

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

Submission by the Loddon Campaspe Community Legal Centre

Loddon Campaspe Community Legal Centre

The Loddon Campaspe Community Legal Centre (**LCCLC**) is a program of the Advocacy & Rights Centre Ltd based in Bendigo. Since 2005, it has operated as a generalist community legal centre and provided legal advice and assistance to people living in the Macedon Ranges, Mount Alexander, Central Goldfields, City of Greater Bendigo, Loddon and Campaspe shires. Loddon Campaspe Community Legal Centre works within a community development framework and seeks to improve access to justice, safeguard human rights and confront structural disadvantage.

We have read the written submissions of the Federation of Community Legal Centres, the Disability Discrimination Legal Service (**DDLS**) and other Victorian community legal centres (**CLCs**). We acknowledge that centres which provide specialist assistance to people with a disability are better placed to inform the Committee broadly on issues faced by people with an intellectual or cognitive disability and their families and carers in accessing and interacting with the justice system. We endorse the comments made by the Federation and DDLS and we provide our contributions in addition to those issues already raised. We consider that there are additional barriers to justice for people with an intellectual disability and their families and carers who live in a regional or rural area and we feel that, as a regional CLC, we are in a unique position to draw these issues to the attention of the Committee.

1. Introduction

The justice system can be difficult to access for people who are vulnerable and disadvantaged. Those who live rurally, who are financially disadvantaged, who have a disability, for whom English is a second language or who are victims of family violence may all face barriers to accessing and interacting with the justice system. However when a person has multiple characteristics which make them vulnerable and disadvantaged, as is commonly the case, barriers to accessing justice and the justice system grows. In our view, a person with an intellectual or cognitive disability living rurally or regionally is likely to face barriers in accessing justice that may be additional or different to a person with an intellectual disability living in city.

LCCLC database records indicate that approximately one quarter of those who access the Centre identify as having a disability/ies of some kind. Of those who identified as having a disability, we are unable to indicate conclusively how many would have intellectual or cognitive disabilities but we suspect it would be a significant proportion. Intellectual disability is a term for which there is no agreed definition, although it is sometimes described as people who have an IQ below 70. LCCLC does not consider that the barriers discussed in this submission should apply only to people with an identified intellectual disability. We consider that they may also apply to people with a cognitive disability, including a mental health condition or learning disability, all of which may affect a person's capacity to undertake certain daily living tasks. LCCLC also recognises that people with an intellectual disability have varying need for assistance, depending on the individual's abilities, personality, severity of their disability and the level of care and support available to them.

All case studies provided in this submission have been de-identified and, where possible, consent of the client has been obtained.

2. Accessibility of the justice system

The barriers faced by Victorians who live regionally or rurally in accessing the justice system is well documented. This issue was addressed in the Parliamentary Rural and Regional Committee's 2010 Final Report of the Inquiry into the Extent and Nature of Disadvantage and Inequity in Rural and Regional Victoria¹.

2.1 Removal of justice 'blackspots' in rural and regional Victoria

The first recommendation of the Access to Law section of the Final Report was the need for a Community Legal Centre in the Goulburn Valley region. LCCLC currently operates a pilot community legal centre in the Goulburn Valley area, based in Shepparton (**GVCLC**). The region, encompassing the city of Shepparton, and the towns of Seymour, Violet Town, Euroa, Numurkah and Cobram, represents one of the last significant black spots for community legal services in Victoria. The lack of a funded community legal centre in the Goulburn Valley region is particularly significant given the high levels of vulnerability and disadvantage of its residents. Of particular concern is the fact that

¹ Parliament of Victoria Rural and Regional Committee, *Inquiry into the Extent and Nature of Disadvantage and Inequity in Rural and Regional Victoria*, October 2010.

Shepparton has been identified as the only community in Victoria to which involuntary income management measures will be applied by the Federal Government from July 2012. Income Management measures are likely to impact on people with an intellectual or cognitive disability because the measures will apply to people who are on a disability support pension, along with other social security payments. LCCLC is concerned that income management measures will involve significant infringements on the human rights of social security recipients². Without a community legal centre in the region, legal and advocacy assistance available to people affected by the income management measures will be extremely limited or available only at a cost. It is therefore critical that funding for a community legal centre in the Goulburn Valley region be prioritised by the Victorian and Federal governments.

Further detail about the inequity experienced by rural and regional Victorians in accessing justice is provided in 'Postcode Justice', the report by Deakin University that explores rural and regional disadvantage in the administration of the law in Victoria³.

2.2 Improved support services in rural and regional Victoria

LCCLC's provides services to a large geographical area in regional and rural Victoria. Its clients live as far as 2 hours away from the LCCLC office in Bendigo and this presents significant challenges to service delivery, particularly for clients with intellectual or cognitive disabilities.

A significant proportion of LCCLC's advice is provided through telephone appointments. LCCLC also provides face to face appointments weekly in Bendigo and fortnightly at Echuca, Maryborough and Kyneton. LCCLC recognises that people with intellectual or cognitive disabilities may be more likely to experience difficulty in explaining their legal issues over the telephone. In some circumstances, carer or support worker of a person with a disability may phone LCCLC on behalf of the person and facilitate the discussion. This is only possible where the person has a carer, friend or support worker available to provide this support. In many situations, especially where a person's intellectual disability is mild, no such support exists. This is particularly evident in rural areas. Where a client of the LCCLC identifies as having an intellectual disability and it is clear that the client has difficulty explaining a legal issue or comprehending advice over the phone, all efforts are made to see the client in person. Of course, due to the limited resources of LCCLC, this is often not possible if the client lives a long way from an outreach location.

It is well documented that people on low incomes, including people with a disability, are less likely to have their own transport and are therefore more likely to be dependent on public transport or a family member or carer⁴. Legal services, courts and other aspects of the justice system should be

² Further information about the impacts of the measures on the Shepparton community is contained in the submission of the GVCLC to the Senate Standing Committee on Community Affairs' Inquiry into the Social Security Legislation Amendment Bill 2011 which can be accessed at <<http://clc4gv.org.au>>

³ Coverdale, Richard, *Postcode Justice - Rural and Regional Disadvantage in the Administration of the Law in Victoria*, Deakin University, July 2011

⁴ Australian Bureau of Statistics, *Australian Social Trends*, 2008, ABS catalogue no. 4102.0. See also National Council on Intellectual Disability, (with the assistance of ACROD and Disabled Peoples' International) for the

easily accessible by public transport in order to facilitate easy access by people who rely on it, including those who have an intellectual disability. Generally, Victorians living regionally and rurally experience disadvantage in accessing adequate public transport⁵. This has been recognised as ‘one of the most significant barriers to accessing services, employment and social networks’⁶. An improved public transport system in regional Victoria may reduce the significant barriers faced by people dependent on public transport in accessing legal appointments, the courts and other supports. The Parliamentary Rural and Regional Committee’s Final Report of the Inquiry into the Extent and Nature of Disadvantage and Inequity in Rural and Regional Victoria made multiple recommendations regarding the need for improvements to public transport and alternative transport in rural and regional Victoria⁷.

Case study: Unsolicited Marketing Calls

The client, who had an intellectual disability, had entered into a number of mobile phone contracts after receiving unsolicited marketing phone calls. He had been offered free gifts and holidays if he signed another person up. He signed up his partner, who also had an intellectual disability. He had no assets and his sole income was the disability support pension. By the time the client presented at LCCLC, he had 5 mobile phone contracts, all with significant debts attached. He had never received the free holiday he had been promised. LCCLC assisted the client to lodge complaints with the Telecommunications Industry Ombudsman about encouraging a person who had an evident intellectual disability to enter into a contract. Ultimately, all 5 telecommunications providers agreed to waive or not pursue the debts, but not without some persistence on the part of LCCLC. One company continued to send the client bills after the agreement to waive the debt was reached as part of the TIO conciliation! A further complaint to the TIO saw the matter finally resolve.

A significant obstacle in this matter was the difficulty in obtaining and explaining information to the client over the phone. However, the client lived approximately 2 hours from the LCCLC office and was entirely dependent on public transport. The client could not afford to travel to Bendigo specifically for legal assistance and could only attend on days when Department of Human Services paid for his transport to attend access visits with his child, who was placed in care in Bendigo. The last bus departed approximately 40 minutes after the completion of access, therefore face to face contact was only possible for a maximum of 15 minutes on any given week and the client was distracted by the possibility of missing the bus. As a result, it

Human Rights and Equal Opportunity Commission, *The Rights of People with Disabilities: Areas of Need for Increased Protection*, 1989.

⁵ Coverdale, Richard, Postcode Justice - Rural and Regional Disadvantage in the Administration of the Law in Victoria, Deakin University, July 2011.

⁶ State Government of Victoria, Transport Connections, Department of Planning and Community Development (1 November 2010), <<http://www.dpcd.vic.gov.au/transport>>.

⁷ Parliament of Victoria Rural and Regional Committee, *Inquiry into the Extent and Nature of Disadvantage and Inequity in Rural and Regional Victoria*, October 2010.

was difficult to obtain important details about the phone contracts and difficult to explain the process to the client.

This matter also exposed the vulnerability of people with intellectual disabilities who receive unsolicited marketing calls and door to door sales.

LCCLC considers that an improvement of support services for people with an intellectual or cognitive disability living in regional and rural Victoria would improve access to legal services and the justice system broadly.

2.3 The case for medical-legal partnerships

Accessibility of services is not only an issue for people with a physical disability but also those with intellectual disabilities. Barriers to physical accessibility to services for people with physical disabilities is an important has been the subject of separate inquiries⁸. People with an intellectual disability may physically be able to enter the door of a legal service or a court however they may lack the awareness or knowledge about how it might be relevant to them or how it might assist them.

A growing movement, particularly in the USA, advocates for improved alliances between health and advocacy services, which includes, but is not limited to, the co-location of these services⁹. Such partnerships have not only broken down the barriers to accessible legal services to people experiencing health issues, they have demonstrated the socio-legal impacts on health and the associated health benefits of effective legal advocacy on behalf of patients. An advocacy health partnership may assist in having legal issues identified (that a person with an intellectual disability may not themselves recognise or address) and referred by health workers to a legal service.

3. Comprehending legal process and procedure

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. The LCCLC provides applicant duty lawyer services at three courts in our region for intervention orders. Through provision of this service, LCCLC encounters clients who have intellectual disabilities who are applying for, or responding to, intervention orders. No assistance is available at the Magistrates Court registry for any person, including those who have an intellectual disability, in completing applications for

⁸ National People with Disabilities and Carer Council, SHUT OUT: The Experience of People with Disabilities and their Families in Australia - National Disability Strategy Consultation Report, 2009.

⁹ For information about the Medico-Legal partnership movement in the USA see <http://www.medical-legalpartnership.org/>. For information about advocacy health alliance movement in Australia see <http://advocacyhealth.net.au>

intervention orders. Once an application has been made, there is no capacity to change the written application, however oral evidence can be provided in support. A person with an intellectual disability may lack the ability to communicate their concerns orally, increasing the importance of a strong written application.

Case study: Intervention order

The client was a victim of numerous sexual assaults by a family member – as a juvenile and then subsequently as an adult. At the time of the criminal proceedings the Police did not take appropriate action in respect of ongoing protection for the client through the intervention order process. As a result the client was required to make application in person. The client’s comprehension and written skills were poor and had been diagnosed with ‘mild’ intellectual handicap – manifesting in limited comprehension of processes and difficulties in communicating previous incidents and sufficient detail in support of the application. These issues were intensified by the trauma of the perpetrator being present to defend the application and denying the client’s allegations.

The client was required to make the application without assistance from the police, or the Magistrates Court Registry staff. Consequently, the application was vague and lacked detail sufficient to put the application itself in danger of being struck out for lack of compliance with the strict requirements of the family violence legislation at the time.

Through the Family Violence Court Outreach program, LCCLC were able to bring to the attention of the Court and the respondent lawyer the significant safety concerns that had not been adequately identified in application, including existing criminal convictions relevant to the proceedings.

This situation revealed a number of deficiencies in the system, most notably, the failure of police to recognise a person clearly in need of their assistance and protection and a lack of supports in place at the Court Registry to assist people with cognitive impairment in completing applications and providing sufficient detail to satisfy legislative requirements.

People with an intellectual or cognitive disabilities living in rural and regional Victoria may experience barriers interacting with the justice system because some programs only operate in Melbourne. For example, no dedicated Enforcement Review Program (‘special circumstances’ list) exists in any Court in the LCCLC catchment area. The Program enables the Court to impose outcomes that reflect the circumstances of the offending. Magistrates in regional courts are not able to refer matters to such lists and are not necessarily experienced in dealing with persons who have special circumstances, including intellectual disabilities or mental health issues. As a result, in the experience of LCCLC, clients may receive less favourable results than if their matters were transferred to special circumstances list in Melbourne where Magistrates receive specific training and gain specialist experience. Regional courts would benefit from the introduction of special circumstances lists, or at least, improved education for regional Magistrates about the need for applying different measures for people who are found to have special circumstances.

4. Awareness of legal rights and options

It is commonly reported that people with a cognitive impairment may be less inclined to pursue a legal issue because they lack an awareness of their legal rights or that a legal remedy to their issue exists¹⁰. LCCLC has 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. In some circumstances, applications can be made for extensions of limitation periods, on grounds of the person's cognitive impairment, but success is dependent on the circumstances of the case, the length of time that has passed and the type of action.

Case study: Unfair dismissal

The client, who had a mild intellectual disability and who was also illiterate, was the subject of bullying at her workplace. The client felt she was coerced to resign when she disclosed the bullying to senior management. Not fully aware of her rights and that she may have been unfairly dismissed, the client contacted LCCLC for assistance about 1 month after the dismissal. LCCLC identified that the 14 day limitation period for an unfair dismissal claim had expired. LCCLC assisted the client to make an application to Fair Work Australia (FWA) for an extension of the 14 day period due to the client's intellectual disability. LCCLC represented the client in a FWA conciliation and negotiated 4 weeks pay in lieu of notice.

5. Lack of control in managing affairs

People with intellectual disabilities who are subject to administration orders are at the mercy of their administrator to deal with issues that may have financial, legal or even criminal implications for them. This places a heavy responsibility on administrators to ensure that matters, such as payment of infringements or response to warrants are completed within time. In our experience, many people who have trustee companies such as State Trustees as administrators have expressed frustration that these matters have a tendency to 'get lost in the system'. In many cases, contact between clients and case workers for the administrator only occur over the telephone and, as discussed above, this can be particularly limiting to people with an intellectual or cognitive disability. We are encouraged by the fact that State Trustees has recently opened a branch in Bendigo, providing the option of an (albeit limited) face-to-face service for clients in this area.

Case study: Administrator fails to deal with infringement

The client was a man with an intellectual disability in Bendigo. VCAT had appointed State Trustees as his administrator. The client had incurred an infringement for speeding and provided State Trustees with the infringement immediately after he received it. State Trustees failed to pay the fine before the due date and the matter was referred to the Magistrates Court where an enforcement order was made against the client. The client informed State Trustees that the enforcement order had been made and requested that they arrange for the payment of the fine.

¹⁰ Cognitive impairment, legal need and access to justice, (Justice Issues Paper 10) (2009)

The time within which to pay the fine pursuant to the enforcement order passed and the client was at risk of having an infringement warrant issued and being arrested. LCCLC advocated on behalf of the client to ensure that State Trustees paid the fine. State Trustees paid the fine, including penalty fees that had accrued from the client's account. LCCLC STL refund the penalty fee amounts! This matter is interesting for a few reasons.

The client did not believe that he needed to have an administrator. He was frustrated by the lack of communication with State Trustees and the lack of face-to-face contact. This event caused him to completely lose faith in STL as his administrator and he applied for a review of the administration order. Ultimately, his application did not succeed, but he was clearly interested in exercising some financial independence, yet was never identified as someone who should participate in the financial independence program. Secondly, had it not been for LCCLC'S intervention, the client may have been arrested before the matter was addressed. Thirdly, it also exposed the vulnerability of people under administration having infringements (and other legal matters) dealt with by their administrator.

It does not necessarily follow that a person with an intellectual or cognitive disability is not capable of making reasonable decisions for themselves, nor does it necessarily follow that if they are not capable of making reasonable decisions for themselves that their wishes be taken into consideration by an administrator, guardian or decision maker. It is critical that decision makers, guardians and administrators are trained to operate within a human rights framework, and that they understand the nuanced and complex nature of capacity. Guardians and administrators should understand the obligation they have to act in the represented person's best interest, and that includes considering the wishes of the represented person whenever they will make a decision for them.¹¹

It is critical that represented persons or persons who are not able to make decisions for themselves have access to legal and advocacy services if they feel that those making decisions on their behalf are not acting in their best interests or taking account of their wishes.

Case study: Will contest

The client had a mild to moderate intellectual disability. The client's aunt had died and left a considerable amount of money to the client and client's sisters. One sister was the executrix and trustee of the will. The money left to the client was to be held in trust for the use of the client at the discretion of the trustee, the sister.

The client wanted to own a home and believed that the money in the trust could be used for that purpose. The trustee was reluctant to use the money for that purpose.

The client contacted the Community Legal Centre for assistance with negotiations with the trustee for the purchase of a house. The Centre negotiated through the trustee's solicitor and was able to communicate the advantages to the client of having a home, what type of home the client wanted and where it would be. Ultimately, the trust purchased a home for the client and gave the client a life interest in the property.

¹¹ Office of the Public Advocate, Good Guardianship - A guide for guardians appointed under the *Guardianship and Administration Act 1986*, 2011.

Without the assistance of LCCLC, the client may not have been able to explain the advantages of having her own home to her sister and may not have been able to achieve a favourable outcome.

6. Supports for parents with an intellectual disability

Parents with intellectual disabilities represent a modest number of all parents in Australia (estimate 1-2%). However, they are over-represented in child protection and legal proceedings¹². These findings are consistent with LCCLC's observations of the experiences of people with an intellectual or cognitive disability in the child protection system.

In our experience, parents with intellectual or cognitive disabilities face significant obstacles in participating in family and child protection proceedings. In many situations, parents with intellectual disabilities are unable to be provided with adequate support to enable their child/ren to be returned to their care because of a lack of support services. People with an intellectual disability may have difficulty understanding why intervention has occurred in the first place, and in our experience, are less likely to challenge matters as a result of their confusion or fear¹³.

Case Study: Child Protection

The client, who had an intellectual disability, was living with his wife (who also had a mild intellectual disability) and children in a rural area. DHS had intervened because they alleged that one of the children had made a disclosure of sexual abuse by the client. The wife and children were being assisted by the only support service in the region, leaving the client without any support. Further, no legal representation could be obtained for the client due to limited lawyers in the region practising in child protection matters. The lawyer for the mother contacted LCCLC and requested that we assist the client.

The difficulties in assisting the client, who had limited capacity to understand the effect of the alleged disclosure, the child protection system and the Court process were myriad. The client lived in a rural location, over 1.5 hours from the LCCLC office thus most of the contact had to occur via telephone. This had a detrimental effect on the client's comprehension of the significant matters being determined. The client's cognitive impairment appeared to give him a heightened fear of authority - the Court and child protection system. The client was inclined to accept anything the Department said, even if he disagreed, because he feared the implications of 'doing the wrong thing'.

In the case described above, LCCLC's assistance meant that the client was, at least, legally represented and could have the process explained to him. The client would have benefited from face-to-face appointments, but his location 1.5 hours from LCCLC and limited resources of the LCCLC

¹² Booth, Booth, & McConnell, 2005; McConnell, Llewellyn, & Ferronato, 2000.

¹³ Schetzer and 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 NSW, August 2003, p47.

meant that this could not be achieved. Due to his rural location, no support worker could assist the client as the only worker in the region was assigned to other members of the client's family.

7. Conclusion

People with intellectual or cognitive disabilities living in regional or rural Victoria are likely to experience different or additional barriers to those living in the city. A number of improvements could be made to services in regional and rural Victoria to reduce the extent of disadvantage felt by people living in these areas. LCCLC makes the recommendations below to the Committee.

Recommendations:

- That further funding be provided to specialist legal and support services for people with an intellectual disability living in a rural, regional or remote area.
- That funding be provided for the establishment of a permanent community legal centre in the Goulburn Valley region.
- That medical-legal partnerships be explored and funded to understand and alleviate the socio-legal impacts on health.
- That supports for parents with an intellectual or cognitive disability be improved in regional and rural Victoria.
- That administrators and guardians are trained to undertake their responsibilities within a human rights framework.
- That special circumstances lists should be established in regional courts.