supervision order is for an indefinite period, however the Act sets out nominal terms, after which time the court may review the order to either amend or revoke the order. Table 10 below sets out the nominal terms for detention under the Act.

**Table 10: Nominal terms for supervision orders.**<sup>907</sup>

Offence	Nominal term
Murder or treason	25 years
Serious offence (as defined by the <i>Sentencing Act 1991</i> (Vic): examples include armed robbery, serious assault, rape and incest)	A period equivalent to the maximum term of imprisonment for the offence
Any other statutory offence for which there is a statutory maximum term of imprisonment	A period equivalent to half the maximum term of imprisonment for the offence
Any other offence punishable by imprisonment for which there is no statutory maximum term	A period specified by the courts

The practical effects of these sentence terms will be discussed in detail in Chapter Nine.

## 7.2 Alternative and therapeutic models of justice

### 7.2.1 Rationale for and development of therapeutic models of justice

Traditional approaches to justice adopt adversarial and punitive measures, which are primarily focused on punishing and deterring offenders. This model of justice involves two parties conducting a legal matter in front of an impartial judge whose main role is to ensure legal rules are not broken and to determine the guilt or otherwise of the parties involved. A problem with these traditional models of justice is that they sometimes leave victims and

and treatment of the forensic patient. When sentenced to such an order the offender becomes a forensic patient under the *Mental Health Act 1986* (Vic).

<sup>905</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 26(2)(b).

<sup>906</sup> Department of Human Services, *Crimes (Mental Impairment and Unfitness to be Tried) Act practice guidelines 2007*, DHS, Melbourne, 2007, p. 31.

<sup>907</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 28(1).

defendants alienated from the court process, as they may not understand many of the procedures and rules that operate in court. These difficulties are exacerbated for people with an intellectual disability or cognitive impairment and can leave them feeling even more alienated from the process.

Therapeutic models of justice have been developed to provide a more positive way of addressing offending behaviour and encourage participation in the process.

Therapeutic jurisprudence originated in the United States from the work of academics David Wexler and Bruce Winick. Wexler and Winick describe the role of therapeutic jurisprudence in the legal system as follows:

Therapeutic jurisprudence focuses our attention on the traditionally under-appreciated area of the law's considerable impact on emotional life and psychological well-being. Its essential premise is a simple one: that the law is a social force that can produce therapeutic or antitherapeutic consequences.<sup>908</sup>

Problem-solving models of justice involve examining the offending behaviour. The courts then deliver sentences that link offenders to community services and programs to address the underlying causes of offending. Problem-solving models of justice therefore help the offender to “develop skills that will enable them to act differently in future situations where they may be at risk of committing a crime”.<sup>909</sup> A report published by the Office of the Public Advocate (OPA) into *Disability and the Courts* observed that the focus of therapeutic jurisprudence is on the causes of offending, rather than the actual offence committed. By shifting the focus in this way the courts can order treatment that attempts to help the offender to manage negative offending behaviour.<sup>910</sup> These kinds of problem-solving courts are:

... strongly based on the notion of early identification and intervention.  
... prompt intervention will ensure that the offender receives the treatment and/or support services he or she requires in contrast to the situation where he or she will spend a lengthy period in custody whilst awaiting trial. Early assessment will ensure offenders have prompt access to service provisions.<sup>911</sup>

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<sup>908</sup> Bruce Winick and David Wexler, *Judging in a therapeutic key: Therapeutic jurisprudence and the court*, Carolina Academic Press, Durham, North Carolina, 2003, p. 7, cited in Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 3.

<sup>909</sup> Intellectual Disability Rights Service, *Enabling Justice: A report on problems and solutions in relation to diversion of alleged offenders with intellectual disabilities from the New South Wales court system*, IDRS, Sydney, 2008, pp. 79-80.

<sup>910</sup> Alexander Zammit, *Disability and the courts: An analysis of problem solving courts and existing dispositional options: The search for improved methods of processing defendants with a mental impairment through the criminal courts*, OPA, Melbourne, 2004, pp. 12-13.

<sup>911</sup> Alexander Zammit, *Disability and the courts: An analysis of problem solving courts and existing dispositional options: The search for improved methods of processing*

By addressing underlying causes of offending it is suggested that positive outcomes will be attained both for the victim of the offence and society in general, as these programs will aim to rehabilitate and address recidivism.

Problem-solving approaches to justice aim to stop the 'revolving door' where some offenders repeatedly move in and out of the justice system. One of the key features of problem-solving approaches to justice is the role of the judicial officer. Under traditional adversarial models of justice, the Magistrate or Judge will impose an order against the accused and have no further involvement in the accused's case management. Corrections Victoria then bears responsibility for enforcing the order.

In problem-solving courts the judicial officer has a role in monitoring and reviewing the offender's compliance with the order. Judicial officers in problem-solving courts actively engage offenders in the process, where in traditional court settings offenders would not communicate with the judge. Encouraging participation in the court process aims to improve the offender's understanding of the process.<sup>912</sup> In its report on *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, the Australian Human Rights Commission noted that:

The process of sitting around a table and discussing the offence and options is also more likely to achieve engagement with Indigenous young people with cognitive disabilities ... Unlike other court proceedings, the less formal nature means that there are opportunities to check whether the young person actually understands what is going on and subsequently any outcomes or orders which they need to abide by.<sup>913</sup>

Dr John Chesterman, the Policy and Education Manager at the OPA, and Mr Stan Pappos, the Housing Services Manager at the Australian Community Support Organisation (ACSO), told the Committee that increased judicial interactions with offenders can have positive effects. Dr Chesterman said:

... it's not just a matter of the matter being heard against them and some punishment being inflicted if they're found guilty but matters being adjourned, for instance, while the person gets access to services, then being heard so the person has had an opportunity to get appropriate services and that may influence the Magistrate in determining an outcome for that matter but it's very much a therapeutic jurisprudence model.<sup>914</sup>

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*defendants with a mental impairment through the criminal courts*, OPA, Melbourne, 2004, p. 15 (citations omitted).

<sup>912</sup> See for example Law Reform Commission of Western Australia, *Court intervention programs*, LRCWA, Perth, Consultation paper, 2008, pp. 26-34; Alexander Zammit, *Disability and the courts: An analysis of problem solving courts and existing dispositional options: The search for improved methods of processing defendants with a mental impairment through the criminal courts*, OPA, Melbourne, 2004, p. 552.

<sup>913</sup> Australian Human Rights Commission, *Preventing crime and promoting rights for Indigenous young people with cognitive disabilities and mental health issues*, AHRC, Sydney, 2008, p. 80.

<sup>914</sup> John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 26. See also John Lesser,

In 2008 the Victorian Government, in the *Attorney-General's Justice Statement*, expressed a commitment to adopting a 'problem-solving approach' to the justice system, stating that:

The Government is committed to addressing the underlying links between disadvantage and offending. The Government will support strategies that can stop, or at least slow, the revolving door that circulates people with chaotic lifestyles in and out of the criminal justice system.<sup>915</sup>

The statement outlined key characteristics of problem-solving approaches to justice, such as:

- a focus on the causes of offending to improve outcomes for offenders, victims and the community;
- the use of judicial authority to foster changed behaviour by offenders;
- a collaborative approach between the court, prosecution, support services and the defendant to identify the most effective response and intervention; and
- a less adversarial dynamic to encourage participation in decision-making.<sup>916</sup>

These features have been adopted both in Victoria and in a number of other jurisdictions across Australia and internationally.<sup>917</sup> Initially this approach to justice was applied in the context of mental health laws, but it has since been incorporated into traditional models of justice for a variety of different issues, such as drug, mental impairment and Indigenous groups.

In Victoria problem-solving approaches to justice were first adopted with the Mental Health Court Liaison Service in 1994. The Service was developed as a response to the increased numbers of people presenting in the Melbourne Magistrates' Court with mental health issues.<sup>918</sup> Following this a range of programs have been developed. Examples include:

- the Assessment and Referral Court List (ARC List);
- the Criminal Justice Diversion Program;

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Magistrate, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, pp. 22-23; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 33.

<sup>915</sup> Department of Justice, *Attorney-General's Justice Statement 2 October 2008: The next chapter*, Department of Justice, Melbourne, 2008, p. 31.

<sup>916</sup> Department of Justice, *Attorney-General's Justice Statement 2 October 2008: The next chapter*, Department of Justice, Melbourne, 2008, p. 31.

<sup>917</sup> Note specialist court programs for offenders with a mental impairment across Australia include the South Australian Magistrates' Court Diversion Program; Queensland's Special Circumstances Court List; the Tasmanian Mental Health Diversion List and the Western Australian Intellectual Disability Diversion Program.

<sup>918</sup> Auditor General Victoria, *Problem solving approaches to justice*, VAGO, Melbourne, 2011, p. 3.

- the Drug Court;
- the Koori and Children's Koori Courts;
- the Court Integrated Services Program (CISP);
- the Enforcement Review Program (ERP);<sup>919</sup>
- the Court Referral and Evaluation of Drug Intervention and Treatment (CREDIT)/Bail Support program; and
- the Neighbourhood Justice Centre (NJC).

The remaining discussion will examine those problem-solving programs that are particularly relevant to people with an intellectual disability or cognitive impairment.

## 7.2.2 Assessment and Referral Court List

### 7.2.2.1 Overview

To address the disadvantages that people with an intellectual disability or cognitive impairment experience when interacting with and accessing the courts, the Department of Justice collaborated with the Magistrates' Court of Victoria to develop the ARC List. The ARC List was established under the *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010* (Vic) with the aim of:

- reducing the risk of harm being caused by an offender, by addressing causes that contributed to the offending;
- improving the offender's health and wellbeing, by facilitating access to appropriate treatments and supports;
- increasing public confidence in the criminal justice system by improving court processes;
- increasing options available to the courts in responding to an offender with a mental impairment, cognitive impairment or neurological condition; and
- reducing the numbers of offenders with a mental impairment or other similar condition from being imprisoned.<sup>920</sup>

The ARC List was established as a three year pilot program in April 2010. A final evaluation of the program is currently being completed. Appraisals have been made over the course of the pilot program, with

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<sup>919</sup> The ERP will be discussed in greater detail in Chapter Nine in relation to sentencing options and the use of the program to people with an intellectual disability or cognitive impairment.

<sup>920</sup> Magistrates' Court of Victoria, *Guide to court support and diversion services*, Melbourne, 2011, p. 2.

recommendations made to improve its operation.<sup>921</sup> An appraisal was undertaken by the ARC List Management Committee after the first six months of the program's operation and a second appraisal was also conducted by the Department of Justice's Court and Tribunals Unit and the Magistrates' Court.

The ARC List began accepting referrals from 31 March 2010 and the first hearing was held on 21 April 2010. The List sits twice a week. In 2011-12 the ARC List held 1144 hearings. During this period 154 referrals were received and 82 new participants were accepted – 52 of these completed the program.<sup>922</sup>

The ARC List is located at the Melbourne Magistrates' Court and works collaboratively with CISP staff. CISP staff provide a team based approach for the assessment and treatment of offenders. CISP staff work to link an accused with support services such as drug and alcohol treatment, crisis accommodation, and disability and mental health services. By working closely with CISP staff, Magistrates in the ARC List examine offenders' needs and develop programs to address those needs. As a consequence, it is envisaged that positive changes will be made to address offending behaviour which ultimately reduces the rate of reoffending.

### 7.2.2.2 Eligibility and referral for participation

To be eligible to participate in the ARC List the accused must have one of the following:

- a mental illness;
- an intellectual disability;
- an ABI;
- an autism spectrum disorder; or
- a neurological impairment, including dementia.<sup>923</sup>

In determining whether to accept an offender on the List, the Court must have regard to any clinical assessments in relation to the accused's impairment that have been made.<sup>924</sup>

In addition to the offender having one of those impairments, the offender must satisfy a number of other conditions in order to be eligible for referral to the ARC List. The eligibility criteria are that:

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<sup>921</sup> Magistrates' Court of Victoria, *Annual report 2010-11*, Magistrates' Court of Victoria, Melbourne, 2011, p. 71.

<sup>922</sup> Magistrates' Court of Victoria, *2011-12 annual report*, Magistrates' Court of Victoria, Melbourne, 2012, pp. 96-97.

<sup>923</sup> *Magistrates' Court Act 1989* (Vic), section 4T(2).

<sup>924</sup> *Magistrates' Court Act 1989* (Vic), section 4S(3A).



- the offender must be charged with a criminal offence that is not a violent, serious violent or serious violent sexual offence;
- the existence of the condition must result in the offender having a substantially reduced capacity in areas such as self-care, self-management, social interaction or communication;
- the offender would benefit from the processes adopted by the court; and
- the offender consents to the referral.<sup>925</sup>

Table 11 below illustrates the main conditions that participants in the program experienced.

**Table 11: ARC List diagnostic criteria for the period July 2011 to June 2012.**<sup>926</sup>

Diagnostic group	Number of participants
Mental illness	38
Acquired brain injury	15
Intellectual disability	8
Autism Spectrum Disorders	1
Other neurological conditions	1

The ARC List is intended for offenders who will plead guilty to the offence they have been charged with. If after referral offenders indicate that they will plead not guilty the matter is transferred to the mainstream court.<sup>927</sup> The requirement for an offender to plead guilty before referral to the List facilitates early intervention in the cycle of offending behaviour, which may prevent or minimise future involvement with the justice system.

### 7.2.2.3 Process once referred and case management

Upon referral, an initial assessment of the offender is conducted to determine whether the offender would benefit from the program. A comprehensive clinical assessment is also conducted by a clinical adviser from the ARC List. Following these assessments a draft Individual Support Plan (ISP) is developed. The ISP will address the underlying causes for the offending, with a view to referring the offender to services and supports that will minimise the likelihood of reoffending.

The draft ISP is referred to the ARC List Magistrate for approval. All hearings before the List Magistrate are conducted in an informal manner. Once the ISP has been approved, regular meetings will be conducted with

<sup>925</sup> *Magistrates' Court Act 1989* (Vic), sections 4S, 4T.

<sup>926</sup> *Magistrates' Court of Victoria, 2011-12 annual report*, Magistrates' Court of Victoria, Melbourne, 2012, p. 97.

<sup>927</sup> *Magistrates' Court Act 1989* (Vic), section 4U.

the offender, defence and prosecution counsel, and CISP staff to discuss the progress in completing the ISP.

On completing the plan a hearing will be conducted to determine the criminal responsibility for the charges. If the offender has completed the plan to the satisfaction of the ARC List Magistrate, the Magistrate will determine the guilt or otherwise of the accused. The List Magistrate will take into account the extent to which the offender participated in the ISP to determine the sentence to be imposed, if the offender is found guilty.<sup>928</sup>

The term of supervision nominated by the ARC List Magistrate depends on the offender's needs. It is anticipated that most offenders will be supervised for a six month period, although supervision and support will be available for up to a year if a longer period of support is required.<sup>929</sup>

The *Justice Legislation Amendment Act 2012 (Vic)* made a number of changes to the management of cases on the ARC List. Magistrates now have the discretion to create separate hearing lists or make alternative arrangements to deal with different types of impairments.<sup>930</sup> When introducing these changes into Parliament, Attorney-General Robert Clark MP said:

These amendments will give explicit recognition to the fact that offenders with different forms of impairment may have different needs and circumstances that need to be taken into account, and they will provide for Parliament and the community to be kept informed about the operation of [the ARC] List.<sup>931</sup>

VLA said that it has been actively involved in the development and operation of the List.<sup>932</sup> Ms Carrie O'Shea, a Senior Criminal Lawyer with VLA who manages the team working on the ARC List, told the Committee that working with clients eligible for the List is very resource-intensive and can involve spending up to an hour a day with some clients. She said that the support offered by her team includes talking to offenders about the issues and anxieties they might be experiencing.<sup>933</sup> She went on to comment on the collaborative operations of the ARC List:

We develop pretty close relationships, where there's consent to do so, with their case managers from DHS [Department of Human Services] and developing those relationships with the other people in the systems can be enormously beneficial. For example, when other issues arise, when other

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<sup>928</sup> *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010 (Vic)*, section 4Y(5).

<sup>929</sup> *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010 (Vic)*, section 4V.

<sup>930</sup> *Justice Legislation Amendment Act 2012 (Vic)*, section 7.

<sup>931</sup> Robert Clark MLA, Attorney-General, *Parliamentary debates*, Legislative Assembly, 1 March 2012, p. 664.

<sup>932</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 2.

<sup>933</sup> Carrie O'Shea, Senior Criminal Lawyer, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 40.

charges come in, there will be multiple sources that may be able to tell us if that occurs ...<sup>934</sup>

The Committee heard positive comments regarding the operation of the ARC List. For example, Mr Pappos from the ACSO said that:

... in our experience they're quite therapeutic, the fact that the Magistrate is involved, particularly in the ARC list, they're quite in-depth and involved in the whole process and, in most of our experiences, it has been quite productive and I think it's led to an enhanced understanding between the service sector and members of the judiciary around some of the pressures that exist, some of the things that are often tried with this particular group of people ...<sup>935</sup>

The following Case Study was provided to the Committee by the OPA to highlight the benefits that an accused with an intellectual disability may experience when referred to the List.

*Case Study 26: Peter's story.*<sup>936</sup>

*"Peter', a man with an intellectual disability, is charged with the commission of numerous petty crimes. Peter is usually very intimidated by police and authority figures and usually struggles to communicate in those settings. However, the informal setting and the plain clothed police prosecutor and judge on the ARC list enabled Peter to engage with the system."*

## 7.2.3 Court Integrated Services Program

### 7.2.3.1 Overview

CISP was established in 2006 as a joint initiative between the Magistrates' Court of Victoria and the Department of Justice. The program was developed to address the overrepresentation of defendants in the Magistrates' Court whose offences were directly related to a combination of disadvantages, such as mental and intellectual impairments, homelessness, poverty and isolation.

The program currently operates at the La Trobe Valley, Melbourne and Sunshine Magistrates' Courts. The program is managed by the Court Support and Diversion Services branch of the Magistrates' Court of Victoria and as at 2009 had 26 staff, which included a case manager.<sup>937</sup>

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<sup>934</sup> Carrie O'Shea, Senior Criminal Lawyer, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 40.

<sup>935</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 27.

<sup>936</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 32. See also Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 5; Glenn Rutter, Manager, Court Support and Diversion Services, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 21.

<sup>937</sup> Department of Justice, *Evaluation of the Court Integrated Services Program: Final report*, University of Melbourne, Melbourne, 2009, pp. 21-22.

The program provides short term assistance, before sentencing, for offenders with health and social needs to:

- work on the causes of the offending through individualised case management;
- provide priority access to treatment and community support services; and
- reduce the likelihood of reoffending.<sup>938</sup>

The benefits of CISP include:

- the program provides a means of assessing a defendant to identify the status of their illness, impairment or disadvantage and provide them with appropriate support; and
- assessment by the case manager identifies appropriate treatments and support available in the community.<sup>939</sup>

An evaluation of the program completed in 2009 found that 50.5 per cent of CISP participants incurred no further charges; therefore the program has positive effects on reducing reoffending.<sup>940</sup> The evaluation of the CISP program compared 200 court users who had completed the CISP program in 2007 against 200 court users who were sentenced in other Magistrates' Court venues across the state.<sup>941</sup> When compared against this group reoffending rates were around 50 per cent for CISP clients and 64 per cent for non-CISP clients.<sup>942</sup> Furthermore cost savings of approximately \$1.98 million could be obtained by preventing a defendant from being imprisoned and referring them for participation in the program.<sup>943</sup>

### 7.2.3.2 Eligibility and referral for participation

To be eligible to participate in the program:

- the offender must be charged with an offence;
- the offender's history of offending indicates a likelihood of reoffending;
- intervention is justified in order to reduce the risk of offending;

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<sup>938</sup> Magistrates' Court of Victoria, *Guide to court support and diversion services*, Melbourne, 2011, p. 5.

<sup>939</sup> Magistrates' Court of Victoria, *Guide to court support and diversion services*, Melbourne, 2011, p. 5.

<sup>940</sup> Department of Justice, *Court integrated service program: Tackling the causes of crime*, Department of Justice, Melbourne, 2010, p. 10.

<sup>941</sup> Department of Justice, *Evaluation of the Court Integrated Services Program: Final report*, University of Melbourne, Melbourne, 2009, p. 112.

<sup>942</sup> Department of Justice, *Court integrated service program: Tackling the causes of crime*, Department of Justice, Melbourne, 2010, p. 10.

<sup>943</sup> Department of Justice, *Court integrated service program: Tackling the causes of crime*, Department of Justice, Melbourne, 2010, p. 11.

- the offender has a physical or mental disability, drug or alcohol dependency or inadequate social, family or economic support that contributed to the severity of the offending;
- the offender may be on summons, bail or remand awaiting a bail hearing; and
- the offender must consent to being involved in the program.<sup>944</sup>

Participation in the program is accepted irrespective of whether a plea has been entered or whether the offender is intending to plead guilty or not to the offence charged.

The Magistrates' Court said that during 2009-10, 2.2 per cent of referrals to CISP were for persons who had an intellectual disability and 9 per cent were for people who presented with indicators of an intellectual disability.<sup>945</sup> The evaluation of CISP found that between 2006 and 2009, 87 out of a total 1246 clients with CISP had an intellectual disability, 67 of whom were receiving support from Disability Services.<sup>946</sup> The evaluation also found that 174 CISP clients had indicators of an ABI.<sup>947</sup>

A person may be referred to the program by police, legal representatives, Magistrates, court staff, support services, family, friends or the person him- or herself. The most common source of CISP referrals is the accused's legal representative, followed by magistrates.<sup>948</sup>

### 7.2.3.3 Process once referred and case management

A referral application is completed to determine whether a formal screening assessment is needed to determine eligibility. When assessing an offender, case managers are required to identify whether a defendant has any indicators of mental health problems, an ABI or an intellectual disability. In its submission to the Committee VLA said that CISP had recently introduced three specialist case managers for offenders with an intellectual disability, ABI or mental illness. These specialist case managers have expertise in these areas of disability and conduct risk factor screening assessments.<sup>949</sup>

During the assessment, case managers will determine the intensity of the intervention required, given the offender's level of risk of reoffending and individual needs. The assessment will examine criminal and legal history, social and economic support needs, drug and alcohol use, and physical and mental health. For low risk offenders a case management plan will be

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<sup>944</sup> Magistrates' Court of Victoria, *Guide to court support and diversion services*, Melbourne, 2011, p. 5.

<sup>945</sup> Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 11.

<sup>946</sup> Department of Justice, *Evaluation of the Court Integrated Services Program: Final report*, University of Melbourne, Melbourne, 2009, p. 53.

<sup>947</sup> Department of Justice, *Evaluation of the Court Integrated Services Program: Final report*, University of Melbourne, Melbourne, 2009, p. 53.

<sup>948</sup> Department of Justice, *Evaluation of the Court Integrated Services Program: Final report*, University of Melbourne, Melbourne, 2009, p. 28.

<sup>949</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 16.

developed referring the offender to appropriate community services. For high risk offenders the Magistrate will determine whether the offender should participate in the program.<sup>950</sup>

Following the assessment, a report is prepared outlining the offender's suitability for participation in the program. If an offender is assessed as suitable for participation in the program, the report will recommend which type of referral is needed.<sup>951</sup> There are three levels of participation:

- Community referral – where minimal support is provided to link the defendant to community service as required;
- Intermediate referral – where case management and monitoring is required; and
- Intensive referral – where intensive case management and support is required.<sup>952</sup>

Depending on the level of participation in the program the court can also order that the offender's progress be monitored by the courts.

An offender is placed on CISP for four months, following which the offender will go back to court to have their case determined. Reports about an offender's participation in the program are given to the court to inform its decision.<sup>953</sup>

CISP was endorsed in evidence received by the Committee as a positive initiative addressing offending behaviour in disadvantaged sectors of the community, such as people with an intellectual disability or cognitive impairment.<sup>954</sup> The following Case Studies illustrate the positive impact that participation in CISP can have on an accused.

*Case Study 27: Greg's story.*<sup>955</sup>

*“Greg’ was a thirty-six year old man who was charged with burglary and was referred to CISP in early 2010. Court records show that he had a history of drug possession, burglary and theft charges over the past eight years and had been jailed twice.*

<sup>950</sup> Law Reform Commission of Western Australia, *Court intervention programs*, LRCWA, Perth, Consultation paper, 2008, p. 162.

<sup>951</sup> Law Reform Commission of Western Australia, *Court intervention programs*, LRCWA, Perth, Consultation paper, 2008, p. 162.

<sup>952</sup> Department of Justice, *Court integrated service program: Tackling the causes of crime*, Department of Justice, Melbourne, 2010, p. 5.

<sup>953</sup> Law Reform Commission of Western Australia, *Court intervention programs*, LRCWA, Perth, Consultation paper, 2008, p. 163.

<sup>954</sup> See for example Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 31; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 16-17.

<sup>955</sup> Auditor General Victoria, *Problem solving approaches to justice*, VAGO, Melbourne, 2011, p. 6.



*Greg was assessed as having issues relating to illicit substance abuse. He also had housing and employment issues, and grief and mental health issues. He was referred to a number of services in the community to help him address these issues.*

*While on the program, Greg attended psychological counselling sessions, as well as regular drug and alcohol treatment appointments. He was also offered temporary housing that provided support, such as meals, during his time on CISP. Through his general practitioner's referral, Greg was diagnosed as having hearing problems for the first time in his life. CISP provided a 'part payment' of a hearing aid for Greg.*

*He was referred to educational training programs to assist him in obtaining a forklift licence.*

*CISP case managers had regular meetings with him to monitor his progress. In Greg's case his CISP team comprised a primary case manager with a background in the drug and alcohol field, a disability case manager, and housing support worker. The CISP case managers provided progress reports to the judiciary throughout Greg's time with the court and upon finalisation of his court matters, Greg was sentenced to a Community Based Order and displayed a high level of motivation to maintain his goals.*

*At his completion of CISP in December 2010, Greg reported he was no longer using illicit substances and would continue to attend psychological, and drug and alcohol counselling to assist him to achieve his goals, such as returning to study and gaining employment."*

*Case Study 28: David's story.<sup>956</sup>*

*"David' has a mild intellectual disability. He has a very lengthy criminal history, including an extended prison term in Western Australia in his early 20s. He was at significant risk of a further period of immediate imprisonment after he was charged with a large number of criminal offences.*

*David was referred to the CISP for case management and referrals to appropriate support services. He was supervised by the magistrate, who granted bail, and returned to court each month for a review of his progress. He initially missed a number of appointments, which had to be rescheduled, and struggled to make progress on the program. Finally, he engaged with a psychologist and began to attend regular appointments with her. Persistence with programs such as CISP is important as many people involved in the court system, especially those with intellectual disabilities, benefit greatly from ongoing support, supervision and case management.*

*David completed the program successfully and the magistrate was pleased with his progress. The magistrate is now more likely to impose a sentence other than immediate custody at the upcoming plea hearing."*

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<sup>956</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 16-17.



## 7.2.4 Neighbourhood Justice Centre

### 7.2.4.1 Overview

The NJC was established in 2007 as a three-year pilot. The NJC operates in a community centre in the suburb of Collingwood in Melbourne. Collingwood was selected as the site for the centre because the City of Yarra has:

- a densely populated geographic area;
- a high concentration of crime and disadvantage; and
- significant access to local community services.

The NJC was the first neighbourhood community justice centre operating in Australia and was based on similar models in the United States of America and in the United Kingdom.<sup>957</sup>

Legislation establishing the NJC, the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic), sets out that its purpose is to provide simplified access to the justice system and to provide therapeutic and restorative approaches to the administration of justice.<sup>958</sup> The overall goals of the NJC are to:

- increase the community's participation in the justice system;
- increase the offender's accountability and improve justice outcomes in response to identified needs;
- improve community outcomes in response to identified needs;
- improve community outcomes in the administration of justice in the City of Yarra by improving the confidence of participants, including victims, defendants, applicants, witnesses and the local community, in the justice system; and
- modernise courts by contributing to cultural and procedural changes in the justice system.<sup>959</sup>

The NJC appears to have been very successful, and crime statistics for the City of Yarra have been cited as providing evidence for its contribution to the reduction of crime in the area:

- residential burglaries fell by 26 per cent;

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<sup>957</sup> Centre for Court Innovation, 'Community courts around the world', viewed 5 September 2012, <<http://www.courtinnovation.org/research/community-courts-around-world>>: There are currently 38 community justice centres operating in the USA and 1 centre operating in each of the United Kingdom and Canada.

<sup>958</sup> *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic), section 1.

<sup>959</sup> Department of Justice, *Evaluating the Neighbourhood Justice Centre in Yarra 2007-2009*, Department of Justice, Melbourne, 2010, pp. 2-9.

- other (mainly commercial burglaries) fell by 20 per cent; and
- motor vehicle theft fell by 38 per cent.<sup>960</sup>

Over its first six months of operation, the number of criminal cases being heard in the NJC was around 160. In June 2009 the number of matters being heard increased to around 2550 (approximately 212 matters per month).<sup>961</sup>

#### 7.2.4.2 Eligibility and accessibility

The Act restricts the centre's jurisdiction to offenders who have a close connection with or who reside in the City of Yarra. For criminal offences the jurisdiction of the court is limited to offenders who:

- reside in the City of Yarra;
- are homeless and are alleged to have committed an offence in the area;
- are homeless and are alleged to have committed an offence outside the area but are living in crisis, transitional or supported accommodation in the area; or
- are Aboriginal with a close connection to the area and are alleged to have committed an offence in the district.<sup>962</sup>

For civil proceedings similar residential criteria are applied in order for the matter to be heard by the NJC.<sup>963</sup> The NJC does not have the jurisdiction to hear committal proceedings for an indictable offence or proceedings in relation to sexual offences.<sup>964</sup>

#### 7.2.4.3 Process once referred

The centre is multi-jurisdictional in nature, as sittings of the Magistrates' Court, Children's Court, Victorian Civil and Administrative Tribunal and the Victims of Crime Assistance Tribunal may be conducted there.

Victoria Police, VLA, Community Correctional Facilities and Youth Justice Victoria work collaboratively with the NJC and a range of other agencies to deliver the Centre's services and objectives. A core feature of the NJC is that a broad range of justice and human service agencies are available to provide a 'one-stop shop' approach to court participants. Table 12 below

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<sup>960</sup> Department of Justice, *Evaluating the Neighbourhood Justice Centre in Yarra 2007-2009*, Department of Justice, Melbourne, 2010, p. 10: Note, however, that while the crime rates in the City of Yarra have reduced, this could be related to other factors affecting crime, such as unemployment rates. So it is not possible to attribute the positive decrease in crime rates solely to the establishment of the NJC.

<sup>961</sup> Department of Justice, *Evaluating the Neighbourhood Justice Centre in Yarra 2007-2009*, Department of Justice, Melbourne, 2010, p. 10.

<sup>962</sup> *Magistrates' Court Act 1989* (Vic), section 4O(2)(a).

<sup>963</sup> *Magistrates' Court Act 1989* (Vic), section 4O(2)(b).

<sup>964</sup> *Magistrates' Court Act 1989* (Vic), section 4O(4).

outlines a sample of organisations that work with the NJC and the role that they carry out. VLA told the Committee that in its experience the agencies working with the NJC work collaboratively to facilitate the release of information that “enables a worker from one agency to obtain information quickly from others without bureaucratic barriers impeding access”.<sup>965</sup>

**Table 12: Agencies involved with the Neighbourhood Justice Centre.**<sup>966</sup>

Agency	Role
Fitzroy Legal Service	Legal services
Dispute Settlement Centre of Victoria	Mediation and community education
Victorian Association for the Care and Re-settlement of Offenders	Post-release support for prisoners and support for families and children of offenders
Court Network	Support for people attending court
Brotherhood of St Laurence	Vocational guidance and support to clients and residents
Carlton & Fitzroy Financial Counselling Service	Financial advice and assistance on financial planning and consumer rights matters
Homeground Inc.	Housing information and referral
Anglicare	Young Adult Restorative Justice Group Conferencing Program

Some differences between the NJC and traditional court models include: that in criminal matters a defendant is able to sit by their lawyer; that a Neighbourhood Justice Officer is present during the process; and the role of the Magistrate. The Neighbourhood Justice Officer assists with the smooth operation of the court by providing a link between court services and agencies. The Officer can also liaise with participants throughout the process to offer assistance.<sup>967</sup>

Mr Pappos commented on the distinctive physical arrangement of the NJC:

The one thing that I think is quite remarkable about that particular courtroom in the Neighbourhood Justice Centre is that there's windows and when there's discussions around someone's offences and the impact it's had on the community, the community is visual, it's out there, they can see it ...<sup>968</sup>

<sup>965</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 16.

<sup>966</sup> Department of Justice, *Evaluating the Neighbourhood Justice Centre in Yarra 2007-2009*, Department of Justice, Melbourne, 2010, p. 15.

<sup>967</sup> Department of Justice, *Evaluating the Neighbourhood Justice Centre in Yarra 2007-2009*, Department of Justice, Melbourne, 2010, p. 17.

<sup>968</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 33.

The Law Institute of Victoria (LIV) and VLA expressed positive views on the operation of the NJC.<sup>969</sup> The LIV noted that having one Magistrate preside over all aspects of a case “provides defendants a greater opportunity to explain their personal circumstances that led to the commission of the offence and, therefore, potentially facilitate identification of any impairment such as intellectual disability”.<sup>970</sup> One Magistrate presiding over a matter provides familiarity and stability to the work of the court. For people with an intellectual disability, consistency in court proceedings and personnel can help create a more positive experience of their involvement with the justice system. The ACSO noted that adopting informal and client focused environments results in more inclusive proceedings that accommodate the special needs of people with an intellectual disability.<sup>971</sup>

When sentencing an offender in the NJC, the Magistrate has the opportunity to gather information from a range of sources in order to inform his or her decisions. Sources of information include the Neighbourhood Justice Officer, a Community Corrections Officer, the Secretary to the Department of Human Services, a health or community service provider, or the victim.<sup>972</sup>

The Centre has a number of justice and social services that it can refer an offender, as well as victims and witnesses, to including:

- drug and alcohol counselling;
- mental health counselling;
- financial counselling;
- legal advice and representation;
- housing support;
- employment and training support;
- victims assistance; and
- mediation.<sup>973</sup>

Magistrates also have the option to suggest that the defendant be involved in an out-of-court problem-solving meeting. Typically this meeting will involve the Neighbourhood Justice Officer, the defendant, their lawyer and any support person, and may include social services or community workers, corrections workers, youth justice workers or the police.

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<sup>969</sup> Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 6; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 15.

<sup>970</sup> Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 6.

<sup>971</sup> Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 13.

<sup>972</sup> *Magistrates' Court Act 1989* (Vic), section 4Q(2).

<sup>973</sup> Department of Justice, *Evaluating the Neighbourhood Justice Centre in Yarra 2007-2009*, Department of Justice, Melbourne, 2010, p. 15.

The problem-solving meeting is intended to encourage discussions about the legal matter and develop options for tackling any underlying problems that the defendant may have. Following the meeting, the Neighbourhood Justice Officer will report back to the court outlining how the meeting went and the problems or outcomes addressed. This meeting, while not influencing the Magistrate's sentencing decision, can inform the Magistrate of issues that are relevant to sentencing.

The following Case Study illustrates positive approaches taken by the Neighbourhood Justice Centre in addressing offending behaviour.<sup>974</sup>

*Case Study 29: John's story.*<sup>975</sup>

*"John' was a 32 year old man who was charged with a series of property and illicit substance-related offences when he was referred to NJC. John had an extensive criminal history and had repeated periods of imprisonment, a number of Community Based Orders (CBO) and at the time of being charged, had a suspended sentence.*

*John had exposure to illicit substances during his early childhood and started to use illicit substances in adolescence. He left school at the age of 14 due to behavioural difficulties.*

*Upon pleading guilty at the NJC Magistrates' Court, John's court case was adjourned so he could be assessed by the multidisciplinary team based at NJC. At the initial assessment, John identified a number [of] personal and treatment goals such as maintaining a drug-free lifestyle, getting a job and seeking treatment for his depression and anxiety. Subsequently John was referred to a number of services based at NJC, which helped him with employment training, further identification of drug and alcohol issues and assessed his mental health needs. He was case managed by the multidisciplinary team.*

*During these assessments, John was identified as having a number of untreated mental health issues which contributed to his offending and behavioural difficulties, including depression, anxiety and symptoms of Attention Deficit Hyperactivity Disorder (ADHD). Subsequently he received appropriate treatment and support. In addition, case management provided at NJC assisted John in meeting his treatment goal of a drug-free lifestyle."*

<sup>974</sup> For other positive comments about the NJC see also Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 6; Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 33; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 16; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 35.

<sup>975</sup> Auditor General Victoria, *Problem solving approaches to justice*, VAGO, Melbourne, 2011, p. 4.

## 7.2.5 Barriers to accessing specialist courts, lists and programs

While the Committee heard that the specialist courts, lists and programs referred to above make a valuable contribution to the community, the Committee also heard that wider access to these initiatives was required.<sup>976</sup>

Ms Kristen Hilton, the Director of Civil Justice Access and Equity at VLA, commented on the positive effect of these initiatives, but also suggested that "... these programs still really represent the exception to the rule".<sup>977</sup> Ms Hilton suggested that as many people moving through the court system have some form of mental illness, there was a need for mainstream courts to take up the principles of therapeutic jurisprudence.<sup>978</sup>

Professor Susan Hayes also commented on the benefits of specialist courts, noting that although they provide access to specialist services and programs, they will not capture all defendants with an intellectual disability. Professor Hayes noted that in order for people to be admitted into most programs, their intellectual disability or cognitive impairment must first be identified, and this did not always occur.<sup>979</sup>

Professor Hayes also said that defendants living in rural and remote areas were less able to access services offered through special programs, as specialist courts were typically located in larger metropolitan areas.<sup>980</sup> A number of witnesses expressed their concern that specialist court programs operated in a limited number of metropolitan courts in Victoria. This has the effect of disadvantaging people with an intellectual disability who live in regional Victoria and are unable to access these services once they become involved in the justice system. Ms Dianne Hadden told the Committee that:

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<sup>976</sup> See for example Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 13; Richard Coverdale, Director, Centre for Rural and Regional Law and Justice, Deakin University, *Transcript of evidence*, Geelong, 20 March 2012, p. 3; Dianne Hadden, Ballarat and District Law Association, *Transcript of evidence*, Ballarat, 17 November 2011, p. 48; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 35; Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 31; Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 34.

<sup>977</sup> Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 35.

<sup>978</sup> Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, pp. 35-36.

<sup>979</sup> Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, p. 4.

<sup>980</sup> Susan Hayes, Head of Behavioural Sciences in Medicine, Sydney Medical School, University of Sydney, *Transcript of evidence*, Melbourne, 21 May 2012, p. 4. See also Nicole Fedyszyn, *Submission no. 37A*, 24 October 2011, p. 10; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 35; Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 30; Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, pp. 33-34.



The CISP program should be provided and properly resourced with qualified clinical and specialist staff at the Ballarat Court as a major regional Court centre. Such a CISP Program could then refer the client to specialist external case management and support services and organisations, provided that these necessary services are available and accessible in rural and regional Victoria. To only provide such services in Melbourne and metropolitan suburbs only exacerbates the disadvantage and inequity already currently being experienced by intellectually disabled and mentally impaired persons who live in rural and regional Victoria.<sup>981</sup>

Access to specialist court programs in regional and rural Victoria was highlighted in research undertaken by Mr Richard Coverdale, Director at the Centre for Rural and Regional Law and Justice at Deakin University. In 2011 Mr Coverdale completed a research project, *Postcode Justice – Rural and Regional Disadvantage in the Administration of the Law in Victoria*. Findings from that project included that:

Eighty per cent of the regional human service organisations interviewed and 54 per cent of the regional lawyers interviewed for the Postcode Justice research indicated that there was limited local access to court programs compared with metropolitan Melbourne; 88 per cent of human service organisations and 63 per cent of regional lawyers indicated their clients were disadvantaged by a lack of specialist courts in regional Victoria.<sup>982</sup>

Mr Coverdale said that while alternative models of justice are welcomed, these programs are not sufficiently available in rural and regional parts of Victoria. Mr Coverdale argued that where alternative models of justice do not exist “there is clearly disadvantage for those communities” in terms of effective access to the justice system.<sup>983</sup>

Finding 10: Problem-solving approaches to justice, which aim to deliver therapeutic models of justice to disadvantaged sectors of the community, should be accessible to all people who require those programs living in metropolitan, regional and rural Victoria.

The Committee heard a number of specific comments on the barriers affecting access to the ARC List.

Some witnesses suggested that services offered by the ARC List may not be able to meet demand. The ARC List will accept referrals from offenders, community service organisations, Magistrates, police, prosecutors and

<sup>981</sup> Dianne Hadden, *Submission no. 58*, 10 November 2011, pp. 3-4. See also Dianne Hadden, Ballarat and District Law Association, *Transcript of evidence*, Ballarat, 17 November 2011, p. 48; Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 31; Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, pp. 33-34.

<sup>982</sup> Richard Coverdale, Director, Centre for Rural and Regional Law and Justice, Deakin University, *Transcript of evidence*, Geelong, 20 March 2012, p. 3. See also Richard Coverdale, *Postcode justice: Rural and regional disadvantage in the administration of law in Victoria*, Deakin University, Melbourne, 2011, pp. 35-41.

<sup>983</sup> Richard Coverdale, Director, Centre for Rural and Regional Law and Justice, Deakin University, *Transcript of evidence*, Geelong, 20 March 2012, p. 3.



legal representatives, and aims to accept 300 cases per year.<sup>984</sup> As the list only sits twice a week, it is possible the number of eligible participants will exceed the capacity of the ARC List. VLA noted resource constraints affecting the ability of the ARC List to accept referrals:

Certain types of offences and any matters committed outside the Melbourne catchment area are excluded from the ARC List. ... while the ARC List is specifically aimed at supporting people with intellectual disabilities, mental illness and other disabilities, currently its capacity and jurisdiction are limited so many people who would otherwise be eligible are not able to participate.<sup>985</sup>

The Committee also heard that the requirement for the accused to plead guilty to the offence, and consent to referral prior to being accepted on the ARC List, was potentially unfair to people with an intellectual disability who would be dealt with through the mainstream courts if they did not consent to referral.<sup>986</sup> The OPP noted that people who are unfit to stand trial are less likely to consent to referral to the ARC List, and therefore such defendants would be excluded from the benefit of participating in the List.<sup>987</sup>

The success of the ARC List and its programs is closely connected with the availability of support services which address the offender's needs and is dependent on increased collaboration between the courts and service providers.<sup>988</sup> As discussed in Chapter Four, access to support services in the community is often limited and available services tend to face resource constraints which limit their ability to assist people. The ability of a person to access support services is often closely connected to the level of collaboration and coordination between agencies. People with an intellectual disability or cognitive impairment often require support throughout their life, not just through the duration of the program.<sup>989</sup>

STAR Victoria told the Committee that the effectiveness of specialised courts needs to be fully explored in order to achieve the best possible outcome for people with an intellectual disability interacting with the courts.<sup>990</sup> STAR Victoria went on to say that:

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<sup>984</sup> Magistrates' Court of Victoria, *2009-10 annual report*, Magistrates' Court of Victoria, Melbourne, 2010, p. 61.

<sup>985</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 15. See also Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 26.

<sup>986</sup> Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 26.

<sup>987</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 4.

<sup>988</sup> Alexander Zammit, *Disability and the courts: An analysis of problem solving courts and existing dispositional options: The search for improved methods of processing defendants with a mental impairment through the criminal courts*, OPA, Melbourne, 2004, p. 38.

<sup>989</sup> Alexander Zammit, *Disability and the courts: An analysis of problem solving courts and existing dispositional options: The search for improved methods of processing defendants with a mental impairment through the criminal courts*, OPA, Melbourne, 2004, p. 38.

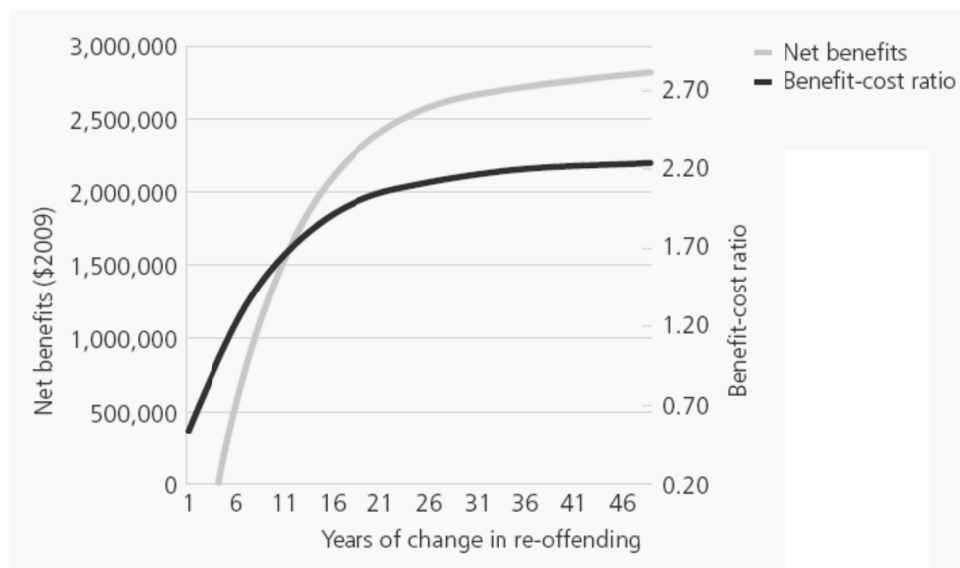
<sup>990</sup> STAR Victoria, *Submission no. 12*, 8 September 2011, p. 2. See also Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 32.

If research supports their further expansion, the government should be committed [to their] establishment so as to redress the existing imbalances and disadvantages that people with an intellectual disability and their families and carers face when accessing and interacting with the justice system.<sup>991</sup>

The LIV suggested that the Government investigate the feasibility of incorporating aspects of the NJC into the mainstream court system in order to improve outcomes for offenders with an intellectual disability in those courts.<sup>992</sup> The LIV called for the expansion of the NJC model of justice to other suburbs in Melbourne which have high rates of offending, similar to the City of Yarra.

The Committee notes that the evaluation of the NJC completed in 2010 by the Department of Justice included a cost-benefit analysis of the program. The evaluation found a positive net benefit of between \$201 002 and \$2 805 853 in terms of changes in reoffending behaviour over the lifetime of the offender from five years after they participated in the program.<sup>993</sup> Figure 15 illustrates the positive net benefits of the reduction in reoffending behaviour after participation in the NJC.

**Figure 15: Cost-benefit of participation in the Neighbourhood Justice Centre.**<sup>994</sup>



<sup>991</sup> STAR Victoria, *Submission no. 12*, 8 September 2011, p. 2. See also Nicole Fedyszyn, *Submission no. 37*, 27 September 2011, p. 2; Jesuit Social Services, *Submission no. 38*, 30 September 2011, pp. 25-26; Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 7; Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 4; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, pp. 21-22; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 35.

<sup>992</sup> Law Institute of Victoria, *Submission no. 48*, 11 October 2011, p. 6.

<sup>993</sup> Department of Justice, *Evaluating the Neighbourhood Justice Centre in Yarra 2007-2009*, Department of Justice, Melbourne, 2010, p. 24.

<sup>994</sup> Department of Justice, *Evaluating the Neighbourhood Justice Centre in Yarra 2007-2009*, Department of Justice, Melbourne, 2010, p. 24.

The Department of Justice is currently conducting the *Integrating Court Programs Project* to unify the range of initiatives currently operating in the Magistrates' Court of Victoria. The aims of the project are to make problem-orientated justice a part of the courts' day-to-day functioning, starting with Magistrates' Courts. The project is focused on taking the lessons learned from these initiatives and consolidating them into a comprehensive model and applying these to courts and tribunals across Victoria.<sup>995</sup>

The Committee notes the positive effect that involvement in specialist court programs and services has on offenders, particularly those who have an intellectual disability or cognitive impairment. The Committee anticipates that the Department of Justice's project will examine the benefits of the specialist court programs and services that have been developed by the courts, with the view to examining areas in which these services could be expanded. The Committee will follow with interest the results of this project and hopes that project findings will, amongst other things, conclude that it is feasible to expand at least some of these court programs and services to rural and regional Victorian courts.

The Magistrates' Court of Victoria stressed the importance of making extra resources available to the courts to ensure that regional and rural areas are adequately serviced.<sup>996</sup> The Committee is aware that the expansion of court support services and specialist lists across Victoria, even in major centres around the state, would require a considerable commitment in resources. However, the Committee believes the benefit of increasing the utilisation of alternative forms of justice, which leads to reduced future offending, outweighs the cost of dealing with offenders in other parts of the justice system, for example, contact with police or incarceration.

**Recommendation 34:** That the Victorian Government extend the use of problem-solving court models currently operating in the Magistrates' Court of Victoria – particularly the Assessment and Referral Court List, the Court Integrated Services Program and the Neighbourhood Justice Centre – across Victorian Magistrates' Courts in major metropolitan and major regional centres.

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<sup>995</sup> Courts and Tribunals Victoria, 'Integrating courts program', viewed 5 September 2012, <<http://www.courts.vic.gov.au/courts-tribunals/courts-portfolio/key-projects-and-initiatives/integrating-court-programs>>.

<sup>996</sup> John Lesser, Magistrate, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, pp. 25, 26; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, pp. 7, 13. See also Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 26.

## Chapter Eight: Evidence

People with an intellectual disability or cognitive impairment are likely to experience a number of disadvantages when seeking to give evidence in court. A key disadvantage is that prejudicial assessments may be made about a person's competency, reliability and credibility based on misconceived stereotypes about the effect of an impairment on a person. As a consequence inadequate weight may be placed on evidence presented by a person with an intellectual disability or cognitive impairment, and in more extreme cases it may be determined that the person lacks the capacity to give evidence altogether.

However, if modifications are made to court processes and procedures it is highly likely that a person with these impairments will be able to give evidence that is both reliable and credible.<sup>997</sup>

This Chapter describes the rules pertaining to the competency of witnesses to give evidence in court and discusses difficulties that may be experienced by people with an intellectual disability or cognitive impairment to satisfy these rules. The Committee also examines methods employed to alleviate disadvantage when giving evidence both prior to and during court appearances.

### 8.1 When is a person competent to give evidence?

#### 8.1.1 General rules about competency to give evidence

In common law a person is considered competent to give evidence if he or she can understand the nature and consequences of the oath before the trial.<sup>998</sup> If a judge determines that a witness is competent to give evidence and the case is being heard before a jury, the jury can determine the weight given to that evidence.

The *Evidence Act 2008* (Vic) introduced a rebuttable presumption that every person has the mental, intellectual and physical capacity to give evidence.<sup>999</sup> The Act sets out two tests, which largely replicate the common law position, for determining competency to give evidence:

<sup>997</sup> M Kebell, C Hatton and S Johnson, 'Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?', *Legal and Criminological Psychology*, vol. 9, pp. 23-35, 2004, p. 24.

<sup>998</sup> *Cheers v Porter* (1931) 46 CLR 521.

<sup>999</sup> *Evidence Act 2008* (Vic), sections 12, 13(6).

- whether the person has the capacity to understand a question about the fact; and
- whether the person has the capacity to give an answer that can be understood to a question about the fact.<sup>1000</sup>

If either of these tests is not satisfied the person is assumed to lack competency to give evidence. The test for determining competency may be raised any number of times during a proceeding, as competence to give evidence is determined by a person's ability to give answers to particular questions about facts.

A person who is not competent to give evidence cannot be compelled to do so, if undue cost or delay would be incurred to overcome their inability to give evidence, or if adequate evidence can be adduced from other witnesses.<sup>1001</sup> If a person's evidence is necessary for a matter to be heard, the court must take steps to overcome that person's incapacity. Examples of such incapacities that could be overcome include a lack of understanding of English, or deafness or mutism.<sup>1002</sup>

The *Evidence Act 2008* distinguishes between sworn and unsworn evidence. Although a person may be competent to give evidence about a fact, they are not considered competent to give sworn evidence about that fact unless they understand that they are under an obligation to give truthful evidence.<sup>1003</sup> If the person is unable to do this the court may accept unsworn evidence from them, provided they have been informed about:

- a) that it is important to tell the truth;
- b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
- c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.<sup>1004</sup>

The question of whether a person is competent to give evidence must be determined by the judge alone, unless the court determines otherwise.<sup>1005</sup> In determining whether a person is competent to give evidence the court may make investigations as it sees fit, such as obtaining information from a person who has relevant specialised knowledge.<sup>1006</sup>

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<sup>1000</sup> *Evidence Act 2008* (Vic), section 13(1).

<sup>1001</sup> *Evidence Act 2008* (Vic), section 14.

<sup>1002</sup> *Evidence Act 2008* (Vic), sections 30, 31.

<sup>1003</sup> *Evidence Act 2008* (Vic), section 13(3).

<sup>1004</sup> *Evidence Act 2008* (Vic), sections 13(4), 13(5).

<sup>1005</sup> *Evidence Act 2008* (Vic), section 189.

<sup>1006</sup> *Evidence Act 2008* (Vic), section 13(8).

### 8.1.1.1 Competency of children to give evidence

Under the *Evidence Act 2008* the competency of a child to give evidence is determined by the same rules applicable to adults. However, it is likely, depending on the age of the child, that the competency tests will be rebutted.

In recognition of the fact that court appearances can be confusing and stressful for children and young people who are witnesses, the Judicial College of Victoria, with assistance from Child Witness Services at the Department of Justice, has developed a guide for members of the judiciary assessing the competency of children and young people to give evidence, and to outline conduct for questioning children and young people.

The guidance states that when determining capacity a Judge or Magistrate can ask children to explain their understanding of points raised, in order to determine whether the court should offer further explanation.<sup>1007</sup> The guidance suggests questions that could be asked to determine whether children can understand and respond to a simple question about a fact.

The guidance also describes how introductions to questioning, cross-examination and the taking of oaths can be stated in a manner that can be easily understood by children. The guidance recognises that while children may understand a particular line of questioning or court procedure, they may find it difficult to verbalise and express themselves.

### 8.1.2 Competency of people with an intellectual disability or cognitive impairment to give evidence

There is no comparable resource to the guidance for assessing children's competency discussed above for assessing the competency of people with an intellectual disability or cognitive impairment to give evidence in court. However, the *Evidence Act 2008* also provides that some arrangements can be made to allow a person with a cognitive impairment to give evidence in court.

People with an intellectual disability or cognitive impairment are not automatically assumed to be incompetent to give evidence.<sup>1008</sup> However, it is possible they may have difficulty satisfying competency tests. For example, people with an intellectual disability or cognitive impairment may be able to answer simple factual questions, but be unable to answer questions that require them to draw inferences. A person with an intellectual disability or cognitive impairment may also have difficulty giving sworn evidence about a fact, because they may not understand the consequences of telling a lie while under oath.<sup>1009</sup>

<sup>1007</sup> Judicial College of Victoria, *Uniform evidence manual*, Judicial College of Victoria, Melbourne, 2009, appendix A.

<sup>1008</sup> *R v Hill* (1851) 169 ER 495.

<sup>1009</sup> Office of the Public Advocate, *Finding the way: The criminal justice system and the person with an intellectual disability*, OPA, Melbourne, 1987, p. 66.

Evidence suggests that people with an intellectual disability or cognitive impairment are sometimes perceived to lack the capacity to give evidence in court. This may occur if a person with an intellectual disability or cognitive impairment finds it difficult to understand complex court processes, or to follow a line of questioning conducted by counsel.

A 2010 report by People with Disability Australia highlighted difficulties that may be experienced by a person with a cognitive impairment giving evidence in court:

Persons with cognitive impairment ... may be easily intimidated and confused in cross-examination by the defence counsel as an apparently angry or aggressive authority figure, and give responses to questions that they think will please the authority figure. The[y] may be confused by complex and unfamiliar words, long sentences, and leading and suggestive questions. They may also be unable to tolerate long periods of cross-examination without a break and may become tired, irritable, and confused. The challenges faced by persons with cognitive disability in giving evidence in court may be deliberately exploited by defence counsel to discredit them as witnesses and undermine the prosecution case. Persons with cognitive impairment may also find the process of giving evidence extremely humiliating and traumatic for these reasons.<sup>1010</sup>

Evidence was presented to the Committee that people with an intellectual disability or cognitive impairment may experience a number of unique difficulties and barriers when interacting with the courts.<sup>1011</sup> The Office of Public Prosecutions (OPP) noted that:

One of the barriers faced by an intellectually disabled witness may be a perception by those involved in the criminal justice system (including jurors) that they lack credibility.

However if a witness does not understand the questions being asked of them he or she may give an answer which does not make sense which may lead a judge or jury to conclude they are not credible or reliable.<sup>1012</sup>

Villamanta Disability Rights Legal Service also expressed concern that:

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<sup>1010</sup> Phillip French, Julie Dardel and Sonya Price-Kelly, *Rights denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairments*, People with Disability Australia, Redfern, 2009, pp. 34-35. See also Jonathon Goodfellow and Margaret Camilleri, *Beyond belief, beyond justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice*, Disability Discrimination Legal Service, Melbourne, 2003, pp. 61-62; Queensland Advocacy Incorporated, *Justice for all: People with an intellectual disability and the criminal justice system*, QAI Incorporated, Brisbane, 2001, pp. 40-41, 44.

<sup>1011</sup> See for example Seniors Rights Victoria, *Supplementary evidence*, 28 May 2012, p. 3; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 35; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, pp. 23-24.

<sup>1012</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 10. See also Margaret Camilleri, *Submission no. 46*, 10 October 2011, p. 4; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 12; Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, p. 25.



The adversarial system of examination, re-examination and cross-examination works against a person who has an intellectual disability. It is taken as a given by legal advocates/barristers that it is usually easy to discredit a witness from the vulnerable categories of children and adults who have a cognitive impairment. Simply ask the same question often enough in different ways and eventually you will get the answer you are looking for, or will discredit the witness.<sup>1013</sup>

The Committee believes that there is a need to support people with an intellectual disability or cognitive impairment when they give evidence in court. Modifications to court processes for adducing evidence could improve the quality of evidence people with an intellectual disability or cognitive impairment provide to the court.

## 8.2 Giving evidence before court

As discussed in Chapter Five, people with an intellectual disability or cognitive impairment may experience a number of vulnerabilities when interacting with the police. They may have a poor understanding of questions asked by the police, and may not understand the implications of answers they give. Consequently, the needs of people with intellectual disabilities may be supported by independent third persons (ITPs) during police interviews, and by permitting alternative arrangements for recording evidence during police interviews.

The Committee's recommendations in Chapter Five for changes that could be made to improve police interactions with people with an intellectual disability or cognitive impairment should be considered along with the recommendations below.

### 8.2.1 Special procedures for taking evidence

The police are able to make audio or audio-visual recordings of interviews with a person with a cognitive impairment where the charge relates wholly or partly to a sexual offence or an indictable offence involving an assault or injury to another person. This evidence may be later presented as evidence in court.<sup>1014</sup> Audio or audio-visual recordings of evidence may only be used at trial if the witness appears at the trial and can attest to the truthfulness of the content on the recording. The witness must also be available for cross-examination or re-examination about what was said.<sup>1015</sup>

This method for presenting evidence in court was first recommended in the Victorian Law Reform Commission's (VLRC) review of *Sexual Offences Against Children*. The VLRC concluded that recordings of evidence from children in relation to sexual offences would:

- be less traumatic for children because it would reduce the number of times the child would have to tell their story;

<sup>1013</sup> Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 4.

<sup>1014</sup> *Criminal Procedure Act 2009* (Vic), sections 366, 367.

<sup>1015</sup> *Criminal Procedure Act 2009* (Vic), section 368(1)(c)(ii).

- ensure that the court had access to statements made by the child shortly after the alleged offence was reported to the police;
- ensure that the interview process was appropriate and that the child was not influenced by the questioning process; and
- encourage offenders to plead guilty.<sup>1016</sup>

People with an intellectual disability or cognitive impairment may also experience difficulties when being interviewed by the police. These include that they may:

- be prone to suggestibility and therefore more susceptible to answering leading questions posed by an investigating officer;
- be overly influenced by an authority figure;
- have a poor understanding of the questions asked and may not understand the implications of any answers given; or
- have poor receptive and expressive language which can make it difficult for them to communicate.<sup>1017</sup>

Pre-recording evidence to be given in court may be highly beneficial to people with an intellectual disability or cognitive impairment. For example, it may help to obtain better quality evidence from a person who has a short attention span, and who is unable to adequately respond to extensive questioning over long periods of time.<sup>1018</sup> Recording evidence allows greater flexibility to build in rest breaks during the interview process. Given that people with an intellectual disability or cognitive impairment may communicate with non-verbal responses, a visual recording of evidence may illustrate more clearly than a transcript of evidence the nature of the person's responses, including non-verbal responses and their level of understanding. Recordings of evidence can not only prove to be an effective prosecution tool, but they can also be used to resolve disputes about police conduct during the interview. Recorded evidence would also help people who find it difficult to recall events over time to present evidence to court.

**Finding 11: The quality of evidence taken from people with an intellectual disability or cognitive impairment during police interviews may be improved by allowing audio and audio-visual recordings of evidence to be taken.**

While recorded interviews may assist the courts to consider evidence from people with an intellectual disability or cognitive impairment, it is critical that police adequately take into account the individual's disability when

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<sup>1016</sup> Victorian Law Reform Commission, *Sexual offences against children*, VLRC, Melbourne, Discussion paper, 1988, p. 108.

<sup>1017</sup> Victorian Law Reform Commission, *Sexual offences*, VLRC, Melbourne, Final report, 2004, pp. 322-323.

<sup>1018</sup> Jonathon Goodfellow and Margaret Camilleri, *Beyond belief, beyond justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice*, Disability Discrimination Legal Service, Melbourne, 2003, p. 68.

conducting interviews. For example, Peninsula Access Support and Training provided an example of its experience supporting a client during a police interview where the interview was recorded as evidence:

It was not clear to him [the interviewing officer] whether what she said was her answer or whether she in fact understood the question in the first place. The interview process was problematic and the questioning needed to be worded even more carefully so that he was not seen to be leading her.<sup>1019</sup>

The OPP also noted the importance of audio and audio-visual recordings of evidence. However, the OPP also stated that a crucial element of these recordings – that the conduct of the interview takes into account the witness' impairment – is often missing. The OPP said that in its experience failure to appropriately take into account a person's impairment can affect the degree to which the prosecution is able to particularise the offence, which can result in charges being withdrawn.<sup>1020</sup> The OPP provided examples of how statements may not provide adequate detail in order to prosecute an offence:

- a person with a cognitive impairment may have difficulty describing what happened;
- a person with a cognitive impairment may have difficulty describing to what part of their body the offending related;
- a person with a cognitive impairment may have difficulty describing the frequency of the offending; or
- a person with a cognitive impairment may have difficulty describing when the offending occurred.<sup>1021</sup>

Audio or audio-visual recordings of evidence can only be taken by an appropriately trained police officer;<sup>1022</sup> however, the OPP noted that the quality of evidence taken is highly dependent on the person interpreting and conducting the interview. The OPP called for improvements in the training of police officers who conduct audio or audio-visual recordings of evidence. Specifically the OPP recommended that a "... component be included which is specifically directed toward the most effective ways to elicit information from those witnesses with a cognitive impairment."<sup>1023</sup> The OPP suggested that, alternatively, a specialisation be created for police officers conducting these kinds of interviews with witnesses with intellectual disabilities or cognitive impairments, or that an intermediary be involved during the interview to help witnesses with communication difficulties.<sup>1024</sup>

The Committee believes that allowing pre-recorded evidence to be admissible in court helps witnesses with an intellectual disability or cognitive

<sup>1019</sup> Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011, p. 2.

<sup>1020</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 8.

<sup>1021</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 8.

<sup>1022</sup> *Criminal Procedure Regulations 2009* (Vic), clause 5.

<sup>1023</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 9.

<sup>1024</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 9.

impairment to provide fuller, more accurate accounts of events than may be elicited through examinations in court. The Committee notes the OPP's concerns regarding the quality of this evidence and the consequences this may have for the prosecution of offences. The Committee believes that improved training for police officers would provide an appropriate mechanism for improving the quality of pre-recorded evidence.

Recommendation 35: That Victoria Police require police officers qualified to conduct audio and audio-visual recordings of evidence to receive training on effective communication with people with an intellectual disability or cognitive impairment, and awareness of the kinds of disadvantages experienced by people with an intellectual disability or cognitive impairment when they become involved in the justice system.

## 8.3 Giving evidence in court

Evidence suggested that where a person with an intellectual disability or cognitive impairment has been found competent to give evidence in court and is fit to be tried, he or she may nevertheless experience communication and comprehension difficulties when giving evidence in court.<sup>1025</sup> The Committee heard that improving support structures for people attending court and modifying methods for giving evidence could assist people with an intellectual disability or cognitive impairment to give accurate evidence in court.

### 8.3.1 Rules about adducing evidence in court

The *Evidence Act 2008* provides a general statement about the orders that the court can make when counsel are questioning witnesses. Such orders include:

- a) the way in which witnesses are to be questioned; and
- b) the production and use of documents and things in connection with the questioning of witnesses; and
- c) the order in which parties may question a witness; and
- d) the presence and behaviour of any person in connection with the questioning of witnesses.<sup>1026</sup>

<sup>1025</sup> See for example Angela Alexander, *Submission no. 8*, 6 September 2011, p. 3; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 8; Daniel Clements, Manager, Brosnan Centre, Jesuit Social Services, *Transcript of evidence*, Melbourne, 21 February 2012, pp. 31-32; Richard Coverdale, Director, Centre for Rural and Regional Law and Justice, Deakin University, *Transcript of evidence*, Geelong, 20 March 2012, p. 3; Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 9; Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 10; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 2; Nadine Hantke, Team Leader, Eastern Regional Mental Health Association, *Transcript of evidence*, Melbourne, 21 February 2012, pp. 7-8; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 27; Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 10; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 14; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 18.

<sup>1026</sup> *Evidence Act 2008* (Vic), section 26.

The *Evidence Act 2008* also establishes rules on examination in chief, cross-examination and re-examination of witnesses.<sup>1027</sup>

An examination in chief is conducted to obtain testimony in support of the issue for which the witness was called. This evidence is usually obtained by question and answer. However, the *Evidence Act 2008* allows the court to allow evidence in chief to be obtained through a narrative form. Providing evidence in narrative form may assist witnesses with an intellectual disability or cognitive impairment to recall events by telling their story of what has occurred. It may be necessary for counsel to rely on questions as well as narrative accounts of the event to elicit the best evidence.<sup>1028</sup>

The purpose of cross-examination is for the person conducting the cross-examination to obtain facts, and it is also a means of questioning evidence presented by the witness. The purpose of re-examination is not merely to remove ambiguities but to also reaffirm matters that may have been discredited during cross-examination. Re-examination must be confined to matters that have been raised during cross-examination, as no new matters can be raised without leave of the judge.<sup>1029</sup>

Rules on the admissibility of evidence gathered during the investigation phase are set out in the *Evidence Act 2008*. The Act states that evidence is admissible in a proceeding if, when considered rationally, it could change a person's assessment of the veracity of a fact considered during the proceeding.<sup>1030</sup>

Admissions made by a defendant in the presence of an investigating officer during criminal proceedings are not admissible unless, in the circumstances of the admission, it was unlikely that the truth of the admission was adversely affected.<sup>1031</sup> In making this determination the court may take into account:

- any relevant condition or characteristic of the person who made the admission, including the age, personality, education and any mental, intellectual or physical disability the person appears to have; and
- if the admission was made in response to questioning, the nature of the questions, the manner in which they were put and the nature of any threat, promise or other inducement made to the person questioned.<sup>1032</sup>

As discussed in Chapter Five, evidence obtained during police interviews with a person with an intellectual disability or cognitive impairment in the

<sup>1027</sup> *Evidence Act 2008* (Vic), section 28.

<sup>1028</sup> Prianka Nair, 'Giving voice in court: Cushioning adversarialism for witnesses with intellectual disabilities', *Current Issues in Criminal Justice*, vol. 21, no. 3, pp. 481-488, 2010, p. 483.

<sup>1029</sup> *Evidence Act 2008* (Vic), section 39.

<sup>1030</sup> *Evidence Act 2008* (Vic), sections 55, 56.

<sup>1031</sup> *Evidence Act 2008* (Vic), section 85(2).

<sup>1032</sup> *Evidence Act 2008* (Vic), section 86(2).

absence of an ITP has sometimes been considered inadmissible by the courts.<sup>1033</sup>

### 8.3.2 Barriers to giving evidence in court

The complexity of the court environment and difficulties in understanding court procedures was highlighted as a barrier affecting the ability of a person with an intellectual disability or cognitive impairment from participating in court. For example, the Office of the Public Advocate (OPA) expressed the view that:

The formality of the court environment with its own set of rules and language is alienating and intimidating for many of OPA's clients.

Characterisations of a 'reasonable' person, rules of evidence which have a tendency to exclude a witness with cognitive disability as unreliable, and the privileging of expert evidence over those of a person with cognitive disability mean that when it comes to courts, a person with cognitive disability is an 'outsider'.<sup>1034</sup>

Other difficulties articulated in submissions included waiting times for legal matters to be heard in court<sup>1035</sup> and limited support arrangements available both prior to and during court appearances.<sup>1036</sup> The Disability Services Commissioner told the Committee about the effect of these delays:

Delays in investigation can result in people with an intellectual disability experiencing difficulty in recalling information as an aspect of their disability and often it is suggested that they can be relatively easily swayed and confused by people who set out to influence them as to the facts and sequence of events in an incident under investigation.<sup>1037</sup>

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<sup>1033</sup> *Evidence Act 2008* (Vic), section 86(s): See for example *R v McNiven* [2011] VSC 397 when Justice Lasry excluded an admission made in the absence of legal advice where the accused had low intelligence.

<sup>1034</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 27.

<sup>1035</sup> See for example Angela Alexander, *Submission no. 8*, 6 September 2011, p. 2; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 8; Lynne Coulson Barr, Deputy Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, pp. 14-15; Disability Advocacy and Information Service Inc., *Submission no. 54*, 3 November 2011, p. 5; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 42; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 5; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 13.

<sup>1036</sup> See for example Matthew Andison, Senior Solicitor, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 30 April 2012, p. 6; John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 24; Communication Rights Australia, *Submission no. 13*, 8 September 2011, p. 8; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 4; Jan Kennedy, Program Manager, Mildura Court Network, *Transcript of evidence*, Mildura, 16 November 2011, pp. 13-14; Loddon Campaspe Community Legal Centre, *Supplementary evidence*, 28 May 2012, p. 5; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 2; Regional Information and Advocacy Council, *Submission no. 51*, 2 February 2011, p. 2; Seniors Rights Victoria, *Supplementary evidence*, 28 May 2012, p. 3.

<sup>1037</sup> Office of the Disability Services Commissioner, *Submission no. 41*, 7 October 2011, p. 5.



### 8.3.3 Methods to overcome barriers to giving evidence

Many of the barriers experienced by a person with an intellectual disability or cognitive impairment before the courts could be overcome if adjustments were made to court procedures and case management, and if support services were made available during and after a person's court appearance.

The *Disability Discrimination Act 1992* (Cth) emphasises the importance of making reasonable adjustments to ensure that a person with a disability is not treated differently from a person without a disability, as failing to do so may amount to discrimination.<sup>1038</sup> According to the Act, a 'reasonable' adjustment does not cause the person making the adjustment unjustifiable hardship.<sup>1039</sup>

If no adjustments are made to court processes people with an intellectual disability or cognitive impairment may:

- be unable to participate fully, adequately or at all in court proceedings;
- feel uncomfortable, fearful or overwhelmed;
- feel resentful or offended by what occurs in courts; and
- not understand what is happening or be able to get their point of view across and be adequately understood.<sup>1040</sup>

#### 8.3.3.1 Witness support prior to and during court appearances

The Committee heard that support services and advocates were often not available in court to assist people with an intellectual disability or cognitive impairment.<sup>1041</sup> The Committee heard that it was important for people with an intellectual disability or cognitive impairment to have a support person in court, who could help to explain court processes and provide reassurance. The Committee was also told that services provided by disability service providers, families and carers may not be adequately experienced to

<sup>1038</sup> *Disability Discrimination Act 1992* (Cth), section 5(2).

<sup>1039</sup> *Disability Discrimination Act 1992* (Cth), section 4.

<sup>1040</sup> See for example Judith Cockram, *Equal justice? The experiences and needs of repeat offenders with intellectual disability in Western Australia*, Activ Foundation Inc., Western Australia, 2005, p. 102; Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, pp. 28-29; Queensland Advocacy Incorporated, *Justice for all: People with an intellectual disability and the criminal justice system*, QAI Incorporated, Brisbane, 2001, p. 27.

<sup>1041</sup> See for example Angela Alexander, *Submission no. 8*, 6 September 2011, p. 2; Grampians disAbility Advocacy, *Submission no. 50*, 28 October 2011, p. 4; Loddon Campaspe Community Legal Centre, *Supplementary evidence*, 28 May 2012, p. 5; Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 2; Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, pp. 9-10; Regional Information and Advocacy Council, *Submission no. 51*, 2 February 2011, p. 2; Women with Disabilities Victoria, *Submission no. 47*, 11 October 2011, p. 30.



appropriately support a person, and that on some occasions third party support may be required.<sup>1042</sup>

### Existing court support services

Disability Client Services, in the Department of Human Services (DHS), is responsible for ensuring that clients registered with the DHS receive adequate support in court.

A general support structure is also provided by the Court Network. The Court Network is a not-for-profit organisation first established in Victoria in 1980 that now operates across Victoria and in metropolitan courts in Queensland.<sup>1043</sup> The Court Network was developed in recognition of the significant barriers affecting access to the justice system, such as the:

- lack of comprehensive, understandable information;
- lack of comprehensive services that recognise the diversity of court users;
- complex culture and language of the court environment; and
- financial and emotional cost of accessing justice.<sup>1044</sup>

For people with an intellectual disability or cognitive impairment these barriers are even more pronounced. Ms Jan Kennedy, Program Manager of the Mildura Court Network, said that in her experience a number of people pass through the courts who have limited understanding of court processes and outcomes.<sup>1045</sup> Services provided by Court Network volunteers aim to break down these barriers by providing personal support, non-legal information and referral services to court users.<sup>1046</sup>

The Court Network relies on volunteers who provide support to victims, offenders, families and children attending court who have little or no support. At present there are over 400 volunteers who work for the Court Network.<sup>1047</sup> The Court Network primarily relies on funding from Commonwealth and state government departments. In Victoria these include the DHS, the Department of Justice and the Legal Services Board.

In 2011-12, 111 919 people were assisted by Court Network volunteers in Victoria.<sup>1048</sup> Support provided by Court Network volunteers included:

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<sup>1042</sup> See for example Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 10; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 45; Peninsula Access Support and Training, *Submission no. 14*, 9 September 2011, p. 4.

<sup>1043</sup> Court Network, 'Court Network', viewed 1 February 2013, <<http://www.courtnetwork.com.au/>>.

<sup>1044</sup> Court Network, 'About Court Network', viewed 11 February 2013, <<http://www.courtnetwork.com.au/AboutCourtNetwork.aspx>>.

<sup>1045</sup> Jan Kennedy, Program Manager, Mildura Court Network, *Transcript of evidence*, Mildura, 16 November 2011, p. 5.

<sup>1046</sup> Court Network, 'About Court Network', viewed 11 February 2013, <<http://www.courtnetwork.com.au/AboutCourtNetwork.aspx>>.

<sup>1047</sup> Court Network, *Annual report 2011*, Court Network, Melbourne, 2011, p. 2.

<sup>1048</sup> Court Network, *Annual report 2011-2012*, Court Network, Melbourne, 2012, p. 18.

- providing support and information about going to court;
- being in court with a person on the day;
- explaining how courts and the legal system operate;
- showing people around the court beforehand to familiarise them with the court setup; and
- referring people to other community services who may be able to assist them.<sup>1049</sup>

Court Network volunteers receive ongoing general training. Ms Kennedy said that while volunteers may have some experience in working with people with an intellectual disability or cognitive impairment, generally volunteers do not, and instead draw upon their own personal experiences when providing support.<sup>1050</sup>

The Committee notes that in 2010-11 the Court Network collaborated with the Justice for Refugees Program (in the Department of Justice) to train volunteers from refugee communities who would subsequently provide support to people from their communities who attend court.<sup>1051</sup> The program was developed in recognition of the fact that it was important to recruit volunteers from diverse backgrounds to ensure that the range of people appearing before the courts are appropriately supported. The Committee is encouraged by the work of the Court Network to train its volunteers to ensure that particular court users receive appropriate support.

Specific support services are delivered by the OPP and the Department of Justice – the Witness Assistance Service and the Child Witness Service. The Witness Assistance Service offers victims and witnesses support from a social worker to assist them to understand legal discussions, and to provide ongoing care for victims and their families in pre-committal and post-appeal stages of their cases.

The Child Witness Service supports children who are witnesses in criminal proceedings and their families. The service aims to alleviate stress that may be experienced by child witnesses by:

- preparing the child for being a witness;
- familiarising the child with court processes and personnel;
- supporting the child and their family throughout the proceeding; and
- providing debriefing and referral to community agencies.<sup>1052</sup>

<sup>1049</sup> Court Network, *Going to court? We can help...* Court Network, Melbourne, 2012, p. 2.

<sup>1050</sup> Jan Kennedy, Program Manager, Mildura Court Network, *Transcript of evidence*, Mildura, 16 November 2011, p. 17.

<sup>1051</sup> Court Network, *Annual report 2011*, Court Network, Melbourne, 2011, p. 16.

<sup>1052</sup> Department of Justice, 'Child witness service', viewed 13 February 2013, <<http://www.justice.vic.gov.au/home/courts/going+to+court/child+witnesses/>>.

Dr John Chesterman, Policy and Education Manager at the OPA, suggested that services modelled on these programs but targeted toward people with a cognitive impairment should be developed.<sup>1053</sup> Dr Chesterman also said that while existing services are good, they tend to be focused on getting prosecutions rather than on supporting someone through the process.<sup>1054</sup>

### **Statutory requirements for support during court appearances**

Under the *Evidence Act 2008* support may also be provided to a person who cannot speak English sufficiently or who may need assistance because they are deaf or mute.<sup>1055</sup> Communication Rights Australia (CRA) expressed two concerns with the provision of this support. Firstly, an order for an interpreter to be provided requires counsel calling the witness to prove that the witness is unable to speak English sufficiently. Secondly, the Act is unclear as to whether an interpreter familiar with alternative methods of communication, such as communication boards, is able to be used.<sup>1056</sup>

CRA suggested that a system for registering and contacting an independent communication worker should be developed to assist people with communication difficulties presenting evidence in court.<sup>1057</sup> CRA noted that in one instance a witness took seven days to provide evidence using a communication board, whereas if an appropriately trained interpreter had been obtained by the court, the evidence could have been taken in two days.<sup>1058</sup>

Ms Jody Saxton-Barney of the Victorian Disability Advisory Council told the Committee that she had similar experiences accessing interpretation services in court, particularly Auslan interpreters for witnesses who are deaf. Ms Saxton-Barney said that although Auslan interpreters can be arranged during court proceedings, interpreters sometimes struggle to provide adequate interpretation of court matters. Ms Saxton-Barney suggested that a relay interpreter could work with Auslan interpreters to interpret legal information and convey this in the clearest and most accurate way possible.<sup>1059</sup>

The Committee heard that, although the provision of these services can be relatively labour-intensive, they may facilitate just outcomes for participants. For example, Ms Lynne Coulson Barr, the Deputy Disability Services Commissioner, told the Committee that a very detailed incident report had been obtained from a person with an intellectual disability using

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<sup>1053</sup> John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 24.

<sup>1054</sup> John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 24 October 2011, p. 24.

<sup>1055</sup> *Evidence Act 2008* (Vic), sections 30, 31.

<sup>1056</sup> Communication Rights Australia, *Submission no. 13*, 8 September 2011, p. 10. See also Margaret Camilleri, *Submission no. 46*, 10 October 2011, p. 7.

<sup>1057</sup> Communication Rights Australia, *Submission no. 13*, 8 September 2011, p. 5.

<sup>1058</sup> Communication Rights Australia, *Submission no. 13*, 8 September 2011, p. 9. See also Jan Ashford, Chief Executive Officer, Communication Rights Australia, *Transcript of evidence*, Melbourne, 21 February 2012, p. 27.

<sup>1059</sup> Jody Saxton-Barney, Victorian Disability Advisory Council, *Transcript of evidence*, Melbourne, 24 October 2011, p. 6.

a communication book with pictures, which allowed the victim to point to the perpetrator and provide an account of what happened.<sup>1060</sup>

### Improving support during court appearances

While recognising that assistance can be provided by an interpreter or Auslan interpreter in court hearings involving a non-English speaking, deaf or mute witness, the OPP expressed concern that comparatively little support is provided to people with an intellectual disability or cognitive impairment.<sup>1061</sup> People with an intellectual disability or cognitive impairment may have difficulty in understanding and responding to questions, or may need to respond to questions in non-standard English, such as with the use of communication boards or a combination of speech, gestures and pointing to symbols to communicate.

The OPP discussed the use of witness intermediaries in the United Kingdom and suggested this model of support could be adopted in Victoria:

The function of an intermediary is to assist intellectually disabled and other 'vulnerable' witnesses to communicate by explaining the questions being asked of them and in turn explaining to the court the answers given by the witness. An intermediary effectively acts as a 'go-between' to facilitate communication between the witness and the court.<sup>1062</sup>

In the United Kingdom the witness intermediary provides more support to witnesses, including those who suffer from a mental illness or significant impairment of intelligence or social functioning, than is currently available in Victoria.<sup>1063</sup> The *Youth Justice and Criminal Evidence Act 1999* (UK) sets out that the functions of the intermediary are to communicate:

- (a) to the witness, questions put to the witness, and
  - (b) to any person asking such questions, the answers given by the witness in reply to them,
- and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.<sup>1064</sup>

The Intermediary Registration Board oversees the registration and standards for intermediaries. Intermediaries are registered after an accreditation and training process, and are assessed against a core set of required competencies. Intermediaries may include speech and language therapists, clinical psychologists, mental health professionals and special needs education professionals.<sup>1065</sup>

<sup>1060</sup> Lynne Coulson Barr, Deputy Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, p. 15.

<sup>1061</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 9.

<sup>1062</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, pp. 9-10 (citations omitted).

<sup>1063</sup> *Youth Justice and Criminal Evidence Act 1999*, (UK), section 16(2).

<sup>1064</sup> *Youth Justice and Criminal Evidence Act 1999*, (UK), section 29(2).

<sup>1065</sup> Ministry of Justice (UK), *Registered intermediary procedural guidance manual*, Ministry of Justice (UK), London, 2012, p. 9.

Intermediaries can provide assistance to a witness during pre-trial preparation to improve a person's understanding of court processes and to enhance his or her capacity to be involved in court appearances.<sup>1066</sup> The OPP suggested that witness intermediaries would enhance the ability for people with an intellectual disability or cognitive impairment to provide evidence to court.<sup>1067</sup> Mr Matthew Andison, a Senior Solicitor at the OPP said:

... it is a case of being next to them in the witness box, facilitating the giving of their evidence to the court ... a witness intermediary could mean the difference between a prosecution proceeding or the charges simply being withdrawn. One of the main barriers faced by an intellectually disabled witness may be a perception by those involved in the process that they lack credibility, and it may be that an intermediary could overcome that barrier ...<sup>1068</sup>

In New South Wales the *Criminal Procedure Act 1986* (NSW) provides that a vulnerable person (which includes a person with an intellectual disability, dementia, a neurological disorder or brain injury) is "... entitled to choose a person whom the vulnerable person would like to have present near him or her when giving evidence."<sup>1069</sup> This support person may be a parent, guardian, relative or friend.<sup>1070</sup> The Act sets out that the support person:

... may be with the vulnerable person as an interpreter, for the purpose of assisting the vulnerable person with any difficulty in giving evidence associated with an impairment or a disability, or for the purpose of providing the vulnerable person with other support.<sup>1071</sup>

An evaluation of the witness intermediary scheme in the United Kingdom between 2004 and 2006 during the scheme's pilot stages found that there were a number of benefits in the use of witness intermediaries. These benefits included that:

- the use of the witness intermediary increased the probability of an offender being convicted of an offence, partly as a result of evidence that was able to be obtained from the witness;<sup>1072</sup> and
- most trial participants, including the assisted witness as well as court personnel, found the assistance provided by the intermediary in facilitating questioning made it easier for

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<sup>1066</sup> Ministry of Justice (UK), *Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses and guidance on special measures*, Ministry of Justice (UK), London, 2011, p. 123.

<sup>1067</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, p. 10.

<sup>1068</sup> Matthew Andison, Senior Solicitor, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 30 April 2012, p. 6.

<sup>1069</sup> *Criminal Procedure Act 1986* (NSW), sections 306M, 306ZK(2).

<sup>1070</sup> *Criminal Procedure Act 1986* (NSW), section 306ZK(3)(a).

<sup>1071</sup> *Criminal Procedure Act 1986* (NSW), section 306ZK(3)(b).

<sup>1072</sup> Joyce Plotnikoff and Richard Woolfson, *The 'Go Between' evaluation of intermediary pathfinder projects*, Office of Criminal Justice Law Reform, 2007, p. 57: Out of 20 cases in which an intermediary was appointed, 13 cases resulted in an offender being convicted of the offence charged.

witnesses to give evidence thereby encouraging more effective participation in court proceedings.<sup>1073</sup>

The Committee recognises that being able to present evidence in court to the best of a person's ability is a fundamental right that must be maintained by the courts. Given the complexities involved in participating in court proceedings and the particular difficulties that a person with an intellectual disability or cognitive impairment may experience when presenting evidence, the Committee believes that the presence of a support person for the witness while giving evidence may be beneficial. The role of the support person should be to relay information and questions both to and from the witness and ensure that he or she understands the process.

The Committee believes there is considerable merit in exploring the use of the witness intermediary model in the United Kingdom. The Committee notes that this scheme has been in operation since 2004 and has undergone a number of evaluations since its introduction. It is the Committee's belief that Victoria will be able to gain insights from the United Kingdom model in developing a comparable system of support for witnesses. The Committee recognises that establishing such a system of support will require a commitment of resources. However, the Committee believes that this support mechanism will be beneficial in terms of facilitating more positive and effective interactions with the court by people with an intellectual disability or cognitive impairment.

**Recommendation 36:** That the Victorian Government consider establishing a witness intermediary scheme modelled on the United Kingdom scheme to provide support for people with an intellectual disability or cognitive impairment. The role of the intermediary could include:

- communicating questions that have been put to the witness;
- communicating answers given by the witness in reply to any questions; and
- explaining questions or answers as necessary to allow them to be understood by the witness.

### Litigation guardians

The appointment of a support person is appropriate for witnesses who are competent to give evidence in court. People with a disability who lack legal capacity and are unable to give instructions may benefit from the appointment of a litigation guardian to act on their behalf as a party to proceedings.<sup>1074</sup> A litigation guardian differs from a guardian appointed under the *Guardianship Act 1986* (Vic), as guardians appointed under that Act are not typically involved in legal proceedings. However, both types of

<sup>1073</sup> Joyce Plotnikoff and Richard Woolfson, *The 'Go Between' evaluation of intermediary pathfinder projects*, Office of Criminal Justice Law Reform, 2007, pp. 59-61.

<sup>1074</sup> See for example *Federal Magistrates Court Rules 2001*, rule 11.08 which describes a person who may need a litigation guardian as a "... person who does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of the proceeding".



guardians are able to provide assistance to lawyers when communicating and obtaining instructions.<sup>1075</sup> A litigation guardian might also be required to:

- attend meetings with the person with a disability;
- attend meetings with solicitors and barristers;
- attend court hearings; or
- read court documents.<sup>1076</sup>

Court rules govern the appointment of a litigation guardian, which provide that a litigation guardian may be appointed by the courts for a person under the age of 18 or a person with a disability (which is defined to include a person with an injury, disease, senility, illness or physical or mental infirmity).<sup>1077</sup> As the rules of the Children's Court do not specifically permit a litigation guardian to be appointed, the Children's Court follows the *Magistrates' Court General Civil Procedure Rules 2010* in order to appoint a litigation guardian in appropriate cases.<sup>1078</sup> Magistrate Francis Zemljak told the Committee that he had appointed the Public Advocate as a litigation guardian in the Children's Court, and that this had been very beneficial for the child concerned.<sup>1079</sup>

The OPA expressed two concerns with the appointment of litigation guardians. Firstly, the OPA observed there is no standard appointment procedure across state courts and tribunals, and secondly, there is no government funded litigation guardian service.<sup>1080</sup> Consequently, when the Public Advocate takes on the role of litigation guardian, it is not specifically resourced to do so and it could be liable to an adverse cost order if the case is unsuccessful. The Committee notes that the VLRC expressed similar concerns in its recent guardianship review at the lack of a funded litigation guardian service. The VLRC's view was that a mechanism should be established to assist people who need a litigation guardian, as without such a mechanism the Courts are forced to appoint either the Public Advocate or the State Trustees to carry out the role in order to avoid the person being unrepresented in court.<sup>1081</sup> The consequences of an unrepresented litigant who has a disability that impacts their

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<sup>1075</sup> See for example *Guardianship and Administration Act 1986* (Vic), section 24(1); Office of the Public Advocate, *Litigation guardian*, OPA, Melbourne, 2008, p. 4: A guardian appointed by the courts has all the powers and duties as a parent would have over a child.

<sup>1076</sup> Office of the Public Advocate, *Litigation guardian*, OPA, Melbourne, 2008, p. 4.

<sup>1077</sup> See for example *Supreme Court (General Civil Procedure) Rules 2005*, rules 15.01, 15.02; *County Court Civil Procedure Rules 2008*, rules 15.01, 15.02; *Magistrates' Court General Civil Procedure Rules 2010*, rules 15.01, 15.02.

<sup>1078</sup> Children's Court of Victoria, *Submission no. 57*, 7 September 2011, p. 3.

<sup>1079</sup> Francis Zemljak, Magistrate, Children's Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 33. See also Children's Court of Victoria, *Submission no. 57*, 7 September 2011, pp. 3-4.

<sup>1080</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 22. See also Tabitha O'Shea, Community Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Bendigo, 28 May 2012, p. 4; Lachlan Singe, Treasurer, Bendigo Law Association, *Transcript of evidence*, Bendigo, 28 May 2012, pp. 38-39.

<sup>1081</sup> Victorian Law Reform Commission, *Guardianship*, VLRC, Melbourne, Final Report, 2012, p. 574.



decision-making capacity appearing before the courts are potentially very severe and the prospects of this occurring should be avoided.

The Committee notes concerns expressed in evidence regarding both the appointment of litigation guardians, and funding for a litigation guardian service. The Committee received little evidence commenting on the use of litigation guardians in courts, but believes that this matter warrants further investigation by the Victorian Government. Arrangements for the appointment of litigation guardians could be amended to:

- ensure consistent processes are employed by the courts to appoint litigation guardians;
- ensure that a mechanism exists to enable a person with a disability to locate a suitably qualified litigation guardian; and
- ensure that organisations currently acting, or required by the courts to act, as litigation guardians, are protected from adverse costs orders should such orders be imposed by the courts.

**Recommendation 37:** That the Victorian Government review current arrangements for the appointment of litigation guardians. The review could seek to:

- ensure consistent processes are employed by the courts to appoint litigation guardians;
- ensure that a mechanism exists to enable a person with a disability to locate a suitably qualified litigation guardian; and
- ensure that organisations currently acting, or required by the courts to act, as litigation guardians are able to draw upon funds to meet adverse costs orders should such orders be imposed by the courts.

### 8.3.3.2 Special arrangements for managing cases

Both the OPA and Victoria Legal Aid (VLA) described improvements that have been made to case management processes when witnesses with an intellectual disability or cognitive impairment are involved.<sup>1082</sup> The following Case Study was provided by VLA to illustrate flexibility that has been introduced by the courts in some cases.

*Case Study 30: Nathan's story part II.*<sup>1083</sup>

*“Nathan’ has significant difficulties understanding the court process. A psychological report stated that Nathan was fit to be tried but recommended that, in order for him to be able to participate in proceedings, the hearing procedures should be adapted, with long breaks and someone to explain the proceedings to Nathan and for him to report back that he understood.*

<sup>1082</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, pp. 29-30; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 14.

<sup>1083</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 11, 14.

*VLA provided an additional lawyer to sit in the dock with Nathan to explain the proceedings and continually monitor his understanding. However, the proceedings were not otherwise amended, save for the judge trying to explain things to Nathan in simple terms.”*

Despite these modifications the Committee heard that other modifications should be introduced to improve the courts' management of cases involving a person with an intellectual disability or cognitive impairment. VLA suggested that these include:

- priority listing to minimise delay
- regular rest breaks during trials and other extended hearings, and
- regular opportunities for lawyers and/or disability workers to explain and clarify understanding during proceedings ...<sup>1084</sup>

The Committee heard that because many people with an intellectual disability or cognitive impairment have difficulty recalling events as time passes, delays in court hearings could discriminate against these people, as questions about their competency could be raised.<sup>1085</sup>

Ms Coulson Barr, the Deputy Disability Services Commissioner, told the Committee that this could be improved by conducting court hearings involving people with an intellectual disability or cognitive impairment in a timely manner.<sup>1086</sup> Mr Stan Pappos, Housing Services Manager at the Australian Community Support Organisation, told the Committee that in his experience:

People with a cognitive impairment quite often don't make that association that if they've offended in January 2011 and they're in court in January 2012, there's a fair degree of time that's passed, and by that stage the response quite often is: why am I here again, what is this about? That was last year, this is the here and now. That's a feature of the people that we work with, that they are quite structured in the way they think, and I think they're not necessarily all that adaptable and all that patient when it comes to these lengthy delays in the criminal justice system.<sup>1087</sup>

VLA shared these concerns and told the Committee about some of the consequences of delays in matters proceeding to court:

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<sup>1084</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 15.

<sup>1085</sup> See for example Angela Alexander, *Submission no. 8*, 6 September 2011, p. 2; Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 8; Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 42; Carrie O'Shea, Senior Criminal Lawyer, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 42; Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 8.

<sup>1086</sup> Lynne Coulson Barr, Deputy Disability Services Commissioner, Office of the Disability Services Commissioner, *Transcript of evidence*, Melbourne, 24 October 2011, pp. 14-15.

<sup>1087</sup> Stan Pappos, Housing Services Manager, Australian Community Support Organisation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 26.

There is almost always a significant delay between an incident with legal consequences occurring and the court hearing to determine its resolution (whether it is a criminal or civil matter). Such delays may even be a number of years. The passage of time following the critical incident makes it difficult, particularly for a person with an intellectual disability, to remember the incident, provide their lawyer with meaningful instructions, give evidence and, in many cases, actually link the incident in question to the court proceedings. Delay between a criminal offence and its hearing also means that, if a penalty is eventually imposed by the court, it may not provide any specific deterrence because the person may not associate the penalty with the behaviour which led to it. As a result, they do not learn from the process and will be no more likely to control or modify their behaviour in the future. People with intellectual disabilities are more likely to learn from an immediate, supportive, behavioural intervention than a court hearing months or years down the track.<sup>1088</sup>

At present under the *Magistrates' Court Act 1989* (Vic) the court has the power to determine its own proceedings.<sup>1089</sup> One aspect of case management that can be used by the Magistrates' Court is the determination of court timetables. The Magistrates' Court *Criminal Procedure Rules 2009* specify that the Magistrates' Court must fix timetables to allow the management of cases in a just and timely manner.<sup>1090</sup> The Magistrates' Court *Listings Protocols*, which are established to support the purposes of the *Magistrates' Court Act 1989* and the *Criminal Procedure Act 2009*, provide detailed listing timeframes for matters before the court. The *Listing Protocols* provide that in listing cases Magistrates could seek to achieve:

- consistency of practice within the court;
- standardisation of coordination procedures across the state;
- timely hearing and disposal of cases;
- flexible listings; and
- reduction of waiting times at court.<sup>1091</sup>

In discussions with experienced lawyers appearing before the court, the Supreme Court of Victoria said that the "... aspect of case management considered most important in the context of intellectually disabled plaintiff is the setting of trial dates."<sup>1092</sup> In recognition of this the Supreme Court of Victoria said that it is considering establishing a new specialist list for the management of medical negligence cases which would include negligence cases resulting in brain injuries. The Court said that the "... utilisation of a specialist list allows the court to develop procedures more tailored to the

<sup>1088</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 14-15.

<sup>1089</sup> *Magistrates' Court Act 1989* (Vic), section 136.

<sup>1090</sup> *Magistrates' Court Criminal Procedure Rules 2009*, rules 5(2), 5(3).

<sup>1091</sup> Magistrates' Court of Victoria, *Listing protocol*, Magistrates' Court of Victoria, Melbourne, 2012, p. 2.

<sup>1092</sup> Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 8.

needs of particular cases and to trial new techniques” in managing those cases.<sup>1093</sup>

As well as improving the timeliness of cases, modifications can be made to court procedures to enhance understanding of and participation in court proceedings. These may include altering communication techniques, and introducing frequent breaks during hearings to accommodate a person with an intellectual disability or cognitive impairment who has a short attention span.

In New South Wales the *Equality before the Law Benchbook* provides guidance to judicial officers on the types of considerations that may be made by the courts when taking evidence from a person with an intellectual disability or cognitive impairment. The Benchbook suggests that when a person with an intellectual disability or cognitive impairment is giving evidence in court, judicial officers should consider:

- investigating what barriers may be experienced by people with disability when giving evidence in court and identifying how those barriers could be removed; or
- that although delay and cost might be incurred in making adjustments, this should be balanced against the person’s right to be able to give evidence.<sup>1094</sup>

Examples of adjustments include:

- allowing the person to have prior access to the court to familiarise themselves with the court;
- being flexible or more precise with the timing of listings and when evidence from the witness is to be taken;
- having frequent breaks; and
- making sure that documents that are critical to the appearance of the person with a disability in court are provided in an appropriate format.<sup>1095</sup>

The Benchbook recognises that people with an intellectual disability or cognitive impairment may require alternative communication techniques to be used to assist them to understand and respond to questions.<sup>1096</sup> Considerations for modifying communication include:

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<sup>1093</sup> Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 8.

<sup>1094</sup> Judicial Commission of New South Wales, *Equality before the law benchbook*, Judicial Commission of New South Wales, Sydney, 2009, p. 5401.

<sup>1095</sup> Judicial Commission of New South Wales, *Equality before the law benchbook*, Judicial Commission of New South Wales, Sydney, 2009, p. 5402.

<sup>1096</sup> Judicial Commission of New South Wales, *Equality before the law benchbook*, Judicial Commission of New South Wales, Sydney, 2009, p. 5409.

- recognising that many people do not want to acknowledge or admit they have an intellectual disability or cognitive impairment, so they may feign understanding;
- talking directly to the person, not their friend, family member or lawyer;
- slowing down the pace of speech so that it is easier to follow; and
- using language that is as simple and direct as possible, but not belittling to the person with the disability.<sup>1097</sup>

The Committee recognises that irrespective of whether a person has an intellectual disability or cognitive impairment, court processes and procedures are complex to understand. The Committee accepts that for people with an intellectual disability or cognitive impairment the prospect of giving evidence in court can present a number of daunting challenges that may be difficult to overcome without appropriate court interventions and modifications being made to court processes. Appropriate modifications in the management of cases involving a person with an intellectual disability or cognitive impairment should enhance the ability of this group of people to participate in court. The Committee notes that Recommendations 26 and 27 aim to improve awareness and understanding by members of the judiciary of the disadvantages experienced by people with an intellectual disability or cognitive impairment. The Committee considers that the existing discretions discussed above, taken together with increased training and guidance material for members of the judiciary, will ensure Judges and Magistrates will make appropriate modifications to court procedures that adequately take into account the impact of a person's disability.

As discussed in Chapter Four, the Magistrates' Court of Victoria is piloting a Court Advice and Support Officer (CASO) role.<sup>1098</sup> While not providing exclusive support to a person with an intellectual disability or cognitive impairment, the CASO provides information and advice to Magistrates, court staff and lawyers on welfare options available to court users.<sup>1099</sup> Both the Children's Court of Victoria and the Supreme Court of Victoria expressed the view that they would benefit from the establishment of similar specialist roles within their jurisdictions.<sup>1100</sup> The Committee believes that the establishment of a coordinating role within all Courts would assist Judges and Magistrates to manage cases involving a person with an intellectual disability or cognitive impairment.

<sup>1097</sup> Judicial Commission of New South Wales, *Equality before the law benchbook*, Judicial Commission of New South Wales, Sydney, 2009, pp. 5407-5408.

<sup>1098</sup> Glenn Rutter, Manager, Court Support and Diversion Services, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 25.

<sup>1099</sup> Magistrates' Court of Victoria, 'New role being piloted at the Melbourne Magistrates' Court', viewed 3 September 2011, <<http://www.magistratescourt.vic.gov.au/news/new-role-being-piloted-melbourne-magistrates-court>>.

<sup>1100</sup> Children's Court of Victoria, *Submission no. 57*, 7 September 2011, p. 3; Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, pp. 9-10.

Recommendation 38: That the Victorian Government consider establishing specialist advocacy roles within the Magistrates', Children's, County and Supreme Courts of Victoria to provide support to Magistrates and Judges to manage cases involving a person with an intellectual disability or cognitive impairment.

### 8.3.3.3 Alternative procedures for giving evidence

Following the VLRC's extensive review of *Sexual Offences* in 2004, the *Criminal Procedure Act 2009* (Vic) was amended to create special protections for children and people with a cognitive impairment<sup>1101</sup> who have been victims of a sexual offence and who are giving evidence in court. Alternative arrangements include:

- permitting evidence to be given from a place other than the courtroom by closed-circuit television or other facilities that enable communication between an alternative place and the courtroom;
- using a screen to remove the defendant from a witness's direct line of vision;
- permitting a person chosen by the witness and approved by the court to be beside the witness while he or she is giving evidence; and
- permitting only specified persons to be present in court while the witness is giving evidence.<sup>1102</sup>

The prosecutor can apply to court for any of these conditions to be accommodated. Guidelines issued by the OPP recognise that giving evidence in sexual offence cases is a traumatic experience. The guidelines state that prosecutors need to ensure that complainants, particularly young children and witnesses with mental impairments, are given regular breaks during court proceedings. This may require the prosecutor to alert the Judge or Magistrate about the need for breaks prior to the witness appearing before the court.<sup>1103</sup>

The main justification for allowing special arrangements for taking evidence from children or victims with a cognitive impairment in sexual offence cases is that it provides extra protection for these particularly vulnerable witnesses from the trauma associated with giving evidence. The special arrangements recognise that for some witnesses the fear of giving evidence in an open court may act as a disincentive to giving evidence, which could result in prosecutions failing.

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<sup>1101</sup> *Criminal Procedure Act 2009* (Vic), section 3: A person with a cognitive impairment is defined to include someone with an intellectual disability.

<sup>1102</sup> *Criminal Procedure Act 2009* (Vic), section 360.

<sup>1103</sup> Office of Public Prosecutions, *Provision of support persons to witnesses*, OPP, Melbourne, 2010, p. 1.



These special arrangements are intended to ensure that young witnesses and those with a mental impairment are able to give evidence in court. Special arrangements for giving evidence in court must be balanced against the need for the defendant to have a fair trial.

The Committee was told by Ms Lee Ann Bassar, from the Victorian Disability Advisory Council, that these alternative measures for giving evidence should be extended across all civil and criminal matters to enhance the ability of all people with an intellectual disability to give evidence. Ms Bassar, however, recognised that different methods for gathering evidence may be needed depending on the nature of the case being heard.<sup>1104</sup>

The Committee believes that the Victorian Government should explore whether alternative arrangements for giving evidence should be expanded. The Committee considers that, among other things, the following matters should be explored:

- What offences should special procedures for giving evidence be available for?
- Should special procedures be applicable to only victims and witnesses with a cognitive impairment, or are there instances in which an accused should also be able to rely on these procedures?
- Whether special procedures should be adopted as a mandatory or discretionary requirement and, if they are a discretionary requirement, how and when should the decision be made to adopt these special procedures?

Recommendation 39: That the Victorian Government examine whether existing mechanisms for giving evidence by alternative means could be expanded, with a view to exploring whether these measures could enhance the level of participation that all people with an intellectual disability or cognitive impairment have in court proceedings.

#### 8.3.3.4 Judicial control over questioning

The language used in court is often difficult for people with an intellectual disability or cognitive impairment to understand. Ideally, counsel should frame questions in terms that the witness understands, to encourage the person's participation during the hearing. There may, however, be tactical reasons for counsel not asking questions in this way. For example, defence counsel may wish to cast doubt on the credibility of the witness's evidence.

The court has the inherent power to control its own proceedings. The rules allow the court to disallow improper questions from being put to a vulnerable witness (which includes a witness with a cognitive impairment

<sup>1104</sup> Lee Ann Bassar, Victorian Disability Advisory Council, *Transcript of evidence*, Melbourne, 24 October 2011, pp. 4-5.



or intellectual disability), or direct that a witness need not answer a question unless the court is satisfied that it is necessary for that question to be asked.<sup>1105</sup> Examples of improper questions include questions that:

- are misleading or confusing;
- are unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
- are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- have no basis other than to highlight a stereotype, for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability.<sup>1106</sup>

For most witnesses the court's ability to disallow improper questions is a discretionary power, but for witnesses who are vulnerable such as those with an intellectual disability or cognitive impairment the court is compelled to do so. In its report into people with an intellectual disability as victims of crime, the OPA stated that:

The protection of victims from unfair or harassing cross-examination by defence counsel must ultimately rest with prosecutors and judges ... it is the duty of a prosecutor and a judge to seek to defend a victim or witness from improper or unduly harsh questioning.<sup>1107</sup>

In its evidence to the Committee, the OPA stressed the important role that the Judge or Magistrate has in gathering evidence in court. The OPA stated that "A decision maker is in a unique position to set the scene for the proceedings, and can to some extent alleviate the sense of alienation a person with a cognitive disability may experience in the court system."<sup>1108</sup> As outlined above, the *Evidence Act 2008* does give Judges and Magistrates some control, both discretionary and mandatory, for controlling the method and form of questions put to vulnerable witnesses. The Committee believes that its recommendations to improve awareness and understanding by members of the judiciary of the disadvantages of people with an intellectual disability or cognitive impairment will add greater weight to the ability of Judges and Magistrates to control hearings involving this group of people (see Recommendations 26 and 27).

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<sup>1105</sup> *Evidence Act 2008* (Vic), section 41(2).

<sup>1106</sup> *Evidence Act 2008* (Vic), section 41(3).

<sup>1107</sup> Office of the Public Advocate, *Silent victims: A study of people with intellectual disabilities as victims of crime*, OPA, Melbourne, Report prepared by Kelley Johnson, Ruth Andrew and Vivienne Topp, 1988, p. 67.

<sup>1108</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 28.

## Chapter Nine: Sentencing decisions and options

A number of considerations need to be balanced when determining appropriate sentences, such as the seriousness of the offence, and any aggravating or mitigating factors. In Victoria once a sentence is determined Corrections Victoria, or Youth Justice within the Department of Human Services (DHS), is responsible for managing the sentence. Principles for determining sentencing have been articulated by the courts to guide decisions:

Sentencing is not a mechanical process. It requires the exercise of a discretion. There is no single “right” answer which can be determined by the application of principle. Different minds will attribute different weight to various facts in arriving at the “instinctive synthesis” which takes account of the various purposes for which sentences are imposed – just punishment, deterrence, rehabilitation, denunciation, protection of the community – and which pays due regard to principles of totality, parity, parsimony and the like.<sup>1109</sup>

This Chapter will begin by examining the principles and purposes of sentencing and explore the courts’ consideration of intellectual disability and cognitive impairment as a relevant factor in sentencing. Custodial and non-custodial sentencing options and their application to offenders with an intellectual disability or cognitive impairment will also be discussed.

### 9.1 Purposes, principles and considerations

#### 9.1.1 Sentencing purposes

Sentencing takes place after a person is found guilty or pleads guilty to an offence. A sentencing judge may need to consider a range of factors when determining an appropriate sentence. In Victoria, the *Sentencing Act 1991* (Vic) sets out the purposes of sentencing, the considerations that should be taken into account when sentencing, and the sentencing orders available to the courts. The *Children, Youth and Families Act 2005* (Vic) sets out a comparable framework for when a child or young person is being sentenced.

Sentencing occurs at a specifically convened public hearing, generally a few weeks after the trial. Sentencing hearings typically require the defendant to be present at the hearing, but they can take place without the defendant. As with a criminal trial, evidence is presented first by the

<sup>1109</sup> *R v Storey* [1998] 1 VR 359, 366 (citations omitted).

prosecution who summarises the case against the offender and then by the defence who provides evidence about the circumstances of the offender. Throughout the hearing the Judge or Magistrate may ask questions or request that reports or assessments be undertaken. Following this, the Judge or Magistrate will sum up the case outlining factors that have shaped the sentencing decision.

The *Sentencing Act 1991* sets out the following purposes in determining the sentence to be imposed:

- to punish the offender to an extent and in a manner which is just in all the circumstances;
- to deter the offender and others in the community;
- to rehabilitate the offender;
- to express the court's denunciation of the conduct committed by the offender; and
- to protect the community from the offender.<sup>1110</sup>

On occasion these purposes may conflict. This problem was addressed by the majority in *Veen v R* where it was said:

... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.<sup>1111</sup>

For young people the need to rehabilitate the offender is regarded as paramount.<sup>1112</sup> If the court is sentencing an offender for a serious sexual or violent offence then the sentence will be principally directed toward the need to protect the community.<sup>1113</sup>

## 9.1.2 Sentencing principles and considerations

The courts have outlined certain fundamental principles that, in addition to sentencing purposes, guide sentencing decisions. These principles include:

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<sup>1110</sup> *Sentencing Act 1991* (Vic), section 5(1).

<sup>1111</sup> *Veen v R* (1988) 77 ALR 385, 392-393.

<sup>1112</sup> *DPP v REE* [2002] VSCA 65, [21]-[22].

<sup>1113</sup> *Sentencing Act 1991* (Vic), section 6D.

- parsimony, which requires the court to impose the least severe sentence required to meet the purposes of sentencing;<sup>1114</sup>
- proportionality, which requires that in sentencing the overall punishment must be proportionate to the gravity of the offending behaviour;<sup>1115</sup>
- parity, which requires that there be consistency in sentencing offenders convicted of similar offences and that there should not be sentence disparities without justification;<sup>1116</sup> and
- totality, which requires that where an offender is at risk of serving more than one sentence, the overall effect of the sentence must be just, proportionate and appropriate to the overall criminality of the offending behaviour.<sup>1117</sup>

The court will also consider the circumstances of the offender and the circumstances in which the offence was committed. Considerations in this regard are:

- a) the maximum penalty prescribed for the offence; and
- b) current sentencing practices; and
- c) the nature and gravity of the offence; and
- d) the offender's culpability and degree of responsibility for the offence; and
- daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated; and
- daa) the impact of the offence on any victim of the offence; and
- da) the personal circumstances of any victim of the offence; and
- db) any injury, loss or damage resulting directly from the offence; and
- e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and
- f) the offender's previous character; and
- g) the presence of any aggravating or mitigating factors concerning the offender or any other relevant circumstance.<sup>1118</sup>

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<sup>1114</sup> *Milne* (1982) 4 CR App R (s) 397.

<sup>1115</sup> *Hoare v R* (1989) 167 CLR 348, 354.

<sup>1116</sup> *Lowe v R* (1984) 154 CLR 606, 610-611.

<sup>1117</sup> *Attorney-General v Tichy* (1982) 30 SASR 84, 92-93.

<sup>1118</sup> *Sentencing Act 1991* (Vic), section 5(2).

In sentencing young offenders the court will have regard to:

- a) the need to strengthen and preserve the relationship between the child and the child's family; and
- b) the desirability of allowing the child to live at home; and
- c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
- d) the need to minimise the stigma to the child resulting from a court determination; and
- e) the suitability of the sentence to the child; and
- f) if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law; and
- g) if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.<sup>1119</sup>

### **9.1.2.1 Relevance of intellectual disability and cognitive impairment to sentencing**

The existence of a mental impairment, such as an intellectual disability or cognitive impairment, may affect the court's assessment of the criminal responsibility of an offender charged with an offence. As discussed in Chapter Seven, the existence of a mental impairment may affect the degree to which an offender can be found culpable for the offence charged. If an offender is found guilty of the offence, or not guilty on the grounds of mental impairment, the existence of the impairment may also be taken into account when sentencing.

There are a number of ways for the courts to take into account the existence of a mental impairment during sentencing. The Committee notes that the development of the common law differs from the legislative factors the courts must have regard to when sentencing an offender. For example, under the *Crimes Act 1914* (Cth), when the courts are sentencing an offender for a federal offence, the court must have regard, among other things, to "the character, antecedents, age, means and physical or mental condition of the person".<sup>1120</sup> Therefore considerations about mental impairment in sentencing decisions are defined in some legislation.

Alternatively, principles have been developed by the courts, rather than through legislation, for considering the effect mental impairment should have when determining an appropriate sentence. For example, principles articulated in *R v Verdins*; *R v Buckley*; *R v Vo* (the *Verdins* principles) suggest that:

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<sup>1119</sup> *Children, Youth and Families Act 2005* (Vic), section 362(1).

<sup>1120</sup> *Crimes Act 1914* (Cth), section 16A(2)(m).

Impaired mental functioning, whether temporary or permanent (“the condition”), is relevant to sentencing in at least the following six ways:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender’s legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Whether there is a serious risk of imprisonment having a significant adverse effect on the offender’s mental health, this will be a factor tending to mitigate punishment.<sup>1121</sup>

The *Verdins* principles were developed in relation to psychiatric disorders, but have since been used by the courts when sentencing offenders with an intellectual disability or other cognitive impairment, such as acquired brain injuries (ABIs).<sup>1122</sup>

The Court in *Verdins* summarised the circumstances in which an offender’s moral culpability may be reduced, if his or her mental condition was:

- a) impairing the offender’s ability to exercise appropriate judgement;
- b) impairing the offender’s ability to make calm and rational choices, or to think clearly;
- c) making the offender disinhibited;
- d) impairing the offender’s ability to appreciate the wrongfulness of the conduct;
- e) obscuring the intent to commit the offence; or

<sup>1121</sup> *R v Verdins; R v Buckley; R v Vo* (2007) 16 VR 269, [32] (citations omitted).

<sup>1122</sup> See for example *R v Curtain* [2007] VSC 209; *R v Nguyen, Ho and Nguyen* [2007] VSC 407; *DPP v Lovett* [2008] VSCA 262; *R v Laracy* [2008] VSC 67; *R v McIntosh* (2008) VSCA 242, [84]-[104].

f) contributing (causally) to the commission of the offence.<sup>1123</sup>

As discussed in Chapter Two, while the effect of intellectual disability or cognitive impairment upon a person is variable, it is not uncommon for a person with a mental impairment to have difficulty appreciating the consequences of their actions, to have poor impulse control, or to be susceptible to exploitation by people who involve them in offending.<sup>1124</sup> The combination of these characteristics may arguably reduce their moral culpability, and may also be significant when sentencing decisions are made.

The second *Verdins* principle, that the condition may have a bearing on the appropriate sanction to be imposed, may be taken into consideration by the court by deciding to impose a sanction that is particularly tailored to people with such impairments (such as a custodial or non-custodial supervision order,<sup>1125</sup> a residential treatment order,<sup>1126</sup> or a justice plan condition<sup>1127</sup>), or it may influence the court's determination that a particular form of sanction is inappropriate.

The third and fourth principles consider the weight to be given to general and specific deterrence in determining sentences. General deterrence refers to deterring members of the community from committing similar offences, while specific deterrence refers to deterring the individual from offending again. Chief Justice Young in *R v Mooney* said that "General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others."<sup>1128</sup> In other cases the courts have said that considerations of general deterrence may be limited as the existence of a mental impairment could attract the sympathy of the community:

General deterrence is simply the deterrence of others and characteristics personal to an offender might make him an unpersuasive vehicle for the deterrence of others in the sight of those others. ... Even in a case where an offender has a mental disability which is unrelated to the commission of the crime the sympathy which his condition must attract in the eyes of others in the community generally may be such that to sentence him with full weight given to general deterrence might have no impact at all upon

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<sup>1123</sup> *R v Verdins; R v Buckley; R v Vo* (2007) 16 VR 269, [26].

<sup>1124</sup> See for example Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, pp. 28-29; Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 23; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 3; Louis Schetzer and Judith Henderson, *Access to justice and legal needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, Law and Justice Foundation of New South Wales, Sydney, Stage 1: Public consultations, 2003, pp. 10-11; C Wilson, T Nettelbeck, R Potter and C Perry, 'Intellectual disability and criminal victimisation', *Trends and Issues in Crime and Criminal Justice*, vol. 60, 1996, p. 2.

<sup>1125</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 26.

<sup>1126</sup> *Sentencing Act 1991* (Vic), section 82AA.

<sup>1127</sup> *Sentencing Act 1991* (Vic), section 80.

<sup>1128</sup> *R v Mooney* [1978] VICCCA (21 June 1978), 5.



others. Human sympathy would say: "Well, you would not expect him to get the same sentence as someone else".<sup>1129</sup>

In respect of specific deterrence the courts have recognised that:

... it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds.<sup>1130</sup>

The difficulty associated with justifying a sentence on the grounds of deterrence, particularly the deterrence of young offenders with an intellectual disability, was highlighted by Mr Daniel Moyle, the Youth Justice and Community Support Service Coordinator at Barwon Youth, who said that:

Depending what their level of cognitive skill is, they may not even understand that this is a punitive approach – that is, you are being sent here because it is the last straw and you are getting a consequence; you are being punished for your behaviour. They do not understand that.<sup>1131</sup>

In some cases it is possible that the punitive and deterrent effect of punishment imposed by the courts may be lost on a person with an intellectual disability or cognitive impairment.

The final *Verdins* principle considers the consequences of imprisonment and whether the sentence may weigh more heavily on an offender with a mental impairment. Justice of Appeal Dodds-Streeton said in *R v Zander* that imprisonment would naturally cause considerable stress to any offender. However, in order for this to be a relevant consideration the court must receive evidence establishing that a particular offender will experience a greater burden than others.<sup>1132</sup> The courts have found that offenders with cognitive impairments such as ABIs or Asperger's syndrome may experience additional hardship.<sup>1133</sup>

In its submission to the Committee, the Supreme Court of Victoria noted the *Verdins* principles and the effect they have on mitigating sentences imposed on offenders with an intellectual disability. The Court also noted that there have been occasions where the mitigating effect of an intellectual disability is overwhelmed by evidence of an offender's criminal history, which may indicate a likelihood that they will reoffend.<sup>1134</sup> The Supreme Court highlighted the case of *R v Patterson*, where the Court was

<sup>1129</sup> *R v Engert* (1995) 84 A Crim R 67, 72, quoted in Judicial College of Victoria, *Victorian Sentencing Manual*, Melbourne, 2006, p. 10.9.5.

<sup>1130</sup> *R v Porter* (1933) 55 CLR 182, 186.

<sup>1131</sup> Daniel Moyle, Coordinator, Youth Justice and Community Support Service, Barwon Youth, *Transcript of evidence*, Geelong, 20 March 2012, p. 35.

<sup>1132</sup> *R v Zander* [2009] VSCA 10, [32]. See also *R v Champion* (1992) A Crim R 244, 254-255.

<sup>1133</sup> See for example *R v Nguyen, Ho and Nguyen* [2007] VSC 407; *R v Finlayson* [2008] VSCA 50; *Director of Public Prosecutions v HPW* [2011] VSCA 88.

<sup>1134</sup> Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 4.

faced with this dilemma when sentencing an offender with an intellectual disability who had been convicted of multiple sexual offences. In that case the Court said:

Cases of this kind present sentencing judges with a particularly difficult task. On the one hand, the offending is very serious in nature, and there is a significant risk of re-offending, attributable in large measure to the offender's intellectual and personality shortcomings. ... On the other hand, as we have said, the mental impairment provides cogent reasons to mitigate sentence, both on accounts of reduced moral culpability and because of difficulties likely to be experienced in prison.<sup>1135</sup>

The difficulty for the courts when determining appropriate sentences for people with an intellectual disability was also recognised by Victoria Legal Aid (VLA). VLA considered that there are limited options available to the courts when sentencing an offender with an intellectual disability and said that "... on occasion the court struggles to identify an appropriate sentence for a client, particularly where they have reoffended numerous times and do not appear to benefit from supervision or other supports."<sup>1136</sup>

## 9.2 Custodial sentences

The *Sentencing Act 1991* sets out a number of generic and specific custodial sentencing options available to the courts – imprisonment, youth detention, residential treatment orders or custodial supervision orders. Offenders with an intellectual disability or cognitive impairment can be placed in mainstream prison facilities, specialised units within the corrections system, or in secure units in the community. Issues associated with appropriate management and screening and assessment are likely to be relevant when a person with an intellectual disability or cognitive impairment is placed in custody.

### 9.2.1 Sentencing options

#### 9.2.1.1 Imprisonment

Imprisonment is the most severe sentencing order available to the courts. Consequently, imprisonment should be a sanction of last resort, and the court must consider whether the purpose for which the sentence is imposed could be achieved by a sentence that does not involve imprisonment.<sup>1137</sup> A statutory offence is only punishable by imprisonment if that sanction is provided for by statute. While almost all indictable offences are punishable by imprisonment, only some summary offences are punishable by imprisonment.<sup>1138</sup>

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<sup>1135</sup> *R v Patterson* [2009] VSCA 222, cited in Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 4.

<sup>1136</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 19.

<sup>1137</sup> *Sentencing Act 1991* (Vic), sections 5(3), 5(4).

<sup>1138</sup> Judicial College of Victoria, *Victorian Sentencing Manual*, Melbourne, 2006, p. 12.3.2.

Where a sentence of more than two years imprisonment has been imposed, the court must set a non-parole period, during which time the offender cannot be released, unless the court determines a non-parole period is inappropriate given the nature of the offence or the past history of the offender.<sup>1139</sup>

In a narrow range of cases the *Sentencing Act 1991* provides that if a person is convicted by the Supreme or County Courts for a serious offence an indefinite term of imprisonment may be ordered.<sup>1140</sup> An indefinite sentence may only be imposed if the court is satisfied the offender poses a serious danger to the community, because of:

- a) his or her character, past history, age, health or mental condition; and
- b) the nature and gravity of the serious offence; and
- c) any special circumstances.<sup>1141</sup>

When determining whether an offender poses a serious danger to the community, the court must have regard to factors including:

- whether the nature of the serious offence is exceptional;
- any relevant medical, psychiatric or other relevant report; and
- the risk of serious danger to members of the community if an indefinite sentence were not imposed and the need to protect the community from such risk.<sup>1142</sup>

The courts are generally reluctant to imprison certain types of offenders, such as first time and young offenders. The courts may also be reluctant to imprison an offender with an intellectual disability or cognitive impairment. Consistent with the final consideration of the *Verdins* principles, Chief Justice King in *R v Smith* identified that ill health might be considered by the courts as mitigating a sentence of imprisonment:

Generally speaking ill-health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.<sup>1143</sup>

As discussed earlier the court will require evidence that imprisonment will be a greater burden on an offender with a mental impairment before it can conclude against imposing such an order. The importance of obtaining evidence about the likely consequences of imprisonment was highlighted by the Court in *Ashe v R*:

<sup>1139</sup> *Sentencing Act 1991* (Vic), section 11(1).

<sup>1140</sup> *Sentencing Act 1991* (Vic), sections 18A, 3: A serious offence is defined to include murder, manslaughter, child homicide, intentionally causing injury and rape.

<sup>1141</sup> *Sentencing Act 1991* (Vic), section 18B(1).

<sup>1142</sup> *Sentencing Act 1991* (Vic), section 18B(2).

<sup>1143</sup> *R v Smith* (1987) 44 SASR 587, 589, quoted in Judicial College of Victoria, *Victorian Sentencing Manual*, Melbourne, 2006, p. 10.9.7.

While *Verdins* states that it is self evident that a prisoner suffering from a mental illness such as severe depression will find prison more burdensome than a person in normal health and that imprisonment may cause a deterioration in such a condition such outcomes are not equally obvious in the case of a prisoner with low intelligence. It is not evident that this condition will necessarily make prison a greater burden.<sup>1144</sup>

In *Ashe v R* the Court did not receive evidence that the offender, who had an intellectual disability, would experience any additional burden if imprisoned and the Court did not mitigate the sentence imposed merely because the offender had an intellectual disability.<sup>1145</sup>

For offenders with an intellectual disability or cognitive impairment the court must be made aware of the intellectual disability and the likely impact upon that person from imprisonment, if it is to have regard for the person's impairment. Other factors that have been taken into account by the courts when determining whether a sentence of imprisonment ought to be reduced include:

- whether the offender is to spend at least part of his or her sentence of imprisonment in seclusion, due to the risk that he or she poses to him- or herself or others;<sup>1146</sup>
- whether the management of the offender's mental health problems would be difficult in a custodial setting;<sup>1147</sup> and
- whether the offender was likely to be isolated in a prison environment due to his or her mental condition.<sup>1148</sup>

Although the courts may be reluctant to sentence an offender with an intellectual disability or cognitive impairment to imprisonment, research discussed in Chapter Two clearly indicates that people with an intellectual disability or cognitive impairment, particularly those with an ABI, are being sent to prison in high numbers.<sup>1149</sup>

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<sup>1144</sup> *Ashe v R* [2010] VSCA 119, [20].

<sup>1145</sup> *Ashe v R* [2010] VSCA 119, [20].

<sup>1146</sup> See for example *R v Margach* [2008] VSC 255; *R v Fitchett* [2010] VSC 393.

<sup>1147</sup> See for example *R v Margach* [2008] VSC 255.

<sup>1148</sup> See for example *R v Tran* [2008] VSCA 80.

<sup>1149</sup> See for example Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 17: This study found that during the period between 2003 and 2006 people with an intellectual disability made up approximately 1.3 per cent of the prison population released during that period; Corrections Victoria, *Acquired brain injury in the Victorian prison system*, Department of Justice, Melbourne, 2011, p. 22: This study found that 42 per cent of male prisoners and 33 per cent of female prisoners between 2007 and 2008 had an ABI.

### 9.2.1.2 Youth detention

Two types of facilities are available for the detention of young offenders – a Youth Justice Centre (YJC) for offenders aged 15 to 21 years, and a Youth Residential Centre (YRC) for offenders under 15 years.<sup>1150</sup>

There are two youth justice custodial precincts in Victoria, and both are managed by the DHS. The Malmsbury Youth Justice precinct accommodates young men aged 18 to 21 who are sentenced to a youth justice order.<sup>1151</sup> The Parkville Youth Justice precinct has two custodial centres that accommodate:

- young males aged between 10 and 18 who have been remanded and sentenced;
- young females aged between 10 and 17 who have been remanded and sentenced; and
- young females aged 18 to 21 who have been sentenced to a youth justice order.<sup>1152</sup>

When deciding whether to confine a young person the court must consider the nature of the offence and the age, character and past history of the young offender.<sup>1153</sup> The court must also be satisfied that:

- there are reasonable prospects for the rehabilitation of the young offender; or
- the young offender would be particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.<sup>1154</sup>

Other sentencing purposes such as deterrence and punishment may also be relevant considerations when sentencing young offenders.<sup>1155</sup>

The maximum period that the court may order the detention of a young offender is between two and three years depending on which court imposed the sentence.<sup>1156</sup> The court must obtain a pre-sentence report if it is considering imposing a YJC or YRC order.<sup>1157</sup> The purpose and content of the pre-sentence report will be discussed in section 9.2.2.

<sup>1150</sup> *Sentencing Act 1991* (Vic), section 32(1).

<sup>1151</sup> Department of Human Services, 'Custody', viewed 1 February 2013, <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/youth-justice/custody>>.

<sup>1152</sup> Department of Human Services, 'Custody', viewed 1 February 2013, <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/youth-justice/custody>>.

<sup>1153</sup> *Sentencing Act 1991* (Vic), section 32(2).

<sup>1154</sup> *Sentencing Act 1991* (Vic), section 32(1).

<sup>1155</sup> *Re PP* (2003) 142 A Crim R 369, [9].

<sup>1156</sup> *Sentencing Act 1991* (Vic), section 32(3).

<sup>1157</sup> *Sentencing Act 1991* (Vic), section 32(1).

Sentencing courts have no power to fix a non-parole period when detaining a young offender in a YJC. Therefore all young offenders who have been detained are immediately eligible for parole.<sup>1158</sup> The Youth Parole Board and the Youth Residential Board, established under the *Children, Youth and Families Act 2005*, are responsible for making parole decisions in respect of young offenders.<sup>1159</sup> The Youth Parole Board has jurisdiction over children and young people aged 15 to 21 who have been sentenced to detention in a YJC. The Youth Residential Board has jurisdiction over children aged 10 to 14 who have been sentenced to detention in a YRC.

### 9.2.1.3 Residential treatment orders

A residential treatment order (RTO) is an order specifically available to offenders with an intellectual disability who have been found guilty of either a serious offence or indecent assault.<sup>1160</sup>

If the court is considering making an RTO the court may request:

- a pre-sentencing report;
- a statement from the Secretary of the DHS that the offender has an intellectual disability as defined under the *Disability Act 2006* (Vic); and
- a plan of available services.<sup>1161</sup>

An RTO may be ordered by the courts if the Secretary has provided notification that a person is suitable for admission to a residential treatment facility and services are available in such a facility.<sup>1162</sup> The *Disability Act 2006* specifies factors to be considered by the Secretary when determining the suitability of an offender for an RTO. These include whether the person presents a serious risk of violence to another person, or if the residential treatment facility can provide services for the treatment of the person with a disability.<sup>1163</sup> The Intensive Residential Treatment Program at the Disability Forensic Assessment and Treatment Service (formerly the Statewide Forensic Service) is deemed a residential treatment facility.<sup>1164</sup>

An RTO should not be imposed by the courts if a less severe sanction could achieve the same purpose.<sup>1165</sup> Courts are to impose RTOs for the principal purposes of rehabilitating the offender and protecting the community.<sup>1166</sup>

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<sup>1158</sup> Judicial College of Victoria, *Victorian Sentencing Manual*, Melbourne, 2006, p. 13.4.2.

<sup>1159</sup> *Children, Youth and Families Act 2005* (Vic), sections 431, 442.

<sup>1160</sup> *Sentencing Act 1991* (Vic), section 82AA(1).

<sup>1161</sup> *Sentencing Act 1991* (Vic), section 82AA(2).

<sup>1162</sup> *Sentencing Act 1991* (Vic), section 82AA(3).

<sup>1163</sup> *Disability Act 2006* (Vic), section 152(1).

<sup>1164</sup> *Disability Act 2006* (Vic), section 151(6).

<sup>1165</sup> *Sentencing Act 1991* (Vic), sections 5(3), 5(4).

<sup>1166</sup> See for example *Disability Act 2006* (Vic), section 152(1)(b): When determining whether to admit the offender to a residential treatment facility the Secretary must be satisfied that the offender poses a serious risk of violence to another person, amongst other things.



People put under an RTO must generally complete the full term of their sentence, although the sentencing court may vary or cancel the order. The offender may also be granted extended leave from detention of up to 12 months.<sup>1167</sup> The purpose of allowing extended leave is to assist the offender to reintegrate with the community.

Two ambiguities with the *Sentencing Act 1991* can be noted regarding the courts' ability to impose an RTO. Firstly, it is unclear what comprises a 'serious offence' under the *Sentencing Act 1991* when the courts are considering imposing an RTO. The definition of a 'serious offence' in the Act includes homicide offences, intentionally causing serious injury, certain arson and drug offences, threats to kill, rape and a number of other sexual penetration offences.<sup>1168</sup> This definition is only applicable to certain specified sentencing options, which do not include RTOs.<sup>1169</sup>

Secondly, as highlighted in evidence from the Supreme Court of Victoria, is an ambiguity associated with the courts ability to impose an RTO.<sup>1170</sup> Section 7 of the *Sentencing Act 1991* contains a list of all orders available to the courts in sentencing an offender. For example, sentencing courts can impose a sentence of imprisonment, detention in an approved mental health service, youth detention, a drug treatment order, a community corrections order or payment of a fine. While the *Sentencing Act 1991* allows an RTO to be imposed, the list of orders available to the court does not include RTOs. The Supreme Court of Victoria noted the case of *R v Farr* where the Court of Appeal commented on this ambiguity.<sup>1171</sup> The Court in that case suggested that the *Sentencing Act 1991* be amended to clarify that an RTO is a sentencing option available to the courts.<sup>1172</sup>

The Committee believes the Victorian Government should address these ambiguities to clarify the position of RTOs within the sentencing hierarchy established by the *Sentencing Act 1991*. The Committee considers these technical amendments will add clarity to the courts' ability to impose RTOs.

**Recommendation 40:** That the Victorian Government consider amending the *Sentencing Act 1991* (Vic) to clarify the courts' ability to impose a residential treatment order for 'serious offences' and the status of residential treatment orders within the sentencing hierarchy available to the courts.

#### 9.2.1.4 Custodial supervision orders

Under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) a person may be found unfit to stand trial or not guilty because of mental impairment.<sup>1173</sup> If a person is found unfit to stand trial he or she can be remanded in prison or another appropriate place for a specified period.

<sup>1167</sup> *Disability Act 2006* (Vic), section 162.

<sup>1168</sup> *Sentencing Act 1991* (Vic), section 3.

<sup>1169</sup> *Sentencing Act 1991* (Vic), section 3.

<sup>1170</sup> Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 7.

<sup>1171</sup> Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 7.

<sup>1172</sup> *R v Farr* [2010] VSCA 351, cited in Supreme Court of Victoria, *Submission no. 25*, 12 September 2011, p. 7.

<sup>1173</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), sections 6, 20.



If the person is found not guilty because of mental impairment the court can either make a custodial (CSO) or non-custodial (NCSO) supervision order or release the offender unconditionally.<sup>1174</sup> The court can order one of three different supervision orders:

- a CSO committing a person to custody in an 'appropriate place' which for a person with an intellectual disability is either a residential institution or registered residential service;<sup>1175</sup>
- a CSO committing a person to custody in prison;<sup>1176</sup> or
- a NCSO releasing the person on conditions decided by the courts and specified in the order.<sup>1177</sup>

A CSO can only be ordered if the court is satisfied that no other practical alternative to custody is available and if the court has received a statement from the Secretary to the DHS that the facilities necessary for the order are available.<sup>1178</sup> The court may attach conditions on a NCSO such as that the person must live in a particular place or participate in a program to help address their behaviour.<sup>1179</sup>

A supervision order, as discussed in Chapter Seven is deemed to be for an indefinite term. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* does, however, provide some safeguards against unlimited detention. In setting the supervision order the court must impose a nominal term which defines the time limits in which a review of the order must be undertaken.<sup>1180</sup> The nominal term varies depending on the offence for which the person was charged.

In its submission VLA expressed concern with the system of detention for a person found unfit to stand trial or not guilty because of mental impairment under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. VLA said:

These orders are generally far lengthier and more restrictive than any sentence which would have been imposed on the person had they pleaded guilty to the charges. For instance, the order may require them to be held in secure care for many years and have to return to the court for periodic reviews of their order. Lawyers are therefore often reluctant to advise a client to pursue a defence of mental impairment, particularly in minor

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<sup>1174</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 26(2).

<sup>1175</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 2(a)(i); *Disability Act 2006* (Vic), section 86(2): The Act provides that the Sandhurst, Colanda and Kew Residential Services are deemed residential institutions and the Plenty Residential Service was proclaimed a residential institution in Victorian Government, 'Revocation and proclamation of residential institution Long Term Rehabilitation Program', *Victorian Government Gazette*, vol. 26, p. 8, 2007.

<sup>1176</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 2(a)(ii).

<sup>1177</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 2(b).

<sup>1178</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), sections 26(3), 26(4).

<sup>1179</sup> Department of Human Services, *Non-custodial supervision orders: Policy and procedures manual*, DHS, Melbourne, 2009, p. 14.

<sup>1180</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), sections 28, 35.

matters where the person would not likely face a custodial sentence if they simply pleaded guilty. However, this practice potentially results in more findings of guilt and convictions being recorded against people with intellectual disabilities when they may technically have had a defence to the charge.<sup>1181</sup>

Another concern was raised in regard to the system for supervision of offenders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. The Act requires that a number of reports be prepared when the courts are considering making a supervision order. The DHS is responsible for preparing reports for people with an intellectual disability, and the Department of Health is responsible for preparing reports for people with a mental illness.<sup>1182</sup> The Office of Public Prosecutions (OPP) expressed concern that although these Departments bear responsibility for monitoring an offender's progress with orders, the Act does not specify which Department is responsible for supervising the order. The OPP suggested that the orders were sometimes not effectively monitored due to this inconsistency:

... in some cases, persons have been released on a supervision order that is supervised by a private medical practitioner. That results in none of the requisite procedures being followed, namely bringing the matter back to court for a major review, or apprehending the person in the event of a breach of the order.<sup>1183</sup>

The OPP said the Act should be amended to clarify whether the Department of Health or the DHS should be responsible for supervising the order.

The Committee accepts that it is essential to ensure that an offender subject to a CSO or NCSO is appropriately supervised and monitored and the court should be kept informed of his or her progress. The Committee believes that Departmental responsibility for supervision and monitoring of persons on CSOs or NCSOs could be clarified by appropriate amendments to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

**Recommendation 41:** That the Victorian Government consider amending the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) to clarify Departmental responsibility for supervising and monitoring Custodial Supervision Orders and Non-Custodial Supervision Orders.

## 9.2.2 Pre-sentence reports

The *Sentencing Act 1991* allows the court to order a pre-sentence report in respect of an offender before determining the sentence.<sup>1184</sup> A pre-sentence report must be ordered by the court if it is considering a community corrections order (CCO) or a YJC or YRC order.<sup>1185</sup> For all other orders the

<sup>1181</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 18.

<sup>1182</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), section 41.

<sup>1183</sup> Office of Public Prosecutions, *Submission no. 20*, 9 September 2011, pp. 5-6.

<sup>1184</sup> *Sentencing Act 1991* (Vic), section 8A.

<sup>1185</sup> *Sentencing Act 1991* (Vic), section 8A(2).

court has the discretion to order a report.<sup>1186</sup> The purposes of a pre-sentence report are to:

- establish the person's suitability for the order being considered;
- establish that any necessary facilities exist; and
- gain advice as to the most appropriate conditions to be placed on the offender.<sup>1187</sup>

The pre-sentence report may consider the following matters:

- the age of the offender;
- the social history and background of the offender;
- the medical and psychiatric history of the offender;
- any alcohol, drug or other substance abuse history disclosed by the offender;
- the educational and employment background of the offender;
- any special needs of the offender; and
- any other services that address the risk of recidivism or other courses, programs or treatments the offender may benefit from.<sup>1188</sup>

The *Children, Youth and Families Act 2005* describes content to be contained in a pre-sentence report when the court is sentencing a child or young person.<sup>1189</sup> Factors considered under this Act are similar to those described in the *Sentencing Act 1991*.

The report is either prepared by the Secretary to the DHS if a YJC or a YRC order is being considered, or by the Secretary to the Department of Justice if the court is considering other orders.<sup>1190</sup>

The court is allowed to use a pre-sentence report when determining the sentence, but the mere fact that it has ordered a report does not oblige it to accept recommendations contained within it. The court therefore retains discretion when determining the most appropriate sentence to impose. This fact has been noted by the courts, for example in *R v Ngo*:

One would not wish in any way to treat reports of this kind as insignificant in the sentencing process. Far from it, but two things should be noted in this regard. In the first place these reports are not given a role which makes the

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<sup>1186</sup> *Sentencing Act 1991* (Vic), section 8A(1).

<sup>1187</sup> *Sentencing Act 1991* (Vic), section 5A(2).

<sup>1188</sup> *Sentencing Act 1991* (Vic), section 8B(1).

<sup>1189</sup> *Children, Youth and Families Act 2005* (Vic), section 573(1).

<sup>1190</sup> *Sentencing Act 1991* (Vic), section 8A(4).

statements of opinion contained in them unchallengeable ... Nor is there anything in the statutory provisions which would deny the sentencing judge full power to disregard what was said in the report if he or she thinks fit. As with any other report or opinion obtained in the course of a plea it should only be given the weight to which it is entitled. Even as to the availability of places in specific institutions and of any necessary facilities, about which it might be more difficult for a judge to have specific knowledge, the judge is still not obliged to accept that advice ...<sup>1191</sup>

Reports for offenders with an intellectual disability or cognitive impairment can contain an assessment of the nature and severity of the offender's cognitive impairment, and the likely impact of particular kinds of orders on those offenders.<sup>1192</sup> The provision of this information may be beneficial to the sentencing court when it is determining the type, length and structure of the order. The court is not obliged to obtain a pre-sentence report on every occasion that it considers sentencing an offender with an intellectual disability. The Committee notes, however, that the *Children, Youth and Families Act 2005* places this obligation on the courts when they are sentencing a child who appears to have an intellectual disability.<sup>1193</sup>

The Committee notes that the VLRC recommended that when sentencing a person with an intellectual disability or cognitive impairment to imprisonment, the court should have the power to request the DHS produce a 'care plan'. The VLRC recommended that a care plan outline services that would be of benefit to the person while they are in prison.<sup>1194</sup> The 'care plan' proposed by the VLRC is similar to a pre-sentence report, as the suggestion was that it should outline services and supports that may be provided to the offender in custody. However, the VLRC recommended that the plan be ordered when the court is considering a sentence of imprisonment, rather than prior to all sentencing decisions.

The Committee acknowledges the benefit of pre-sentence reports when sentencing offenders with an intellectual disability or cognitive impairment, but it heard, however, that the preparation of pre-sentence reports by Departments could take some time. Judge Paul Grant, the President of the Children's Court, said that in the Children's Court's experience:

One of the difficulties with that [pre-sentence report] process is it takes a long time. Normally, if we get pre-sentence reports, DHS or youth justice are able to deliver reports in about six weeks. If we seek a report as to someone's intellectual disability, it takes about 12 weeks.<sup>1195</sup>

A similar concern was expressed by Mr Michael Holcroft the President of the Law Institute of Victoria (LIV).<sup>1196</sup> Judge Grant suggested that the

<sup>1191</sup> *R v Ngo* [1999] VSCA 222, 48.

<sup>1192</sup> *Sentencing Act 1991* (Vic), section 8B(1)(c).

<sup>1193</sup> *Children, Youth and Families Act 2005* (Vic), section 571(3).

<sup>1194</sup> Victorian Law Reform Commission, *People with intellectual disabilities at risk: A legal framework for compulsory care*, VLRC, Melbourne, Final report, 2003, p. 132.

<sup>1195</sup> Paul Grant, President, Children's Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 30.

<sup>1196</sup> Michael Holcroft, President, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 18.

length of time taken by the DHS to produce pre-sentence reports was indicative of the DHS facing resource constraints that limit its ability to complete this function in a timely fashion.<sup>1197</sup>

The Committee believes the Victorian Government should examine the capacity of the Department of Justice and the DHS to prepare pre-sentence reports and determine whether both Departments could be better resourced to enable them to produce reports in a timely and efficient manner.

**Recommendation 42:** That the Victorian Government ensure the Department of Human Services and Department of Justice prepare pre-sentence reports in a timely and efficient manner for people with an intellectual disability or cognitive impairment.

## 9.2.3 Custodial sentences and people with an intellectual disability or cognitive impairment

### 9.2.3.1 Overview of management of the Victorian Correctional facilities

The *Corrections Act 1986* (Vic) and the *Corrections Regulations 2009* (Vic) provide the legislative basis for correctional services in Victoria. The legislative framework is supplemented by the *Correctional Management Standards* and *National Standard Guidelines for Corrections in Australia*, which establish minimum requirements for correctional facilities for both men and women in Victoria.

Corrections Victoria is responsible for all adults sentenced to a custodial sentence in Victoria. The Youth Justice section of the DHS is responsible for children sentenced to youth detention. The *Corrections Act 1986* gives the state authority for the security, safety and welfare of prisoners and offenders, and for the maintenance of standards within correctional facilities. The purposes of the Act are to:

- establish, manage and secure prisons and prisoners' welfare; and
- administer services related to community-based corrections and the welfare of offenders.<sup>1198</sup>

Corrections Victoria is responsible for managing more than 50 community correctional services and 14 prisons across the state. Victoria's Community Correctional Services supervise adult offenders (aged 18 years and over) who have been sentenced by the court to serve community corrections orders or who are conditionally released from prison on parole by the Adult Parole Board.

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<sup>1197</sup> Paul Grant, President, Children's Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 30.

<sup>1198</sup> *Corrections Act 1986* (Vic), section 1.

Comparatively Victoria appears to have a lower rate of imprisonment compared to other states, although over the five years from June 2006 to June 2010 the prison population has increased substantially. During this period the prison population increased from 3905 prisoners to 4537 prisoners.<sup>1199</sup> Table 13 illustrates the prison profile of prisoners with an intellectual disability across all prisons in Victoria in 2009-10.

**Table 13: Prisoners with an intellectual disability, Victoria, 2009-2010.**<sup>1200</sup>

Prison	30 June 2009		30 June 2010	
	Number	%	Number	%
Ararat Prison	3	0.8	3	0.8
Barwon Prison	4	1.5	2	0.6
Beechworth Correctional Centre	-	-	-	-
Dame Phyllis Frost Centre	4	1.7	2	0.8
Dhurringile Prison	1	0.6	-	-
Fulham Correctional Centre	4	0.5	1	0.1
Judy Lazarus Transition Centre	-	-	-	-
Langi Kal Kal Prison	-	-	-	-
Loddon Prison	10	2.6	12	3.0
Marngoneet Correctional Centre	1	0.4	-	-
Melbourne Assessment Prison	5	1.8	10	3.6
Metropolitan Remand Centre	19	3.0	8	1.3
Port Philip Prison	55	7.5	50	6.5
Tarrengower Prison	-	-	-	-

Most adult females with an intellectual disability are held in custody at the Dame Phyllis Frost Centre, and most adult males with an intellectual disability are held in the Marlborough Unit at Port Philip Prison. The Marlborough Unit is specifically designed for prisoners with an intellectual disability, or prisoners who have other similar needs. The unit can accommodate 33 prisoners with an intellectual disability.<sup>1201</sup> Loddon Prison has a smaller unit that can accommodate six prisoners with an intellectual disability.<sup>1202</sup>

<sup>1199</sup> Corrections Victoria, *Statistical profile of the Victorian prison system: 2005-06 to 2009-10*, Department of Justice, Melbourne, 2010, p. 11.

<sup>1200</sup> Corrections Victoria, *Statistical profile of the Victorian prison system: 2005-06 to 2009-10*, Department of Justice, Melbourne, 2010, pp. 73-86.

<sup>1201</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 7.

<sup>1202</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 8.



In addition to the framework established by the *Corrections Act 1986* there are also guiding principles for the management of correctional facilities across Victoria. Guiding principles include:

- that community correctional programs and facilities should be designed and managed in a manner that acknowledges offenders' dignity, individual worth and potential for change;<sup>1203</sup>
- the management of offenders should be based on an assessment of the security risk they present, their risk of reoffending, and be tailored to address their individual criminogenic and other needs;<sup>1204</sup>
- offenders should be able to expect continuity of interventions, opportunities for rehabilitation, and consistency in management when they move from a custodial environment into community-based supervision;<sup>1205</sup> and
- the design and management of community correctional services should reflect specific needs of offenders that may arise from their gender, age, cultural background, physical or mental impairment, health status or other potential sources of discrimination.<sup>1206</sup>

In response to the overrepresentation of offenders with a disability within Victorian prisons, Corrections Victoria has developed an overarching disability framework – *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*. The three key objectives of the Framework are to:

- consolidate existing programs and services;

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<sup>1203</sup> Department of Justice, Government of Western Australia, Corrective Services, New South Wales, Correctional Services, South Australia, Corrective Services, Australian Capital Territory, Department of Justice, Tasmania, Department of Corrective Services, Queensland Government, Department of Justice, Victoria and Department of Justice, Northern Territory Government, *Standard guidelines for corrections in Australia*, 2004, standard 1.

<sup>1204</sup> Department of Justice, Government of Western Australia, Corrective Services, New South Wales, Correctional Services, South Australia, Corrective Services, Australian Capital Territory, Department of Justice, Tasmania, Department of Corrective Services, Queensland Government, Department of Justice, Victoria and Department of Justice, Northern Territory Government, *Standard guidelines for corrections in Australia*, 2004, standard 5.

<sup>1205</sup> Department of Justice, Government of Western Australia, Corrective Services, New South Wales, Correctional Services, South Australia, Corrective Services, Australian Capital Territory, Department of Justice, Tasmania, Department of Corrective Services, Queensland Government, Department of Justice, Victoria and Department of Justice, Northern Territory Government, *Standard guidelines for corrections in Australia*, 2004, standard 6.

<sup>1206</sup> Department of Justice, Government of Western Australia, Corrective Services, New South Wales, Correctional Services, South Australia, Corrective Services, Australian Capital Territory, Department of Justice, Tasmania, Department of Corrective Services, Queensland Government, Department of Justice, Victoria and Department of Justice, Northern Territory Government, *Standard guidelines for corrections in Australia*, 2004, standard 7.



- create responsive and inclusive policy and guidelines; and
- collect comprehensive data and conduct research.<sup>1207</sup>

In oral evidence to the Committee Ms Jan Shuard, Deputy Commissioner of Corrections Victoria, said that Corrections Victoria actively engages with offenders, including those with a disability, to ensure that offender management practices are effective and appropriate.<sup>1208</sup>

### 9.2.3.2 Vulnerabilities of people with an intellectual disability or cognitive impairment while in custody

Evidence suggests that offenders with an intellectual disability are vulnerable to being taken advantage of and abused in the prison environment, which may undermine the value of incarceration as a form of punishment.<sup>1209</sup> In a recent consultation paper on the criminal responsibility of people with a mental impairment in the criminal justice system, the New South Wales Law Reform Commission concluded that a person with an intellectual disability may experience a number of unique difficulties in prison, including:

- an exacerbation of symptoms;
- interruption or unavailability of treatment;
- victimisation by other prisoners; and
- further punitive effects of being held in solitary confinement in order to protect him- or herself or other prisoners.<sup>1210</sup>

The Office of the Public Advocate (OPA) told the Committee of its experiences advocating for offenders with a cognitive impairment who were imprisoned. The OPA said that it:

... has advocated for at least three prisoners with cognitive disability whose physical and mental condition has seriously deteriorated during their time in prison. The prison environment, time spent in seclusion (sometimes for

<sup>1207</sup> Corrections Victoria, *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*, Department of Justice, Melbourne, 2009.

<sup>1208</sup> Jan Shuard, Deputy Commissioner, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, pp. 2-3.

<sup>1209</sup> See for example Law Reform Commission of Western Australia, *Court intervention programs*, LRCWA, Perth, Consultation paper, 2008, p. 97; Peter McGhee and Siobhan Mullany, 'Keeping people with intellectual disability out of jail', *Precedent*, vol. 83 November/December, pp. 16-21, 2007, p. 17.

<sup>1210</sup> New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, NSWLRC, Sydney, Consultation paper 6, 2010, pp. 232-233. See also Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 37; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 7.

their own protection) and a lack of targeted supports were identified as key factors in these cases.<sup>1211</sup>

The OPA also provided the Committee with the following Case Study to illustrate one client's negative experience of being imprisoned.

*Case Study 31: Chris's story.*<sup>1212</sup>

*"Having lost his remaining parent and his connection with the home and community he grew up in, 'Chris', a man with a moderate to severe intellectual disability and paranoid schizophrenia was charged with trying to kiss a young girl and assaulting a boy who teased him because he had a disability.*

*Chris was found unfit to plead on the basis of mental impairment and the judge suggested that he needed accommodation where he received 24 hour support. Disability Services said they had no appropriate accommodation for Chris and so, with nowhere else to go, he was remanded to prison.*

*In prison, unable to understand why he was there or comply with prison regulations like providing a urine sample on demand, Chris's behaviour became very difficult to manage. After months in remand, periodically attending court to be told Disability Services still had no supported accommodation for him, he was being held in seclusion 23 hours a day, shackled during his one hour out of seclusion, and regularly drugged to manage his behaviour.*

*Ultimately, the judge in Chris's case threatened to subpoena the DHS Secretary if appropriate accommodation was not found for Chris within 10 days. Chris was placed in supported accommodation within days.*

*In total, Chris was imprisoned for one year. As a result of his prison experiences, Chris became agoraphobic, depressed and now shows signs of post-traumatic stress disorder. It took a year after his release for Chris to feel comfortable about going down to the local shops to do his shopping and banking."*

In its submission, Autism Victoria argued that there are "exceptional cost[s] in both financial and human terms in a person being sent to [gaol]", and suggested that custodial sentences should only be imposed as a last resort when sentencing an offender with an intellectual disability or an Autism Spectrum Disorder.<sup>1213</sup> A similar view was articulated by Jesuit Social Services, who suggested that there were benefits both to the offender and

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<sup>1211</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 35. See also Karl Jenkins, EW Tipping Foundation, *Transcript of evidence*, Melbourne, 7 November 2011, p. 20; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, pp. 6-7.

<sup>1212</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 36.

<sup>1213</sup> Autism Victoria, *Submission no. 16*, 9 September 2011, p. 7.

the wider community from diverting offenders with an intellectual disability away from custodial sentences.<sup>1214</sup>

Carers NSW noted that the experience of their carers was that:

... prison does not help people with an intellectual disability and even presents opportunities to learn dangerous new behaviours. People with an intellectual disability achieve better outcomes when they are diverted away from prison and offered support in the community.<sup>1215</sup>

Carers NSW also added that the negative impact of custodial sentences on a person with an intellectual disability is compounded by the fact that they often lose the support of their carer when they are imprisoned.<sup>1216</sup>

### 9.2.3.3 Issues while in custody

A number of issues for people with an intellectual disability or cognitive impairment in the corrections system were identified. These included identification of people with an intellectual disability or cognitive impairment upon reception into correctional facilities, training of Correctional Officers in the appropriate management of and interaction with prisoners with these impairments, and the availability of appropriate support and rehabilitation programs when in custody.<sup>1217</sup>

During the reception process prisoners are placed in an appropriate unit within the corrections system. Corrections Victoria takes into account the security, management, and personal needs of the prisoner. Correctional Officers also identify prisoners who present with special needs and who may be vulnerable if placed within mainstream prison facilities. If an adult with a disability is identified in prison, Corrections Victoria conducts an assessment to determine if they should remain in their current unit. Prisoners may be transferred to another unit or prison, or Corrections Victoria may apply to have them transferred to a residential treatment facility or a registered residential service under the *Disability Act 2006*.<sup>1218</sup>

<sup>1214</sup> Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 14.

<sup>1215</sup> Carers NSW, *Submission no. 17*, 9 September 2011, p. 7.

<sup>1216</sup> Carers NSW, *Submission no. 17*, 9 September 2011, p. 3.

<sup>1217</sup> See for example Carers NSW, *Submission no. 17*, 9 September 2011, p. 7; Daniel Moyle, Coordinator, Youth Justice and Community Support Service, Barwon Youth, *Transcript of evidence*, Geelong, 20 March 2012, pp. 34, 35; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, pp. 36, 37; Danielle Rygiel, Coordinator, Youth Connections, Barwon Youth, *Transcript of evidence*, Geelong, 20 March 2012, pp. 34-35; STAR Victoria, *Submission no. 12*, 8 September 2011, p. 1; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, pp. 36, 36; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, pp. 6-7, 9; Jesuit Social Services, *Submission no. 38*, 30 September 2011, pp. 2, 27; Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 5; Carrie O'Shea, Senior Criminal Lawyer, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 36; Ursula Smith, *Submission no. 11*, 8 September 2011, pp. 1, 9; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 9, 20, 21; Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 5.

<sup>1218</sup> *Disability Act 2006* (Vic), section 166.

Following reception, the Prison Manager must ensure that the prisoner is given, in a readily understandable manner, information that is necessary for them to understand their status and information regarding prison routines and programs.<sup>1219</sup> The national Standard Guidelines also require that upon reception “Prisoners should be appropriately managed according to their individual needs in regard to: health, any intellectual disability; cultural or linguistic issues.”<sup>1220</sup>

### **Identification of intellectual disability and cognitive impairment**

A number of witnesses raised concerns with the Committee about the process for identifying people with an intellectual disability or cognitive impairment upon entry into the prison system. Ms Ursula Smith expressed her concern that there currently appears to be no routine assessment of people entering correctional facilities to determine whether they have a disability.<sup>1221</sup> Mr Holcroft, President of the LIV, also expressed concern about the identification of people with an intellectual disability in custody, stating that:

People really need to be identified at an early stage in the corrections process if they have got an intellectual disability, because otherwise they get put with mainstream prisoners and the chances of victimisation increase dramatically.<sup>1222</sup>

The OPA noted that where a person entering the prison system is registered with Disability Services they will be supported by a Disability Services Client Manager who will be able to ensure that the disability is identified and that appropriate facilities and services are made available. However, identification of people with a disability who are not registered, either because they do not meet eligibility criteria for Disability Services, or because they are unaware of their disability, “... relies on individual prison staff to notice a person’s cognitive disability and refer them for assessment.”<sup>1223</sup> The OPA recommended that routine assessments of all

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<sup>1219</sup> Department of Justice, Government of Western Australia, Corrective Services, New South Wales, Correctional Services, South Australia, Corrective Services, Australian Capital Territory, Department of Justice, Tasmania, Department of Corrective Services, Queensland Government, Department of Justice, Victoria and Department of Justice, Northern Territory Government, *Standard guidelines for corrections in Australia*, 2004, standards 1.4, 1.5, 1.6.

<sup>1220</sup> Department of Justice, Government of Western Australia, Corrective Services, New South Wales, Correctional Services, South Australia, Corrective Services, Australian Capital Territory, Department of Justice, Tasmania, Department of Corrective Services, Queensland Government, Department of Justice, Victoria and Department of Justice, Northern Territory Government, *Standard guidelines for corrections in Australia*, 2004, standard 1.40.

<sup>1221</sup> Ursula Smith, *Submission no. 11*, 8 September 2011, p. 9.

<sup>1222</sup> Michael Holcroft, President, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 17.

<sup>1223</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 36. See also Brain Injury Australia, *Submission no. 2*, 18 August 2011, p. 25.

people entering the corrections system, including juvenile correctional facilities, should be considered.<sup>1224</sup>

Mr Peter Persson, Manager for Disability, Youth and Ageing at Corrections Victoria, told the Committee that identification of prisoners with an intellectual disability is comparably easier than for prisoners with other cognitive impairments such as ABIs. He said that often people with an intellectual disability who enter prison are supported through the justice system by Disability Services and have, therefore, had their disability formally identified.<sup>1225</sup> Mr Persson noted that the costs and time associated with conducting full neuropsychological assessments make diagnosing cognitive impairments, such as ABIs, in prisoners a very resource-intensive process. Mr Persson told the Committee that Corrections Victoria uses the *Heidelberg Screening Tool*, which is a structured tool that can be used by non-clinicians and therefore is accessible for all corrections staff.<sup>1226</sup>

The Committee is encouraged by evidence presented by Corrections Victoria about its efforts to improve the identification of people with cognitive impairment in the corrections system.

Nevertheless, the Committee is concerned that people with an intellectual disability may be entering the corrections system without appropriate support. As noted in Chapter Four, this may be because the person does not satisfy eligibility criteria, may have an undiagnosed disability, or may not want to identify themselves as having an impairment. If people in this group of offenders present in prison, their impairment may not be identified and therefore they may be more vulnerable and disadvantaged when in custody.

The Committee acknowledges work already commenced by Corrections Victoria to improve the identification of people with an intellectual disability or cognitive impairment, and encourages Corrections Victoria to continue to explore methods to ensure people with an intellectual disability or cognitive impairment are not 'slipping through the cracks' in the corrections system.

### **Disability awareness training**

Increased training opportunities for staff working in correctional facilities could improve the experiences of people with an intellectual disability or cognitive impairment in custody. Increased training opportunities for corrections staff would help ensure that staff responses to the needs of people with an intellectual disability or cognitive impairment are appropriate.

Brain Injury Australia noted that under the United Nations *Convention on the Rights of Persons with Disabilities* State parties are required to promote appropriate training to people working in the administration of

<sup>1224</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 36. See also Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 2; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 5.

<sup>1225</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 3.

<sup>1226</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 4.

justice, including prison staff.<sup>1227</sup> Brain Injury Australia's research into disability-specific training for police and corrections staff indicated that training was not consistently available across Australia, although the Committee notes that Brain Injury Australia concluded that Victoria appears to have better opportunities for training police and corrections staff than other states and territories.<sup>1228</sup>

Mr Persson told the Committee that very specialised skills are needed to work with prisoners with intellectual disabilities and cognitive impairments.<sup>1229</sup> Mr Persson said that following the identification of large numbers of people with ABIs presenting in correctional facilities, Corrections Victoria has employed a specialist ABI clinician.<sup>1230</sup> Ms Shuard added:

... we have trained staff particularly working with people who have an acquired brain injury so that the way they are working with them does not make it worse but in fact makes the management easier if they understand what they are dealing with because it can often be interpreted as aggressive or difficult behaviour. If staff have an understanding that it is actually an acquired brain injury, then they operate differently and the outcomes are much better for everybody.<sup>1231</sup>

Mr Persson said that Corrections Victoria provides staff with a range of training opportunities, ranging from an introductory disability training program for all new community correctional officers to specialist training for prison staff who work in the dedicated units for prisoners with an intellectual disability.<sup>1232</sup> Mr Persson also said that in training staff the aim "... really is to try to embed within our everyday correctional practice the issue of disability so that it is not seen as a sort of add-on that we think of down the track. It is something that we should consider on a systematic basis."<sup>1233</sup>

The Committee commends Corrections Victoria for its efforts to improve services to prisoners with an intellectual disability or cognitive impairment. The Committee believes that the Victorian Government should continue to support Corrections Victoria in providing education and training within the corrections system. The Committee also believes that the Victorian Government should draw upon Correction Victoria's experiences in training Corrections staff when examining how education and awareness about people with an intellectual disability or cognitive impairment can be improved across government agencies.

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<sup>1227</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), article 13.

<sup>1228</sup> Brain Injury Australia, *Submission no. 2*, 18 August 2011, p. 29.

<sup>1229</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 7.

<sup>1230</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 8.

<sup>1231</sup> Jan Shuard, Deputy Commissioner, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 4.

<sup>1232</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 8. See also Corrections Victoria, *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*, Department of Justice, Melbourne, 2009, p. 18.

<sup>1233</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 3.



Recommendation 43: That the Victorian Government continue to support Corrections Victoria in providing education, training, and resource programs for Corrections staff working with people with an intellectual disability or cognitive impairment.

## 9.2.4 Parole and post-release services

The purpose of parole is to supervise the reintegration of offenders from prison into the community. The *Sentencing Act 1991* provides that if the court is sentencing an offender to life imprisonment, or a term of imprisonment of more than two years, the court must define a period the offender must serve in prison before becoming eligible to be released on parole, unless the court considers that the nature of the offence or the past history of the offender makes the fixing of a non-parole period inappropriate.<sup>1234</sup>

When determining non-parole periods the courts have typically used proportional ranges of between 60 and 75 per cent of the total sentence,<sup>1235</sup> although the particular circumstances of the offender may mitigate in favour of imposing a shorter non-parole period. For example, in *Ashe v R* the Court of Appeal considered that the non-parole period imposed by the sentencing court was too high when regard was given to the offender's intellectual disability.<sup>1236</sup> A shorter non-parole period may be beneficial for an offender with an intellectual disability or cognitive impairment as it may allow the offender to undergo rehabilitation and treatment services to better integrate into the community upon release.

In Victoria the Adult Parole Board, the Youth Residential Board and Youth Parole Board are responsible for determining whether to grant parole to adult and young offenders.

### 9.2.4.1 Adult parole decisions

The Adult Parole Board is an independent statutory body established under the *Corrections Act 1986*.<sup>1237</sup> The Board has jurisdiction over the following offenders:

- offenders for whom the court has ordered a prison sentence where a non-parole period applies;
- young offenders who are being transferred between prison and youth justice centres under the *Children, Youth and Families Act 2005*; and
- offenders who are subject to detention or supervision under the *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*.

<sup>1234</sup> *Sentencing Act 1991 (Vic)*, section 11(1).

<sup>1235</sup> See for example *R v Bolton and Barker* [1998] 1 VR 292, [27]; *R v Tran and Tran* [2006] VSCA 222, [27].

<sup>1236</sup> *Ashe v R* [2010] VSCA 119, [35].

<sup>1237</sup> *Corrections Act 1986 (Vic)*, section 61.



The Board conducts meetings at prisons around Victoria on a regular basis and meets with offenders early in their sentence term to encourage successful reintegration into the community and to ensure that offenders are directed toward appropriate programs. In 2011-12 the Adult Parole Board considered 10 205 cases, making 1843 orders for the release of offenders on parole, and denying parole in 296 cases. Of 1843 offenders released on parole, 1042 completed parole successfully.<sup>1238</sup>

While the *Corrections Act 1986* grants the Board power to make decisions relating to parole, the Act does not specify factors to be taken into account by the Board when making a decision. Instead parole decisions are based on the individual merits of each case, and on guidance set out in the Adult Parole Board's *Members Manual*.

The *Members Manual* was examined by the Sentencing Advisory Council (SAC) in its recent *Review of the Victorian Adult Parole System*.<sup>1239</sup> The SAC found that factors taken into account when deciding whether to release an offender on parole included:

- comments made by the judge when imposing the sentence;
- the offender's criminal history;
- the offender's previous history of supervision in the community;
- potential risks to the community;
- reports, assessments and recommendations made by a variety of professionals, including medical practitioners, psychiatrists, psychologists, custodial staff and community corrections officers;
- submissions made by the offender, the offender's family, friends and potential employers or any other relevant individual;
- representations made by the victim or the victim's family; and
- conduct of the offender while in prison, including the offender's willingness to participate in relevant programs and courses while in custody.<sup>1240</sup>

Corrections Victoria is responsible for preparing a parole assessment report for each prisoner who is eligible for parole. This report includes an assessment based on the Victorian Intervention Screening Assessment Tool (VISAT). VISAT examines criminological factors such as the current

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<sup>1238</sup> Department of Justice, *Adult Parole Board of Victoria 2011-12 annual report*, Adult Parole Board, Melbourne, 2012, pp. 26-27, 30.

<sup>1239</sup> Sentencing Advisory Council, *Review of the adult parole system*, Sentencing Advisory Council, Melbourne, 2012, p. 17: Note the Adult Parole Board's *Members Manual* is not a public document.

<sup>1240</sup> Sentencing Advisory Council, *Review of the adult parole system*, Sentencing Advisory Council, Melbourne, 2012, p. 27.

offence and offending history against psychosocial factors such as social integration, education and employment to assess:

- the likelihood that the individual will engage in offending behaviour, if no efforts are made to manage risks;
- the probable nature, severity and frequency of any future offending;
- the likely victims of any such future offending;
- steps that may be taken to manage the individual's risk of offending; and
- circumstances that may exacerbate the individual's risk of offending.<sup>1241</sup>

Each parole order made by the Adult Parole Board is subject to ten standard conditions, such as not breaking the law, submitting to supervision by a Community Corrections Officer, and undertaking employment, training or unpaid community work. The Board may also impose special conditions on the grant of parole, covering issues such as place of residence, assessment, treatment programs and curfews.

The Committee notes that the SAC released its report on the Victorian parole system in March 2012. The SAC's recommendations are currently being considered by the Attorney-General. Issues highlighted in the SAC's inquiry included:

- criteria the Adult Parole Board should consider when making parole decisions; and
- advantages and disadvantages from formally stating criteria used by the Board to determine parole in legislation.

The SAC examined guidance contained in the Members Manual for determining parole and considered that while the guidance provides some information that is relevant to determining parole, the material does not provide explicit guidance on how determinations are to be made.<sup>1242</sup>

In New South Wales criteria used by the Parole Authority are set out in legislation.<sup>1243</sup> While the relevant legislation does not refer specifically to people with an intellectual disability or cognitive impairment, criteria set out in the Act is sufficiently broad to allow the Parole Authority to consider the special requirements and needs of offenders with an intellectual disability or cognitive impairment. The criteria set out in the NSW legislation largely replicates material contained in the Victorian Members Manual.

<sup>1241</sup> Sentencing Advisory Council, *Review of the adult parole system*, Sentencing Advisory Council, Melbourne, 2012, p. 33.

<sup>1242</sup> Sentencing Advisory Council, *Review of the adult parole system*, Sentencing Advisory Council, Melbourne, 2012, p. 41.

<sup>1243</sup> *Crimes (Administration of Sentences) Act 1999* (NSW), sections 135, 135A, 128, 128A.

The SAC considered, on balance, enshrining in legislation the list of factors to be considered by the Board would not "... significantly improve the operation of the parole system, enhance transparency or accountability or improve public safety."<sup>1244</sup> The Committee supports this observation.

The Committee heard that even when an offender with an intellectual disability is due for parole he or she can be denied parole because appropriate support services are not available in the community should they be released.<sup>1245</sup> Life Without Barriers stated that:

A lack of community support or diversionary programs suitable to people with intellectual disability can also affect the granting of parole. In some cases, people with intellectual disability are excluded or ineligible for programs that would support their release on bail or parole because of their intellectual disability ...<sup>1246</sup>

A 2007 study commissioned by Corrections Victoria examined the characteristics of prisoners with an intellectual disability released from prison compared with prisoners without an intellectual disability released from prison. The study found that 15.3 per cent of prisoners with an intellectual disability who were eligible for parole were denied parole compared to only 6.4 per cent of their counterparts without an intellectual disability. Table 14 illustrates these findings.

**Table 14: Outcome of parole hearings and parole at earliest eligibility date.**<sup>1247</sup>

Parole outcome	Prisoners with an intellectual disability		Prisoners without an intellectual disability	
	Number (N=59)	%	Number (N=109)	%
Granted parole	50	84.7	102	93.6
Denied parole	9	15.3	7	6.4
Parole by EED	Number	%	Number	%
Parole on EED	21	42.0	69	67.6
Parole after EED	28	56.0	31	30.4
No set EED	1	2.0	2	2.0

The study also examined reasons for denying and granting parole at the earliest eligibility date (EED), the results of which are illustrated in Table

<sup>1244</sup> Sentencing Advisory Council, *Review of the adult parole system*, Sentencing Advisory Council, Melbourne, 2012, p. 48.

<sup>1245</sup> See for example Life Without Barriers, *Submission no. 32*, 19 September 2011, p. 5; Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 35; Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 10; Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 39; Villamanta Disability Rights Legal Service Inc., *Submission no. 55*, 7 November 2011, p. 9.

<sup>1246</sup> Life Without Barriers, *Submission no. 32*, 19 September 2011, pp. 5-6.

<sup>1247</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 21.

15. Lack of suitable accommodation was found to be the most common reason why parole was delayed for prisoners with an intellectual disability compared with prisoners without an intellectual disability.

**Table 15: Reasons for parole denial or parole after earliest eligibility date.<sup>1248</sup>**

Reasons for parole denied	Prisoners with an intellectual disability		Prisoners without an intellectual disability	
	Number (N=9)	%	Number (N=7)	%
Accommodation	3	33.3	0	0.0
Breach of previous parole	2	22.2	3	42.9
Refused programs	0	0.0	1	14.3
Insufficient time	2	22.2	2	28.6
Prisoner's request	2	22.2	1	14.3
Reasons for parole after EED	Number	%	Number	%
Accommodation	14	50.0	4	12.9
Positive drug test	0	0.0	6	19.4
Programs / support	4	14.3	4	12.9
Administrative	4	14.3	8	25.8
Breach of previous parole	6	21.4	9	29.0

VLA provided evidence of an occasion in which it supported a person with an intellectual disability who had been denied bail.

**Case Study 32: Alan's story part III.<sup>1249</sup>**

*"When 'Alan' was sentenced, the court deliberately structured his term of imprisonment so that he had a shorter than usual non-parole period, allowing him to be eligible for release from custody and supported during a longer period of parole in the community, to maximise his prospects of rehabilitation.*

<sup>1248</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 21.

<sup>1249</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 9.

*Alan completed the non-parole period of his sentence. However, he was not granted parole for over three months because Disability Services were unable to find appropriately staffed supported accommodation for him. This essentially subverted the court's intention that Alan should have a longer period of time under supervision in the community on parole. There was a disjuncture between the legal process of sentencing and the implementation of that sentence in practice, which operated to Alan's detriment.*

*When Alan was about to be released from prison (without any parole supports in place), the Secretary of the Department of Justice considered applying for a supervision order. The factors taken into account were the results of risk assessment screenings, an assessment of Alan's proposed future place of residence and, linked to this, his level of support and supervision in the community, which was in essence was no different to what it had been prior to his offending and incarceration."*

Despite both anecdotal evidence received by the Committee and the study commissioned by Corrections Victoria suggesting that people with an intellectual disability or cognitive impairment appear to be denied parole more often than their non-disabled counterparts, the SAC's consultations with the Adult Parole Board indicated that most prisoners are granted parole at their EED.<sup>1250</sup>

The Committee believes that further investigation is needed to examine the sufficiency of accommodation options to ensure that people with an intellectual disability or cognitive impairment are not unjustifiably denied parole. The Committee notes that in Chapter Four it recommended that the Victorian Government examine whether there are sufficient numbers of accommodation facilities for people with an intellectual disability who have been released on bail or parole (Recommendation 3). The Committee also notes that as part of Corrections Victoria's *Disability Framework 2010-2012* Corrections Victoria and Disability Services have been working to develop transitional accommodation and support options to assist the transition and integration of prisoners with a cognitive impairment in the community.<sup>1251</sup>

#### **9.2.4.2 Youth parole decisions**

When considering parole decisions, the Youth Parole and Youth Residential Boards obtain information from a range of sources, such as guidance by the sentencing court and reports from corrections staff, parole officers, psychologists, medical staff and others working with the young person.<sup>1252</sup> Factors considered by the Boards when making a decision include:

- the interests of, or risks posed to, the community;

<sup>1250</sup> Sentencing Advisory Council, *Review of the adult parole system*, Sentencing Advisory Council, Melbourne, 2012, p. 14.

<sup>1251</sup> Corrections Victoria, *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*, Department of Justice, Melbourne, 2009, p. 5.

<sup>1252</sup> Department of Human Services, *Youth Parole Board and Youth Residential Board: Annual report 2011-12*, DHS, Melbourne, 2012, p. 3.

- the interests and age of the young person;
- the capacity for parole to assist with the young person's rehabilitation;
- the nature and circumstances of the offence;
- the young person's criminal history;
- the family and community support networks available to the young person upon release; and
- submissions made by the young person, their family, friends and potential employers.<sup>1253</sup>

The Youth Parole and Youth Residential Boards are able to impose conditions on parole, such as requiring the young person to:

- attend substance abuse counselling;
- attend anger management, psychological or psychiatric counselling;
- reside where directed; and
- submit to drug testing as directed.<sup>1254</sup>

Table 16 illustrates parole orders issued by the Boards in 2011-12 and 2010-11.

**Table 16: Parole orders issued by Youth Parole and Youth Residential Boards.**<sup>1255</sup>

Status	2010-11	2011-12
Females – youth justice centre	10	11
Males – youth justice centre	220	241
Females – youth residential centre	2	0
Males – youth residential centre	8	5
Total	240	257

As discussed in Chapter Two, surveys of young people in custody appearing before the Boards found that significant proportions of young people in youth detention present with difficulties with mental

<sup>1253</sup> Department of Human Services, *Youth Parole Board and Youth Residential Board: Annual report 2011-12*, DHS, Melbourne, 2012, p. 3.

<sup>1254</sup> Department of Human Services, *Youth Parole Board and Youth Residential Board: Annual report 2011-12*, DHS, Melbourne, 2012, pp. 8-9.

<sup>1255</sup> Department of Human Services, *Youth Parole Board and Youth Residential Board: Annual report 2011-12*, DHS, Melbourne, 2012, p. 4.

functioning.<sup>1256</sup> The Boards have recognised differences between a young offender with and without an intellectual disability and have developed coordinated and collaborative practices between Disability Services and youth justice programs to assist with planning services for young offenders with an intellectual disability both while in custody and when released on parole.<sup>1257</sup>

#### 9.2.4.3 Pre- and post-release services and support

The Committee heard evidence highlighting the importance of pre- and post-release services to assist prisoners to reintegrate into the community.<sup>1258</sup> The Committee also received evidence expressing concern that there were not enough support programs and services specifically targeted toward offenders with an intellectual disability or cognitive impairment. The OPA suggested that one of the main issues affecting the rehabilitation outcomes of prisoners with a cognitive impairment is "... the dearth of support services and rehabilitation programs for this group".<sup>1259</sup> VLA, while acknowledging the range of programs delivered by Corrections Victoria aimed at reducing reoffending, commented on the suitability of these programs for offenders with an intellectual disability:

Depending on the degree of disability and the problems they are being used to address, these strategies are generally not effective for people with intellectual disabilities unless they are significantly adapted and delivered by people with specialist training. This puts people with intellectual disabilities at a disadvantage as they are less likely to benefit from the interventions, are less likely to complete their orders and remain at risk of reoffending.<sup>1260</sup>

VLA argued that more targeted support programs are required to assist the rehabilitation of offenders with an intellectual disability.<sup>1261</sup> Jesuit Social Services similarly stated that:

Therapeutic programs for prisoners, including access to individual treatment need to be enhanced across all correctional facilities to

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<sup>1256</sup> See for example Department of Human Services, *Youth Parole Board and Youth Residential Board: Annual report 2010-11*, DHS, Melbourne, 2011, p. 20: Between 14 and 27 per cent of young people appearing before the Boards presented with an intellectual disability and Department of Human Services, *Youth Parole Board and Youth Residential Board: Annual report 2011-12*, DHS, Melbourne, 2012, p. 12: 39 per cent of 169 males and eight females presented with issues concerning intellectual functioning.

<sup>1257</sup> Department of Human Services, *Youth Parole Board and Youth Residential Board: Annual report 2010-11*, DHS, Melbourne, 2011, p. 20.

<sup>1258</sup> Victorian Advocacy League for Individuals with Disability Inc., *Submission no. 56*, 7 November 2011, p. 5.

<sup>1259</sup> Office of the Public Advocate, *Submission no. 29*, 13 September 2011, p. 35. See also Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 6; Daniel Moyle, Coordinator, Youth Justice and Community Support Service, Barwon Youth, *Transcript of evidence*, Geelong, 20 March 2012, pp. 34-35.

<sup>1260</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 21.

<sup>1261</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 21. See also Association for Children with a Disability, *Submission no. 42*, 7 October 2011, p. 4.



encourage opportunities for self improvement and the strengthening of pro-social behaviour.<sup>1262</sup>

Jesuit Social Services endorsed findings by Corrections Victoria in its report on *Intellectual disability in the Victorian Prison System* that individually targeted and tailored programs need to be delivered in correctional facilities to support offenders while they are imprisoned, and also in order to increase opportunities for offenders post-release.<sup>1263</sup> The Ethnic Communities' Council of Victoria also supported tailoring rehabilitation programs to meet the needs of particular groups of offenders, such as offenders from culturally and linguistically diverse communities who have a disability.<sup>1264</sup>

Mr Persson, of Corrections Victoria, noted that prison programs for offenders with an intellectual disability should have a different focus compared to programs for offenders without these impairments. Mr Persson said that programs for this group of prisoners are:

... not a matter of rehabilitation; it is a matter of habilitation. In many instances they have whole gaps in their repertoire of skills, particularly around independent living and the day-to-day stuff of making a life. Often they have not got those sorts of skills ...<sup>1265</sup>

Prisoners who receive a sentence of more than six months are assessed on the risk of reoffending, offence-specific program requirements, and other offence-related needs. Research conducted by Corrections Victoria found that the most common needs of prisoners with an intellectual disability were related to literacy, homelessness, psychiatric assistance and employment. The results of this research are illustrated in Table 17.

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<sup>1262</sup> Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 27.

<sup>1263</sup> Jesuit Social Services, *Submission no. 38*, 30 September 2011, pp. 12, 27.

<sup>1264</sup> Ethnic Communities' Council of Victoria, *Submission no. 19*, 9 September 2011, p. 12.

<sup>1265</sup> Peter Persson, Manager of Disability, Youth and Ageing, Corrections Victoria, *Transcript of evidence*, Melbourne, 16 April 2012, p. 7.

**Table 17: Offence-specific programs and offence-related needs.**<sup>1266</sup>

Offence-specific programs	Prisoners with an intellectual disability		Prisoners without an intellectual disability	
	Number	%	Number	%
Drug and alcohol	32	88.9	76	84.4
Violence	14	38.9	34	37.8
Sex offender	4	11.1	3	3.3
Cognitive skills	32	88.9	80	88.9
Offence-related needs	Number	%	Number	%
Family and social support	9	25.0	16	17.8
Literacy	17	47.2	4	4.4
Financial management	0	0.0	9	10.0
Homelessness	16	44.4	18	20
Gambling	1	2.8	7	7.8
Parenting	3	8.3	8	8.9
Violence behaviour	3	8.3	6	6.7
Employment	13	36.1	36	40.0
Psychiatric	14	38.9	27	30.0
Cultural identity	1	2.8	2	2.2
Negative peer group	2	5.6	9	10.0
Acquired brain injury	1	2.8	1	1.1
English as a second language	0	0.0	6	6.7

Corrections Victoria has developed a number of targeted rehabilitation programs for offenders with an intellectual disability or cognitive impairment. The Corrections Victoria *Disability Framework 2010-2012* outlines a number of current or planned support initiatives that will specifically address the support needs of prisoners with an intellectual disability or cognitive impairment. Examples include:

- developing the Joint Treatment Program at Port Philip Prison for offenders with a cognitive impairment, providing offence-specific and skill-based programs to prisoners;<sup>1267</sup>
- developing appropriate rehabilitation programs for offenders with a cognitive impairment serving a community-based sentence,<sup>1268</sup> and

<sup>1266</sup> Corrections Victoria, *Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Department of Justice, Melbourne, 2007, p. 24: Note 126 prisoners were surveyed.

<sup>1267</sup> Corrections Victoria, *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*, Department of Justice, Melbourne, 2009, p. 16.

- undertaking research into the drug and alcohol treatment needs of prisoners with an intellectual disability to inform the development of rehabilitation programs for this group of prisoners.<sup>1269</sup>

The Victorian Association for the Care and Resettlement of Offenders, the Australian Community Support Organisation and Jesuit Social Services have also developed initiatives to assist offenders with an intellectual disability who have had contact with the justice system to reintegrate into the community. Examples highlighted in evidence included:

- the Problematic Sexual Behaviour Service run by the Australian Community Support Organisation assists young people with an intellectual disability who have exhibited dangerous sexual behaviour. The program provides intensive therapeutic support to assist young offenders to address this behaviour;<sup>1270</sup>
- the Brosnan Youth Service delivered by Jesuit Social Services assists young people exiting prison. Services include case management, supported accommodation, drug and alcohol counselling, recreation programs, and employment and training programs;<sup>1271</sup> and
- Perry House, run by Jesuit Social Services, is a supported accommodation facility providing accommodation to young people with an intellectual disability exiting prison.<sup>1272</sup>

The Committee is encouraged by work undertaken by Corrections Victoria and those community organisations who support this group of offenders. The Committee notes that the Victorian Government has made commitments to increase support within prisons to reduce reoffending through rehabilitation. For example, in August 2012 a \$100 000 facility at Loddon Prison for prisoners with an intellectual disability was opened. The facility will deliver specialist treatment programs and other skills-based programs to prisoners with an intellectual disability.<sup>1273</sup> The Committee believes that current efforts by Corrections Victoria to improve its services for offenders with an intellectual disability or cognitive impairment should continue to be supported by the Victorian Government, to assist their reintegration into the community upon release.

**Recommendation 44:** That the Victorian Government continue to support Corrections Victoria to deliver and develop programs directed toward offenders with an intellectual disability or cognitive impairment.

<sup>1268</sup> Corrections Victoria, *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*, Department of Justice, Melbourne, 2009, p. 16.

<sup>1269</sup> Corrections Victoria, *Committing to the challenges: Corrections Victoria Disability Framework 2010-2012*, Department of Justice, Melbourne, 2009, p. 18.

<sup>1270</sup> Australian Community Support Organisation, *Submission no. 24*, 12 September 2011, p. 4.

<sup>1271</sup> Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 6.

<sup>1272</sup> Jesuit Social Services, *Submission no. 38*, 30 September 2011, p. 6.

<sup>1273</sup> Andrew McIntosh, MP, 'Boost for disability services at Loddon prison' (Media Release, 24 August 2012).

## 9.3 Non-custodial sentences

Non-custodial sentencing options may be imposed by the courts for a number of reasons, such as the court determining that a custodial sentence is inappropriate given the nature of the offence or that the chances of rehabilitation are higher if custodial sentences are avoided. Given the vulnerabilities that may be experienced by people with an intellectual disability or cognitive impairment while in custody and the courts' apparent reluctance to imprison offenders with a mental impairment, non-custodial sentencing options are likely to be considered. Non-custodial sentencing options include community corrections orders (CCOs), fines, non-custodial supervision orders (NCSOs) and justice plan conditions.

### 9.3.1 Options available

#### 9.3.1.1 Community corrections orders

In January 2012 a new community corrections order (CCO) system came into effect. The CCO system provides non-custodial sentences that allow for the rehabilitation and punishment of offenders in the community. The CCO system sits between imprisonment and fines in the sentencing hierarchy available to the courts.<sup>1274</sup>

The purpose of the CCO is to provide a community-based sentence that may be used for a wide range of offending behaviours. Consideration is given to the need to address the circumstances of the offender and the underlying offending behaviour.<sup>1275</sup> Orders can be tailored by the imposition of particular conditions to address the individual's circumstances. Conditions that may be imposed by the courts when ordering a CCO include:

- unpaid community work such as working at a hospital, educational or charitable institute;<sup>1276</sup>
- treatment and rehabilitation such as drug and alcohol treatment;<sup>1277</sup>
- that the offender be supervised, monitored or managed to encourage compliance with the order;<sup>1278</sup>
- prohibiting the person from contacting particular people;<sup>1279</sup>
- directing or restricting where the person can live;<sup>1280</sup>

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<sup>1274</sup> *Sentencing Act 1991* (Vic), section 7(1).

<sup>1275</sup> *Sentencing Act 1991* (Vic), section 36.

<sup>1276</sup> *Sentencing Act 1991* (Vic), section 48C.

<sup>1277</sup> *Sentencing Act 1991* (Vic), section 48D.

<sup>1278</sup> *Sentencing Act 1991* (Vic), section 48E.

<sup>1279</sup> *Sentencing Act 1991* (Vic), section 48F.

<sup>1280</sup> *Sentencing Act 1991* (Vic), section 48G.

- prohibiting the person from entering or staying in a specified place or area;<sup>1281</sup>
- a curfew, restricting them from leaving home during particular times;<sup>1282</sup>
- restricting access to licensed premises;<sup>1283</sup> and
- judicial monitoring.<sup>1284</sup>

When determining conditions to impose with a CCO the court must have regard to the principle of proportionality and the purposes of sentencing – punishment, deterrence, rehabilitation, denunciation and community protection.<sup>1285</sup>

Community-based sentencing options may potentially benefit offenders with an intellectual disability or cognitive impairment. Benefits include that CCOs potentially:

- do not expose people with an intellectual disability or cognitive impairment to the risks they might experience when in custody;
- offer an opportunity for an offender with an intellectual disability or cognitive impairment to maintain living and working relationships. Continuity in these areas is particularly important for people with an intellectual disability or cognitive impairment and may prove more meaningful in terms of addressing underlying offending behaviour; and
- provide more scope for individualised programs to be developed, and for monitoring offenders within the community.<sup>1286</sup>

In its report on transitional services for people with a cognitive disability, the OPA identified cost savings associated with the use of community-based sentencing compared with imprisonment. Table 18 illustrates cost differences between imprisonment and community corrections.

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<sup>1281</sup> *Sentencing Act 1991 (Vic)*, section 48H.

<sup>1282</sup> *Sentencing Act 1991 (Vic)*, section 48I.

<sup>1283</sup> *Sentencing Act 1991 (Vic)*, section 48J.

<sup>1284</sup> *Sentencing Act 1991 (Vic)*, section 48K.

<sup>1285</sup> *Sentencing Act 1991 (Vic)*, section 48A.

<sup>1286</sup> Phillip French, *Disabled justice: The barriers to justice for persons with disability in Queensland*, QAI Incorporated, Brisbane, 2007, pp. 106-107.

**Table 18: Average costs of imprisonment versus community corrections orders for one offender.**<sup>1287</sup>

	Cost of imprisonment	Cost of community corrections
For one day	\$148.10	\$11.43
For six months	\$27 028.25	\$2086.00
For one year	\$54 056.50	\$4171.95

### 9.3.1.2 Justice plan conditions

The sentencing court can attach a justice plan condition when imposing a CCO. A justice plan is a special plan that is available when sentencing an offender with an intellectual disability. Imposing conditions requires offenders to comply with the plan of available services, which are designed to reduce the likelihood of reoffending.<sup>1288</sup> When considering whether to attach a justice plan to a CCO, the court may require a pre-sentence report, a statement from the Secretary of the DHS that the person has an intellectual disability as defined by the *Disability Act 2006*, and a plan of available services designed to reduce the likelihood of reoffending.<sup>1289</sup>

When a justice plan is presented to court it is accompanied by a client overview report. The client overview report contains background information on the offender, and indicates the likelihood of the offender adhering to the plan given his or her previous contact with Disability Services.<sup>1290</sup> Ms Kristen Hilton, Director of Civil Justice Access and Equity at VLA, told the Committee that justice plans "... have been a really valuable tool in terms of providing people with the right supports and the right sorts of mechanisms to better integrate into the community."<sup>1291</sup>

Disability Services is responsible for monitoring an offender's compliance with a justice plan.<sup>1292</sup> In practice Disability Services may liaise with Corrections Victoria to provide advice on progress and whether there have been any breaches of the plan.<sup>1293</sup>

<sup>1287</sup> Office of the Public Advocate, *From corrections to the community: The need for transitional support services for offenders with a cognitive disability*, OPA, Melbourne, 2003, p. 31: Note these figures relate to the previous community based order scheme.

<sup>1288</sup> Department of Human Services, *Criminal justice practice manual 2007*, DHS, Melbourne, 2007, p. 34.

<sup>1289</sup> *Sentencing Act 1991 (Vic)*, section 80(3).

<sup>1290</sup> Department of Human Services, *Criminal justice practice manual 2007*, DHS, Melbourne, 2007, p. 35.

<sup>1291</sup> Kristen Hilton, Director, Civil Justice Access and Equity, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 7 November 2011, p. 38.

<sup>1292</sup> Department of Human Services, *Criminal justice practice manual 2007*, DHS, Melbourne, 2007, p. 49.

<sup>1293</sup> Department of Human Services, *Criminal justice practice manual 2007*, DHS, Melbourne, 2007, p. 49.

## Justice plan effectiveness

While justice plans potentially provide a valuable tool to encourage the rehabilitation of offenders with an intellectual disability, the Committee heard that insufficient allocation of resources could undermine their effectiveness. STAR Victoria said that:

Justice Plans for offenders with an intellectual disability can be compromised in their planning and implementation due to lack of availability of desirable programs and services.<sup>1294</sup>

The Australian Psychological Society said that anecdotally the effectiveness of justice plans was limited, as they often do not specify goals and outcomes to be achieved by the offender. The Society considered that this was, in part, due to a lack of detailed knowledge of how community and welfare services could assist in the rehabilitation of offenders with an intellectual disability. The Society suggested that more could be done to enhance justice plans for people with an intellectual disability by improving communication and coordination between justice and community service providers.<sup>1295</sup>

Some submissions also expressed concern about the time taken to develop justice plans. The Magistrates' Court of Victoria noted that due to insufficient coordination and collaboration between DHS and Corrections Victoria, the Court had experienced long delays in obtaining a justice plan.<sup>1296</sup> In its submission to the Committee VLA provided the following Case Study to highlight negative consequences that can arise from delayed justice plans.

### *Case Study 33: Kamol's story.*<sup>1297</sup>

*“Kamol’ has a long history of criminal offending, drug use and being abused. He was assessed as eligible for Disability Services on account of his intellectual disability as a young teenager, but has not engaged with Disability Services for many years. Kamol was remanded in custody after being arrested during the commission of a criminal offence. There were also a substantial number of outstanding warrants for his arrest.*

*Kamol was brought before a magistrate however bail was refused due to his history of failing to appear at court and because there was no suitable accommodation available for him. The matter could not finalise by way of plea and sentencing on the day because a report from Disability Services supported the imposition of a justice plan. As a result, he was held in custody.*

<sup>1294</sup> STAR Victoria, *Submission no. 12*, 8 September 2011, p. 1.

<sup>1295</sup> Australian Psychological Society, *Submission no. 22*, 9 September 2011, p. 5.

<sup>1296</sup> Magistrates' Court of Victoria, *Submission no. 31*, 16 September 2011, p. 10.

<sup>1297</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, pp. 9-10.



*The matter was adjourned numerous times while Disability Services completed the justice plan assessment and report. Kamol had been held in custody for so long waiting for the justice plan report that the magistrate finalised the matter by giving him an immediate custodial sentence, declared as time already served on remand. Kamol was therefore released without a justice plan, any accommodation or services in place to support him in the community.”*

The effectiveness of justice plans is dependent on the availability of appropriate services in the community. If justice plans are to be effectively implemented in all cases, it is likely that relevant community services will need to receive additional resources. The Committee notes, however, that increasing expenditure on these community services in order to reduce recidivism and incarceration will likely lead to overall cost savings, as well as improved social outcomes. The Committee recommends that the Victorian Government explore the adequacy of programs and services targeted toward reducing offending by people with an intellectual disability or cognitive impairment.

Recommendation 45: That the Victorian Government ensure resources are provided for programs and services directed toward reintegration and rehabilitation of offenders with an intellectual disability or cognitive impairment into the community.

### **Expanding the use of justice plan conditions**

Justice plans are only available to people with an intellectual disability. Consequently, when considering appropriate sentencing options and conditions for people with other cognitive impairments, such as ABIs, the courts are not able to draw upon services that may be delivered through a justice plan.

The Victorian Aboriginal Legal Service observed that similar difficulties may be experienced by a person with a cognitive impairment as by a person with an intellectual disability, and argued that offenders with a cognitive impairment should be eligible for justice plan conditions.<sup>1298</sup> VLA noted that while “People who are placed on justice plans as part of a sentencing order from the court are automatically linked in and given priority for services with Disability Services ...”, offenders whose impairments do not fall within the meaning of ‘intellectual disability’ contained in the *Disability Act 2006* are not linked with similar services.<sup>1299</sup>

In its review of *People with Intellectual Disabilities at Risk* the VLRC found that there was no reason why justice plan conditions could not be used for

<sup>1298</sup> Victorian Aboriginal Legal Services Co-operative Limited, *Submission no. 39*, 3 October 2011, p. 20. See also Vivian Avery, Lawyer, Villamanta Disability Rights Legal Service Inc., *Transcript of evidence*, Melbourne, 21 May 2012, p. 12; Victorian Coalition of ABI Service Providers Inc., *Submission no. 42*, 7 October 2011, p. 11.

<sup>1299</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 19. See also Vivian Avery, Lawyer, Villamanta Disability Rights Legal Service Inc., *Transcript of evidence*, Melbourne, 21 May 2012, p. 12; Carrie O’Shea and Eleanore Fritze, ‘A Helping Hand for the Vulnerable’, *Law Institute Journal*, vol. 85, pp. 56–, 2011, p. 37.

offenders with other cognitive impairments.<sup>1300</sup> The VLRC also noted that justice plans would only be suitable if appropriate services were also made available in the community.<sup>1301</sup>

The Committee has noted throughout this report that the similarities in disadvantages experienced by people with an intellectual disability and cognitive impairment provide justification for similar supports to be provided to people with these impairments when they become involved in the justice system. The Committee therefore believes that the courts should have the power to impose a justice plan condition on offenders with a cognitive impairment, should the court consider such conditions appropriate. The Committee notes that the DHS would need to be appropriately supported to fulfil the increased demand for justice plans. The Committee believes that expanding non-custodial sentencing options available to the courts may contribute to reducing the overrepresentation of people with cognitive impairments, such as ABIs, in correctional settings.

**Recommendation 46:** That the Victorian Government consider amending the *Sentencing Act 1991 (Vic)* to allow the court to impose a justice plan when sentencing any offender with a 'disability' within the meaning of the *Disability Act 2006 (Vic)*.

### 9.3.1.3 Fines and infringement notices

A fine is a sanction most commonly applied in the Magistrates' and Children's Courts and is one of the least common orders made in the County and Supreme Courts. For example, of the 63 370 offenders sentenced in the Magistrates' Court in 2001-2002, 58 per cent (36 834) received a fine. In 2002-03, 44 per cent (2788) of offenders found guilty in the Children's Court received a fine.<sup>1302</sup>

The courts have a general power to fine an offender in addition to or instead of any other sentence for which the offender may be liable.<sup>1303</sup> The principal restrictions on the imposition of a fine are:

- that a fine may not be imposed if the purpose for the sentence can be achieved by a dismissal, discharge or adjournment;<sup>1304</sup>
- the fine must not exceed the maximum specified for the offence;<sup>1305</sup> and
- the fine must be proportionate to the offending.<sup>1306</sup>

<sup>1300</sup> Victorian Law Reform Commission, *People with intellectual disabilities at risk: A legal framework for compulsory care*, VLRC, Melbourne, Final report, 2003, p. 127.

<sup>1301</sup> Victorian Law Reform Commission, *People with intellectual disabilities at risk: A legal framework for compulsory care*, VLRC, Melbourne, Final report, 2003, p. 127.

<sup>1302</sup> Children's Court of Victoria, *Annual report 2002-2003*, Children's Court of Victoria, Melbourne, 2003, p. 19; Department of Justice, *Victorian Magistrates' Court sentencing statistics 1996/1997-2001/2002*, Department of Justice, Melbourne, 2002, p. 69.

<sup>1303</sup> *Sentencing Act 1991 (Vic)*, section 49.

<sup>1304</sup> *Sentencing Act 1991 (Vic)*, section 5(7).

<sup>1305</sup> *Sentencing Act 1991 (Vic)*, sections 49(2), 52, 109.

The courts have said that the main purpose for which a fine may be imposed is for the punishment of the offender and the deterrence of both the offender and the community from committing similar offences. For example, in *R v Sgroi* the Court said that “Where the fine is appropriate it should not be used merely as a soft option but should have some real sting in it from the point of view of the offender and be sufficiently punitive to act as a general deterrent”.<sup>1307</sup>

Once the court has imposed a fine it must determine the amount of the fine. Factors that the court must consider when determining the amount of the fine include the financial circumstances of the offender and the nature of the burden that will be imposed on the offender as a result of the payment.<sup>1308</sup> The courts have said that it is not just or rational to impose a fine which is beyond the offender’s reasonable capacity to pay. For example, in *Smith v R* President Kirby said:

The imposition of a fine which is totally beyond the means of the person fined and which the Court, the prisoner and the community realise has no prospect whatsoever of being paid, does nothing for the deterrence of others. Such a fine is seen by the community for what it is: a symbolic act of the law without intended substance which neither coerces the particular prisoner nor convinces the community.<sup>1309</sup>

The onus is on the defendant to put material before the court to highlight that their financial circumstances might make it difficult for them to pay the fine.<sup>1310</sup>

Once the court has imposed a fine it is ordinarily payable immediately. However, the court may allow payment by instalment.<sup>1311</sup> A person in default of a payment may apply to the court to convert the fine or part of it into an order to perform unpaid community work for a number of hours, or into imprisonment.<sup>1312</sup>

A fine is not enforceable unless the person has been in default of payment or any instalment due under an instalment order for more than one month.<sup>1313</sup> Where a person is in default the court may issue a warrant of arrest unless the sentencing court has ordered the person to perform unpaid community work.<sup>1314</sup>

As well as fines imposed by sentencing courts, many Victorian Acts, regulations and local council laws allow for infringement notices to be issued. Infringement notices, commonly known as ‘fines’ or ‘on-the spot

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<sup>1306</sup> *Hoare v R* (1989) 167 CLR 348, 354.

<sup>1307</sup> *R v Sgroi* (1989) 40 A Crim R 197, 200, quoted in Judicial College of Victoria, *Victorian Sentencing Manual*, Melbourne, 2006, p. 15.3.2.

<sup>1308</sup> *Sentencing Act 1991* (Vic), section 50(1).

<sup>1309</sup> *Smith v R* (1991) 25 NSWLR 1, 21.

<sup>1310</sup> *Cheshire* (1994) 76 A Crim R 261, 270.

<sup>1311</sup> *Sentencing Act 1991* (Vic), sections 53, 54, 55, 61.

<sup>1312</sup> *Sentencing Act 1991* (Vic), sections 62A, 63.

<sup>1313</sup> *Sentencing Act 1991* (Vic), section 62(1).

<sup>1314</sup> *Sentencing Act 1991* (Vic), sections 62(1A), 62(2), 62(2A).

finer', give the person in receipt of the notice a chance to pay the penalty specified on the notice and avoid formal court proceedings.

The *Infringements Act 2006* (Vic) regulates the infringement system in Victoria and provides the framework for the regulation and enforcement of infringement notices. The Act also contains provisions that are designed to alleviate the inflexibility of the system for particularly vulnerable people, including those who have an intellectual disability.

A person who has been issued with an infringement notice can apply to the relevant enforcement agency for a review or revocation of the decision to serve the notice if the person believes that:

- a decision was contrary to law or involved a mistake of identity;<sup>1315</sup>
- a special circumstance applies to that person – that is, the person had an intellectual disability, disability or mental condition that had the effect of making the person unable to understand or control the conduct that constituted the offence;<sup>1316</sup> or
- the conduct for which the notice was served should be excused having regard to any exceptional circumstances relating to the offence.<sup>1317</sup>

If the enforcement agency receives an application for review of an infringement notice and finds that a special circumstance applies, the agency must withdraw the notice and issue a formal warning in its place, or withdraw the notice.<sup>1318</sup> If, however, the infringement is confirmed the enforcement agency must refer the matter to the Enforcement Review Program (ERP) of the Magistrates' Court, or to the Children's Court if the notice has been issued against a child.<sup>1319</sup>

When a person is arrested and brought before the Magistrates' Court for failing to pay an infringement notice, the court must impose imprisonment unless the person can demonstrate that a 'special circumstance' exists, or that imprisonment would be excessive, disproportionate or unduly harsh.<sup>1320</sup> If such circumstances exist then the court can discharge or reduce the amount of the fine, make an order for imprisonment if the person fails to pay the fine by instalment, or impose a community corrections order.<sup>1321</sup>

Fines may have a disproportionate effect on people with an intellectual disability or cognitive impairment, as people with an intellectual disability or cognitive impairment may have limited income and therefore may have

<sup>1315</sup> *Infringements Act 2006* (Vic), section 22(1).

<sup>1316</sup> *Infringements Act 2006* (Vic), section 3.

<sup>1317</sup> *Infringements Act 2006* (Vic), section 22(1).

<sup>1318</sup> *Infringements Act 2006* (Vic), section 25(2).

<sup>1319</sup> *Infringements Act 2006* (Vic), section 25(3).

<sup>1320</sup> *Infringements Act 2006* (Vic), section 160.

<sup>1321</sup> *Infringements Act 2006* (Vic), sections 160(2), 160(3).

difficulty paying the fines.<sup>1322</sup> A person with an intellectual disability or cognitive impairment may also fail to understand the consequences of failing to pay a fine and inadvertently be in default and, therefore, potentially incur further penalties.<sup>1323</sup> The new framework for infringements was introduced, in part, to address the large numbers of socially disadvantaged people, including people with an intellectual disability, who were becoming involved in the infringement system.<sup>1324</sup>

Despite these protections created for vulnerable people, the Federation of Community Legal Centres said that often enforcement agencies, when presented with a person with an intellectual disability, do not exercise their power under the *Infringements Act 2006* to withdraw infringement notices. Instead the Federation said that enforcement agencies tend to confirm the decision to issue the notice and the matter is then referred to the ERP for consideration.<sup>1325</sup> The Federation of Community Legal Centres said that while the changes to the infringement system have contributed to some positive outcomes for people with an intellectual disability, in the experience of many community legal centres enforcement agencies do not support the measures created by the Act, resulting in "... increased and inappropriate court-based interventions for people with a cognitive disability".<sup>1326</sup> VLA confirmed this assertion, and said that when matters are referred to the Court:

Invariably, the matters are either withdrawn by the prosecutors on the day, dismissed by the court or subject to a nominal penalty like an adjourned undertaking. The entire process, from making the initial revocation application through to the hearing, is resource intensive for the many agencies involved, including VLA.<sup>1327</sup>

VLA highlighted another difficulty associated with referring matters to the ERP. There are three means by which a person may proceed to the ERP – through referral from the enforcement agency, arrested in default of

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<sup>1322</sup> See for example Chris Atmore, Policy Officer, Federation of Community Legal Centres (Victoria) Inc., *Transcript of evidence*, Melbourne, 24 October 2011, p. 31; Anna Howard, Principal Solicitor, Loddon Campaspe Community Legal Centre, *Transcript of evidence*, Bendigo, 28 May 2012, pp. 16-17; Mary Mangan, Managing Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 38; Jane Penberthy, Principal Lawyer, Central Highlands Community Legal Centre, *Transcript of evidence*, Ballarat, 17 November 2011, pp. 24-25; Glenn Rutter, Manager, Court Support and Diversion Services, Magistrates' Court of Victoria, *Transcript of evidence*, Melbourne, 21 May 2012, p. 24; Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*, Mildura, 16 November 2011, p. 5; Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 37; Victorian Disability Advisory Council, *Submission no. 44*, 10 October 2011, p. 17.

<sup>1323</sup> See for example Abigail Gray, Sophie Clarke and Suzie Forell, *Cognitive impairment: Legal need and access to justice*, Law and Justice Foundation of New South Wales, Sydney, 2009, p. 3; New South Wales Law Reform Commission, *Penalty notices*, NSWLRC, Sydney, Final Report, 2012, pp. 351-352, 354-356.

<sup>1324</sup> Tony Lupton MP, *Parliamentary debates*, Legislative Assembly, 2 March 2006, p. 464.

<sup>1325</sup> Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 6.

<sup>1326</sup> Federation of Community Legal Centres (Victoria) Inc., *Submission no. 40*, 6 October 2011, p. 6.

<sup>1327</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 12.

payment of the infringement, or self-referral.<sup>1328</sup> Where an offender has been arrested the court has the power to impose imprisonment in lieu of the outstanding fine.<sup>1329</sup>

When a person seeks to refer a matter to the ERP for consideration, the hearing proceeds as a summary prosecution in accordance with procedures set out in the *Criminal Procedure Act 2009* (Vic). This procedure provides a person with a right to appeal against decisions made by the Magistrates' Court.<sup>1330</sup> However, where a person has been arrested in default of payment of an infringement, the procedure set out in the *Infringements Act 2006* applies, which does not allow a right of appeal.

People with an intellectual disability or cognitive impairment may find it difficult to understand why a fine was imposed and the consequences of failing to pay it. Dr Chris Atmore, Policy Officer at the Federation of Community Legal Centres, described her experience of working with a client with an intellectual disability who had received fines over a number of years, amounting to around \$20 000. The client, in her opinion, did not understand why the fines were being imposed and the consequences of failing to pay the fines.<sup>1331</sup> VLA suggested that not allowing an appeal right significantly disadvantaged people with an intellectual disability or cognitive impairment as unless the court is aware of the person's disability, the court will impose imprisonment in lieu of fines.<sup>1332</sup> In order to avoid this possibility, Mr Jacob Torney, Senior Lawyer with VLA, noted that the courts need to be aware of the effect of the disability on the person in order to respond appropriately.<sup>1333</sup>

VLA provided the following Case Study to illustrate consequences that may flow from the absence of an appeal right from decisions made by the Magistrates' Court.

<sup>1328</sup> *Infringements Act 2006* (Vic), sections 25, 159, 68.

<sup>1329</sup> *Infringements Act 2006* (Vic), section 160.

<sup>1330</sup> *Criminal Procedure Act 2009* (Vic), section 254: The Enforcement Review Program operates as a specialist jurisdiction of the Magistrates' Court.

<sup>1331</sup> Chris Atmore, Policy Officer, Federation of Community Legal Centres (Victoria) Inc., *Transcript of evidence*, Melbourne, 24 October 2011, p. 32. See also Beth Aufdemberge, Katie-anne Powell, Lainie Hocart, Malinthe De Mel, Cameron Soleimani and Wendy Couzens, *Submission no. 18*, 9 September 2011, p. 1; Roger Steel, Co-coordinator of Disability Services, Mallee Accommodation and Support Program, *Transcript of evidence*, Mildura, 16 November 2011, p. 7; Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, pp. 37-38.

<sup>1332</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 13.

<sup>1333</sup> Jacob Torney, Senior Lawyer, Central Highlands Regional Office, Victoria Legal Aid, *Transcript of evidence*, Ballarat, 17 November 2011, p. 37.



*Case Study 34: Michael's story.*<sup>1334</sup>

*"An order was made in respect of 'Michael' following execution of infringement warrants relating to \$35,000 worth of fines he had incurred. The order was to the effect that he would be imprisoned in default of specified regular payments. Michael defaulted on this order and is currently liable to serve a significant term of imprisonment.*

*According to a recent psychological report, Michael has a full-scale IQ of 61. He has suffered a significant decline in his mental state.*

*Before the Magistrate, Michael was represented by a duty lawyer who was not aware of his impairments. They were not put before the Court when the order was made. Michael has no right of appeal to the County Court to remedy the Magistrates' Court's decision because the Infringements Act does not provide this."*

VLA recommended that the *Infringements Act 2006* be amended to create an appeal right, as the effects on a vulnerable person who faces imprisonment in lieu of unpaid fines may be unjustified.<sup>1335</sup>

The Committee believes that a right of appeal against sentences of imprisonment in lieu of payment of fines is warranted for people with an intellectual disability or cognitive impairment, given the difficulties that may be experienced by people with an intellectual disability or cognitive impairment in paying the fine and understanding the consequences of failing to pay a fine. The Committee therefore recommends that the *Infringements Act 2006* be amended to create an appropriate appeal right.

**Recommendation 47:** That the Victorian Government amend the *Infringements Act 2006* (Vic) to create an appeal right against decisions made by the Magistrates' Court to impose imprisonment in lieu of payment of fines for people with an intellectual disability or cognitive impairment.

**Adopted by the Law Reform Committee  
25 February 2013**

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<sup>1334</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 13.

<sup>1335</sup> Victoria Legal Aid, *Submission no. 52*, 2 November 2011, p. 13. See also Beth Aufdemberge, Katie-anne Powell, Lainie Hocart, Malinthe De Mel, Cameron Soleimani and Wendy Couzens, *Submission no. 18*, 9 September 2011, p. 12.



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*Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic)  
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**Queensland**

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**Tasmania**

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*Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

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*Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI) (entered into force 20 December 1971).

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# Appendix One:

## List of submissions

	Name of individual or organisation	Date received
1	Name withheld (confidential)	21 July 2011
2	Brain Injury Australia	18 August 2011
3	George Gray Centre Inc.	18 August 2011
4	Merri Community Health Services	5 September 2011
5	Ms Maria Ann Kolovrat	6 September 2011
6	Name withheld	6 September 2011
7	Name withheld	6 September 2011
8	Ms Angela Alexander	6 September 2011
9	Inclusion Melbourne	7 September 2011
10	Mr George A.R. Faulkner	8 September 2011
11	Ms Ursula Smith	8 September 2011
12	STAR Victoria	8 September 2011
13	Communication Rights Australia	9 September 2011
14	Peninsula Access Support and Training	9 September 2011
15	JacksonRyan Partners	9 September 2011
16	Autism Victoria	9 September 2011
17	Carers NSW	9 September 2011
18	Ms Beth Aufdemberge, Ms Katie-anne Powell, Ms Lainie Hocart, Mr Malinthe De Mel, Mr Cameron Soleimani and Ms Wendy Couzens	9 September 2011
19	Ethnic Communities' Council of Victoria	9 September 2011
20	Office of Public Prosecutions	9 September 2011
21	State Trustees	9 September 2011
22	Australian Psychological Society	9 September 2011
23	Name withheld	9 September 2011
24	Australian Community Support Organisation	12 September 2011
25	Supreme Court of Victoria	12 September 2011
26	Ms Dorota Cipusev	12 September 2011
27	Name withheld (confidential)	12 September 2011
28	Radius Disability Services	12 September 2011
29	Office of the Public Advocate	13 September 2011
30	Legal Services Commissioner	13 September 2011
31	Magistrates' Court of Victoria	16 September 2011
32	Life Without Barriers	19 September 2011

	Name of individual or organisation	Date received
33	CASA Forum	21 September 2011
34	Victoria Police	23 September 2011
35	Leadership Plus	23 September 2011
36	Wesley Mission Victoria	23 September 2011
37	Ms Nicole Fedyszyn	27 September 2011
37A	Ms Nicole Fedyszyn* <i>*Supplementary submission</i>	24 October 2011
38	Jesuit Social Services	30 September 2011
39	Victorian Aboriginal Legal Services Cooperative Limited	3 October 2011
40	Federation of Community Legal Centres (Victoria) Inc.	6 October 2011
41	Office of the Disability Services Commissioner	7 October 2011
42	Victorian Coalition of ABI Service Providers Inc.	7 October 2011
43	Association for Children with a Disability	7 October 2011
44	Victorian Disability Advisory Council	10 October 2011
45	Coalition for Disability Rights	10 October 2011
46	Dr Margaret Camilleri	10 October 2011
47	Women with Disabilities Victoria, Domestic Violence Victoria, Federation of Community Legal Centres (Victoria) Inc., Maroondah Halfway House/Brenda House, Women's Legal Service Victoria and Family Law Legal Service	11 October 2011
48	Law Institute of Victoria	11 October 2011
49	Youthlaw	20 October 2011
50	Grampians disAbility Advocacy	28 October 2011
51	Regional Information and Advocacy Council	2 November 2011
52	Victoria Legal Aid	2 November 2011
53	Assert 4 All	10 November 2011
54	Disability Advocacy and Information Service Inc.	3 November 2011
55	Villamanta Disability Rights Legal Service Inc.	7 November 2011
56	Victorian Advocacy League for Individuals with Disability Inc. (VALID)	7 November 2011
57	Children's Court of Victoria	7 November 2011
58	Ms Dianne Hadden	10 November 2011
59	Ballarat and District Law Association Inc.	16 November 2011
60	Gippsland Community Legal Service	23 May 2012

## Appendix Two: List of witnesses

**Public hearing, 24 October 2011**  
**Legislative Council Committee Room, Parliament House,**  
**Spring Street, East Melbourne**

Witness(es)	Organisation
Ms Patricia Malowney, Deputy Chair Ms Lee Ann Bassar Ms Jody Saxton-Barney Ms Annie Stringer, Senior Policy Officer, Office for Disability	Victorian Disability Advisory Council
Mr Laurie Harkin, Disability Services Commissioner Ms Lynne Coulson Barr, Deputy Disability Services Commissioner Ms Jo-Anne Mazzeo, Senior Legal and Policy Officer	Office of the Disability Services Commissioner
Ms Colleen Pearce, Public Advocate Dr John Chesterman, Manager of Policy and Education Ms Lois Bedson, Policy and Research Officer	Office of the Public Advocate
Dr Chris Atmore, Policy Officer Ms Julie Phillips, Manager, Disability Discrimination Legal Centre	Federation of Community Legal Centres (Victoria) Inc.

**Public hearing, 7 November 2011**  
**Room G1, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Mr Bradley Roberts, Education and Outreach Adviser	Legal Services Commissioner
Mr Kevin Stone, Executive Officer, Victorian Advocacy League for Individuals with Disability Inc. (VALID) Ms Rhonda Lawson-Street, State Manager, National Disability Services Mr Jieh-Yung Lo, Policy Officer, National Disability Services Victoria Ms Dariane McLean, Advocate, VALID Mr John McKenna, Advocate, VALID Ms Karl Jenkins, EW Tipping Foundation	Coalition for Disability Rights
Mr Stan Pappos, Housing Services Manager	Australian Community Support Organisation
Ms Kristen Hilton, Director of Civil Justice Access and Equity Ms Carrie O'Shea, Senior Criminal Lawyer	Victoria Legal Aid



**Public hearing, 16 November 2011**  
**Committee Room, Mildura Council Deakin Avenue Service**  
**Centre, Deakin Avenue, Mildura**

Witness(es)	Organisation
Mr Roger Steel, Coordinator of Disability Services	Mallee Accommodation and Support Program
Ms Jan Kennedy, Program Manager	Mildura Court Network
Mr Tony Masterson, Manager	Murray Mallee Community Legal Service
Ms Marilyn Sobkowiak, Service Coordinator	Sunraysia Residential Services

**Public hearing, 17 November 2011**  
**Reading Room, Craig's Royal Hotel, Lydiard Street, Ballarat**

Witness(es)	Organisation
Ms Fiona Tipping, Advocate Mr Michael Bernard, Individual	Grampians disAbility Advocacy Association
Mr John Burt, Principal	Ballarat Specialist School
Ms Jane Penberthy, Principal Lawyer	Central Highlands Community Legal Centre
Ms Mary Mangan, Managing Lawyer Mr Jacob Torney, Senior Lawyer	Victoria Legal Aid, Central Highlands Regional Office
Mr Philip Lynch, President Ms Dianne Hadden, Honorary Treasurer	Ballarat and District Law Association

**Public hearing, 21 February 2012**  
**Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Ms Susan Timmins, Policy Officer Mr Keith Hitchen, Executive Director, Action on Disability within Ethnic Communities Mr Alistair Maule, Solicitor, Association of Employees with Disability Legal Centre Mr Alf Francett, Program Director, Eastern Regional Mental Health Association Ms Nadine Hantke, Team Leader, Eastern Regional Mental Health Association	Ethnic Communities' Council of Victoria
Ms Kerry Stringer, Former Chair Mr Marc Paradin, Policy Officer	Victoria Coalition of ABI Service Providers
Mr Kevin Stone, Executive Officer Mr John McKenna, Advocate Ms Dariane McLean, Advocate	Victorian Advocacy League for Individuals with Disability Inc (VALID)
Ms Jan Ashford, Chief Executive Officer	Communication Rights Australia
Ms Julie Boffa, Policy Manager Mr Daniel Clements, Manager, Brosnan Centre	Jesuit Social Services
Mr Nick Rushworth, Executive Officer	Brain Injury Australia
Mr Trevor Carroll, Executive Officer	Disability Justice Advocacy

**Public hearing, 20 March 2012**  
**The Boardroom, Geelong RSL, Barwon Heads Road, Belmont**

Witness(es)	Organisation
Mr Richard Coverdale, Director	Centre for Rural and Regional Law and Justice, Deakin University
Ms Glenda Laby, Advocacy Coordinator	Assert 4 All
Ms Dot Leigh, Parent Dr Brian Donovan, Parent Mr James Patterson, Parent Mrs Mary Patterson, Parent	Geelong Parent Network
Ms Di Leverett, Principal	Nelson Park School
Mr Daniel Moyle, Coordinator of Youth Justice and Community Support Service Ms Danielle Rygiel, Coordinator, Youth Connections	Barwon Youth

**Public hearing, 16 April 2012**  
**Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Ms Jan Shuard, Deputy Commissioner Mr Peter Persson, Manager of Disability Youth and Ageing	Corrections Victoria

**Public hearing, 30 April 2012**  
**Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Mr Matthew Andison, Senior Solicitor	Office of Public Prosecutions
Commander Ashley Dickinson	Victoria Police

**Public hearing, 21 May 2012**  
**Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Professor Susan Hayes, Head of Behaviour Sciences in Medicine	Sydney Medical School, University of Sydney
Ms Deidre Griffiths, Principal Solicitor and Executive Officer Mr Vivian Avery, Lawyer	Villamanta Disability Rights Legal Service
Mr Michael Holcroft, President	Law Institute of Victoria
Mr John Lesser, Magistrate Mr Glenn Rutter, Manager of Court Support and Diversion Services Mr Glen Hardy, Program Analyst Assessment and Referral Court List	Magistrates' Court of Victoria
Judge Paul Grant, President Mr Francis Zemljak	Children's Court

**Public hearing, 28 May 2012  
Reception Room, Bendigo Town Hall, Hargreaves Street,  
Bendigo**

<b>Witness(es)</b>	<b>Organisation</b>
Ms Tabitha O'Shea, Community Lawyer	Seniors Rights Victoria
Mr Ian McLean, Chief Executive Officer	Golden City Support Services
Ms Anna Howard, Principal Solicitor	Loddon Campaspe Community Legal Centre
Ms Chris Jacksen, Coordinator Ms Helenmary Dingwall, Team Leader Ms Sheree McCallum, Case Manager	Victorians Assistance and Counselling Program, St Luke's Anglicare
Ms Eileen Oates, Chief Executive Officer	Loddon Campaspe Centre Against Sexual Assault
Mr Luke Docherty, President Ms Lachlan Singe, Treasurer	Bendigo Law Association



# Extract from the minutes of proceedings

## Monday 25 February 2013

The Minutes of the Proceedings of the Committee show the following divisions that took place during consideration of the Draft Report.

**Motion: That Recommendation 3, as amended, stand part of the report.**

Moved: Mr Russell Northe.

Seconded: Mr Clem Newton-Brown.

The Committee divided on the question:

**Ayes:**

Mr Clem Newton-Brown

Mr Russell Northe

**Noes:**

Ms Jane Garrett

Mr Anthony Carbines

There being an equality of votes, the Chair cast his vote with the Ayes.

*Carried.*

**Motion: That Recommendation 17, as amended, stand part of the report.**

Moved: Mr Russell Northe.

Seconded: Mr Clem Newton-Brown.

The Committee divided on the question:

**Ayes:**

Mr Clem Newton-Brown

Mr Russell Northe

**Noes:**

Ms Jane Garrett

Mr Anthony Carbines

There being an equality of votes, the Chair cast his vote with the Ayes.

*Carried.*

**Motion: That Recommendations 19-21, as amended, stand part of the report.**

Moved: Mr Russell Northe.

Seconded: Mr Clem Newton-Brown.

The Committee divided on the question:

**Ayes:**

Mr Clem Newton-Brown

Mr Russell Northe

**Noes:**

Ms Jane Garrett

Mr Anthony Carbines

There being an equality of votes, the Chair cast his vote with the Ayes.

*Carried.*





# Minority Report

## **Inquiry Into Access To And Interaction With The Justice System By People With An Intellectual Disability And Their Families And Carers**

We agree with and have adopted the vast majority of recommendations in this report, which we believe will greatly assist access to justice for persons with intellectual disabilities and cognitive impairment if adopted by the Victorian Government.

There are, however, a number of issues that we believe are critical to ensuring access to justice for vulnerable people in our community.

We are disappointed that the majority of the Committee did not adopt our suggested amendments in these key areas and hence we present this minority report.

Our report relates to fundamental objections to five recommendations out of 47 (recommendations 3, 17, 19, 20 and 21) and our desire for a further recommendation to be added to the report. We sought to amend a further 14 recommendations (recommendations 4, 6, 13, 24, 28, 29, 30, 31, 33, 36, 38, 40, 41 and 46) to give greater effect to the importance of their adoption by the Victorian Government, however these amendments were rejected. We were pleased the Committee agreed to our amendments to include specific detail on initiatives outlined in bullet points for nine recommendations including recommendations 4, 6, 12, 14, 15, 22, 23, 36 and 37. We believe these successful amendments are important because they articulate and set out some details and directions to the Victorian Government regarding these recommendations and how they can be implemented.

### **PAROLE AND ACCOMMODATION**

The Law Reform Committee (LRC) received evidence that people with an intellectual disability or cognitive impairment are often denied the opportunity to be released from prison on parole solely on the basis that there is no suitable accommodation for them in the community.

This is an issue of particular concern given the gross over-representation of persons with intellectual disabilities or cognitive impairment in our criminal justice system.

This, in our view, is not an acceptable situation in our society and is a breach of these individuals' human rights. It also contributes to continuing recidivism and over-representation of these vulnerable people in our prisons. It also places a strain on an already over-crowded prison system which must accommodate individuals who would otherwise be released to continue their sentence in the community.

It is clear that expensive prison accommodation is being used as a substitute for the lack of State Government investment in suitable accommodation for people with intellectual disabilities and cognitive impairment eligible for parole.

A simple review of available accommodation options as recommended by the Committee will not address this issue and will not lead to action from the Victorian Government on evidence provided to the Committee that access to justice for people with an intellectual

disability and cognitive impairment is denied, or at least limited, because of a lack of accommodation options outside of the prison system.

Accordingly, we proposed that Recommendation 3 should read:

*“That the Victorian Government ensure that people with an intellectual or cognitive impairment are not denied parole solely due to the availability of suitable accommodation.”*

This was not accepted by the majority of the Committee.

### **INDEPENDENT THIRD PERSONS (ITP)**

The LRC unanimously agreed in Recommendation 16 that guidance contained in the Victoria Police manual be enhanced to clarify an officer’s obligation to obtain an Independent Third Person (ITP) during an interview with a person suspected of having an intellectual disability or cognitive impairment.

The Committee heard considerable evidence that the voluntary network of ITPs was under great strain due to a lack of resources to properly reimburse, train and attract ITPs.

Based on the evidence presented to the Committee, it is our view that ITPs play a critical role in protecting the rights and interests of people with an intellectual disability or cognitive impairment who come into contact with the justice system. Every effort should be made to manage this resource in a way that ensures the Office of the Public Advocate can sustain the number of ITPs required to meet demand.

Accordingly, we proposed that Recommendation 17 should read:

*“That the Office of the Public Advocate be adequately funded to ensure that Independent Third Persons (ITPs) are reimbursed for all reasonable costs they incur. Caps on the amount of work for which ITPs can be reimbursed should be removed. Also, that the Victorian Government provide sufficient funding to the Office of the Public Advocate to promote the ITP program and to train new ITPs. The Victorian Government should review incentives for participation in the program to ensure that sufficient suitably qualified people are able to perform the duties of an ITP.”*

This was not accepted by the majority of the Committee.

### **VICTORIA LEGAL AID**

Given the current crisis in legal aid funding in Victoria which has resulted in trials being abandoned and judges speaking on the public record about their concerns for the integrity of the justice system, we are of the strong view that any recommendations relating to access to legal aid by persons with an intellectual disability or cognitive impairment (including accessing proper medical reports to identify these conditions) should make reference to adequate funding.

The LRC heard evidence from Victoria Legal Aid and community legal centres that often the failure to properly diagnose persons with an intellectual disability or cognitive impairment coming into contact with the justice system not only compounded the difficulties these individuals faced, but made it more likely for there to be a protracted and costly journey through the system that could in some circumstances be avoided with a proper diagnosis and early response.

Accordingly, we proposed that Recommendations 19 – 21 should read:

Recommendation 19: *“That the Victorian Government provide funding to ensure that specialist community legal centres and other agencies that provide services directly to people with an intellectual disability or cognitive impairment are able to adequately meet demand.”*

Recommendation 20: *“That the Victorian Government commission research to examine the adequacy of legal aid funding provided by Victoria Legal Aid and to assess whether financially disadvantaged sectors of the community are able to access sufficient legal aid, particularly those with an intellectual disability or cognitive impairment.”*

Recommendation 21: *“That the Victorian Government support Victorian Legal Aid to review current guidelines for grants of legal aid to facilitate the production of psychological or psychiatric reports to determine whether clients have an intellectual disability or cognitive impairment. Furthermore, that the Victorian Government ensure that psychological or psychiatric reports are available to determine whether individuals that come into contact with the justice system have an intellectual disability or cognitive impairment in all appropriate cases.”*

We determined that a further related Recommendation 21B was required.

Recommendation 21B: *“That the Victorian Government examine whether funding for Victoria Legal Aid should be increased to allow for the changes to guidelines for grants of legal aid as proposed in Recommendation 21.”*

These amendments and the additional recommendation were not accepted by the majority of the Committee.

#### **USE OF THE TERM “CONSIDER”**

The role of the Law Reform Committee is to make recommendations to the Victorian Government to improve and reform the application of the law in the State. As many as 14 recommendations in this report were qualified because of a desire by the majority of the Committee not to make a more definitive determination to the Victorian Government.

It is our view that based on the written submissions and in-person evidence provided to the Committee, that clear and unambiguous recommendations to the Victorian Government should have been made with regard to Recommendations 4, 6, 13, 24, 28, 29, 30, 31, 33, 36, 38, 40, 41 and 46. Simply asking the Victorian Government to ‘consider’ courses of action with regard to these recommendations undermines the reference given to the Committee by the Parliament in relation to access to the justice system by people with an intellectual disability or cognitive impairment.

Therefore, we are of the view that the term 'consider' should be deleted from these recommendations to give greater weight and conviction to the evidence heard by the Committee that these recommendations 'should' be implemented.

*Our amendment to delete 'consider' from these recommendations to give them greater effect and avoid watering them down was not supported by the majority of the Committee.*

## **CONCLUSION**

We thank the members of the Committee and the secretariat for their work on this important report and acknowledge the written submissions and in-person evidence that has assisted the Committee to make 47 recommendations to the Victorian Government.

Inclusion of the recommendations and amendments we have put forward would go further towards ensuring greater and fairer access and interaction with the justice system by people with an intellectual disability or cognitive impairment in Victoria.

Too often, access to justice comes down to an individual's financial circumstances, their personal well-being and any available family and peer support. People with an intellectual disability or cognitive impairment are disproportionately reliant on the resources and advocacy of government to navigate the system and secure just and fair outcomes.

As the Committee heard time and again in evidence, the fact that such a disproportionate number of people with an intellectual disability or cognitive impairment are caught up in our justice and prison systems indicates that more must be done to defend their rights as citizens and ensure they have access to justice in equal measure to their fellow Victorians.

The LRC report and the important amendments outlined in our Minority Report provide the Victorian Government with an opportunity to reform areas of the justice system that are failing vulnerable Victorians.

**Jane Garrett MP**  
Deputy Chair  
State Member for Brunswick

**Anthony Carbines MP**  
State Member for Ivanhoe

February 2013