



Villamanta Disability  
Rights Legal Service Inc.

# **PEOPLE WHO HAVE AN INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM**



**A guide and educational tool for people working in the  
criminal justice system: Judges, Magistrates, Court Staff,  
Lawyers, Advocates, Police and Corrections Workers**

## **DISCLAIMER OF LIABILITY**

**This publication provides general information but does not constitute legal advice. Legal issues around intellectual disability and the criminal law can be complex and will vary from person to person. While care has been taken in the presentation of this material, the writers and the publisher disclaim any liability for action taken or not taken as a result of the contents of this book or for any errors or omissions in the information.**

## Acknowledgements

This publication was written for Villamanta Disability Rights Legal Service Inc. by Melbourne Coaching Network (Consulting Arm) (special thanks for their contributions to our respected project worker the late Shauna Hearity, Patrick Doyle, Marcia Pinski and Vivienne Topp) and by Villamanta Disability Rights Legal Service Inc. (special thanks to Alex Risk (Villamanta Disability Rights Legal Service Inc. Committee of Management), Greg Leeson, Belinda Jane, Vivienne Nicol, Ben von Einem, Darrell Harding and Deidre Griffiths).

**funded by a grant from**



**We particularly thank the Victoria Law Foundation for funding the project.**

Many individuals and organisations assisted in the production of this publication and we would like to thank the following people for their contributions:

**Deanna Caruso (Barrister), Commander Ashley Dickinson (Victoria Police), Hugh de Kretser (Federation of Community Legal Centres), Patrick Doyle (Barrister), Judge Elizabeth Gaynor (Victoria County Court), Graeme and Tammy (consumers), Phil Grano (Office of the Public Advocate), Ashley Halphen (Barrister), Toni Higgins (Victoria Legal Aid), Laurie Harkin (Victorian Disability Services Commissioner), Dr Frank Lambrick (Office of the Senior Practitioner), Claudine Lewis (Victorian Department of Human Services), Peter Persson (Corrections Victoria, Department of Justice), Deputy Chief Magistrate Jelena Popovic (Magistrates' Court of Victoria), Robyn Mills (Victoria Legal Aid), John McKenna (Better Access Consulting), Kevin Stone (VALID), Joel Townsend (Victoria Legal Aid), Bryan Walkinshaw (Office of the Public Advocate), Fred Wright (past Manager, Disability Forensic Assessment & Treatment Service, Victoria), John Walsh (Price Waterhouse Coopers) and Fiona Seymour (Mental Health Legal Centre, Victoria)**

## **Dedication**

Shauna Hearity 1968 – 2011

This publication is dedicated to the memory of Shauna Hearity, respected colleague, lawyer and passionate advocate for people who have a disability, who was the publication's leading project worker.



Villamanta Disability  
Rights Legal Service Inc.

### **Villamanta Disability Rights Legal Service Inc.**

Villamanta Disability Rights Legal Service Inc. (Villamanta), the publisher of this work, is a **disability advocacy agency** which takes the form of a **community legal centre** (CLC). Villamanta works only on disability-related legal and justice issues for people in Victoria who have a disability. It has a priority constituency of people who have an intellectual disability, doing most of its legal casework for them.

Villamanta's aim is to make sure that people who have a disability, in particular an intellectual disability, get the same opportunities as other Victorians, and are able to know about and to exercise their legal and human rights and get a fair deal from the legal system. To achieve its aim Villamanta provides legal services, community legal education and policy & law reform. It also provides some training and sells some publications on disability related legal issues.

Villamanta is funded by the Federal Government under the *National Disability Advocacy Program*.



**Australian Government**

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**Department of Families, Housing,  
Community Services and Indigenous Affairs**

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# 1. INTRODUCTION

## The purpose of this publication

People who have an intellectual disability are, and should be treated as, valued members of the community and enabled to have the same rights and choices as other people. This is often not what happens in practice. In particular, it is often not what happens in the criminal justice system. Each of them is an individual and, while sharing some characteristics with other people who have an intellectual disability, they should always be treated as an individual.

This publication is intended to be used as an educational tool and guide for those who come into contact with people who have an intellectual disability who are involved in the criminal justice system. People who have an intellectual disability have specific vulnerabilities when they have contact with the criminal justice system, from the time of apprehension to incarceration. They are more susceptible to suggestibility and false incrimination and if imprisoned, more likely to be physically, emotionally and financially abused. They are also subject to court orders in the civil justice system that may at times be more punitive than criminal justice orders.<sup>1</sup>

This guide should assist police, lawyers, advocates, Courts, Judges, Magistrates and corrections employees to better understand people who have an intellectual disability and to be aware of their rights and of the disadvantages they experience, and also be better able, when working with people who have an intellectual disability, to treat them with dignity and respect and ensure the most fair and just treatment and outcomes possible for them.

## People who have an intellectual disability and who are involved with the criminal justice system

People who have an intellectual disability and who are involved with the criminal justice system are by far one of the most vulnerable and disadvantaged groups in our society. Studies have found that offenders who have an intellectual disability are more likely to be uneducated, unemployed, poor, members of an indigenous minority, have suffered from childhood neglect or abuse, have deficits in social and communication skills, and suffer from behavioural and/or psychiatric disorders.<sup>2</sup>

“The ‘typical’ offender with an intellectual disability is disadvantaged by a wide range of psychological and social difficulties: nearly always a young male, he is more likely than his non-disabled counterpart to be single, belong to a minority group, have been imprisoned previously, have experienced institutionalisation, abuse and neglect as a child, have come from a disrupted

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<sup>1</sup> Crocker A, Cote G, Toupin J, St Onge B, 2007 “ Rate and characteristics of men with an intellectual disability in pre-trial detention” *Journal of Intellectual & Developmental Disability*, June 2007; 32(2): p144

<sup>2</sup> William Glaser and Kristen Deane, “*Normalisation in an Abnormal World: A Study of Prisoners with an Intellectual Disability*”, *International Journal of Offender Therapy and Comparative Criminology*, 43 (3) 1999 p338 and Hayes, S, “*Prison Services and offenders with intellectual disability – the current state of knowledge and future directions*”, paper presented at the 4<sup>th</sup> International Conference on the Care and Treatment of Offenders with a Learning Disability, 6-8 April 2005, University of Central Lancashire, Preston, UK.

family, have been segregated in a special school, have needed supported accommodation and generally lead a somewhat chaotic lifestyle.”<sup>3</sup>

It has been estimated that people who have an intellectual disability are over-represented in the prison population by a rate of 3 to 4 times the prevalence in the general population.<sup>4</sup> It has been reported that nearly 13% of the prison population in NSW have an intellectual disability, with rates between 0% and 10% reported for the other states, “between 6-19% of people on probation exhibit indications of intellectual disability, but very few have had actual contact with intellectual disability services”<sup>5</sup>. Studies have shown that people with an intellectual disability tend to be susceptible to suggestion when interrogated by police<sup>6</sup>, have difficulty in understanding their rights and in providing instructions to their lawyers<sup>7</sup>. Offenders with an intellectual disability are less likely to be paroled because of a lack of suitable accommodation.<sup>8</sup> Furthermore, people with intellectual disabilities are more likely to experience a range of mental health problems, with possibly 50% or more having a psychiatric disorder<sup>9</sup>. In Australia there has been found to be a high rate (74.5%) in recidivist offenders (people who re-offend) of prior contact with psychiatric services.<sup>10</sup> Those with a dual disability (intellectual and mental health) are more likely to exhibit behaviour that may attract police attention and so lead to them becoming involved with the criminal justice system.<sup>11</sup> The high connection between drugs and alcohol abuse and offending behaviour is consistent with that of offenders who do not have a disability.

The person who has an intellectual disability may come into contact with the criminal justice system as a victim, a witness or an offender. The focus of this publication is on the offender. To illustrate the experiences of such offenders we tell the story of a young woman called “K.A.” and, in regard to one particular issue, a man named “S.B.”, each of whom has an intellectual disability, as they progress through the criminal justice system. Their stories in relation to their experiences of the criminal justice system are common for people who have an intellectual disability.

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<sup>3</sup> Glaser W and Florio D, 2004 “Beyond specialist programmes: a study of the disability needs of offenders with intellectual disabilities requiring psychiatric attention” *Journal of Intellectual Research* Vol 48 Part 6 pp591

<sup>4</sup> Susan Hayes and Gerard Craddock, *Simply Criminal* (2<sup>nd</sup> edition, 1992) p 46. The authors note the significant difficulties in arriving at an accurate estimate of this rate (pp 30-46). On the over-representation of a broader class of people with a ‘cognitive impairment’ see James Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (2007) pp1-2

<sup>5</sup> Crocker A, Cote G, Toupin J, St Onge B, 2007 “Rate and characteristics of men with an intellectual disability in pre-trial detention” *Journal of Intellectual & Developmental Disability*, June 2007; 32(2): pp143-152

<sup>6</sup> Harriet Stacy, “Interviewing Witnesses with an Intellectual Disability” in Hayes and Craddock (eds) *Intellectual Disability and the Law: Contemporary Australian Issues* (2000) p 21

<sup>7</sup> Mark Ierace, *Disability: A Manual for Criminal Lawyers* (1989) pp7-19

<sup>8</sup> Intellectual Disability in the Victorian Prison System – Characteristics of prisoners with an intellectual disability released from prison 2003-2006. Corrections Research Paper Series Paper No. 2 September 2007 p6

<sup>9</sup> Ibid Hayes p46

<sup>10</sup> Glaser p592

<sup>11</sup> Crocker p144

## 2. THE EXPERIENCE OF THE PERSON WHO HAS AN INTELLECTUAL DISABILITY

*"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.*

"K.A.'s" experience is common for many people who have an intellectual disability who are involved in the criminal justice system. Historically, many people who had an intellectual disability were institutionalised. With recent de-institutionalisation, people now live in the community. Unfortunately this movement to community living has not been accompanied by the provision of adequate support services and, consequently, many people who have an intellectual disability struggle to survive with dignity in the community. Many are homeless and many others live in boarding houses. Often when they are living in the community they have little or no say over their lives and they find it difficult to assert themselves.

Intellectual disability is also known as developmental disability. This means that the person has difficulty learning BUT they can learn. They learn at a different pace and process information in different ways from other people. They benefit enormously from interaction with people who have good communication skills and time.

More often than not people will not disclose that they have an intellectual disability. Very often they do not believe they have a disability. They may not disclose their intellectual disability because they may have been teased and bullied because of it all of their life. Intellectual disability may not be obvious to the police, lawyers, Magistrates or others involved in the criminal justice system.

There are some advantages if the person's intellectual disability is identified by police, or other people in the criminal justice system, particularly their lawyer.

People who have an intellectual disability must be interviewed as soon as possible after an incident as they may have a poor concept of time and get confused. Often they have told their story many times before they are formally interviewed and may take on the interpretation of others.

If the person chooses not to disclose their disability, it is important that their lawyer identify the person's special needs in order to assist them in giving meaningful instructions and taking advice. This does not require the lawyer to 'assess' the person, rather to be aware of the need to communicate in a way that is meaningful.

### 3. CHARACTERISTICS OF PEOPLE WHO HAVE AN INTELLECTUAL DISABILITY

A person who has an intellectual disability may show some of the following characteristics:

#### *General indicators*

*They may:*

- be unable to read and write or tell the time.
- not identify as having a disability but may explain that they are on the Disability Support Pension or perhaps attended special school.
- live in a supported residential setting.
- be acting strangely because they have missed a dose of medication. (Check whether they are on medication and have possibly missed a dose).
- have a history of drug and/or alcohol use. Intellectual disability may have been compounded by alcohol or drugs. Remember to consider this possibility.
- have a worker or someone who provides them with support. Remember to ask them if they do.

#### *Social interaction*

*They may:*

- appear to be indifferent to others or socially isolated.
- find it difficult to concentrate and have poor listening skills.
- be unable to read social cues.
- seem inappropriate, may be socially inappropriate e.g. stand too close or talk too loudly, seeming to shout.
- be eager to please...over compliant...agreeing to things that are not true.
- have difficulty expressing themselves.
- appear to lack empathy.
- avoid eye contact.
- have difficulty understanding your tone of voice.
- have difficulty remembering facts or details.
- use repetitive language or repeat the end of your sentence.
- make literal interpretations of figurative speech. Sayings such as "you got left holding the baby" will be perplexing.

- be honest to the extent of rudeness.
- become argumentative, angry or agitated in response...possibly because they do not understand the nature of the question.
- have difficulty in foreseeing the consequences of their actions.<sup>12</sup>

All of these factors are important to take into account when dealing with a person who has an intellectual disability. This is particularly important for police who may come into contact with a person who has an intellectual disability for the first time. The above information is also extremely important for a lawyer representing a person who has an intellectual disability to be aware of.

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<sup>12</sup> Jim Simpson, "Acting for a client with an intellectual disability", Law Society Journal, NSW, April 1987 p 42

## 4. DEFINITION OF INTELLECTUAL DISABILITY

*"K.A." qualified for the disability support pension because of both her intellectual disability and mental illness. Her lawyers were able to use this fact when conducting pleas in the Magistrates' Court for minor offences.*

Intellectual disability is a developmental disorder. This means that people can be born with it, or acquire it during the developmental period, that is up to the age of eighteen years. People with intellectual disability have significantly more difficulty than others in learning new things, understanding concepts, solving problems, concentrating and remembering. Consequently, they require extra support to learn and achieve their full potential.

In many cases the reasons for a person's intellectual disability are not known or cannot be determined. However, some of the most common known causes are:

- genetic conditions (for example, Down syndrome, fragile X syndrome or Rhett syndrome)
- problems during pregnancy (for example, infections or exposure to toxins)
- problems at birth (for example, not getting enough oxygen)
- health problems (for example, whooping cough, measles or meningitis)
- environmental factors (for example, extreme malnutrition, inadequate medical care or exposure to poisons such as lead or mercury).

Intellectual disability cannot be cured but support can help people with intellectual disability to achieve their potential and lead happy, often productive, fulfilling lives.

Not all people who have an intellectual disability are the same. Each is an individual and should be viewed and treated as one. Some people will be mildly affected in their ability to learn new information and skills. Others may be moderately to severely affected. Early intervention, education, training and support all contribute to people with intellectual disability leading full and satisfying lives.

One way of looking at intellectual disability – as with any disability – is the **medical model** which focuses on the deficits of the person, rather than the abilities.

A more constructive, pragmatic definition of disability is the **sociological model** which defines disability in terms of the support needs of an individual. This approach sees the effect of the disability as something that will vary and can be increased or decreased by external factors. It does not view intellectual disability as an unchangeable characteristic of the individual. This definition does not rely on the capacity of the person being set in stone, but also on the environment and the support that they receive. Using this approach, adjusting the environment and the support to meet the person's needs can increase the person's capacity and reduce the effect of the disability.

The social model sees the 'cure' to the problem of disability in the restructuring of society. Unlike medically based 'cures', which focus on the individual and their impairment, this is an achievable goal and to the benefit of everyone. This approach suggests that the individual and collective disadvantage of people with a disability is due to a complex form of institutional discrimination as fundamental to our society as sexism, racism or heterosexism.\*

For the purpose of proving to a court that a person does have an intellectual disability, however, it is the medical model that is required to be used.

It is important to understand the legal definition of intellectual disability in the criminal justice system. Intellectual disability is not treated as a unified or clearly defined category across Victorian criminal law. Cognitive impairment is the broad legal definition and is a term that covers a range of disabilities which adversely affect a person's ability to understand and process information. It includes intellectual disability, acquired brain injury, mental illness and neurological disorders.<sup>13</sup> A type of intellectual impairment which might attract the operation of a common law principle might not necessarily attract the operation of a statutory provision dealing with intellectual disability. The American Psychiatric Association Diagnostic and Statistical Manual of Disorders [DSM IV] provides diagnostic criteria for mental disorders. It is used by clinicians, researchers, psychiatric drug-regulation agencies, health insurance companies, pharmaceutical companies and policy makers and the Courts as the authority for categorising mental disorders. The DSM IV uses the term "mental retardation" instead of "intellectual disability". It is important to note that the term "mental retardation" is used in the USA, but it is *not used* in Australia. The correct terminology in Australia is "intellectual disability".

The DSM IV defines Mental Retardation [Intellectual Disability] as follows:

***Diagnostic features:***

*The essential feature of Mental Retardation is significantly sub-average general intellectual functioning (criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (criterion B). The onset must occur before 18 years (criterion C).*

Criterion A is defined by the intelligence quotient (IQ or IQ equivalent) obtained by assessment with one or more standardised test (e.g. Wechsler, Stanford-Binet) with sub-average intellectual functioning defined as an IQ of about 70 or below. A standard deviation of  $\pm 5$  allows inclusion of those with an IQ of 70-75 who exhibit significant deficits in adaptive behaviour.

Criterion B allows an assessment of how effectively the person copes with activities of daily living. Several scales are used to assess capacity in this area (e.g. Vineland, the American Association on Mental Retardation [AAMR] Adaptive Behaviour Scale).

Criterion C allows the inclusion of people who may have sustained an injury post birth, but before the age of 18, that has affected their cognitive ability.

Generally, common law principles apply with greater flexibility than statutory provisions. The most important thing to note about the definition of intellectual disability is that specific sentencing options are only available where an offender has

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\*Intellectual Disability Rights Service Inc. (NSW), "Introduction to Intellectual Disability", 2009

<sup>13</sup> Victoria Police/ Office of the Public Advocate "Responding to a person who may have a cognitive impairment" 2008

what falls within the *statutory* definition of an intellectual disability in the *Disability Act 2006* (Vic) (*Disability Act*). (see below)

## **Dual Diagnosis/Dual Disability – Mental Illness and Intellectual Disability**

Up to 50% of people who have an intellectual disability may have a coexisting psychiatric disorder, like “K.A.”. Studies highlight that people who have an intellectual disability have a markedly increased risk of mental illness compared with the general population. Dual diagnosis refers to coexistence of mental illness and intellectual disability (Note: in other contexts it may mean substance abuse and mental illness). People who have an intellectual disability experience multiple stressors in their lives, many of which may contribute to the development of a mental illness. These include: genetic biochemical factors, early childhood experiences, psychosocial stressors and cognitive behavioural problems. Notably the rate of depression, schizophrenia and bipolar disorder is twice that of the general population.<sup>14</sup>

It is often difficult to identify mental illness when it is experienced by people who have an intellectual disability for reasons including communication and cognitive difficulties. An accurate assessment may need to include observations, and information from carers, teachers and significant others. An assessment of the person’s ability to manage activities of daily living may also assist in identifying mental health issues.

## **Other Disabilities/Health Issues and Intellectual Disability**

It is important to be aware that a person who has an intellectual disability may also have one or more of a range of other health issues and/or disabilities which may contribute to the difficulties they encounter in life and, in particular, in their experience of the criminal justice system. It is crucial that these issues are identified and acknowledged and that, in the light of them, they - and most importantly, the person him or herself - are treated and dealt with, appropriately. The following are some of the most significant of these and are discussed in more detail in the Appendices to this publication: Mental Health and Illness, Physical Disabilities and Sensory Disabilities, Acquired Brain Injury (ABI), ADHD (Attention Deficit Hyperactivity Disorder), Autism/ Autistic Spectrum Disorder (ASD), Asperger’s Syndrome.

See Appendices A and B of this publication for more information about these disabilities and health issues and their implications for people who have an intellectual disability.

## **Statutory Definitions of Intellectual Disability in Victorian Legislation**

The legislation most directly concerned with intellectual disability in Victoria is the *Disability Act 2006*, which came into operation on 1 July 2007. The Act is predominantly concerned with the provision of services to people with disabilities, and replaced the *Intellectually Disabled Persons’ Services Act 1986* (Vic) (the IDPS Act) and the *Disability*

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<sup>14</sup> Vanny K, Levy M, Hayes S (2008) People with an Intellectual Disability in the Australian Criminal Justice System *Psychiatry Psychology and Law*, Vol 15, No 2, July 2008, pp261-271

*Sentencing Act 1991* (Vic). The Act intersects at important points with the criminal law, and in particular it has a significant effect on the sentencing options available for offenders who have an intellectual disability. The Act defines ‘disability’ as follows:

s 3

“*disability* in relation to a person means —

- (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.” (Emphasis added)

It is important to note that the *Disability Act 2006* initially *excluded* Autism Spectrum Disorders (ASDs). This was rectified in 2009 when ASDs were deemed to be included, being acknowledged as a form of \*neurological impairment.

The Act defines ‘intellectual disability’ as follows:

“*intellectual disability*, in relation to a person over the age of 5 years, means the concurrent existence of —

- (a) significant sub-average general intellectual functioning; and
- (b) significant deficits in adaptive behaviour —  
each of which became manifest before the age of 18 years.”

The two main elements in the definition of ‘intellectual disability’ (i.e. significantly below-average intellectual functioning and adaptive deficits) reflect the clinical concepts noted above, and will likely be interpreted against this background. The definition of intellectual disability which was used in the IDPS Act expressly contemplated the use of intelligence tests to determine whether a person’s intellectual functioning was significantly below average.<sup>15</sup> Given this background, and the widespread use of intelligence testing in clinical diagnoses of intellectual disability, one would expect IQ testing to be a common measure of ‘sub-average intellectual functioning’ for the purposes of the *Disability Act*. In the first instance, a decision that a person has an intellectual disability within the meaning of the *Disability Act* is made by the Secretary to the Department of Human Services.<sup>16</sup>

The way in which the definition of ‘disability’ has been drafted appears to indicate that people who have an impairment which meets the criteria set out in paragraph (a) of that definition do not qualify as having an intellectual disability. That is, disability of

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<sup>15</sup> Though the IDPS Act did not mandate the use of such a test: see section 8.

<sup>16</sup> *Disability Act*, s 50; *Sentencing Act 1991* (Vic) s 80.

the kind described in paragraph (a) (such as an acquired brain injury) has been defined as an alternative to the kind of disability defined in paragraph (b) (an intellectual disability).

In any event, the requirement that an intellectual disability manifest itself before the age of 18 years would exclude many people who have conditions such as acquired brain injuries from the ambit of the definition. The 'manifestation before the age of 18 years' requirement is a significant restriction on the scope of the definition. The restriction also formed part of the definition of intellectual disability under the IDPS Act. As is noted below, it means that certain sentencing options will only be available to people who have an intellectual disability who can demonstrate that their condition was evident before the age of 18.

In November 2003 the Victorian Law Reform Commission published a report dealing with the legislative framework for the treatment and detention of people who have an intellectual disability without their consent.<sup>17</sup> For the purposes of that report, the Commission adopted the definition of intellectual disability used in the IDPS Act. However, the Commission suggested that the recommendations it made should also be implemented with respect to people with other kinds of cognitive impairment, such as acquired brain injuries and autism spectrum disorders.<sup>18</sup>

## **Intellectual Disability at Common Law – Unfitness to be tried**

Intellectual disability is not a concept or category recognised as such at common law. Rather, it is often recognised in the application of broader common law principles which make allowance for the mental infirmity of defendants. For example, the common law concept of fitness to be tried is broadly concerned with the ability of an accused person to comprehend the nature of the allegations being made against them and of the trial.<sup>19</sup> Courts have held that this concept embraces intellectual disability as well as mental illness.<sup>20</sup> Moreover, for the purposes of the common law test for fitness to be tried, the age at which a disability becomes manifest is irrelevant. In short, common law principles are more flexible than statutory rules in recognising and accommodating mental impairments, and are less concerned with categorising impairments than with identifying their effect on the mind of an accused.

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<sup>17</sup> *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*, Victorian Law Reform Commission 2003

<sup>18</sup> *Ibid*, at [1.3]

<sup>19</sup> The common law principles of fitness to be tried have now been enacted in statutes in all states and territories. In Victoria, the relevant Act is the *Crimes (Mental Impairment and Unfitness To Be Tried) Act 1997* (Vic).

<sup>20</sup> *R v Mailes* [2001] NSWCCA 155

## 5. POLICE INTERVIEWS

*"K.A." is well known to the police. She agreed to speak with the police because she "knew them" and because, in her words, "that is how it always happened."*

*There is a history of the police conducting interviews at her home, often without an independent third person (ITP) being present (and, when there was an independent third person present, it was a social worker known to "K.A."). Police had interviewed "K.A." for minor offences for a number of years without giving her a proper caution. "K.A." was unaware that she had a right to a lawyer prior to questioning.*

### Cautions and Confessions

With a few minor exceptions, statutes relevant to criminal procedure and investigation contain no special provisions to deal with people who have an intellectual disability who are suspected of having committed a crime. However, a suspect's intellectual disability might have a considerable influence on the operation of common law principles concerning police investigations, particularly in relation to the discretion to exclude confessional evidence.

The standard caution administered by police before questioning a person in custody follows the language used in the *Crimes Act 1958* (Vic) (in particular sections 464A (3) and 464C (3)). Commentators have pointed out that in many cases people who have an intellectual disability will not understand the caution.<sup>21</sup> This has led to suggestions for a simplified caution to be given to people who have an intellectual disability.<sup>22</sup> The fact that a suspect who has an intellectual disability may not properly comprehend the caution may lead to the exclusion of the record of interview of that suspect.

### Interviews Excluded or Admissible

At common law, a record of interview containing confessions or admissions by the accused may be excluded from the evidence either because it was not given voluntarily or because it would be unfair to admit it. The discretion to exclude admissions on the ground of unfairness is often triggered by some form of police misconduct or failure to comply with a statutory requirement.

In *R v Li* [1993] 2 VR 80, the accused was a young Vietnamese person with a basic command of English. During his interview with police, it became apparent that he did not understand the standard caution which was read to him. Coldrey J ruled the record of interview inadmissible both on the ground of involuntariness and by applying the unfairness discretion. The two main points of his reasoning are:

"(1) The concept of voluntariness extended to and encompassed the situation where answers were given by an accused person who lacked understanding that such questions need not have been answered, and, as a result, felt compelled to participate in the interview process. In such circumstances, the interview would

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<sup>21</sup> See Susan Hayes, "Needle in a Haystack: Identifying The Offender With Intellectual Disability", in Hayes and Craddock (eds) *Intellectual Disability and the Law: Contemporary Australian Issues* (2000) pp63-71p64

<sup>22</sup> Mark Ierace, *Intellectual Disability: A Manual for Criminal Lawyers* (1989) pp17-18, NSWLRC Report No 80, [4.34]-[4.38]

be non-voluntary. This was so even though the interview itself might be conducted in an ostensibly cooperative fashion;

(2) The lack of understanding of the accused of the nature of his rights resulted in his inability to determine whether to speak or remain silent or whether to seek legal advice, or whether to speak to a friend or relative. Had the accused understood his ability to avail himself of those rights, the course of the interview might have been very different. In all of the circumstances, the interview should also be excluded in the exercise of the fairness discretion."<sup>23</sup>

## Difficulty Comprehending Police Caution

When it became apparent to the interviewing police officer in Li's case that the accused did not fully comprehend the caution, the officer simply re-stated it in the same terms. Coldrey J said:

"On the face of it, there is nothing in the re-reading of this formulation ...to give one any confidence that it engendered any understanding in the accused, albeit that the interviewer obtained the responses to which I have referred.

The accused in the course of his evidence ... stated that he did not know the meaning of such phrases as "you are not obliged" and "to communicate"; nor was he aware of the role of a solicitor or the meaning of "a right".<sup>24</sup>

From Coldrey J's reasoning in *Li's* case it follows that police need to take particular care in the case of suspects who have an intellectual disability to ensure that they understand the rights which the statutory caution describes. The case of *R v Larson* [1984] VR 559 provides further authority for this. In that case, Hampel J took into consideration the intellectual limitations of the accused in exercising the fairness discretion to exclude confessional evidence.<sup>25</sup>

## Identifying suspects with an intellectual disability

So, to ensure compliance with common law principles of fairness in interviews, police need to be able to identify suspects with an intellectual disability. Commentators have noted that police may have considerable difficulty in doing this, particularly without adequate training or the aid of a diagnostic test.<sup>26</sup> Both the NSW and Victorian Law Reform Commissions have recommended the development of guidelines and training programs for police, to assist in the identification of suspects with cognitive impairment.<sup>27</sup> Victoria Police have been working with the Office of the Public Advocate, the Department of Human Services and the Victorian Equal Opportunity and Human Rights Commission to develop a checklist to help police identify cognitive impairment in suspects.<sup>28</sup> The Victorian Law Reform Commission has also endorsed proposals raised by Victoria Police for the identification of persons with a cognitive

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<sup>23</sup> *R v Li* [1993] 2 VR 80

<sup>24</sup> *Ibid*, 86

<sup>25</sup> At 569

<sup>26</sup> See Susan Hayes, "Needle in a Haystack: Identifying The Offender With Intellectual Disability", in Hayes and Craddock (eds) *Intellectual Disability and the Law: Contemporary Australian Issues* (2000) pp63-71

<sup>27</sup> See Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) p200

<sup>28</sup> *Ibid*, p201

impairment to be recorded on police databases (such as the LEAP database) to assist police to deal appropriately with such persons in the future.<sup>29</sup>

## **Independent Third Persons (ITPs)**

Suspects who have an intellectual disability interviewed by police face the following kinds of problems:

- lack of understanding of their legal rights, such as the right to silence;
- over-anxiousness to please, susceptibility to suggestive questions by authority figures and to making false confessions;
- difficulties with the types of questions asked by police such as times, dates and descriptions;
- memory difficulties; and
- limited concentration.<sup>30</sup>

If police recognise that a suspect has an intellectual disability, or a mental illness, they are required to contact an 'independent third person' (ITP) to be present during the interview with the suspect and provide support for them. In Victoria, the presence of an independent third person is not a statutory requirement, but a function of police standing orders.<sup>31</sup> Similar provisions exist in South Australia, Western Australia, Queensland, the Northern Territory, the Australian Capital Territory and England and Wales.<sup>32</sup>

The Victorian provisions state:

### **"Presence of Independent Person**

3. Any witness or suspect believed to be intellectually or mentally impaired should be interviewed in the presence of an independent person (such as a close relative, friend or an independent third person who is not associated with the inquiry).

4. The independent person should be contacted and allowed a reasonable time to be present before the interview is commenced.

5. In the State (of Victoria), if a relative or friend cannot be located or is not suitable, D24 should be contacted to access an independent person. D24 have been provided with a list of independent persons from the Office of the Public Advocate.

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### **Role of the Independent Person**

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<sup>29</sup> Ibid, p202

<sup>30</sup> See NSWLRC Report No 80, [4.6]

<sup>31</sup> Force Circular Memorandum 92.2.26, cited in NSWLRC Discussion Paper No 29: *People With An Intellectual Disability And The Criminal Justice System: Policing Issues* (1993) at [6.21]

<sup>32</sup> Ibid NSWLRC Report No 80, [4.89]

7. The role of the independent person is to facilitate communication between police and the impaired person during the interview process. They may provide emotional support and ensure that the person understands his or her rights and the caution. However they are not the person's legal counsel or advocate and should not make decisions on behalf of the person. It is a neutral role."<sup>33</sup>

Although police are responsible for arranging for the attendance of an ITP, the program is co-ordinated by the Office of the Public Advocate (OPA). ITPs provided by the OPA are trained volunteers who are registered with the OPA, and they are able to attend police interviews after hours.

### *Difference between ITP and Advocate*

As the police standing orders indicate, the ITP is not an advocate for suspects who have an intellectual disability. The distinction between an ITP and a legal representative is an important one. To take an example, given the kinds of problems listed above which suspects who have an intellectual disability might face (such as susceptibility to suggestive questioning) a lawyer representing such a suspect should advise them in the strongest possible terms to exercise their right to silence.<sup>34</sup> However, the role of an ITP in this respect would only extend to explaining what the right to silence is.

### *ITPs giving evidence*

Because ITPs are not legal representatives of an accused, their discussions with the accused are not privileged. Accordingly, an ITP may be called to give evidence, which could operate to the detriment of the person questioned. ITPs might, for example, be questioned about the content of discussions between themselves and the suspect before the commencement of the police interview, or about the fairness of the interview.<sup>35</sup>

### *Comparison of Victorian and Commonwealth provisions for ITPs*

A useful comparison of the Victorian position on ITPs for suspects who have an intellectual disability may be made with the special provisions in the *Crimes Act 1914* (Cth) dealing with Aboriginal or Torres Strait Islander suspects. Under s 23(H) of the *Crimes Act 1914* (Cth), where police intend to question an Aboriginal person or Torres Strait Islander who is under arrest, they must immediately notify an Aboriginal Legal Aid organisation. Further, an interview must not commence unless the suspect has an 'interview friend' present or the suspect expressly waives the right to have an interview friend. An 'interview friend' is defined in s 23H (1) as:

- “(a) a relative or other person chosen by the person; or
- (b) a legal practitioner acting for the person; or
- (c) a representative of an Aboriginal legal aid organisation; or

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<sup>33</sup> Police Standing Orders

<sup>34</sup> Mark Ierace, above n 7, p 19

<sup>35</sup> NSWLRC Discussion Paper No 29: *People With An Intellectual Disability And The Criminal Justice System: Policing Issues* (1993) at [6.28]

(d) a person whose name is included in the relevant list maintained under subsection 23J (1).”

The Commonwealth provisions seem to provide greater protection to an accused. First, they have statutory force. Second, they require that contact be made with an organisation which can provide a legal representative. Third, a suspect’s legal representative may fulfil the role of an ITP as well as being able to provide legal advice, represent the interests of the accused, and have discussions with the accused that are privileged.

The Commonwealth provision also requires the suspect to be given an opportunity to communicate with the interview friend in private (s 24(H) (2) (d)). Although the Victorian provisions dealing with ITPs do not contain such a requirement, as discussed below, failure to allow a private conversation between a suspect and an ITP may have implications for the admissibility of any record of interview.

### *Common law requirement for ITPs*

The Victorian requirement for the presence of an ITP in an interview with a suspect who has an intellectual disability has no statutory force. It does, however, have common law force. In *R v Warrell* [1993] 1 VR 671 the Victorian Court of Criminal Appeal held that a confession given in an interview with police should not have been admitted into evidence where the correct procedure regarding the ITP had not been followed. In that case, the suspect had not been allowed an opportunity to speak privately with the ITP before the interview was conducted. It is worth quoting from the Court of Criminal Appeal’s judgment at length:

“...in situations where a police officer becomes aware of the reasonable possibility that a person who he desires to interview may be suffering under some such disadvantage or disability, it is to be expected that particular care will be taken in relation to any such questioning. In circumstances where doubt exists as to the suspect's knowledge of his rights under the law, or as to his ability to respond adequately to questions asked of him or as to his capacity to choose freely to speak or remain silent, a failure to take reasonable steps to ensure that such knowledge or capacity exists may provide part of the basis for a finding of unfairness and result in the discretionary exclusion of any statement made.”<sup>36</sup>

...

“... over recent years, there has been increased attention given to the problems encountered by specific groups within our community with respect to our investigative and legal processes. The need for the adoption of special procedures when dealing with children has long been accepted. In certain parts of the country, guidelines have been developed for the interrogation of aboriginal offenders: see *R v Anunga* (1976) 11 ALR 412, where the need for additional care to be taken in the interviewing of persons whose ethnic background may place them at significant disadvantage to other members of the community, was also identified.”

“More recently, the special position of the intellectually disabled has been receiving increased attention. The particular instructions, to which attention has

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<sup>36</sup> [1993] 1 VR 671 at 678 (Phillips CJ, Hampel and Vincent JJ)

been directed in the present case, represent part of a process which has been underway for some time to ensure that the principles that we have earlier mentioned have practical operation with respect to the interrogation of intellectually disabled persons and that the rights which the law states are possessed by every member of the community can, as a matter of practical reality, be exercised by those who are so disadvantaged."

"The instructions create, of course, purely internal standards of conduct for members of the police force and cannot be attributed the force of law. Nevertheless, they do indicate the level of care which must, if the integrity of the system is to be maintained, be taken in such situations."

"The applicant was observed by the police members who arrested and interviewed him to be intellectually disabled. Strictly interpreted, it could be said that they complied with the letter of the instructions by arranging for the presence of [the ITP]. Nevertheless, their failure or refusal to permit her to speak privately to the applicant effectively denied him the support which should be accepted as necessary if there was to be confidence that the objectives to which we earlier referred were to be achieved."

...

"By reason of his disability the applicant was in a position of disadvantage compared with other members of the community when being interviewed by the police. On the evidence, he was effectively left without the assistance necessary if that disadvantage was to be addressed."<sup>37</sup>

The Court held that the trial judge's failure to appreciate the significance of the opportunity which was lost by the accused to speak in private with the ITP resulted in the miscarriage of the Court's discretion to admit the confessional evidence.

## Forensic Procedures (Taking Samples)

The *Crimes Act* (1958) (Vic) allows police, for the purposes of an investigation, to take a forensic sample from a suspect with that person's informed consent (s 464S). (The word "Forensic" means the sample is to be used or applied in the investigation and establishment of facts or evidence in a court of law.) Before they can do this the police must explain to a suspect the purpose of the sample and the use to which it can be put in language '*likely to be understood by the person*' (s 464S (1)). There is no case law on what this requirement means when a person has an intellectual disability. However, a plain reading of the section would seem to require that the explanatory language used by the police should be appropriately adapted to the individual characteristics of particular suspects, including their intellectual aptitude.

A failure to explain the nature and purpose of a forensic procedure in language which could be understood by a person who has an intellectual disability would give rise to a discretion to exclude the evidence of the sample (in accordance with *Bunning v Cross* (1978) 141 CLR 54 and the cases which have followed it). However, in the case law a distinction is drawn between 'real' evidence and confessional evidence, with Courts

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<sup>37</sup>Ibid, p681

less likely to exclude the former category of evidence in the exercise of the discretion (see *R v Su and Goerlitz* [2003] VSC 305).

If a suspect is incapable of giving informed consent to undergo a forensic procedure, the police must apply to the Magistrates' Court for an order directing the suspect to undergo the procedure: s 464T.

## 6. LAWYERS & ADVOCATES ADVOCATING FOR A PERSON WHO HAS AN INTELLECTUAL DISABILITY

*"K.A." reported that she was sometimes told by lawyers that it was in her best interest to plead guilty to offences. When acting for a client with an intellectual disability it is important to take instructions and act on those instructions and not what the lawyer believes is in the best interest of the client.*

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. However, lawyers take instructions from people from a range of backgrounds, cultures and with a vast range of communication skills and levels of understanding. People with intellectual disabilities have the same needs as many other clients and to that extent, are no different. Good lawyering is good communication - without necessarily labelling the person.

What lawyers should know about people who have an intellectual disability is the following:

- with adequate assistance most people with a mild level of intellectual disability can lead independent lives or semi-independent lives;
- people who have an intellectual disability can and do learn, with creative teaching techniques - people with severe intellectual disability can learn basic self-care, simple meal preparation and routine activities.
- There is little in the appearance of many people with an intellectual disability to indicate that they have a disability. Most often it will be in their social interaction and communication that questions may be raised.<sup>38</sup>

While it is impossible and dangerous to generalise, the following are some signals which may indicate that a person has an intellectual disability:

- Difficulty with reading and writing;
- Short attention span, easily distracted;
- Difficulty with abstract thinking and reasoning;
- Difficulty in understanding questions and instructions;
- Responding inappropriately or inconsistently to questions in their efforts to cover up their lack of understanding or in their eagerness to please;
- In receipt of a disability support pension;
- Spent time living in an institution.<sup>39</sup>

Lawyers should also be aware that some clients may prefer a lawyer who is the same gender as them. They should ask the client if they would prefer a male or female lawyer.

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<sup>38</sup> Jim Simpson, "Acting for a client with an intellectual disability", Law Society Journal, NSW, April 1987 p42

<sup>39</sup> Ibid p43

## The Importance of Advocacy

It is extremely important that people who have an intellectual disability receive access to independent advocacy, both legal and non-legal. This will enable them to communicate their views, needs and wishes and will help to ensure that their human and legal rights are protected.

## Non-Legal Advocacy

It should be noted that legal advocacy is not the only type of advocacy that can be of assistance to people who have an intellectual disability. There are a number of experienced and skilled advocacy agencies that provide generalist advocacy support to people who have a disability and can be extremely supportive to people, both when they come into contact with the criminal justice system and under other circumstances when they need advocacy assistance. In addition to sources of legal advocacy, the main Victorian advocacy organisations are listed in the **contacts list** at the end of this publication. These advocates often work in conjunction with lawyers to advocate for people who have a disability.

## Sources of Legal Assistance

People who have an intellectual disability will usually gain legal advice and representation in relation to criminal matters from Victoria Legal Aid (VLA) or, with VLA funding, from private lawyers who do legally-aided criminal law work.

Other sources of initial advice and assistance, regarding criminal and/or other legal issues, include community legal centres (CLCs). There are numerous CLCs in Victoria, most of which are members of the Federation of Community Legal Centres (Vic.) and the National Association of Community Legal Centres. Some CLCs are generalist services and some are specialists. The specialist CLCs most relevant to people who have a disability are the Mental Health Legal Centre, Villamanta Disability Rights Legal Service Inc., the Disability Discrimination Legal Service, AED (Association of Employees with Disability) Legal Service and the Prisoners' Legal Service Victoria. **(See details of Prisoner's Legal Service Victoria (PLSV) below and details of other specialist disability-related Community Legal Centres (CLCs) in the Contacts List in Section 16 at the end of this publication).**

## **The Prisoners Legal Service Victoria (PLSV)**

The Prisoners Legal Service Victoria (PLSV) is a program of Community West Inc. (a Neighbourhood House) and operates as part of the Brimbank Melton Community Legal Centre. The project is funded by the Legal Service Board Victoria.

**Accessing Legal advice from the Prisoners Legal Service by Telephone:** Tuesdays 10am-4pm on (03) 9362 1758

PLSV provides free legal services and advice to prisoners located in 3 prisons and the remand centre:

- Port Phillip Prison;
- Dame Phyllis Frost Centre;
- Metropolitan Assessment Prison; and
- Melbourne Remand Centre.

### **The PLSV Provides:**

- Access to legal information and prison-focussed advice. Criminal law advice is usually *not* provided as this is available from Victoria Legal Aid
- Legal workshops and general advice sessions
- Simple and informative fact sheets
- Limited case-work and representation

### **Limitations of PLSV Service**

PLSV may provide legal advice on the phone or in a prison visit, prepare legal documents for clients, negotiate on their behalf, or refer them to a more appropriate service or lawyer who can help.

The type and the extent of assistance PLSV can provide depends on a number of factors, including:

- The nature of the legal matter;
- The ability of the person to help him/herself;
- The merits of the case;
- The availability of other assistance; and
- The workload of the Service.

## **The Purpose of the PLSV:**

- Provide legal services, education and information on prison-related problems to prisoners and their families
- Support Community Legal Centre workers and other prisoner advocates by providing prison law information and expertise
- Work to reform laws and policies that affect prisoners and their families.

Previous work has been done by CLCs in the area of Prison Law in a range of matters that were the subject of legal proceedings, including:

- Disability discrimination
- Imprisonment of mentally ill persons
- Alleged murder of prisoner by prison guard
- FOI – access to documents relating to alleged assault by prison guards
- FOI – Access to prison operating instructions
- Transfer / placement
- Professional privilege
- Placement / separation
- Use of force; self defence
- Professional privilege; use of force; use of restraints
- Prison offence; prison drug strategy; denial of visits.
- Coronial Inquests into deaths in custody.

With the introduction of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), PLSV are of the opinion that the rights protected under the *Charter* apply equally to all people, including prisoners in Victoria in their dealings with government and other public authorities.

## **Court Network**

Court Network is a voluntary, partially government funded, non-legal, court support service operating throughout Victoria. It assists members of the Victorian community who attend court. It provides support and information services to both court applicants and victims of crime. Information, support and referral services are provided by approximately 300 trained volunteers supporting people accused of crime, families who have become secondary victims of crime, adults and children who have been violated or exploited by crime, and litigants who have little or no support.

Court Network operates its services on-site in the Supreme, County, Coroner's, Family, Children's and Melbourne and district Magistrates' Courts. It is the only court-based service explicitly and solely concerned with the needs of court users.

As a state-wide service, Court Network also provides services in the regional courts of Gippsland, Geelong, Ballarat, Bendigo, Echuca, Wodonga, Warrnambool, Mildura and Shepparton.

Court Network helps people attending court by providing:

- A safer court environment
- Access to support, information and referral before, during and after a court appearance
- Access to a well-managed and trained team of volunteer Networkers
- Written and verbal information on relevant and appropriate community and legal services
- Emotional and practical support
- Assistance with arranging interpreters and disability access at the courts
- Pre-court tours for people to familiarise them with the courts
- Free access to services and a Telephone Helpline: Phone 1800 681 614

Court Network has contact with an extensive number of support services including Victoria Legal Aid, the Witness Assistance Service, Centres Against Sexual Assault, Men's line, community legal centres, Victorian Association for the Care and Resettlement of Offenders, Drug and Alcohol Rehabilitation Services, Bereavement Services, Family Counselling Services, Child Protection Services.

## **Suggestions to Assist in Communicating with a person who has an Intellectual Disability**

Some clients who have an intellectual disability may have limited communication skills. Communicating with a client who has an intellectual disability may be more time consuming and may demand greater creativity than lawyers are used to providing.<sup>40</sup>

### **Suggestions to assist with communication**

- Conduct the interview where it is quiet and there are few distractions;
- Schedule extra time for the interview;
- Identify yourself, repeatedly if you need to. Remind the person that you are there for them , to protect their rights and to assist them to get across their version of events;
- Aim to keep the situation calm; be as natural as possible;
- Use the person's name often, particularly at the beginnings of questions;
- Give your advice in clear, brief sentences; speak slowly and clearly without shouting or being condescending;
- Always use plain English, short words and sentences and avoid jargon and complex words;

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<sup>40</sup> Megan Scannell, "Acting for a client with an Intellectual Disability - How to provide a better Service". Redfern Legal Centre's Intellectual Disability Rights Service p109

- Encourage the person to use their own terminology so you can identify words they feel comfortable with;
- Consider using non-verbal cues such as pictures, drawing;
- Gestures can be misinterpreted. Reinforce gestures with a statement to avoid misunderstanding;
- If possible meet with the person alone to gain their instructions before allowing a support person or carer to assist;
- Speak to the person directly if there is a person assisting and ask the person who has the intellectual disability permission to ask the support person questions;
- Break instructions or advice into small parts and continually check the person's understanding;
- Allow plenty of time for the person to respond;
- Be patient and if necessary repeat yourself;
- Check the person's understanding by asking them to repeat back to you your advice in their own words;
- Take a break if the person is getting distressed or tired;
- If the person is angry with you this might be because they are unsure of what is happening and feel threatened or frightened that the situation is out of their control;
- Take frequent breaks;
- Remember to introduce yourself to the client and explain, in a simple and straightforward way, what your role is and the purpose of the interview. Most people who have an intellectual disability will be unfamiliar with the legal system;
- People who have an intellectual disability often have difficulty adjusting to new situations and may get very anxious. It is worth spending time putting the client at ease as this anxiety will get in the way of further communication. Some clients may not say anything for fear of saying the wrong thing. Conduct the interview in an informal manner and environment;
- Many people who have a disability understand more easily than they communicate. Allow more time for the client to communicate. Try not to interrupt. Patiently repeat the question or break it down into more simple questions if the client has not understood;
- Ask the client to tell you if they do not understand;
- Try not to ask in such a way as to suggest an answer. For example, do not ask was the ball blue, ask what colour was the ball;
- If you are unsure of what the client has said go back over the information and ask the question in another way. Reassure the client that you are repeating for your clarification, not because he or she was wrong;
- Your client will pick up on your non-verbal cues – be aware of the messages you are sending out to the client.
- Do not raise your voice at the client. Do not assume that a person who has an intellectual disability also has a hearing difficulty.<sup>41</sup>
- Written communication, including use of computers, is helpful for some clients. Written confirmation of what has been said may also be helpful.
- Communication by alternative methods, such as picture boards or electronic forms of assisted communication may be the best method to communicate with

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<sup>41</sup> Victorian Police/ OPA fact sheet; UK the National Autistic Society Guide for criminal justice professionals 2008

some clients for whom speech is difficult. (Further information may be obtained from Communication Rights Australia)

## 7. BAIL AND COURT SERVICES

*"K.A." on many occasions was unable to state where she would live, as she was homeless. She also had no associates and no other family members with whom she could live. She has spent a significant amount of time in custody after being refused bail. She also had a number of "fails to appear at court" because she did not clearly understand what her bail conditions were.*

There are no special provisions which alter the usual rules and procedures for the granting of bail in the case of people who have an intellectual disability. However, although the *Bail Act 1977* (Vic.) (Bail Act), makes no special allowance for accused people who have an intellectual disability, its terms are sufficiently flexible to allow adaptation to individual circumstances.

Where a person who has an intellectual disability has a bail hearing during Court hours, they may be assisted in obtaining legal representation through Victoria Legal Aid. After-hours support with respect to bail hearings (i.e. before a \*bail justice) may be more difficult to obtain.<sup>42</sup> (\*Bail justices are appointed under the Bail Act and trained by Victoria Police, the Magistrates' Court, and the Department of Justice, to hear bail applications. They are often required to attend call-outs and rule on bail applications on weekends and late at night when the courts are closed.)

The OPA's policy is that ITPs should not assist people during bail justice hearings, as this would fall outside the scope of their role and training.<sup>43</sup> However, in its recent review of the *Bail Act*, the Victorian Law Reform Commission recommended that the role of the ITP be expanded to encompass the provision of support and advice to people who have an intellectual disability about bail and the nature of bail hearings.<sup>44</sup>

### Complying with bail conditions

For reasons connected with the general disadvantages they suffer as defendants in the criminal justice system, people who have an intellectual disability may find it more difficult than other accused to be granted bail. For example, an accused may be unable to understand the requirements of their bail<sup>45</sup>; 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>46</sup> Further, as the Victorian Law Reform Commission has observed, there is a danger that bail decision-makers might set inappropriate conditions on bail for persons who have an intellectual disability, particularly if they do not have adequate training about the effects of cognitive impairment.<sup>47</sup>

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<sup>42</sup> VLRC, *Review of the Bail Act*, p202

<sup>43</sup> *Ibid*, p202

<sup>44</sup> *Ibid*, p203

<sup>45</sup> And thereby fail to meet a statutory pre-condition for the granting of bail: *Bail Act* s 17. One example of this occurring is discussed by the VLRC Review of the *Bail Act*, pp205-206.

<sup>46</sup> *Ibid*, pp204-5, NSWLRC Report No. 80, [4.72]-[4.78]

<sup>47</sup> VLRC Review of the *Bail Act*, p205

## Failing to appear at court

On a plain reading of the *Bail Act* no allowance is made for the disadvantages experienced by people who have an intellectual disability in the determination of whether to grant bail. For example, the Act provides that failing to appear in answer to bail means that an accused loses their presumptive right to bail, and must 'show cause' why their detention in custody is no longer justified.<sup>48</sup> The statute itself makes no allowance for an impairment, such as intellectual disability, being the underlying reason for a previous failure to answer bail. However, case law indicates that the *Bail Act* should be interpreted with regard to particular circumstances of the accused, including any mental impairment which they might have.

In *Re Walker* [2007] VSC 129, Cavanough J determined an application for bail of an accused person who had an intellectual disability who had to 'show cause' why bail should be granted.<sup>49</sup> In granting the application, his Honour took into account the following factors which were relevant to the accused's intellectual disability:

- the fact that the accused would be more vulnerable in custody as a result of his intellectual disability;
- the fact that his intellectual disability would be taken into account in sentencing if he were found guilty [this appears to have been relevant to his Honour's assessment of the likely term of imprisonment the accused would have to serve if found guilty]; and
- the fact the accused's history of failures to appear in answer to bail was due to his difficulties in organising himself rather than deliberate evasion.

It follows from the approach taken by Cavanough J in *Re Walker* that, as noted above, although the *Bail Act* makes no special allowance for accused people who have an intellectual disability, its terms are sufficiently flexible to allow adaptation to individual circumstances.

## Department of Human Services responsibility

The Victorian Department of Human Services has a responsibility to identify services for a person who has an intellectual disability where the likelihood of re-offending is minimal, to help the Court and the police make their decision in relation to a bail application.

## Accommodation and Bail

*"K.A." would benefit significantly from services, particularly in the form of accommodation and case management.*

The Victorian Department of Human Services, Disability Services, funds two short-term accommodation and support services that provide priority placement to people who have a disability who are involved in the criminal justice system. These services were developed to ensure that people who have an intellectual disability are not denied bail

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<sup>48</sup> This is the effect of s 4(4)(d) of the *Bail Act*

<sup>49</sup> The accused had been charged with an offence falling within s 4(4)(c) of the *Act*

solely on the grounds that they have no suitable accommodation. These two accommodation facilities provide a state-wide service for a total of ten people at any one time.

## Court Services

*"K.A." would benefit significantly from the available court services.*

A person who has an intellectual disability may also have other issues at the time of applying for bail such as alcohol and substance abuse. In the past these alleged offenders slipped through the net and may have been incarcerated for minor offences because of lack of support in the community and/or lack of accommodation.

The Magistrates' Court of Victoria has a CREDIT / Bail Support Program and a Court Integrated Support Program (CISP).

### *CREDIT/Bail Support Program*

The objectives of the CREDIT/Bail Support Program include:

- To provide early treatment and access to drug treatment/ rehabilitation programs.
- To provide access to accommodation, welfare, legal and other community supports.
- To provide clients and the court with monitoring and support of clients on the program for a period of 3-4 months.
- To minimise harm to the client and the community by addressing the issues related to substance abuse.
- To reduce risks of further re-offending.

### *Client Eligibility for the CREDIT/Bail Support Program*

- **Voluntary Participation**  
Engagement with the CREDIT Bail Support Program and referral to treatment is voluntary, with a client agreeing to undergo a comprehensive drug assessment and attend treatment. The client may however, be subject to a range of bail conditions.
- **Violent Offences**  
Any person eligible for Bail is eligible to engage with the CREDIT Bail Support Program. In cases where an offender is charged with violent offences or where there are safety concerns, the CREDIT Bail Case Manager will provide any relevant details to alcohol and other drug treatment agencies. This will ensure the offender is provided with the most appropriate treatment and the most suitable clinician available. It also allows the agency to address any security concerns.

- **Illicit Drug Use**

A client must have a recent and problematic illicit substance use, however, this may not be identified until the time of assessment. Although the exclusive use of alcohol or other licit substances excludes the defendant from participation, clients may still be referred to an appropriate treatment service to assist in addressing issues of misuse/abuse.

- **Referral**

Although referrals may come from any source, the most common sources of referral are from Magistrates, Legal Representatives, Treatment Providers, Police and clients themselves. Referrals may be accepted if the client meets all eligibility criteria.

- **Court Order**

Clients may not be accepted for the Program if they are currently subject to drug treatment conditions as part of a court order (CCO and Parole) and are complying with the order. This does not exclude referral to treatment if the defendant wishes to engage.

If a defendant is in breach of an order, and is no longer eligible to access drug treatment services via the order, they may be assessed.

- **Breach of Court Order**

If a defendant is potentially in breach of a suspended sentence, CCO or Parole, the referral for assessment may be made. The Magistrate will be made aware of any potential breaches.

## **Bail**

A Magistrate may grant bail under the condition the defendant engages in a drug and alcohol assessment or drug treatment, as recommended by the CREDIT Bail Case Manager.

In these cases, the CREDIT Bail Case Manager may be required to provide the Magistrate with regular attendance and progress reports.

The exclusion of this bail condition does not exclude the defendant from being referred to, and engaging in, recommended treatment.

## **Service Provided to Clients on Bail**

The range of services provided to clients on bail has included the following:

- Assessment;
- Treatment and support plan;
- Case management, support and supervision while on bail and follow-up;
- Referral to drug treatment services including detox and rehabilitation programs;

- Referral to Government and non-Government support services;
- Referral to crisis accommodation short term and payment of expenses;
- Passport photos for identification and medical purposes;
- Referral to pharmacotherapies and payment of medication expenses short term;
- Outreach service for clients requiring intensive support;
- Detox and rehabilitation program visits; and
- Referral to WISE Employment program for training/employment assistance.

Referral to the CREDIT/Bail Support Program can be made via a Magistrate, police, legal representative, court nominee, family or the client themselves. Clients are required to commit to treatment and attending regular support meetings with their case manager.

CREDIT/Bail Program is located at Broadmeadows, Dandenong, Ringwood, Heidelberg, Frankston, Geelong and Ballarat Magistrates' Courts, with a Rural Outreach Diversion Worker (RODW) located at the Bendigo Magistrates' Court.

### *Court Integrated Support Program (CISP)*

CISP is a service established by the Department of Justice and the Magistrates' Court of Victoria to help ensure that defendants get support and services to reduce re-offending and make communities safer.

The CISP joins together a number of existing support services within the court, including the CREDIT/Bail Support Program and Aboriginal Liaison Program. It links defendants to support services such as drug and alcohol treatment, crisis accommodation, disability services and mental health services.

#### The CISP aims to:

- Provide short term assistance for defendants with health and social needs before sentencing.
- Work on the causes of offending through individualised case management support.
- Reduce re-offending rates.

The CISP is available at the Melbourne, Sunshine and Latrobe Valley Magistrates' Courts.

### **Assessment and Referral Court (ARC) List**

The Assessment and Referral Court List (the ARC List) is a specialist court list of the Magistrates' Court developed by the Department of Justice and the Magistrates' Court of Victoria to meet the needs of accused persons who have a mental illness and/or a cognitive impairment.

The ARC List is not available to serious offenders but may be of use for new offenders or people who have been accused of less serious charges and who have an intellectual disability

The List is located at Melbourne Magistrates' Court and works collaboratively with the Court Integrated services Program (CISP), which provides case management to participants. Case management may include psychological assessment, referral to welfare, health, mental health, disability, and/or housing services and/or drug and alcohol treatment.

### *Legislation establishing the ARC List*

The ARC List was established by the *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010*.

### *Aims of the ARC List:*

- To reduce the risk of harm to the community by addressing the underlying factors that contribute to offending behaviour
- To improve the health and wellbeing of accused persons with a mental impairment by facilitating access to appropriate treatment and other support services
- To increase public confidence in the criminal justice system by improving court processes and increasing options available to courts in responding to accused persons with a mental impairment
- To reduce the number of offenders with a mental impairment received into the prison system.

### *Eligibility Criteria for the ARC List*

An accused person will be eligible for the ARC List if:

- The accused is charged with a criminal offence that is not a violent, serious violence or serious sexual offence as defined by section 6B(1) of the *Sentencing Act 1991*
- The accused has one or more of the following:
  - a mental illness
  - an intellectual disability
  - an acquired brain injury
  - an autism spectrum disorder
  - a neurological impairment, including but not limited to dementia
- The accused has one or more of the above, which causes a substantially reduced capacity in at least one of the areas of self-care, self-management, social interaction or communication
- The accused would benefit from a problem-solving court process and an individual support plan
- The accused must consent to participate in the List.

### *Referrals to the ARC List*

Referrals to the ARC List will be accepted from the accused, significant others, community service organisations, magistrates, police, prosecutors, legal representatives and other court based support services.

ARC List Referral Forms are available electronically and from the Court Support services counter, Level 4, Melbourne Magistrates' Court. It is necessary to speak with a member of the ARC List Team prior to making a referral.

### *ARC list process*

Once a referral to the ARC List is made:

- The CISP staff will conduct an initial assessment and will start to address support needs.
- Liaison will occur with the List staff to determine the next available court date.
- A List clinical advisor will undertake a comprehensive clinical assessment.
- At the next available List sitting, the List Magistrate will decide whether to accept the participant in the List.
- If the referral is accepted, the List clinical advisor will develop a draft individual support plan (ISP) in collaboration with the participant and the CISP staff for approval of the Magistrate.
- The participant will appear before the List Magistrate on a regular basis to discuss her/his progress.
- If the participant pleads guilty at the end of their participation, they will be sentenced within the List.
- Participants will be involved with the List for between three and twelve months, with most being discharged from the List within six months.
- If the referral is not accepted, the offender's charges will be referred back to the mainstream (regular) court lists. Where appropriate, the CISP will continue to provide necessary support to the accused or, where connected with services, referred back to those relevant treatment and support services.
- If the participant pleads not guilty her/his case will be returned to mainstream (regular) court for a contested hearing.

### *ARC List Court Hearings*

The ARC List operates on a Problem-Solving Court model, which provides an informal approach where the Magistrate hears the matter(s) and reviews the participant's progress on the program from the Bar Table, along with ARC List staff and the participant.

## 8. The Crimes (Mental Impairment and Unfitness to be Tried) Act 1997

*Lawyers have never run a defence of mental impairment case for "K.A." in the Magistrates Court in relation to minor offences. This is one option for lawyers to consider in the future.*

### Fitness to be Tried

At common law, an accused could not stand trial unless they were 'fit to plead' to the charges which had been laid against them. This concept required a minimum level of comprehension on the part of the accused, in particular, the ability:

1. to understand the nature of the charge;
2. to plead to the charge and exercise the right to challenge potential jurors;
3. to understand that the trial is an inquiry into whether the accused did that with which they are charged;
4. to follow the course of proceedings;
5. to understand the substantial effect of the evidence led by the prosecution; and
6. to answer the charge with a defence.<sup>50</sup>

The law concerning fitness to stand trial is now set out in statutes in all states and territories. In Victoria, the relevant legislation is *The Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) (the Unfitness to Be Tried Act). The definition of fitness to be tried in the Act closely follows the common law concept of fitness to plead outlined above.

In principle, an intellectual disability might render an accused unfit to stand trial within the meaning of the Act. The New South Wales Court of Criminal Appeal considered whether the NSW equivalent of the Victorian legislation concerning fitness to be tried covered persons with an intellectual or developmental disability.<sup>51</sup> The Court faced the difficulty that the introductory sections of the relevant NSW legislation only referred to 'mental illness' and 'mental conditions.' Having regard to the common law history of the principles concerning fitness to be tried, the Court held that the legislation should not be read so as to exclude intellectual disability from the ambit of its operation. Essentially, the Court held that the NSW legislation concerning fitness to be tried was intended to reflect the broad scope of common law principles concerning fitness.

### *Adjournment and investigation into Fitness to Stand Trial*

Where a real and substantial question arises during a proceeding as to the fitness of an accused to stand trial, the Act provides that the trial judge must adjourn the proceeding to allow an investigation to take place into the fitness of the accused (s 9). The investigation is conducted before a jury, in accordance with a statutory procedure which allows the parties and the judge to call evidence. If the jury finds that the accused is not fit to stand trial, and the judge determines that the accused is unlikely to

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<sup>50</sup> See *R v Presser* [1958] VR 45 at 48 (Smith J)

<sup>51</sup> *R v Mailes* [2001] NSWCCA 155

become fit to stand trial within the next twelve months, the court must conduct a special hearing.

### *Special Hearing*

The special hearing is an inquiry into the guilt of the accused before a jury, and is to be conducted as if it were a criminal trial at which the accused pleaded not guilty (s 16). After a special hearing, the jury may return the following findings:

- (a) not guilty of the offence charged;
- (b) not guilty of the offence because of mental impairment [see below]; or
- (c) the defendant committed the offence charged [which finding must be beyond reasonable doubt].

Where a finding of not guilty is returned, the defendant is taken to have been found not guilty at a criminal trial. The procedure for a finding of not guilty by reason of mental impairment is outlined in the section on the Defence of Mental Impairment.

Where a jury on a special hearing finds that the defendant committed the offence, the judge may either release the defendant unconditionally, or declare that the defendant is liable to supervision under Part 5 of the Act. The nature of a supervision order under Part 5 is summarised below.

### **Defence of Mental Impairment**

The Unfitness to Be Tried Act also abolished the common law defence of insanity, and replaced it with a statutory defence of mental impairment (s 20). The defence will apply where the person:

- (a) did not know the nature and quality of their conduct; or
- (b) did not know that their conduct was wrong.

### **Verdicts of not guilty and Supervision Orders**

If the person is found to have a mental impairment the Court must enter a verdict of not guilty. The consequence of a finding that a person is not guilty of an offence by reason of mental impairment is that a Court must either release the person or make a supervision order under Part 5 of the Act. A supervision order may involve releasing an offender on conditions (a non-custodial supervision order) or may involve a term of custodial supervision (s 26). Where conditions are imposed on an offender's release, the Court must ensure that any services which are prescribed in the order are available by requesting the Secretary to the Department of Human Services to provide a 'certificate of available services' (s 47).

When a custodial supervision order is made, an offender may either be committed to custody in prison or, in the case of a person who has an intellectual disability, the Secretary may specify that services are available in a Residential Treatment Facility (RTF).

## **Matters in the Magistrates' Court**

The Magistrates' Court is not empowered by the Unfitness to Be Tried Act to determine a person's fitness to be tried or to conduct a special hearing to determine their guilt. However, an accused may still run a defence of mental impairment in a contested hearing in the Magistrates' Court. If the person is found to have a mental impairment, the defence is accepted and the Unfitness to be Tried Act requires the Court to discharge them (s 5). What often happens in practice, however, is that the prosecution will refer the matter to a higher court, i.e.: the County Court, for trial/plea.

## 9. SENTENCING

*"K.A." repeatedly tried to find suitable accommodation to suit her specific needs and it was always refused. As a result of her high number of minor offences a justice plan was ordered which included a direction that the service provider was to provide specific accommodation to suit her needs (not group accommodation). When the justice plan expired the service provider attempted to put her in group accommodation, which had previously failed, and "K.A.'s" offending recommenced.*

### **Diversion and Police Database and Criminal Records**

The Diversion Program may be applicable to many offenders who have a disability, including those who have an intellectual disability. The program is available for most offences which can be heard in the Magistrates' Court<sup>52</sup> and is designed to enable first-time offenders to avoid gaining a criminal record. Like the Assessment and Referral Court (ARC) List, the Diversion Program may help to avoid prison terms or severe penalties for people who have come into contact with the criminal justice system because of their disability and who could benefit from receiving and cooperating with services. Effectively, both the Diversion Program and the ARC List are ways of keeping people out of prison by finding for them and "forcing" them to cooperate with, services that can, in turn, assist them.

Criminal records are a major issue for people that can, among other things, affect them being able to gain employment/make a living. Normally, even where a conviction is not recorded following a plea of guilty or a finding by a magistrate that a charge has been proven, a person charged will nonetheless have a record of the matter coming to court and of the penalty imposed (this will appear on the police LEAP database, so could form a "police record"). By contrast, participation in the diversion program does not result in any record.

#### *Eligibility for Diversion Program*

An offender will be able to participate in the diversion program if:

- they acknowledge responsibility for the offence and agree to participate in the program;
- the prosecution (i.e. the police) consents; and
- the Court, informing itself in any manner it thinks fit, considers it appropriate.

The conditions for the program are set in consultation with a Court Diversion Coordinator and the Court. If diversion is approved, the case will be adjourned for up to a year, and will then be dismissed if the offender has complied with the program conditions. Importantly, there appears to be no limitation on the kinds of conditions which might be set as part of a diversion program. Depending on how the scheme comes to be implemented and the availability of appropriate services, it may be that there is scope through the diversion program to address the particular needs of people who have an intellectual disability early in their contact with the criminal justice system.

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<sup>52</sup> Diversion is available for all offences except drink driving offences and offences punishable by a fixed or minimum penalty: *Magistrates' Court Act 1989* (Vic) s 128A(1)

## *Diversion Program v. Defence of Mental Impairment*

It should be noted that in some circumstances lawyers tend to opt for diversion instead of the defence of mental impairment in the Magistrates' Court. It is essential that lawyers are aware that the defence of mental impairment is available to people who have an intellectual disability and that, if proved, the case will be dismissed.

On the other hand, in the case of more serious offences, lawyers should keep in mind that a person who has an intellectual disability, or some other form of cognitive impairment (e.g. an acquired brain injury) and uses the defence of mental impairment, will possibly spend what is effectively a longer sentence of incarceration than an offender who does not have a disability. This is because a person who does not have a disability will more easily get parole, whereas a person with an intellectual disability, for whom appropriate accommodation and support services may not easily and quickly be found, may spend much longer in prison or a treatment facility before being able to re-enter the community. (See, for example, the case of "S.B." in 11.1 SUPERVISED TREATMENT ORDERS, below)

## **Sentencing People who have an Intellectual Disability**

Division 3 of Part 3B of the *Sentencing Act 1991* (VIC) (*Sentencing Act*) deals specifically with offenders who have an intellectual disability. This part of the *Sentencing Act* modifies the sentencing options for offenders who have an intellectual disability in two ways. First, by allowing for the making of **community corrections orders** and **adjourned undertakings** which mandate compliance with **justice plans**; and second, by prescribing conditions for the making of **residential treatment orders**.

The *Disability Act* has modified slightly the regime for the provision of Justice Plans, in particular by making provision for the review of such plans (*Sentencing Act* s 82).

The major change to sentencing options for people who have an intellectual disability brought in by the *Disability Act* is the new provision the Act has made for residential treatment orders. The provision for such orders follows in part the recommendations made by the Victorian Law Reform Commission after its review of the compulsory detention and treatment of people who have an intellectual disability.

## **Adjourned Undertakings, Justice Plans, Community Correction Orders and Pre-Sentence Reports**

### *Community Orders*

Prior to 16 January 2012, there were different types of court imposed community orders, including Community Based Orders, Intensive Correction Orders and Combined Custody and Treatment Orders. Since 16 January, 2012, these sentencing orders have been replaced by a single **Community Correction Order**.

## *Community Correction Orders*

The new Community Correction Order (CCO) is a flexible order that can have different program conditions applied based on the circumstances of the offence, the offender's needs and situation, and the direction of the court.

A CCO must have at least one condition, based on the risk and needs of the offender and the severity of the offence, including:

- supervision
- unpaid community work
- treatment and rehabilitation
- curfews
- bans on entering specified areas or places
- bans on entering many licensed premises and bans on drinking alcohol in other licensed premises
- bans on contacting or associating with specific people or group
- residential restrictions or exclusions relating to the offender's accommodation.

A CCO may only include a community work condition. This kind of CCO was previously known as a Community Based Order for Community Work Only (CBO/CW).

In addition to the CCO, there are also two types of community orders relating to the payment of fines:

- Fine Default Unpaid Community Work Orders
- Fine Conversion Orders

These two orders are similar because they have only one condition - to perform unpaid community work. The offender is required to undertake the unpaid community work hours imposed by the court and report to a Community Corrections Officer when issues arise regarding attendance.

Fine Default Unpaid Community Work Orders and Fine Conversion Orders have replaced the 'Community Based Orders in Default of Payment of a Fine' (CBO/FD).

Community Work Permits (CWP) are issued by the Infringement Court for failing to satisfy fines from Infringement notices, for example, speeding fines.

## **Parole Orders**

When a prisoner is sentenced to more than 12 months imprisonment, there may be a period set where the prisoner is eligible for release on parole. Prisoners granted parole are still under sentence – parole is seen as a means of supervising and assisting prisoners to re-integrate into the community successfully, reducing the likelihood of re-offending.

## **Adjourned Undertakings**

In the Victorian criminal justice system, an alternative to imprisonment is to receive an **adjourned undertaking**. An undertaking may be given with or without a conviction being recorded. In deciding this, under s 8 of Victoria's *Sentencing Act*, a magistrate may take into account:

- the severity of the offence
- the character and history of the person
- any impact a conviction will have on a person's economic and social wellbeing, along with their future employment prospects.

The non-recording of a conviction does not dismiss any conditions imposed by the court, which still may decide to fine an individual, or require they pay compensation or restitution to a victim of the crime.

Young and first time offenders generally receive the benefit of a good behaviour bond, which is encapsulated in s 83A of Victoria's *Sentencing Act* allowing a magistrate to defer a sentence for six months for an individual who is found guilty of an offence, and who is under the age of 25.

If a court finds a young person guilty of an offence, the court may adjourn (postpone) proceedings for up to one year. The court will order that the young person pay a bond and comply with set conditions.

Conditions can include being of good behaviour and appearing before the court when required. If the young person complies with the conditions for the period set by the court, the charge will be dismissed and no conviction will be recorded. If conditions of the bond are not met, the young person may be resentenced.

The law relating to good behaviour bonds for young people is contained in sections 367–372 of the *Children, Youth and Families Act 2005*.

## **Adjourned Undertakings and CCOs for People who have an Intellectual Disability**

The complexities of qualifying for and/or complying with the requirements of Adjourned Undertakings or CCOs may make them difficult for some people who have an intellectual disability to get, or to successfully carry out. Nonetheless they should certainly be considered and, where appropriate, pursued as possible options.

Where a Court is considering making an order that an offender who has an intellectual disability be released on an adjourned undertaking (under Part 3B, Division 3 of the *Sentencing Act*) or a **community corrections order**, the Court may request, under s 80 of the *Sentencing Act*:

- a **statement** from the Secretary to the Department of Human Services that a person has an intellectual disability within the meaning of the *Disability Act*;
- a **plan** of available services; and
- a **pre-sentence report** prepared in accordance with Division 1A of Part 3.

Where a Court is considering making a **Justice Plan** it must first accept that the offender meets the definition of 'intellectual disability' under the *Disability Act* (as set out above in section 4 of this publication, in **Statutory Definitions of Intellectual Disability in Victorian Legislation**). A determination by the Secretary of DHS that a person meets this definition is a pre-condition to exercise by a Court of any of the sentencing options provided for in s 80 of the *Sentencing Act*.

The Court may order the person to participate in the services in the Justice Plan for up to 2 years. This can only occur after it is agreed that the person fits the *Disability Act's* definition of intellectual disability and the Court has received both:

- the plan of available services; and
- a pre-sentence report.

Importantly, s 80 of the *Sentencing Act* does not alter the other provisions in the Act concerning **community correction orders**. So, the offender must agree to comply with the order before it is imposed (s 37). If the order is made, they must also comply with the Justice Plan, as it becomes a **condition** of the community correction order or bond.

### *Pre-sentence Reports*

The '**pre-sentence report**' (s 80) is prepared by the Office of Corrections Victoria (which is part of the Department of Justice) in accordance with Division 1A of Part 3 of the *Sentencing Act*. The pre-sentence report is broadly concerned with the suitability of an offender for the kind of Court order being considered.

### *Justice Plans*

By contrast, the **Justice Plan** is prepared by DHS and is more specifically concerned with recommending available services which address the offending behaviour.<sup>53</sup> In practice, there appears to be no real distinction between a 'justice plan' and a 'plan for available services'.<sup>54</sup> The planning process involves finding appropriate, available disability services programs designed to meet the individual needs of an offender, such as: anger management training, sex offender education, employment placement and training, or drug and alcohol treatment.

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<sup>53</sup> See Department of Human Services, *Criminal Justice Practice Manual* (2007) p34, at [http://www.dhs.vic.gov.au/\\_data/assets/pdf\\_file/0011/596693/c\\_and\\_is\\_criminaljusticepracmanual\\_0907.pdf](http://www.dhs.vic.gov.au/_data/assets/pdf_file/0011/596693/c_and_is_criminaljusticepracmanual_0907.pdf)

<sup>54</sup> Ibid, p30

## *Review of Justice Plans*

Section 82 of the *Sentencing Act* now allows for a review by the Court of a Justice Plan. The offender, the Secretary to Department of Human Services and the Secretary to the Department of Justice may all apply for a review of the Justice Plan. If an offender's needs are not being met by the plan, or they are failing to comply with it, the Court may vary, cancel or confirm the condition that they comply with it.

## **Residential Treatment Orders**

**Residential treatment orders** represent a new kind of sentence. Again, the Court cannot make a residential treatment order without first receiving: a statement from DHS to the effect that a person has an intellectual disability; a plan of available services and; a pre-sentence report.

Where the Court is considering the imposition of a residential treatment order, the plan of available services prepared by DHS will focus on the offender's suitability for placement with a **residential treatment facility** (RTF), and the availability of a place at such a facility. Section 802A of the *Sentencing Act* provides that a Court may only make a residential treatment order where:

- the plan of available services has specified that the offender can be placed in a facility;
- the Secretary to DHS has specified that that the person is suitable for admission to such a facility; and
- the offence is a 'serious offence'.<sup>55</sup>

### **Admission to a Residential Treatment Facility (RTF)**

The *Disability Act* gives some guidance as to when admission to an RTF is appropriate for offenders.

Section 152 of the *Disability Act* says:

(1) A person with a disability may only be admitted to a Residential Treatment facility if:

(a) the person has an intellectual disability; and

(b) the person presents a serious risk of violence to another person;

and

(c) all less restrictive options have been tried or considered and are not suitable; and

(d) the residential treatment facility can provide services for the treatment of the person with a disability and that treatment is suitable for that person; and

(e) the Senior Practitioner has been notified of the proposed admission; and

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<sup>55</sup> A serious offence is either indecent assault, or a 'serious offence' within the meaning of s 3(1) of the *Sentencing Act*. This section lists a number of specific offences as serious, including murder, rape, and armed robbery.

(f) an order specified under subsection (2) applies to the person enabling compulsory treatment to be provided.

(2) For the purposes of subsection (1) (f), the following orders are specified-

- (a) a residential treatment order made under the *Sentencing Act* 1991;
- (b) a parole order made under the Corrections Act 1986;
- (c) a custodial supervision order made under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997;
- (d) an order transferring the person from a prison under section 166;
- (e) an extended supervision order made under the Serious Sex Offenders Monitoring Act 2005.

From the above it should be noted that **residential treatment orders** are not the only orders under which offenders who have an intellectual disability may be placed in RTFs. Once an offender has been placed in an RTF, a **treatment plan** for that person must be prepared within 28 days (*Disability Act*, s 153).

### **Proclamation of Residential Treatment Facilities**

The *Disability Act* allows the Governor in Council to proclaim facilities to be RTFs under the Act (s 151). RTFs may be classified by the proclamation to be either long-term RTFs or short-term RTFs. The Act deems one facility already to have been proclaimed as an RTF, namely the Intensive Residential Treatment Program of the Disability Forensic Assessment and Treatment Service, which is located at Fairfield (s 151(6)). To date, this is the *only* RTF which has been proclaimed in Victoria.

### **Review of Residential Treatment Orders**

A residential treatment order is reviewable by the Court who made the order under s 82A of the *Sentencing Act*, on application by the offender, the Secretary to DHS or the Secretary to DOJ. On such a review, the Court may confirm, vary or cancel the order if it is satisfied that the offender is not complying with the order, or the offender's needs are not being met by the order.

## **Custodial and Non-Custodial Sentencing Options**

Courts have the same range of sentencing dispositions available for offenders who have an intellectual disability as they do for any other offenders, including:

- An adjourned undertaking (with or without conviction);
- Fines (with or without conviction)
- Community correction orders (with or without conviction)
- Suspended sentences
- Imprisonment
- Deferral of sentence if aged between 18 and 25

## Sentencing Principles

Sentencing, at common law, involves the exercise of a discretion as to the appropriate punishment for an offender. This discretion must be exercised according to established **sentencing principles**, which require that the particular circumstances of an offence and an offender must be considered.

Importantly, the sentencing principles which apply to offenders who have an intellectual disability are the same as for offenders who have a mental illness.<sup>56</sup> The Victorian Court of Appeal in *R v Verdins* [2007] VSCA 241 reconsidered and restated these principles.

*Verdins* re-cast the principles which had been laid down in the well-known case of *R v Tsiaras* (1996) 1 VR 398, which had set out the ways in which a sentence might be mitigated in light of an offender's mental illness. However, as the Court observed in *Verdins*, the misconception developed that the principles enumerated in *Tsiaras* were only applicable where an offender had a serious psychiatric condition. The Court went on to make it clear that *Tsiaras* principles are applicable in any case of impaired mental functioning, irrespective of the psychological classification of that impairment, and that the relevant matter for the Court is to consider what particular affect a given impairment had on an offender in the circumstances of the case. In reformulating the *Tsiaras* principles, the Court stated (at [32]):

"Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

- \* 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.
- \* The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
- \* 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.
- \* 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.
- \* 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.
- \* Where there is a serious risk of imprisonment having a significant adverse

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<sup>56</sup> See *R v Williams* [2000] VSCA 174 at [10]; *R v Norris* [2007] VSCA 241 at [18]

effect on the offender's mental health, this will be a factor tending to mitigate punishment."

In explaining the first of these principles, the Court made it clear that an offender's moral culpability will be reduced where their mental condition impaired their ability to make reasoned judgments, think clearly, or appreciate the wrongfulness of the act.<sup>57</sup> The breadth of this approach makes it readily adaptable to cases of offenders who have an intellectual disability. Similarly, in explaining the sense in which general deterrence is moderated as a sentencing consideration (the third principle), the Court quoted with approval the following statement from *R v Wright* (Unreported, NSWCCA, 1997, per Hunt CJ at CL):

"The full understanding of the authority and requirements of the law which is attributed to the ordinary individual of adult intellectual capacities cannot be expected of a person whose intellectual function is insufficient to have that understanding. The means by which the courts give effect to that principle (as an instrument of social administration) is to moderate the consideration of general deterrence to the circumstances of the particular case."

Arguably the most important aspect of common law principles of sentencing, as they apply to persons who have an intellectual disability, is their flexibility. Courts have made it clear that they cannot be applied in any formulaic way, but will be adapted to suit the particular circumstances of each case, with particular reference to how an offender's disability affected them at the time of the offence.

## **Psychological Assessment and Reports in relation to an Offender who has an Intellectual Disability**

If pleading guilty to an offence it is advisable for the legal representative to obtain a **psychological** (or, where appropriate, **psychiatric**) **assessment and report** in relation to the client's level of intellectual disability. There are numerous types of psychologist and it is important to find one with the most relevant training and experience working with people who have an intellectual disability. (Similarly, if acquired brain injury, mental health, or other types of cognitive impairment, are present, assessments and reports should be provided by an appropriate expert).

Levels of intellectual disability generally fall into three categories:

### **Mild**<sup>58</sup>

IQ Range 52-67

- About 90% of people who have an intellectual disability
- Generally attended normal schools (with special classes)
- Most are able to live independently but are vulnerable without some special training and crisis or family support
- May live in boarding houses
- May be in open or supported employment
- Many are unemployed

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<sup>57</sup> [2007] VSCA 102 at [26]

<sup>58</sup> Ibid Jim Simpson p43

## **Moderate<sup>59</sup>**

IQ Range 36-51

- Many have attended special schools
- Generally require supported or supervised accommodation
- Most will communicate through speech but have some difficulty
- Many will be in supported employment

## **Severe<sup>60</sup>**

IQ Range 20 – 35

Profound Under 20

- Most will attend special school
- Most will have communication difficulty, may use single words or signs
- More likely to have additional disabilities (physical, sensory, epilepsy)
- Will need supervised accommodation and often assistance with personal care
- Will attend activity centres as adults if places are available

The Court will accept a psychiatric or psychological report.

If a person is also a client of the Department of Human Services it may be relevant for their lawyer or other person assisting them, to request and present a **disability services case worker report**, if the client has a case worker. The client will have to sign a consent form to obtain the report. The report should cover the following details:

- Family background
- Educational background
- Residential history
- Vocational history
- Informal supports
- Medical history (if relevant)
- The person's level of intellectual disability
- How the intellectual disability impacts on the person's life
- Where relevant – a person's ability to use public transport, domestic, social and financial circumstances, communication skills, literacy and numeracy skills and motivational levels.<sup>61</sup>

## **Parole**

### **Adult Parole**

The purpose of parole is to supervise the reintegration of offenders into the community, for at least six months before the end of their total sentence. While on parole the offender is still considered to be under sentence. The *Sentencing Act* 1991 requires a judge or magistrate to set a parole period for any sentence longer than 24 months,

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<sup>59</sup> Ibid Jim Simpson p43

<sup>60</sup> Ibid Jim Simpson p43

<sup>61</sup> Disability Services Criminal Justice Practice Manual 2007 p8

\*Information about parole sourced from the Victorian Department of Justice's website [www.justice.vic.gov.au](http://www.justice.vic.gov.au)

unless it is not appropriate. For sentences between 12 and 24 months, it is the court's decision whether or not to fix a parole period. Parole is not possible for sentences less than 12 months.\*

Parole benefits the wider community by ensuring offenders are supervised and supported during reintegration, and reducing recidivism. It is not simply a reward for a prisoner's good behaviour. Prisoners must make progress during their non-parole period in order to be considered for conditional release.

Aside from general obligations that must be met by all offenders on parole, further conditions imposed are tailored to each case. Conditions of parole may include:

- attendance for assessment for alcohol or drug addiction, or submitting medical, psychological or psychiatric assessment and treatment
- no contact, directly or indirectly, with the victim or certain potential victims
- no unsupervised contact with children
- a curfew
- strict conditions about place of residence and avoidance of certain geographical locations
- abstinence from alcohol
- requirements to attend personal development programs
- random substance testing.

### ***The role of the Adult Parole Board***

The role of the Adult Parole Board of Victoria (the Board) is to make independent and appropriate decisions in relation to:

- the release of prisoners on supervised conditional release
- the cancellation of orders and return of offenders to prison custody
- the submission of reports to the Minister for Corrections as required by legislation.

The Youth Parole Board is a separate body and operates under the auspices of the Department of Human Services.

### ***Factors taken into consideration by the Adult Parole Board***

In making its decisions, the Board considers the interests of both the community and the prisoner, the position of the victim, and the intentions of the sentencing authority. Factors taken into the consideration by the Board include:

- the nature and circumstances of the offence(s)
- comments made by the Judge when imposing the sentence
- the offender's criminal history
- previous history of supervision in the community
- potential risk to the community and/or the individual offender

- release plans
- 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 individuals
- representations made by the victim or by persons related to the victim
- representations made by the offender or others with an interest in the case
- the conduct of the offender while in custody and whether any positive drug tests have been recorded
- the offender's willingness to participate in relevant programs and courses while in custody.

### ***Decisions of the Adult Parole Board***

The Board may:

- grant a prisoner release onto parole
- deny release on parole
- defer consideration until a later date
- cancel an offender's parole.

There is no formal avenue of appeal against a decision of the Board, but a prisoner may request a review of any decision of the Board.

Prisoners eligible for release on parole are automatically brought to the Board's attention.

## **Youth Parole**

### ***Youth Parole Board / Youth Residential Board***

The Youth Parole and Youth Residential Boards exercise jurisdiction over all young people sentenced by a court to a period of detention in a youth justice custodial centre and over young people transferred by the Adult Parole Board from imprisonment in adult prison to serve their sentence in a youth justice centre.

## 10. THE PRISON SYSTEM

*While in custody "K.A." was not placed in a prison disability service, but was placed in a mainstream (general) prison, with other prisoners that did not have an intellectual disability. She was subjected to abuse from the other prisoners. It reminded her of the abuse that she had experienced when she was in state care as a young person.*

### **Intellectual Disability in the Victorian Prison System**

Corrections Victoria undertook a study to explore the characteristics of prisoners who have an intellectual disability who were released from prison between 1 July 2003 and 30 June 2006, and compared those characteristics to a random sample of prisoners released during the same period who did not have an intellectual disability.

The study cohort was drawn from a total of 7,805 prisoners released during the study period, and consisted of 346 prisoners of whom 102 had an identified intellectual disability. Female prisoners were excluded from the study due to the statistically insignificant number of female prisoners with an intellectual disability released from prison during the study period.

The findings of the study illustrate that prisoners who have an intellectual disability differ from prisoners who do not have an intellectual disability in a number of important ways. Key findings include:

- 1.3 per cent of male prisoners released from prison were identified as having an intellectual disability, which is marginally higher than the presence of intellectual disability in the general Victorian population, estimated at 1 per cent.
- Of the study cohort (346 prisoners), a significantly greater proportion of prisoners who had intellectual disability was Indigenous (16.7 per cent) than in the sample (4.9 per cent) of prisoners who did not have an intellectual disability.
- Overall, prisoners with an intellectual disability were younger and had three times the rate of youth detention episodes of prisoners who did not have an intellectual disability, and had a greater number of community corrections orders, prior sentenced terms of imprisonment and prior remand only terms of imprisonment.
- Prisoners with an intellectual disability were more likely to be denied parole and less likely to receive parole at their earliest eligibility date than prisoners who did not have an intellectual disability. A lack of suitable accommodation was the most common reason for parole being delayed and denied to prisoners who have an intellectual disability.
- There was a marked difference in the security classification of prisoners who have an intellectual disability and the sample of people who did not have an intellectual disability, with significantly more prisoners with an intellectual disability classified as medium security and significantly fewer classified as minimum security at release. Prisoners with an intellectual disability also had a higher average number of prison incidents recorded against them and were assessed as being at higher risk of re-offending. No prisoners who have an intellectual disability were assessed as being low risk, and 81 per cent were

assessed as being at high risk of re-offending, compared to 36 per cent of the sample of prisoners who did not have an intellectual disability.<sup>62</sup>

## Corrections Victoria Disability Framework

In 2007 the Victorian Department of Justice had, as one of its priorities, addressing the over-representation of the vulnerable and disadvantaged in the criminal justice system. Corrections Victoria, as a business unit of the Department of Justice, developed a Disability Framework titled “Addressing the Barriers” Corrections Victoria Disability framework 2007-2009. The Disability Framework builds on the Department of Justice *Disability Action Plan* 2005-2008. The Disability Framework aims to establish reliable prevalence and assessment data, enhance access to programs and services and equip the Correctional workforce with the necessary skills to appropriately manage offenders with a disability.<sup>63</sup>

At present Corrections Victoria only identifies people with an intellectual disability if they meet the criteria as outlined in the *Disability Act* by the Department of Human Services.<sup>64</sup> There are two prison locations that accommodate male prisoners registered as having an intellectual disability. Marlborough Unit at Port Phillip Prison (a maximum security prison) can accommodate 33 male prisoners, both sentenced prisoners and those on remand. The second unit is at Loddon Prison (a medium security facility), which has three four bedroom cottages. Each cottage can accommodate two prisoners who have an intellectual disability. Female prisoners who have an intellectual disability are located at the Dame Phyllis Frost Centre, a multi security level prison. Corrections Victoria does not have a special unit for these prisoners and they are placed in units according to offence type and functioning level.<sup>65</sup>

Corrections Victoria has a vision of addressing the issue of disability by integrating it into all aspects of planning, training, program development and infrastructure projects. They have developed a statement of principles that include:

### Providing Fairer Access to Services

- All offenders with a disability have the same rights as non-disabled offenders to access and participate in services and programs that are appropriate to their needs. Every attempt will be made to reduce the barriers that prevent participation in services and programs.
- Where it is demonstrated as necessary, additional measures will be supported to ensure all offenders have access to services and programs.<sup>66</sup>

### Supporting Improved Access to Justice

- All staff will receive the necessary leadership, training, support and preparation to work effectively and appropriately with offenders with a disability.

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<sup>62</sup> Intellectual Disability in the Victorian Prison System – Characteristics of prisoners with an intellectual disability released from prison 2003-2006. Corrections Research Paper Series Paper No. 2 September 2007 p6

<sup>63</sup> Addressing the Barriers – Corrections Victoria Disability Framework 2007-2009 p1

<sup>64</sup> Ibid p7

<sup>65</sup> Ibid p8

<sup>66</sup> Ibid p.v

- Staff will be made aware of the legislative and procedural provisions that protect the rights of offenders with a disability who have an impaired capacity for decision-making.
- The provision of effective correctional practice in relation to offenders with a disability will be based on research and best practice to ensure quality outcomes and best value for the resources available.<sup>67</sup>

### Protecting and Promoting Diversity

- In valuing difference, the diversity (race, culture, ethnicity, nationality, health, sexuality and gender) of offenders with a disability is recognised and respected. The development and implementation of best practice initiatives will encourage and support this diversity.
- Equality of opportunity for offenders with a disability will be actively promoted, and unlawful discrimination will not be tolerated.<sup>68</sup>

It should be noted that correctional facilities and programs are subject to the provisions of the EO Act and the DDA relating to the provision of services. In addition, section 47 of the *Corrections Act 1986* (Vic) states the rights of prisoners, which include:

*(f) If intellectually disabled or mentally ill, the right to have reasonable access within the prison or, with the governor's approval, outside a prison to such care and treatment as the medical officer considers necessary or desirable in the circumstances.*

### Strengthening Partnerships

- Close partnerships with the disability, mental health and broader health and community systems are integral to providing better outcomes for offenders with a disability in addressing re-offending and enhancing community safety. Such partnerships will help achieve consistency of responses and integrated service systems.<sup>69</sup>

## **The Disability Forensic Assessment and Treatment Service (DFATS)**

The Disability Forensic Assessment and Treatment Service (DFATS, formerly known as the Statewide Forensic Service) is funded by the Disability Services Division of the Victorian Department of Human Services and managed by North and West Metropolitan Region.

DFATS delivers assessment, treatment and consultancy services for people with a disability who are involved in the criminal justice system. Services are provided across a range of settings including onsite, in the community and prisons. The Intensive Residential Treatment Program within DFATS (proclaimed as a residential treatment facility under the *Disability Act 2006*) provides assessment and treatment in a secure facility for a small number of adults with an intellectual disability.

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<sup>67</sup> Ibid p v

<sup>68</sup> Ibid p vi

<sup>69</sup> Ibid p vi2

## 11. THE SENIOR PRACTITIONER

The position of the Senior Practitioner was established under the *Disability Act*. The Senior Practitioner is generally responsible for ensuring that the rights of persons who are subject to restrictive interventions and compulsory treatment are protected and that appropriate standards in relation to restrictive interventions and compulsory treatment are complied with (*Disability Act 2006*, s.23 (2) (a)). The Senior Practitioner works to educate the disability services sector about best practice in working with people who have behaviours of concern and also the use of the most appropriate and least restrictive interventions and compulsory treatment.

If you have a concern in relation to the restrictive interventions and compulsory treatment of a person who has an intellectual disability, you can contact the Office of the Senior Practitioner. (See contacts list at end of this publication for contact details)

## 12. CIVIL DETENTION AND TREATMENT ORDERS

Not all detained people are held under criminal law orders. Some are held and treated under orders made under civil (non-criminal) law.

### Supervised Treatment Orders

*"K.A." has not been subject to a Supervised Treatment Order so, instead, we will look at the example of "S.B."*

*"S.B." has an intellectual disability and comes from a disadvantaged background and dysfunctional family and social background.*

*From adolescence to early adulthood he was charged with and convicted of a number of sexual offences varying in gravity.*

*In early adulthood "S.B." was charged with a serious offence (as defined in the Sentencing Act). Due to his being found to be unfit to be tried the matter was determined at a special hearing. "S.B." was found to have committed the offence and spent a substantial period in prison. Upon release from prison he has not re-entered the community and since that time has received various forms of supervision, the latest being a Supervised Treatment Order.*

*Essentially, "S.B.", after completing his custodial sentence, has remained in the care and supervision of the State under various orders, essentially civil detention orders, providing a number of government departments and service providers with the authority to decide, on his behalf, where he will reside, what treatment he will undergo and other lifestyle decisions that are required to be made for him from time to time. The latest of these orders is a Supervised Treatment Order which is provided for and regulated by the Disability Act 2006.*

*A lack of appropriate accommodation options in the community (ensuring the person's own safety and the safety of the community from the potential for the person to re-offend) has resulted in "S.B." undergoing a greater period of institutional treatment and care than necessary and is more restrictive than necessary.*

**Supervised treatment orders (STOs)** are a new kind of civil order provided for in the *Disability Act 2006* (Vic). The order is designed to allow for the detention of people who have an intellectual disability who pose a risk of harm to others. A person need not have been found guilty of a crime for a supervised treatment order to be made. The provisions in the Act concerning these orders largely reflect the recommendations of the 2003 Victorian Law Reform Commission Report: *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*.

Only registered disability service providers who have been approved by the Secretary to DHS may use supervised treatment. The Act allows Authorised Program Officers of disability service providers to apply to VCAT for a supervised treatment order in respect of persons who have an intellectual disability who are receiving residential services in accordance with a treatment plan, and where the Officer is satisfied that the person meets the criteria for the making of the order.

The Public Advocate must be notified of any application to VCAT for a supervised treatment order. VCAT may then allow the Public Advocate to be joined as a party. However, the Act does not stipulate that, once joined to the proceeding as a party, the Public Advocate must act as the representative of the person who has an intellectual disability. Nothing in the Act guarantees that a person in respect of whom an application for a supervised treatment order is made will be represented at the hearing. This may be a situation that could be challenged under the Victorian Charter of Human Rights (discussed below). Representation may be available from Victoria Legal Aid or Villamanta Disability Rights Legal Service Inc.

### ***Requirements for Supervised Treatment Orders (STOs)***

VCAT can only make a supervised treatment order if it is satisfied that:

- the person has previously exhibited a pattern of violent or dangerous behaviour which has caused serious harm or created the risk of serious harm to others;
- there is an ongoing risk of serious harm to others which cannot be substantially reduced by less restrictive means;
- services to be provided to the person will substantially reduce the risk of harm; and
- the person is not consenting to a treatment plan.

Where these criteria are satisfied, VCAT may make the order.

### ***Contents of Supervised Treatment Orders (STOs)***

The order **must**

- require the person to reside at a particular location;
- set out the period over which it will be in force, which can be no longer than one year.

The order **may**

- also specify any other conditions to which the person must be subject, and;
- require the person to participate in a treatment plan and;
- state the intervals at which it will be reviewed.

### ***Implementation, oversight and application for review of STOs***

Orders must be implemented by the Authorised Program Officer. The implementation of a supervised treatment order must be overseen by the Senior Practitioner. The Authorised Program Officer, Senior Practitioner and the person who is subject to the order are all empowered to apply to VCAT for review, variation or revocation of an order.

## **Complex Needs**

*The Human Services (Complex Needs Act) 2003* (Vic) (the CN Act) was introduced to facilitate the delivery, through the **Multiple & Complex Needs Initiative** (MACNI), of services to people who have multiple and complex needs, including those with combinations of mental illness, substance abuse problems, intellectual disability, or acquired brain injury. The CN Act is concerned with people who pose a risk of harm to

themselves or others, and is intended to enable support services to be provided to this group in a co-ordinated and flexible way.

The CN Act established the **Multiple and Complex Needs Panel** which is designed to oversee the scheme.

### *Referral, Eligibility and Notifications to the Multiple & Complex Needs Initiative*

The CN Act enables the Secretary of the Department of Human Services to refer people to the Panel if the Secretary believes they are eligible. The Panel ultimately determines the question of eligibility.

An eligible person is a person who –

- has attained 16 years of age:

and

- appears to satisfy two or more of the following criteria –

- (i) has a mental disorder within the meaning of the Mental Health Act 1986;
- (ii) has an acquired brain injury;
- (iii) has an intellectual impairment
- (iv) is an alcoholic or drug dependent person within the meaning of the Alcoholics and Drug-dependent Persons Act 1986;

and

- has exhibited violent and dangerous behaviour that has caused serious harm to himself or herself or some other person or is exhibiting behaviour which is reasonably likely to place himself or herself or some other person at risk of serious harm;

and

- is in need of intensive supervision and support and would derive benefit from receiving coordinated services in accordance with a care plan under this Act that may include welfare services, health services, mental health services, disability services, drug and alcohol treatment services or housing and support services.

The Secretary must notify a person who has been referred to the Panel. A person may refuse to be referred to the Panel. Refusal to participate is discussed further below.

### *Procedure of the Multiple and Complex Needs Initiative (MACNI)*

If the Panel agrees with the Secretary that the person meets the eligibility criteria, the Panel has the discretion to nominate that person for assessment. In order to assess a person's eligibility, the Panel is empowered under the CN Act to obtain certain personal and health-related information about the referred person.

A person who is nominated for assessment by the Panel is then referred to a 'multi-disciplinary agency' with which DHS has an agreement. The agency then conducts an analysis of the person's needs, consulting the person's carers, current service providers and, if the person agrees, their family. The agency then prepares a draft care plan for consideration by the Panel. The plan should specify the treatment, support and housing recommended by the agency.

The agency with which DHS has a current agreement is Indigo Assessment Service. It is managed by a consortium led by Western Region Health Service and includes Salvation Army St Kilda Crisis Service, Home Ground Services and North Western Mental Health.

The Panel may accept the recommended care plan with or without modification, and must appoint a care plan co-ordinator, who has responsibility for implementing and monitoring the care plan.

*Refusal to participate in the multiple and complex needs scheme*

A person may refuse to participate at any stage of the MACNI process. That is, individuals may refuse to be referred to the Panel, refuse to be assessed and refuse to be subject to a care plan. The CN Act allows a person or organisation seeking treatment for a person under the scheme, to whom a purported refusal is communicated, to assess whether, in their professional judgment, there has been a refusal for the purposes of the CN Act.

In the case of a person under the age of 18, a refusal may only be made by a parent or guardian.

It should be noted that legal representation is denied to people on this program. There is a possible case to be answered denying a person who has an intellectual disability legal representation at the hearing under the Victorian Charter of Human Rights.

## 13. THE VICTORIAN CHARTER OF HUMAN RIGHTS

The *Charter of Human Rights and Responsibilities 2006* (Vic) ('the Charter') came into force in its entirety on 1 January 2008. Broadly, the human rights which the Charter enumerates apply in two ways. First, in the interpretation and application of laws. Secondly, to the conduct and decision-making of public authorities. In both respects one would expect that, over time, the Charter would have an impact on the experience of people who have an intellectual disability. Certainly, the application of the Charter in these ways provides scope for representatives of people who have an intellectual disability to make human rights based arguments on their behalf.

To date, the Charter has been the subject of limited judicial consideration, and the extent to which it will affect the treatment of people who have an intellectual disability in the criminal justice system is uncertain. The Charter contains no specific provisions dealing with people who have an intellectual disability.

### **The effect of the Charter on interpretation and development of laws**

The Charter mandates that other statutes must, in so far as it is possible, be interpreted in a way that is compatible with human rights (s 32). Accordingly, any statutory provision which applies specifically to people who have an intellectual disability must be interpreted in light of the rights set out in the Charter. To take an example, s 193 of the *Disability Act 2006* (Vic) allows for the compulsory detention and treatment of people who have an intellectual disability who are regarded as a danger to themselves or others, even where they have not committed a criminal offence.<sup>70</sup> The kinds of treatment and conditions to which a person detained under such an order can be lawfully subject is not clearly limited by the *Disability Act*. In determining the lawful limits of such treatment, a Court would be bound to have regard to Charter rights, including the right of persons detained without charge to be treated in a way that is appropriate for persons who have not been convicted (s 22).

The Charter contains no provision which expressly requires the common law to be interpreted or developed in conformity with human rights, and the extent to which the Charter will have a bearing on the common law is unclear. However, at common law, international human rights instruments such as the Charter Committee on Poverty Issues (which the Charter largely adopts) are a legitimate influence on the exercise of common law judicial powers and discretions.<sup>71</sup> It has been held that the significance of these international instruments 'can only be enhanced' by the enactment of the Charter by the Victorian Parliament.<sup>72</sup>

At common law, a suspect's ability to understand their rights when being interviewed by police is highly relevant to the discretion to exclude evidence of admissions on the basis that they have been unfairly obtained.<sup>73</sup> The fact that the Charter contains an express recognition that all persons are entitled to the equal protection of law, it might be argued, reinforces the need to focus on the special needs of disadvantaged groups

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<sup>70</sup> Such an order can only be made by VCAT where the statutory criteria set out in s 191 of the *Disability Act* are met.

<sup>71</sup> See *Tomasevic v Travaglini* [2007] VSC 337, and the authorities cited at note p52

<sup>72</sup> *Ibid*, [55]

<sup>73</sup> See *R v Warrell* [1993] 1 VR 671 and *R v Li* [1993] 2 VR p80

when considering questions such as the fairness of admitting confessional material in a criminal case.

## **The effect of the Charter on conduct of public authorities**

The Charter makes it unlawful for a public authority to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right in making a decision (s 38). Public officials, statutory bodies, Councils, Ministers, and Victoria Police are all 'public authorities' within the meaning of the Charter (s 4).

So, wherever a public official or statutory body is given a statutory function with respect to people who have an intellectual disability, they must have regard to the rights of those people, as enumerated in the Charter. For example, it would seem that the Senior Practitioner appointed under the *Disability Act* would be a public authority within the meaning of the Charter. The Senior Practitioner is given a number of important powers and functions under the Act, including the ability to:

- monitor the administration of restrictive interventions and compulsory treatments by disability service providers and give directions about such treatments; and
- direct applications to be made for supervised treatment orders.

In exercising these functions, the Senior Practitioner is bound by s 38 of the Charter to consider the human rights of people who have a disability who may be subject to such treatment, including their rights to liberty, freedom of movement, and humane treatment.

Legal practitioners should become familiar with the Victorian Charter of Human Rights and consider challenging decisions made at every stage in the criminal justice system where their client who has an intellectual disability has been denied their rights.

## 14. APPENDICES

### **APPENDIX A – Other disabilities, conditions and health issues that may also impact upon people in the criminal justice system who have an intellectual disability**

#### ***Mental Health and Illness***

As noted above, many people who have an intellectual disability also have some form of mental health issue. These may include, among others, Anxiety, Depression, Bipolar Disorder/Manic Depression, Schizophrenia, Obsessive Compulsive Disorder, Personality Disorder. It is crucial that such issues are recognised and dealt with appropriately and - most importantly - that the person receives appropriate support and best possible treatment, for their mental health issue(s). Psychiatric diagnosis and - where relevant and appropriate - treatment, should be provided. It should however be noted that, although medication is often prescribed by psychiatrists (for example, serotonin or other chemicals for the treatment of depression) the most appropriate treatment will not necessarily be with medication, or medication alone, as appropriate counselling or psychological therapy and a supportive environment can be of equal or greater benefit in many cases.

It should be noted that correctional facilities and programs are subject to the provisions of the *EO Act* and the *DDA* relating to the provision of services. In addition, section 47 of the *Corrections Act 1986* (Vic) states the rights of prisoners, which include:

*(f) If intellectually disabled or mentally ill, the right to have reasonable access within the prison or, with the governor's approval, outside a prison to such care and treatment as the medical officer considers necessary or desirable in the circumstances.*

#### ***Physical Disabilities and Sensory Disabilities***

People who have an intellectual disability may also have one or more physical disability, sensory disability or illnesses. These will usually be apparent and in such cases it is expected that appropriate assistance, treatment and support in relation to them will be provided to the person while they are involved in the criminal justice system. In particular, there is some evidence that sensory disabilities such as hearing and sight impairment are high among people who have an intellectual disability. Such factors may impact on the person's ability to take advice and give instructions.<sup>74</sup>

#### ***Acquired Brain Injury (ABI)***

An acquired Brain Injury may result from many possible causes including accidental causes such as motor vehicle accidents, falls, assaults, epileptic seizures, drugs and/or alcohol abuse. Various different parts of the brain may be affected and impairment may include cognitive impairment, memory loss, and/or changed temperament. It is important to note, when working with a person who has an acquired brain injury who may appear to be "lazy", that they are not actually being purposely lazy but are in fact

<sup>74</sup> Vanny K, Levy M, Hayes S (2008) People with an Intellectual Disability in the Australian Criminal Justice System *Psychiatry Psychology and Law*, Vol 15, No 2, July 2008, pp261-271

exhibiting involuntary behaviour that results from the impairment of their brain. Accordingly, they should not be “punished” for such behaviour.

### ***ADHD (Attention Deficit Hyperactivity Disorder)***

ADHD may particularly be a factor affecting young people but may also have an impact on adults who have this disorder. ADHD is a behavioural and developmental disorder that includes, in varying degrees in different children, inattention, impulsivity and overactivity. The mind of a child with ADHD has been described by one expert as “the restless, circling brain”. Some researchers believe that in a person who has ADHD, key neurotransmitters (brain chemicals - a chemical substance that transmits nerve impulses across a synapse - the space between nerve cells or neurons) that release particular chemicals in the brain are not metabolised in the typical way. Following diagnosis of ADHD, medication may be prescribed that is thought to act on the neurotransmitters, so that greater amounts of the relevant chemical are released, helping to curb the hyperactive and compulsive behaviours and to aid concentration. Diagnosis by a paediatrician is necessary and generally only a paediatrician can prescribe the relevant medications.

Medication is not generally prescribed for adults but may serve a useful purpose in assisting children to get through their education with positive outcomes. A child with undiagnosed/untreated ADHD may hear or absorb only parts of what is being said to him/her. A person who has ADHD may also have great difficulty getting to sleep at night which may mean that they will have difficulty getting up in the morning and to work/school/appointments, etc., on time. ADHD can affect a person’s ability to gain from education and to participate in the workforce. In turn, their self-esteem and self-confidence can be lowered and they may be more likely to develop anxiety and/or depression. They may also be left vulnerable to entering the criminal justice system.

### ***Autism/ Autistic Spectrum Disorder (ASD)***

Autism is now known as Autistic Spectrum Disorder (ASD). The word “autism” (from the Greek word “autos” meaning “self”) was first used to describe the behaviour of children who showed little interest in others, insisted on routines and displayed unusual body movements such as flapping hands. Autism is now recognised as a “spectrum” which includes behaviour ranging from extreme to milder forms. Most people with autism, probably 70% of them, also have some degree of intellectual disability, although those with Asperger’s syndrome (one form of autism) typically have average to above average intelligence.

In Victoria, recent acknowledgement and inclusion of ASDs as a neurological impairment under the *Disability Act 2006* means that all people with an ASD (not only those who have an intellectual disability, or some other form of disability covered by the *Disability Act*) can now be considered for disability services.

People with significant autistic behaviour will usually be readily recognisable by lay persons, as well as by those in the medical and legal/justice professions, as having some form of disability. Approximately 50% of people with autism have no or little speech. They will also usually live with the support of carers and be unlikely to appear in the criminal justice system. However, some people, at the mild end of the autistic spectrum, have far less obvious features of autism and may not be easily recognisable.

This is particularly true of those people who have either Asperger's Syndrome or High Functioning Autism. (There are arguably some differences between these two forms of autism, particularly in early development, but the approaches to appropriately dealing with them are the same). For the purposes of this publication we will use the term "Asperger's Syndrome".

### ***Asperger's Syndrome***

People who have Asperger's Syndrome but do not have an intellectual disability are not significantly more likely to appear in the criminal justice system than people who do not have a disability. However, those who do enter the system may be at a distinct disadvantage. This is because some people who have Asperger's Syndrome may be described as having an "invisible or hidden disability", as they may not appear to have a disability at all. These people, particularly young people, may be particularly at risk of inappropriate treatment in the criminal justice system if their disability is not recognised and acknowledged. As noted above, many people who have Autism also have an intellectual disability. Some people who have Asperger's Syndrome (which is at the mild end of the Autism spectrum) have an intellectual disability, however, most have an average to above-average intelligence level, and a small percentage have very high intelligence levels; Albert Einstein and Isaac Newton, for example, are both thought to have had Asperger's Syndrome and many people who have Asperger's Syndrome pursue careers in engineering or sciences.

Because of the significant impact it may have on people, some of whom also have an intellectual disability, both in making them vulnerable to entering the criminal justice system and also on their experience of that system, Asperger's Syndrome is discussed at greater length in Appendix B of this publication (below). It will be noted that some of the "autistic" characteristics of a person who has Asperger's Syndrome (for example, difficulty making eye contact) also appear in the list of characteristics that people who have an intellectual disability may have, in section 2 of this publication, **THE EXPERIENCE OF THE PERSON WHO HAS AN INTELLECTUAL DISABILITY** (above). The information in Appendix B may also be useful for those working with people who have Asperger's Syndrome, but who do not have an intellectual disability.

## **APPENDIX B – Asperger’s Syndrome: An overview**

There are arguably some differences between two of the forms of autism known as Asperger’s Syndrome and High Functioning Autism, particularly in early development, but the approaches to appropriately dealing with them are the same. For the purposes of this publication we will use the term “Asperger’s Syndrome”.

Asperger’s Syndrome has been described by one writer as “autism’s gentle cousin”. Whereas people who have autism are sometimes described as “living in their own world”, people who have Asperger’s Syndrome have been described as “living in their own world *in* the world”.

Asperger’s Syndrome is a developmental disorder or difference that affects how the brain processes information. Neuro-imaging research has identified particular structural and functional differences (compared with neuro-typical people) in the brains of people who have Asperger’s Syndrome, in particular of the *amygdala*, a part of the brain associated with the recognition and regulation of emotions including anger, anxiety and sadness. Children who have Asperger’s Syndrome think about and understand the world somewhat differently from neuro-typical children. (A person who has Asperger’s Syndrome can be likened to a person from a foreign culture having to learn how to function in a new country, where the language and social customs are very different from their own). Asperger’s Syndrome shapes a child’s social, emotional and communication skills and behaviours. Children with Asperger’s Syndrome can have low self-esteem, a predisposition to anxiety, difficulty understanding why someone (such as a bully) would behave in a particular way. They use cognitive mechanisms to compensate for impaired ability to process social information. This is extremely stressful for them and can lead to mental exhaustion by the end of what, for a neuro-typical child, would be a normal and not particularly stressful day.

### ***Some aspects of Asperger’s Syndrome:***

#### **Communication, use of language and conversation**

People who have Asperger’s Syndrome may have difficulty having a reciprocal conversation. They may tend to speak “at” people rather than with them. They may sometimes use unusual words and have favourite words that they use frequently as substitutes for the more usual choices of words. For example “Would you please attack (or burn) that?” (pointing at a plate of food they have finished with), meaning “Would you please take the plate away?” They may often ask unusual, sometimes bizarre, questions, such as “What would you do (or what would you say) if a man came and sat down beside us and started eating his hat?” This can be a strategy to try to have a kind of conversation. It can become rather tiresome for a person on the receiving end. (Typical peer group members are more likely to wish to participate in a more typical and reciprocal conversation about how they are feeling, what they have been doing, would like to do, are thinking, etc.)

People who have Asperger’s Syndrome may also use language inappropriately and in a way that may, at some point in their lives, lead them into legal difficulties. For example, they may say to someone, without meaning the usual sense of the words, possibly

thinking they are being amusing, “I’d like to kill you” or ask “Can I kill you?”. When speaking to those close to them who know them well this will not usually be a problem. It may, however, have a different affect if addressed to a stranger. Where a neuro-typical child can be quickly taught not to say such things, a child who has Asperger’s Syndrome may not easily learn this lesson and may continue to use the inappropriate words. Over-use of swear words and an inability to assess the appropriateness of the setting or company in which they are being used, can also be an issue for people who have Asperger’s.

Diagnosis may lead to a young person with Asperger’s Syndrome receiving important help from a speech pathologist to develop communication skills. This includes learning how to begin, continue, repair and end a conversation. These are skills that typical children learn progressively and are soon able to utilise intuitively.

People who have Asperger’s Syndrome take language very literally and may have difficulty understanding that a literal meaning of words is not always intended by a speaker. Expressions such as “You’ll have to fly to get there on time” are often lost on people who have Asperger’s Syndrome. Statements such as “It’s raining cats and dogs” may leave them puzzled, expecting to see cats and dogs falling out of the sky. If something is inferred or implied they often may not pick it up. They need the whole thing spelt out clearly to be able to process it. This is often the hardest part of communication for a person with Asperger’s.

People who have Asperger’s Syndrome also may not be able to process information quickly, particularly if there is noise and activity around them, and need to be given time to respond to questions and support and clarification to understand what is being asked of them. Instructions in writing, broken up into smaller chunks and also explained verbally, are recommended. People who have Asperger’s Syndrome may be very hesitant to ask for clarification from people in authority (teachers, police officers) if they have not understood instructions, because they may feel this will draw attention to them. They may also fear they may be “yelled at” for not having listened and understood in the first place, or they may feel it would be rude to say they do not understand, as they can see that the person is trying hard to explain clearly to them.

### **Communication and work using computers**

It is often extremely beneficial for people with Asperger’s, or high-functioning autism, to use forms of electronic communication such as computers, internet and text messaging, to communicate with people. They do not have to cope with making eye contact, reading body language and tones of voice which can be an enormous relief for some people. Similarly, issues with difficulty writing by hand can be avoided by use of computers in employment or to do school/university work. Taking legal instructions and giving legal advice can be assisted by using these methods of communication, as can successfully providing counselling or psychological assistance.

### **Weak central coherence**

People who have Asperger’s Syndrome are said to have “weak central coherence” which means that they have considerable difficulty understanding the overall picture or gist of things. For them, the details are visible but the context is often not perceived.

## **Non-verbal communication – eye contact and facial expression**

Many people who have Asperger's Syndrome often do not make good eye contact and their facial expressions may be limited. Making eye contact can be literally painful for a person who has Asperger's Syndrome and lack of eye contact, or seeming not to be paying attention to someone speaking to them, often does not mean that they are not taking in what is being said. This will vary from person to person. For example, some people may be better at these things than others if they have a strong interest in drama and/or watching television series. A person who has Asperger's may like to "doodle" with a pen while being spoken to, rather than look at the speaker, but this does not mean that they are not listening to the speaker.

### **Face Blindness (Prosopagnosia)**

Some people with Asperger's Syndrome have "face blindness" (prosopagnosia), a condition in which they have difficulty with facial recognition. It is one of the conditions known to occur occasionally with autism and Asperger's Syndrome.

Some people with Asperger's have traits that seem similar to, but are not, face blindness. A person with Asperger's Syndrome who avoids looking at people will have difficulty identifying them by face. A person with Asperger's Syndrome might only look at, for example, a person's mouth and not other parts of the face.

A drawback of this that might impact on a person in the justice system is that, when asked what someone looked like, they would say that they did not know/could not describe them. They might then be taken to be either lying or, at very least, rude.

Recollection of people's names may also be an issue for a person who has Asperger's, possibly connected to the issue of face blindness.

It may therefore be helpful, when communicating with a person who has Asperger's, to identify yourself to them on each meeting, explaining/reminding them who you are and why you are there.

### **Emotions and empathy**

People who have Asperger's Syndrome often have difficulty reading and modulating their own emotions. It is extremely important to note, however, that children and adults who have Asperger's Syndrome do have the same emotions as typical children or adults, for example they do feel love and admiration, etc., often very strongly. They just have difficulty sometimes in recognising and modulating their feelings.

They may also have difficulty reading other people's emotions. They may only read "happy" and "angry" from other people's facial expressions and body language, and they may even get those confused. They may have difficulty working out what other people are "thinking". They may also have difficulty reading people's tones of voice, facial expressions and body language. (In contrast to those who have Asperger's Syndrome, typical children intuitively consider and integrate all the facial signs, voice tones and context, to work out which emotion is being conveyed. Typical children

quickly develop the ability to work out, as far as possible, what other people are “thinking”).

Failure to correctly “read” another person’s thoughts and/or feelings may occasionally lead to a person who has Asperger’s Syndrome incorrectly believing that another person, of whom they are particularly fond, reciprocates their feelings. A friendly, smiling face, for example, may be misinterpreted and have more read into it than is intended by the other person. It is possible that this may occasionally make a person who has Asperger’s vulnerable to accusations of stalking.

For many people who have Asperger’s Syndrome the difficulty with recognising and understanding their own emotions means that many subtle forms of “feelings” (for example, embarrassment, disappointment, surprise) are not always clearly understood by them; this can leave them feeling confused. As a result, people, and particularly children/young people who have Asperger’s Syndrome, may often react to any of these emotions with a feeling of anger and confusion, rather than one of a number of other, more appropriate, reactions that neuro-typical children would feel and exhibit.

A diagnosis of Asperger’s Syndrome may lead to assistance with learning to overcome or compensate for these difficulties being provided by psychologists and speech pathologists. Early diagnosis is extremely important to ensure that young people who have Asperger’s can receive crucial early intervention assistance.

### **Meltdowns and behavioural issues**

Stressful social interactions and distressing environmental factors can lead to a child or adult person who has Asperger’s becoming unable to cope. A child in a school setting or an adult in a noisy, busy shopping centre, or social setting, may become overwhelmed by the many sounds and activities surrounding them and the extremely distressing demands of daily social interaction. A child may be touched and jostled in a queue to the point that the touch of someone nearby in the queue is unbearable for them. They may feel they are being pushed and therefore hit out at the other person. A meltdown can cause a person to simply not be able to do anything at all; they may not be able to communicate at these times, although they may know that they need to do something. This can be extremely debilitating and leave them in a state where they simply want to retreat and curl up in a ball, possibly for hours, until their distress subsides. Such meltdowns, usually caused by sensory over-load, may be avoided or made less traumatic by careful choice of environment and timing of activities.

### **Social interaction and vulnerability**

Making typical friendships is often difficult for people who have Asperger’s Syndrome because of the communication and conversation and empathy difficulties discussed above. These children/people are also more likely to be bullied, or used by others as “pawns” in social (and sometimes criminal) interactions, than typical children/people.

### **Fear of authority and eagerness to please**

People who have Asperger’s can be fearful of people in authority. They may know that they need to be polite and honest, but that can sometimes be taken too far, and an attempt to please can lead to them being totally misinterpreted.

## **Low self-esteem, anxiety and depression**

Because of the issues mentioned above, some people who have Asperger's Syndrome may "feel" or "know" that they are somewhat different from other people and may therefore develop resultant low self-esteem. This may also lead to anxiety and sometimes to depression.

## **Organisational skills**

Many people with Asperger's Syndrome have "impaired executive function" which makes it difficult for them to organise things. They may need more support than typical children/adults who, by a relatively early stage of childhood or adolescence, are usually "taking responsibility" for organising and executing activities at school and at home. It is noteworthy that some highly successful people who have Asperger's Syndrome have a person in their life who acts as a kind of executive secretary for them (often a spouse or a paid employee) and that, without this person, they would be organisationally lost. For children who have Asperger's Syndrome, a parent often fills this role.

Confronted with a written question for school work, or other purposes (such as written questions from legal advisers or for police questioning processes), a person who has Asperger's Syndrome may be easily overwhelmed, seeing just a large chunk of writing, and be unable to break it down and work out exactly what they are being asked to do, what steps they need to take and what materials they will need to do these things. Similarly, verbal questions may also appear to be overwhelming, and require to be "broken down", clearly communicated and clarified. Providing a written copy of a discussion or meeting where instructions have been taken and legal advice has been given, can be extremely helpful.

## **Time perception and time management**

The perception of time of a person who has Asperger's Syndrome is often different from that of typical adults/children, making it difficult for them to judge and manage time and complete tasks within a particular time frame. It may also mean that they may sometimes have difficulty getting to a particular place at the appointed time. This different perception of time in some people who have Asperger's Syndrome has been likened to "Pacific Islands' time", a different perception of time in a different culture.

## **Homework**

Many children who have Asperger's Syndrome have a strong aversion to "Homework". The reason for this is that children who have Asperger's Syndrome spend all day at school having to consciously and intellectually interpret what is going on around them by way of conversation, meanings, body language, facial expressions, tones of voice and the myriad of other subtle social messages and academic ones. Unlike typical children, children who have Asperger's have to "consciously" learn social integration skills, decipher the social cues and codes and cognitively determine what to do and say in social situations.

They also have to cope with the intense sensory experiences of a noisy classroom and rarely have an opportunity to relax during the school day. (All of this is done intuitively and without significant stress by their typical peers). This is extremely demanding and stressful for many children who have Asperger's Syndrome. By the end of the school day these children are often emotionally and intellectually drained; some have described it as feeling as though "their brains are fried".

For many children who have Asperger's Syndrome home is seen as a place to relax and unwind and lower their stress and anxiety levels so that they can be refreshed to face the next day at school. To expect these children to do more school work at home is often counterproductive. Instead, there is a strong argument that it is preferable to incorporate the "Homework" and other assignments that might be expected to be completed at home by typical children, into the school day. This is sometimes done by dropping one or more subjects and spending the time on "homework".

### **Areas of academic weakness**

Children/students who have Asperger's Syndrome may have a particular weakness in one area of learning, for example, mathematics. They may need additional, preferably one-on-one, tutoring to assist with this.

### **Sport**

Many children who have Asperger's Syndrome have difficulties with fine and/or gross motor skills and coordination making them less skilled at sports. Some of them may become acutely aware of being less able than typical children at sports involving teamwork and/or hand/eye coordination and motor skills. Understanding rules of ball games and having to process the many messages coming from all directions at once can be overwhelming for children with Asperger's Syndrome. Having to compete in group sports may become increasingly demoralising and humiliating for such children to the point where they avoid Physical Education classes and activities whenever possible. They may, on the other hand, be happy to work out in a gym, to use an exercise machine at home, or do some particular sports, such as swimming, because these are sole activities where no team work is required and no one is judging performance.

### **Sensory issues**

For many people who have Asperger's Syndrome, certain sensory stimuli that do not bother typical people, are intolerable. The experience, for them, can be likened to the same type of intense, unpleasant feeling or reaction experienced by many neuro-typical people when they hear the sound of a piece of chalk screeching down a blackboard, or experience the catching of a broken finger nail on fabric.

**Touch** – Many children who have Asperger's Syndrome may be bothered by the feeling of tags on clothes and therefore usually cut them off. They may not like the feeling of clothes around their neck, wrists or ankles. Some people may be extremely bothered by, for example, the feeling or sound of car air conditioning blowing in their face.

Many children with Asperger's Syndrome are not "cuddly" children. They may not like people touching them or, for example, touching their hair. Some may find physical

touch from others to be extremely distressing and hesitate to move around in the community for fear of being brushed against or accidentally touched.

On the other hand, some people who have Asperger's find great relief from stress and anxiety of their day to day life in being firmly held or covered by, for example, a specially designed weighted blanket. They have a need for touch and for being close, but it disturbs them. The weighted blanket provides that, like a hug, but without involving another person which is often too overwhelming for the person with Asperger's. Hence they get their tactile needs met, but in a way that they can cope with. It is often also found to be very "containing" which can be very important for people with Asperger's who can feel lost in big, open spaces.

**Taste, Smell and Feel** – Some people who have Asperger's, because of sensory issues, have limited foods that they can tolerate and may be upset by some smells or perfumes that would not particularly affect neuro-typical people. They may be unable to tolerate touching (and therefore preparing) or eating certain foods because of their texture.

**Sound and Noise** – Many children and adults who have Asperger's Syndrome are bothered by particular sounds. This will vary from person to person but may include, for example, the sounds of people eating and drinking, the sounds of household appliances, such as fridges, car air conditioning and other sounds that would not bother or even be particularly noticed by, neuro-typical people. Some particular types of music or radio programs may be intolerable, while other music, even very loud music, may be readily tolerated or even enjoyed. Loud noises that the neuro-typical person hears as "normal" can see the person curling up on the floor in extreme distress, covering their ears.

MP3 players are particularly popular with some people who have Asperger's as a source of "white noise", to drown out other sounds that they find distressing. (An MP3 player is a portable audio device people can use to listen to songs/recordings saved in the MP3 format). In a similar way, people who experience tinnitus (perceived ringing in the ears) use "white noise" as tinnitus maskers. Tinnitus maskers are a range of devices based on simple white noise machines which are used to add natural or artificial sound into the person's environment, in order to suppress or mask the perceived ringing.

The mechanism of sound masking can be explained by analogy with light. In a dark room where someone is turning a lamp on and off, the light will be obviously noticeable. However, if the overhead lights are turned on, turning on the lamp will no longer be as distracting because it has been "masked". Tinnitus maskers increase the level of sound in the listener's environment and therefore mask the ringing in the sufferer's head with a calming, less intrusive sound. A similar effect is achieved by some people who have Asperger's to reduce the distressing effects of problematic noise. Good sound-proofing of the living or work environment can also be extremely beneficial for people who have Asperger's, as can quiet household appliances. A quiet and non-distracting place is important for daily wellbeing and also essential for taking legal instructions and giving legal advice in.

## **Obsessive Compulsive behaviours**

Some people who have Asperger's Syndrome may also have some obsessive compulsive behaviours or issues. For example, they may have an unusual or exaggerated concern about cleanliness, because of fear of dirt or germs, and may therefore wash their hands very frequently and dislike touching rubbish bins. An advantage of this characteristic may be that the person will be extremely good at a job such as packing/unpacking and arranging items that have to be placed very precisely.

## **Special interests**

People who have Asperger's often have one or more area of special interest to which they will devote a lot of time and become extremely knowledgeable about. The classic example is that of the hobby of "train spotting". Ideally, the person's particular interest could become the subject of their studies and future employment. A person with Asperger's may not cope with just any job as they may not see why it needs to be done. Having only one interest makes it hard to comprehend how someone would want to do anything unrelated to that interest. Finding work in the field of their special interest is therefore highly advisable.

A drawback of this characteristic is that the person may consider it a "waste of time" to learn about other important topics or areas of study, as they cannot understand why others would waste their time on learning about things that are of no interest to them. This can be a problem in the school setting. Additional efforts may be needed to encourage the person to study outside of their field of special interest and to convince them that this is required for their future educational development and may actually benefit them.

Another drawback of the special interest characteristic can be that the person only wishes to discuss, or even "lecture on", their special topic. This can lead to boredom for their audience. Additional efforts may therefore be required to teach the person to severely limit the length of their discussions of their special topic and to understand that others are not necessarily going to be as interested in it as they are.

## **Reflecting on the day's conversations and events**

Many people who have Asperger's "replay" whole segments of their day's events in their mind, perhaps while going to sleep (which may delay the sleep process and leave them with insufficient sleep) and ponder on the true meaning of events or things people said. Some people who have Asperger's report that it is like watching a movie in their head; they can recall the precise detail of the events or conversations. They can dwell on conversations for a long time and wonder why someone said or did something, and try to work out what they meant. They may frequently take a negative interpretation of what happened or was said. Many people with Asperger's never go away from anything without later analysing it. This may, indeed, be one of the characteristics that contribute to them often being very good at whatever it is they do.

## **Strengths and interests**

It is important to note, and keep in mind, that people who have Asperger's Syndrome, while being a little different in some ways from people who are neuro-typical, usually also have many talents, gifts and skills. As noted previously, for example, many scientists and engineers are people who have Asperger's. People who have Asperger's often have a very good sense of humour. They also make extremely loyal friends and are devoted family members.

## **Bibliography to Appendix B**

Attwood, Tony - **Asperger's Syndrome. A guide for Parents and Professionals** (Jessica Kingsley Publishers, London, 1998)

Attwood, Tony - **The Complete Guide to Asperger's Syndrome** (Jessica Kingsley Publishers, London, 2007)

Eisenmeyer, Richard - **Having Asperger's Syndrome: A First Consultation** (DVD) (available through Autism Australia)

Green, Christopher - **Understanding ADHD** (Doubleday Australia, 2004)

Robison, John Elder - **Be Different: Adventures of a Free-Range Aspergian (With practical advice for Aspergians, Misfits, Families & Teachers)** (Bantam, Random House, Australia, 2011)

Wing, Lorna - **The Autistic Spectrum** (Constable & Robinson, London, 2003)

## APPENDIX C – Victoria Legal Aid Fact Sheet – Assisting Clients who have an Intellectual Disability



### VLA Factsheet - Assisting Clients who have an Intellectual Disability

Victoria Legal Aid (VLA) recognises that people who have an intellectual disability are more vulnerable than other members of the community in certain areas of law. VLA has responded by targeting guidelines to meet this need. This factsheet contains information on a few common areas where practitioners might need to assist clients who may have an intellectual disability.

**Special Circumstances** If your client has an intellectual disability, the special circumstances guidelines can assist your client to qualify for a grant of assistance. If an applicant qualifies on the means test, but the matter is not otherwise one which VLA would fund, VLA may provide a grant of assistance under the special circumstances guidelines if the applicant has an intellectual disability.

**Infringements** People who have an intellectual impairment can experience greater difficulty managing accumulated fines. Recognising this, VLA's infringements guideline applies specifically to a person who has, or had suffered, at the time of the offence, from a mental disorder, intellectual impairment, brain injury or dementia. If you have a client with an intellectual disability who is liable to pay multiple infringements that exceed \$1000 your client may qualify for assistance to discharge or vary those infringements. (State Civil Law guideline 10)

**Victims of Crime Assistance Tribunal** There is evidence that people who have an intellectual disability may be three times more likely than those without a disability to be victims of physical assault, sexual assault and robbery. VLA has implemented a new Victims of Crime Assistance Tribunal (VOCAT) guideline for an applicant to be represented in the Victims of Crime Assistance Tribunal by an in-house practitioner or a Community Legal Centre. If you have a client who may be eligible to make a claim from the tribunal you should discuss obtaining a grant of assistance from VLA. Applications for assistance for VOCAT matters are not subject to the means test. (State Civil Law guideline 5a)

**Child Protection** Studies in the child protection arena have shown that a disproportionately large number of children of parents with intellectual disabilities are removed from the primary carer. VLA has adopted broad guidelines in Children's Court (Family Division) matters. If you have a client who opposes an order sought by the Department of Human Services you should discuss obtaining a grant of assistance for your client. (State Criminal Law guideline 5.3)

**Family Violence** Having an intellectual disability may increase the likelihood of being involved in an incident of family violence. VLA facilitates representation for applicants and respondents in family violence matters pursuant to court orders and also via grants of assistance. If you have a client who needs assistance for an intervention order matter, you should discuss your client's matter with VLA. (State Civil Law guideline 6)

**Criminal Prosecutions** Studies have shown that people with an intellectual disability are overrepresented in prison populations. VLA's summary crime guidelines emphasise assisting clients who at risk of a term of imprisonment. (State Criminal Law guideline 1.2)

**Other matters** VLA also provides grants of assistance in the following areas - Mental Health Review Board Hearings, Guardianship matters, Administration Matters, Equal Opportunity Cases, Social Security Cases, Sex Offender Monitoring, Family Law, Traffic Prosecutions & Public Interest Matters. If you are unsure whether VLA provides assistance in a particular area you can call for advice.

#### Contact VLA

If you would like to discuss any of the guidelines above or if you have any questions in relation to the assistance that VLA can provide you can contact VLA's Legal & Policy team on:  
Phone – 9606 5212      Fax – 9269 0250

## 15. USEFUL CONTACTS

### **ACSO (Australian Community Support Organisation)**

1 Hoddle Street  
Richmond VIC 3121  
P.O Box 14278, Melbourne VIC 8001  
Ph: (03) 9413 7000  
[www.acso.org.au](http://www.acso.org.au)

### **Adult Parole Board of Victoria**

4/444 Swanston St  
Carlton VIC 3053  
Ph: (03) 9094 2111  
Fax: (03) 9094 2125  
Interpreter Service 131 450 and ask for the Adult Parole Board  
Email: [apb.enquiries@justice.vic.gov.au](mailto:apb.enquiries@justice.vic.gov.au)

### **AMIDA**

Action for more independence and dignity in accommodation  
1<sup>st</sup> Floor - Ross House  
247 Flinders Lane  
Melbourne VIC 3000  
Ph: (03) 9650 2722  
[www.amida.org.au](http://www.amida.org.au)

### **ARC LIST (Assessment and Referral Court List)**

Melbourne Magistrates' Court  
Level 4, 233 William Street  
Melbourne VIC 3000  
GPO Box 882G, Melbourne VIC 3001  
Ph: (03) 9628 7936 or (03) 9628 7975  
Fax (03) 9628 7976  
Email: [cisp@justice.vic.gov.au](mailto:cisp@justice.vic.gov.au)

### **Association for Children with a Disability**

Suite 2/98 Morang Road  
Hawthorn VIC 3122  
Ph: (03) 9818 2000  
[www.acd.org.au](http://www.acd.org.au)  
[mail@acd.org.au](mailto:mail@acd.org.au)

### **Australian Human Rights Commission**

GPO Box 5218  
Sydney NSW 2001  
Ph: (02) 9284 9600  
Ph: 1300 369 711  
[www.hreoc.gov.au/disability\\_rights/](http://www.hreoc.gov.au/disability_rights/)

### **Carers Victoria**

Level 1, 37 Albert Street  
Footscray VIC 3011  
Ph: (03) 9396 9500 Free Call 1800 242 636  
[www.carersvic.org.au](http://www.carersvic.org.au)

### **Citizen Advocacy Sunbury and Districts**

5/36 Macedon Street  
Sunbury VIC 3426  
Ph: (03) 9744 7378  
Email: [casunbury1@bigpond.com.au](mailto:casunbury1@bigpond.com.au)

### **Colac Otway Region Advocacy Service**

50 Rae Street  
Colac VIC 3250  
Ph: (03) 5232 1009  
Email: [pgbrady@bigpond.net.au](mailto:pgbrady@bigpond.net.au)

### **Communication Rights Australia**

Unit 4, 3 Tuck Street  
Moorabbin VIC 3189  
Ph: (03) 9555 8552  
Ph: (03) 9555 8948  
Fax 61 3 9555 8550  
[www.caus.com.au](http://www.caus.com.au)

### **Corrections Victoria**

22/121 Exhibition Street  
Melbourne VIC 3001  
Ph: (03) 8684 6600  
[www.justice.vic.gov.au](http://www.justice.vic.gov.au)

### **County Court of Victoria**

250 William Street  
Melbourne VIC 3000  
Ph: (03) 8636 6510  
[www.countycourt.vic.gov.au](http://www.countycourt.vic.gov.au)

### **Court Network (Victorian Court Information & Welfare Network Inc.)**

Ground Floor, 565 Lonsdale St. Melbourne VIC 3000  
Ph: (03) 9603 7420  
Helpline 1800 681 614  
Email: [admin@courtnetwork.com.au](mailto:admin@courtnetwork.com.au)

### **Department of Human Services, Victoria (DHS)**

50 Lonsdale Street  
Melbourne, VIC 3000  
Local Call - 1300 650 172

### **Department of Human Services - Intake & Response**

#### **DHS – Intake & Response**

Melbourne Metropolitan Region  
Free Call - 1800 783 783

#### **DHS – Intake & Response**

Eastern Metropolitan Region  
Ph: 9843 6312

**DHS – Intake & Response**

North & West Metropolitan Region  
Ph: (03) 9412 2741

**DHS – Intake & Response**

Southern Metropolitan Region  
Local Call - 1300 131 079

**DHS – Intake & Response**

Barwon-South Western Region  
Free Call - 1800 675 132

**DHS – Intake & Response**

Gippsland Region  
Ph: (03) 5136 2474

**DHS – Intake & Response**

Grampians Region  
Free Call - 1800 670 143

**DHS – Intake & Response**

Hume Region  
Free Call - 1800 783 783 (Landline)  
1300 238 1323 (Mobile)

**DHS – Intake & Response**

Loddon-Mallee Region  
Free Call - 1800 229 822

**Disability Advocacy and Information Service Inc.**

20 Stanley Street (P.O Box 982)  
Wodonga VIC 3689  
Ph: 1300 886 388  
Ph: (02) 6056 2420  
[www.dais.org.au](http://www.dais.org.au)

**Disability Advocacy Victoria Inc. (DAV) (formerly Victorian Disability Advocacy Network (VDAN))**

DAV is the peak body for Victorian independent disability advocacy agencies.

C/- Communications Rights Australia  
4/3 Tuck Road  
Moorabbin 3189  
Ph: (03) 9555 8552  
Mob 0418 371 507  
Email: [info@vdan.org.au](mailto:info@vdan.org.au)  
[www.vdan.org.au](http://www.vdan.org.au)

**Disability Discrimination Legal Service**

Ross House  
2<sup>nd</sup> Floor 247 Flinders Lane  
Melbourne VIC 3000  
Ph: (03) 9654 8644  
Ph: 1300 882 872  
[www.communitylaw.org.au/ddls](http://www.communitylaw.org.au/ddls)

### **Disability Forensic Assessment and Treatment Service (DFATS)**

(formerly State-wide Forensic Services)

P O Box 137

FAIRFIELD VIC 3078

Ph: (03) 9280 2730

### **Disability Justice Advocacy**

86 Herbert Street

Northcote VIC 3070

Ph: (03) 9481 7022 Free Call 1800 808 126

[www.justadvocacy.com](http://www.justadvocacy.com)

### **Disability Resource Centre**

86-88 Herbert Street

Northcote VIC 3070

Ph: (03) 9481 6646

[www.drc.org.au](http://www.drc.org.au)

### **Disability Resource Centre – Outer South East Outreach Service**

186 Foster Street

East Dandenong VIC 3175

Ph: (03) 9791 4870 (Mon-Wed)

### **Disability Rights Victoria**

86 Herbert Street

Northcote VIC 3070

Ph: (03) 9489 2999

Email: [admin@leadershipplus.com](mailto:admin@leadershipplus.com)

### **Flat Out Inc.**

54 Pin Oak Crescent

Flemington VIC 3031

Ph: (03) 9372 6155

[www.flatout.org.au](http://www.flatout.org.au)

### **Gippsland Disability Advocacy**

P.O Box 409

Morwell VIC 3840

Ph: (03) 5133 9440

Email: [admin@gdai.org.au](mailto:admin@gdai.org.au)

### **Grampians Disability Advocacy Association Inc.**

#### **Ararat**

Shop 2, 32 Tuson Street

Ararat VIC 3377

Ph: (03) 5352 2722 Free Call 1800 552 272 [not mobiles]

Email: [asas@netconnect.com.au](mailto:asas@netconnect.com.au)

**Ballarat** - Ph: (03) 5333 7344

**Horsham** - Ph: (03) 5381 2400

### **Guardianship List, Victorian Civil & Administrative Tribunal (VCAT)**

55 King Street

Melbourne VIC 3000

Ph: (03) 9628 9911 Free call - country callers only - 1800 133 055

Fax (03) 9628 9932

Email: [vcat@vcat.vic.gov.au](mailto:vcat@vcat.vic.gov.au)

[www.vcat.vic.gov.au](http://www.vcat.vic.gov.au)

### **Health Services Commissioner, Victoria**

30<sup>th</sup> Floor 570 Bourke Street

Melbourne VIC 3000

Ph: (03) 8601 5200 Free Call 1800 136 066

[www.health.vic.gov.au/hsc/](http://www.health.vic.gov.au/hsc/)

### **Inside Access Project (a project of the Mental Health Legal Centre)**

Ph: (03) 9629 4422

(See Mental Health Legal Centre contact details, below)

### **Jesuit Social Services**

371 Church Street

P O Box 271

Richmond 3121

Ph: (03) 9427 7388

[www.jss.org.au/](http://www.jss.org.au/)

### **Leadership Plus (formerly Action for Community Living)**

Advocacy House

86 Herbert Street

Northcote VIC 3070

Ph: (03) 9489 2999

[www.leadershipplus.com](http://www.leadershipplus.com)

### **Magistrates' Court of Victoria**

233 William Street

Melbourne VIC 3000

Ph: (03) 9628 7777

[www.magistratescourt.vic.gov.au/](http://www.magistratescourt.vic.gov.au/)

### **MACNI (Multiple and Complex Needs Initiative)**

MACNI is managed by the Department of Human Services in partnership with the Department of Justice

### **Department of Human Services (MACNI)**

50 Lonsdale Street

Melbourne VIC 3000

Ph: (03) 9096 7995

### **MACNI Regional Co-ordinators:**

#### **Barwon-South West Region (MACNI)**

Department of Human Services

Cnr Fenwick & Little Malop Streets

Geelong VIC 3220

Ph: (03) 5226 4540

**Grampians Region (MACNI)**

Department of Human Services  
State Government Offices  
Cnr Mair & Doveton Streets  
Ballarat VIC 3350  
Ph: (03) 5333 6530

**Loddon-Mallee Region (MACNI)**

Department of Human Services  
74-78 Queen Street  
Bendigo VIC 3552  
Ph: (03) 5434 5555

**Hume Region (MACNI)**

Department of Human Services  
43-47 Rowan Street  
Wangaratta VIC 3677  
Ph: (03) 5722 0555

**Gippsland Region (MACNI)**

Department of Human Services  
64 Church Street  
Traralgon VIC 3844  
Ph: (03) 5177 2500

**North & Western Metropolitan Region (MACNI)**

Department of Human Services  
145 Smith Street  
Fitzroy VIC 3065  
Ph: (03) 9412 5333

**Eastern Metropolitan Region (MACNI)**

Department of Human Services  
883 Whitehorse Road  
Box Hill VIC 3125  
Ph: (03) 9843 6000

**Southern Metropolitan Region (MACNI)**

Department of Human Services  
122 Thomas Street  
Dandenong VIC 3175  
Ph: (03) 9213 2111

**MACNI Department of Justice (Corrections Victoria)  
State-wide Co-ordinator**

22/121 Exhibition Street  
Disability Programs  
Melbourne VIC 3000  
Ph: 0488 309 363

### **Melbourne East Disability Advocacy**

P O Box 302  
Surrey Hills VIC 3127  
Ph: (03) 9808 8633  
[www.meda.org.au](http://www.meda.org.au)

### **Mental Health Legal Centre Inc.**

Level 9, 10–16 Queen Street  
Melbourne VIC 3000  
Ph: (03) 9629 4422; 1800 555 887 (toll free)  
Fax (03) 9614 0488  
[www.communitylaw.org.au/mentalhealth](http://www.communitylaw.org.au/mentalhealth)

### **North East Citizen Advocacy**

P.O Box 251  
Watsonia VIC 3087  
Ph: (03) 8407 3684

### **Office of the Public Advocate**

Level 5, 436 Lonsdale Street  
Melbourne VIC 3000  
Ph: 1300 309 337  
Ph: (03) 9603 9567

### **Office of the Senior Practitioner**

Level 7, 50 Lonsdale Street  
Melbourne VIC 3000  
GPO Box 4057, Melbourne VIC 3001  
Ph: (03) 9096 9968  
Email: [seniorpractitioner@dhs.vic.gov.au](mailto:seniorpractitioner@dhs.vic.gov.au)  
[www.dhs.vic.gov.au/ds/osp](http://www.dhs.vic.gov.au/ds/osp)

### **Our Community**

21 Stanley Street  
West Melbourne VIC 3003  
Ph: (03) 9320 6800  
Email: [service@ourcommunity.com.au](mailto:service@ourcommunity.com.au)  
[www.ourcommunity.com.au](http://www.ourcommunity.com.au)

### **Regional Information and Advocacy Council Inc. (RIAC) Head Office, Shepparton**

P O Box 1763  
Shepparton VIC 3632  
Ph: (03) 5822 1944  
Intake – Free Call 1800 221 944  
[www.riac.org.au](http://www.riac.org.au)

### **Regional Information and Advocacy Council Inc. (RIAC) Bendigo**

P.O Box 2219  
Bendigo VIC 3554  
Ph: (03) 5443 0550  
Intake – Free Call 1800 221 944  
[www.riac.org.au](http://www.riac.org.au)

### **Regional Information and Advocacy Council Inc. (RIAC) Geelong**

P O Box 8203

Newtown VIC 3220

Ph: (03) 5221 8033

Intake – Free Call 1800 221 944

[www.riac.org.au](http://www.riac.org.au)

### **Regional Information and Advocacy Council Inc. (RIAC) Mildura**

P O Box 2641

Mildura VIC 3502

Intake – Free Call 1800 221 944

[www.riac.org.au](http://www.riac.org.au)

### **Reinforce Inc.**

2<sup>nd</sup> Floor 247 – 251 Flinders Street

Melbourne VIC 3000

Ph: (03) 9650 2730

### **Southern Disability Advocacy**

P.O Box 161

Bentleigh VIC 3204

Ph: (03) 9533 5977

Email: [info@southernda.org.au](mailto:info@southernda.org.au)

### **Southwest Advocacy**

P.O Box 480

Warrnambool VIC 3280

Ph: (03) 5561 4584

[www.southwestadvocacy.org.au](http://www.southwestadvocacy.org.au)

### **STAR Victoria Inc.**

Advocating for people with intellectual disability and their families

Ross House

2<sup>nd</sup> Floor 247 Flinders Lane

Melbourne VIC 3000

Ph: (03) 9650 2730

[www.starvictoria.org.au](http://www.starvictoria.org.au)

### **Supreme Court of Victoria**

210 William Street

Melbourne VIC 3000

Ph: (03) 9603 6111

[www.supremecourt.vic.gov.au](http://www.supremecourt.vic.gov.au)

### **VALID**

(Victorian Advocacy League for Individuals with Disability Inc.)

235 Napier Street

Fitzroy VIC 3065

Ph: (03) 9416 4003 Free Call 1800 655 570 (Rural Victoria only)

[www.valid.org.au](http://www.valid.org.au)

### **Victoria Legal Aid**

350 Queen Street

Melbourne VIC 3000

Ph: (03) 9269 0120 Free Call – Country callers 1800 677 402

[www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)

### **Victorian Council of Social Services (VCOSS)**

Level 8, 128 Exhibition Street

Melbourne VIC 3000

Ph: (03) 9654 5050 Free Call 1800 133 340

Email: [vcoss@vcoss.org.au](mailto:vcoss@vcoss.org.au)

[www.vcoss.org.au](http://www.vcoss.org.au)

### **Victorian Disability Advisory Council**

GPO Box 2392V

Melbourne VIC 3001

Ph: (03) 9208 3015

Email: [vdac@dpd.vic.gov.au](mailto:vdac@dpd.vic.gov.au)

### **Victorian Equal Opportunity & Human Rights Commission**

Level 3, 240 Lygon Street

Carlton VIC 3053

Ph: 1300 891 848

[www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au)

### **Villamanta Disability Rights Legal Service Inc.**

44 Bellerine Street

Geelong VIC 3220

Ph: 1800 014 111 (callers who have a disability)

Ph: (03) 5229 2925 (all other callers)

[www.villamanta.org.au](http://www.villamanta.org.au)

### **Women with Disabilities Victoria *Empowering women***

P.O Box 1160K

Melbourne VIC 3000

Ph: (03) 9664 9317

[www.wdv.org.au](http://www.wdv.org.au)

### **Yooralla Society of Victoria**

P.O Box 200

Melbourne VIC 8009

Ph: (03) 9666 4500

Email: [ooralla@ooralla.com.au](mailto:ooralla@ooralla.com.au)

[www.yooralla.com.au](http://www.yooralla.com.au)

### **Young People in Nursing Homes National Alliance**

3 Wall Street

Richmond VIC 3121

Ph: (03) 9428 5677

[www.ypinh.org.au](http://www.ypinh.org.au)

### **Youth Disability Advocacy Service**

Level 2, 180 Flinders Street  
Melbourne VIC 3000

Ph: (03) 9267 3755 or (03) 9267 3733 or 1300 727 176 (Cost of a local call)

[www.ydas.org.au](http://www.ydas.org.au)

### **Youth Parole Board**

Level 10, 50 Lonsdale Street  
Melbourne VIC 3000

Ph: (03) 9096 7534

Email: [YouthJustice@dhs.vic.gov.au](mailto:YouthJustice@dhs.vic.gov.au);

[youthparole@dhs.vic.gov.au](mailto:youthparole@dhs.vic.gov.au)

[www.cyf.vic.gov.au/youth-justice/parole](http://www.cyf.vic.gov.au/youth-justice/parole)

### **Acquired Brain Injury Assistance**

For information regarding advocacy for people with acquired brain injury contact:

#### **Leadership Plus**

Advocacy House

86 Herbert Street

Northcote VIC 3070

Ph: (03) 9489 2999 TTY: 9489 1179

[www.leadershipplus.com](http://www.leadershipplus.com)

For information regarding acquired brain injury support, resources, and referrals contact:

#### **BrainLink**

The Nerve Centre

54 Railway Road

Blackburn VIC 3130

Ph: (03) 9845 2950 Free Call 1800 677 579

[www.brainlink.org.au](http://www.brainlink.org.au)

For acquired brain injury assessment and consulting contact:

#### **ARBIAS (Alcohol Related Brain Injury Australian Services)**

P O Box 5002

Brunswick VIC 3056

Ph: (03) 8388 1222

[www.arbias.org.au](http://www.arbias.org.au)

ISBN 978-0-9871576-2-1

