Access to justice in the criminal justice system for people with disability

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Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to make a submission to the Australian Human Rights Commission (the Commission) in relation to the Issues Paper, *Access to justice in the criminal justice system for people with disability* (the Issues Paper). The LIV is grateful for the extension of time in which to make the submission.

The LIV is Victoria’s peak body for lawyers and those who work with them in the legal sector, representing over 16,000 members. The LIV has a long-standing interest in mental health law and the rights of people with disabilities, which are monitored by the Disability Law Committee of the LIV’s Administrative Law and Human Rights Section. Members of the Disability Law Committee have extensive experience providing legal representation to individuals with disabilities in the criminal justice system, including both victims and accused.

The LIV regularly makes submission on issues affecting the rights of people with disabilities.1 LIV submissions which relate to access to justice for individuals with disability include:

- People with disabilities and interlock devices for drink driving offenders (9 June 2009)
- *National Equality Act* (10 February 2011)
- Victorian Parliamentary Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (11 October 2011)
- Review of Guardianship (20 May 2010) and Response to Guardianship Final Report (10 December 2012)

The Issues Paper and identified barriers to justice

We note that the Issues Paper focusses on the barriers for people with disability who need communication supports or who have complex and multiple support needs, but that the term “disability” is broad and includes intellectual disability, acquired brain injury, cerebral palsy, hearing impairment, speech impairment, psychosocial disability or mental illness or other cognitive impairment. We note further that the scope of the Issues Paper is broad, in that it considers people with disability in all areas of the criminal justice system, including those who are victims of crime, accused of crimes, witnesses, defendants and offenders.

In the Issues Paper the Commission identifies five barriers that limit or prevent access to justice for people with disability. These barriers are summarised as follows:

Barrier 1: Community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disability. This means that people with disability are left without protection and face ongoing violence, or have repeated contact with the criminal justice system because appropriate programs and community support are not available.

Barrier 2: People with disability do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.

Barrier 3: Negative attitudes and assumptions about people with disability often result in people with disability being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.

Barrier 4: Specialist support, accommodation and programs may not be provided to people with disability when they are considered unable to understand or respond to criminal charges made against them (‘unfit to plead’). Instead, they are often indefinitely detained in

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1 LIV submissions are available on our website at <http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Submissions>. 

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prisons or psychiatric facilities without being convicted of a crime. This situation mainly happens to people with intellectual disability, cognitive impairment and people with psychosocial disability.

Barrier 5: Support, adjustments and aids may not be provided to prisoners with disability so that they can meet basic human needs and participate in prison life. They often face inhuman and degrading treatment, torture and harmful prison management practices.

Access to justice for people with intellectual disability and psychosocial disability

The LIV considers that people with disabilities generally face a range of barriers to access to justice in the criminal justice system, whether they are victims or accused.

We refer the Commission specifically to the submission the LIV made to the Victorian Parliamentary Law Reform Committee’s (VPLRC) Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers in October 2011. A copy of that submission is enclosed. In that submission the LIV addressed issues of high priority within the criminal law jurisdiction in relation to people with intellectual disability that had been identified by members, including:

- Early identification by police and by lawyers of people with intellectual disability
- The Neighbourhood Justice Centre project
- The Melbourne Magistrates' Court’s Assessment and Referral Court List System, and
- Sentencing of persons with an intellectual disability

We note that, on 5 March 2013, the VPLRC tabled its final report on the Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers. Recommendations included that the Victorian Government extend across Victoria’s major metropolitan and regional centres the problem-solving court models operating at the Neighbourhood Justice Centre and the Assessment and Referral Court List [Recommendation 34]. We note that KPMG is undertaking an evaluation of the Assessment and Referral Court List but that this evaluation is yet to be finalised.

We now make additional submissions in relation to access to justice for people with psychosocial disability. Please note that we seek to raise specific issues highlighted by LIV members, rather than attempt to provide a comprehensive response to all issues raised in the Issues Paper. Furthermore, the LIV is aware that there are a range of legal and institutional issues that have led the Commission to inquire into whether people with disability may not have their rights protected or be treated equally in the criminal justice system. In this submission the LIV focuses on what it sees as a key barrier to justice for people with disability; ensuring people with disability receive appropriate support to participate in criminal justice processes. This requires input, involvement and assistance from a range of sectors, including but not limited to the legal profession.

The LIV submits that the provision of legal assistance would play a part in ensuring people with disability receive the appropriate supports to access justice in the criminal justice system. Chronic underfunding of legal aid means that many people, including those with disability, are unable to obtain legal advice or representation. The LIV has been actively lobbying the federal and state governments for the past five years to increase legal aid funding. The LIV has also called on the federal government to increase funding to Community Legal Centres and restore funding to the...
Mental Health Legal Centre, an independent community based service providing free, confidential and independent legal assistance to Victorians on legal issues related to mental illness. ⁴

People with psychosocial disability as victims of violence

The LIV notes that people with psychosocial disability are more likely to be a victim of violence than the general population.⁵ Furthermore, despite the fact that they are more likely to come in contact with police, evidence suggests that crime and violence against people with psychosocial disabilities often goes undetected by, or unreported to, police.⁶ Further to the issues identified in the Issues Paper as barrier 2, the LIV considers that where people with psychosocial disabilities are subjected to violence and abuse in institutional settings where they are receiving care, support and/or treatment, that the support of staff and others is critical, not only in preventing such cases arising in the first place, but also in responding and taking appropriate action when such situations arise. This may include reporting the matter to police and supporting a person to access appropriate independent support services and legal representation. The support of staff therefore directly impacts access to justice for both the victim and the accused, including their ability to enforce and/or defend their rights in the criminal justice system.

Women who experience violence and abuse in public psychiatric units

The LIV is concerned about the prevalence of sexual and other harassment and assault experienced particularly by women in public psychiatric units. Women are particularly vulnerable to abuse and violence in psychiatric inpatient facilities, with studies indicating that up to 70% of women have past experience of physical or sexual abuse.⁷ Further, a recent study conducted by the Alfred Hospital in Victoria found that women are six times more at risk of assault in mixed-sex psychiatric units than in a female-only unit.⁸

A report published in May 2013 by the Victorian Mental Illness Awareness Council, Zero tolerance for sexual assault: A safe admission for women reveals that 45% of women surveyed had experienced sexual assault during their admission to a psychiatric inpatient unit.⁹ Sixty-one per cent of survey respondents said that they reported the assault to the nurse or doctor, and, of those, 82% said the nurse or doctor had been “not at all” helpful.

In December 2012 the LIV wrote to the Victorian Minister for Mental Health, calling for a range of measures to prevent sexual harassment and assault of women in psychiatric units and ensure any  

⁹ The VMIAC surveyed 50 women from 9 mental health services around Victoria about their experiences of safety, harassment and assault during admission to psychiatric in-patient units. See Victorian Mental Illness Awareness Council, Zero Tolerance for Sexual Assault: A safe admission for women available at <http://www.abc.net.au/reslib/201305/r1115028_13591277.pdf>. 
allegations were responded to appropriately and properly investigated in a timely manner. This included that all staff demonstrate competence in implementing the Chief Psychiatrist’s Guideline, Promoting sexual safety, responding to sexual activity and managing allegations of sexual assault in adult acute inpatient units. The LIV submits that staff training is crucial to ensuring implementation of the Chief Psychiatrist’s Guideline and that allegations of sexual harassment and assault of women in psychiatric units are appropriately investigated.

**Violence and abuse in supported residential services**

The LIV is also concerned about the risk of violence, abuse and assault of people with disabilities, including psychosocial disability, in supported residential services (SRSs). SRSs provide accommodation and support for people, including people who have a disability, in a shared living environment. They are privately operated services but must be registered with the Victorian Government and are monitored to ensure they provide certain standards of personal support and accommodation. The LIV notes also that Community Visitors report an increase in reported cases of violence abuse and assault of residents in such accommodation.

Victoria’s Public Advocate recently developed a good practice guideline for organisations, staff and volunteers who work with adults with a cognitive impairment, communication disability, mental illness or other disability who are at risk of violence, neglect or abuse. This includes SRSs. *The Interagency Guideline for Addressing Violence, Neglect and Abuse (IGUANA)* outlines what action should be taken when violence, neglect or abuse is reported, witnessed or suspected by staff. The guideline was developed in collaboration with statutory agencies, family violence and sexual assault services, Victoria Police, and representatives from the disability and mental health sectors in Victoria and draws on national and international research and practice, as well as the United Nations Convention on the Rights of Persons with Disabilities.

The IGUANA guideline is designed to help ensure that immediate action is taken and that such action is respectful of the person and empowers them to make their own choices and decisions wherever possible.

It identifies the following key steps that staff and volunteers are expected to take:

1. Protect the person
2. Support the person
3. Report the matter immediately
4. Preserve any evidence
5. Contact the family or carer
6. Encourage the person to take part in any investigation
7. Take further action if there are doubts or concerns

In addition, the guideline specifies the actions the head of the organisation should take, including:

- Ensuring the preceding actions have been taken
- Ensuring that an investigation occurs
- Protecting the wellbeing and rights of service users
- Protecting whistleblowers

The LIV notes that, at the IGUANA launch of 31 May 2013, 28 agencies working broadly in the mental health and disability sectors had endorsed the guideline. The LIV supports the implementation of the IGUANA guideline to assist people with disabilities, including psychosocial...

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disabilities, in settings such as SRSs to be appropriately and effectively supported where violence, neglect or abuse is reported, witnessed or suspected by staff.

The LIV also welcomes recent steps taken by the Victorian Government to improve standards and conditions in SRSs. From 1 July 2012 the new Supported Residential Services (Private Proprietors) Act 2010 and the Supported Residential Services (Private Proprietors) Regulations 2012 (SRS regulations) came into force. These establish minimum standards for the accommodation and personal support services provided in SRSs and in particular have strengthened reporting requirements for serious incidents. The Victorian Department of Health Protocol for Responding to Allegations of Sexual Assault in SRS was also released in October 2012.\footnote{Department of Health, \textit{Responding to allegations of sexual assault in SRS: Clarifying roles for SRS proprietors, the Department of Health and Centres Against Sexual Assault} (October 2012) available at: \url{http://docs.health.vic.gov.au/docs/doc/9D7764ADF8CF97F2CA257A91007FF11A/$FILE/CASA%20PROTOCOL_FINAL%2024%20SEPT%2012.pdf}.}