



14 August 2013

Australian Human Rights Commission  
GPO Box 5218  
Sydney NSW 2001

By email to: [cristina.ricci@humanrights.gov.au](mailto:cristina.ricci@humanrights.gov.au)

Dear Ms Ricci

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

The Law Institute of Victoria welcomes the opportunity to provide comment on the Australian Human Rights Commission Issues Paper on access to justice in the criminal justice system for people with disability. The LIV is grateful for the extension of time in which to make the submission.

Please contact Courtney Guilliat, Policy Adviser for the Administrative law and Human Rights Section, on (03) 9607 9375 or [cguilliatt@liv.asn.au](mailto:cguilliatt@liv.asn.au) in relation to this submission.

Yours sincerely,

**Reynah Tang**  
President  
Law Institute of Victoria

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

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GPO Box 5218  
Sydney NSW 2001

**Via email:** [cristina.ricci@humanrights.gov.au](mailto:cristina.ricci@humanrights.gov.au)

14 August 2013

**Queries regarding this submission should be directed to:**

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## Introduction

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

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

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

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

## The Issues Paper and identified barriers to justice

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

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

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

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

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

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

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

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

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

## **Access to justice for people with intellectual disability and psychosocial disability**

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

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

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

We note that, on 5 March 2013, the VPLRC tabled its final report on the Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers.<sup>2</sup> Recommendations included that the Victorian Government extend across Victoria's major metropolitan and regional centres the problem-solving court models operating at the Neighbourhood Justice Centre and the Assessment and Referral Court List [Recommendation 34]. We note that KPMG is undertaking an evaluation of the Assessment and Referral Court List but that this evaluation is yet to be finalised.

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

The LIV submits that the provision of legal assistance would play a part in ensuring people with disability receive the appropriate supports to access justice in the criminal justice system. Chronic underfunding of legal aid means that many people, including those with disability, are unable to obtain legal advice or representation. The LIV has been actively lobbying the federal and state governments for the past five years to increase legal aid funding.<sup>3</sup> The LIV has also called on the federal government to increase funding to Community Legal Centres and restore funding to the

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<sup>2</sup> Victorian Parliament Law Reform Committee, *Report on the Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (March 2013), available at: <[http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05\\_Access\\_to\\_justice\\_intellectually\\_disabled\\_-\\_Final\\_Report.pdf](http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf)>.

<sup>3</sup> More information on the LIV's lobbying efforts is available on the LIV/Victorian Bar Legal Aid Matters website: <<http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/LIV-projects/Legal-Aid-Matters>>.

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Mental Health Legal Centre, an independent community based service providing free, confidential and independent legal assistance to Victorians on legal issues related to mental illness.<sup>4</sup>

## People with psychosocial disability as victims of violence

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

## Women who experience violence and abuse in public psychiatric units

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

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

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

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<sup>4</sup> See Law Institute of Victoria President's blog, *Mental Health and the Law* (March 14 2013), available at <<http://www.liv.asn.au/Mobile/Home/PresidentsBlog/BlogPost.aspx?blogpostid=413707>>.

<sup>5</sup> Karen Hughes, Mark A Bellis, Lisa Jones, Sara Wood, Geoff Bates, Lindsay Eckley, Ellie McCoy, Christopher Mikton, Tom Shakespeare, Alana Officer, 'Prevalence and risk of violence against adults with disabilities: a systematic review and meta-analysis of observational studies', (2012) 379 *Lancet journal* 162.

<sup>6</sup> Office of the Public Advocate, *Breaking the Cycle* (2012), p 38, available at <[http://www.publicadvocate.vic.gov.au/file/file/Report/2012/OPA\\_BTC\\_FRReport\\_Web.pdf](http://www.publicadvocate.vic.gov.au/file/file/Report/2012/OPA_BTC_FRReport_Web.pdf)>.

<sup>7</sup> See for example the Victorian Women's Mental Health Network (VWMHN) 2006 survey of 75 women, cited in VWMHN, *Nowhere to be safe: Women's experiences of mixed-sex psychiatric wards* (2007) available at <<http://www.vicserv.org.au/uploads/documents/general%20docs/Nowhere%20to%20be%20Safe%20Final%20Layout.pdf>>.

<sup>8</sup> See for example, Farrah Tomazin, 'High risk in mixed wards', *The Age*, 28 April 2013, available at: <<http://www.theage.com.au/victoria/high-risk-in-mixed-wards-20130427-2ilpi.html>>.

<sup>9</sup> The VMIAC surveyed 50 women from 9 mental health services around Victoria about their experiences of safety, harassment and assault during admission to psychiatric in-patient units. See Victorian Mental Illness Awareness Council, *Zero Tolerance for Sexual Assault: A safe admission for women* available at <[http://www.abc.net.au/reslib/201305/r1115028\\_13591277.pdf](http://www.abc.net.au/reslib/201305/r1115028_13591277.pdf)>.

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allegations were responded to appropriately and properly investigated in a timely manner.<sup>10</sup> This included that all staff demonstrate competence in implementing the Chief Psychiatrist's Guideline, *Promoting sexual safety, responding to sexual activity and managing allegations of sexual assault in adult acute inpatient units*. The LIV submits that staff training is crucial to ensuring implementation of the Chief Psychiatrist's Guideline and that allegations of sexual harassment and assault of women in psychiatric units are appropriately investigated.

## **Violence and abuse in supported residential services**

The LIV is also concerned about the risk of violence, abuse and assault of people with disabilities, including psychosocial disability, in supported residential services (SRSs). SRSs provide accommodation and support for people, including people who have a disability, in a shared living environment. They are privately operated services but must be registered with the Victorian Government and are monitored to ensure they provide certain standards of personal support and accommodation. The LIV notes also that Community Visitors report an increase in reported cases of violence abuse and assault of residents in such accommodation.<sup>11</sup>

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

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

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

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

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

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

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

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<sup>10</sup> Joint letter to the Minister for Mental Health, Re: Safety and Sexual Harassment and Assault in Victorian Psychiatric Units (21 December 2012), available at: [http://www.communitylaw.org.au/mhlc/cb\\_pages/files/Letter%20to%20the%20Minister\\_sex%20assault%20%26%20female%20wards%20211212.pdf](http://www.communitylaw.org.au/mhlc/cb_pages/files/Letter%20to%20the%20Minister_sex%20assault%20%26%20female%20wards%20211212.pdf).

<sup>11</sup> See Office of the Public Advocate, *Community Visitors Annual Report 2011 – 2012* (September 2012), available at: <http://publicadvocate.vic.gov.au/file/Community%20Vistors%20Annual%20Report%202012.pdf>.

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

The LIV also welcomes recent steps taken by the Victorian Government to improve standards and conditions in SRSs. From 1 July 2012 the new *Supported Residential Services (Private Proprietors) Act 2010* and the Supported Residential Services (Private Proprietors) Regulations 2012 (SRS regulations) came into force. These establish minimum standards for the accommodation and personal support services provided in SRSs and in particular have strengthened reporting requirements for serious incidents. The Victorian Department of Health Protocol for Responding to Allegations of Sexual Assault in SRS was also released in October 2012.<sup>12</sup>

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<sup>12</sup> Department of Health, *Responding to allegations of sexual assault in SRS: Clarifying roles for SRS proprietors, the Department of Health and Centres Against Sexual Assault* (October 2012) available at: [http://docs.health.vic.gov.au/docs/doc/9D7764ADF8CF97F2CA257A91007FF11A/\\$FILE/CASA%20PROTOCOL%20FINAL%2024%20SEPT%2012.pdf](http://docs.health.vic.gov.au/docs/doc/9D7764ADF8CF97F2CA257A91007FF11A/$FILE/CASA%20PROTOCOL%20FINAL%2024%20SEPT%2012.pdf).





11 October 2011

Law Reform Committee  
Parliament of Victoria  
Spring Street  
EAST MELBOURNE VIC 3002

Email to [vplrc@parliament.vic.gov.au](mailto:vplrc@parliament.vic.gov.au)

Dear Parliament of Victoria Law Reform Committee,

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

The Law Institute of Victoria (LIV) welcomes the opportunity to make a submission in response to the Parliamentary Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers.

Our submission is attached.

We understand that we are making this submission beyond your extended deadline and that you may not be able to consider all of our comments in light of the time frames you are working to.

Please contact Brigid Foster, Lawyer to the Criminal Law Section on [bfoster@liv.asn.au](mailto:bfoster@liv.asn.au) or (03) 9607 9374 or Laura Helm, Lawyer to the Administrative Law and Human Rights Section on [lhelm@liv.asn.au](mailto:lhelm@liv.asn.au) or (03) 9607 9380 in relation to this matter.

Yours sincerely,

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

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To: Parliament of Victoria Law Reform Committee

11 October 2011

***Queries regarding this submission should be directed to:***

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## Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission to the Law Reform Committee of the Parliament of Victoria inquiry on access to and interaction with the justice system by people with an intellectual disability and their families and carers (the inquiry). Thank you for the extension of time to make this submission.

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 15,000 members. Many LIV members have extensive experience providing legal representation to individuals with intellectual disabilities and their families, including, for example, civil litigants and those in the criminal justice system, both victims and accused, individuals under the *Disability Act 2006* (Vic) and in aged care facilities and to assist applications for intervention orders.

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

- *National Equality Act* (10 February 2011)
- Review of Guardianship (20 May 2010)
- Inquiry into the Migration Treatment of Disability (4 November 2009 and 25 March 2010)
- People with disabilities and interlock devices for drink driving offenders (9 June 2009)
- Migration and Disability Inquiry (9 June 2009)
- Sterilisation of Children with an Intellectual Disability (8 November 2006)
- Review of Disability Legislation (23 December 2004)
- Non Therapeutic Sterilisation of Minors with a Decision Making Disability (9 June 2004)
- Comments on Community Treatment Orders Discussion Paper (9 April 2003)
- *Information Privacy Act 2000* and the *Health Records Act 2001* (25 February 2003)
- Call for Review of Civil Detention Legislation in Victoria (19 February 2003)

## Terms of Reference

The LIV notes that under the terms of reference for the inquiry, the Law Reform Committee is required to inquire into, consider and report on access to and interaction with the justice system by people with an intellectual disability and their families and carers, including:

- (a) key issues and themes, including but not limited to:
  - (i) participants' knowledge of their rights;
  - (ii) availability of appropriate services and supports;
  - (iii) dealings with the police; and
  - (iv) the operation of the courts;
- (b) measures within Australia and internationally to improve access to, and interaction with, the justice system, including but not limited to measures that seek to:
  - (i) break down barriers to the justice system and enhance participation;
  - (ii) deliver just and equitable outcomes;
  - (iii) facilitate collaborative and co-ordinated approaches across government departments and agencies; and
  - (iv) provide responses that address the circumstances of the offender and offence concerned.

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<sup>1</sup> LIV submissions are available on our website at <http://www.liv.asn.au/Membership/Practice-Sections/Submissions>.

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- (c) consideration as to whether the findings of the inquiry have broader application to people with a disability other than an intellectual disability, for example those with an acquired brain injury or neurological condition leading to cognitive disability.

The LIV understands that this inquiry arose in response to the release of a report in 2010 by the Office of the Public Advocate (OPA), 'Violence against people with cognitive impairments' which investigated the circumstances of 88 OPA clients who had been victims of interpersonal violence. The report focuses on the response of service providers, notably from the disability and family violence sectors, as well as the response of Victoria Police and the Justice system. The terms of reference of the inquiry are much broader in scope than the OPA report and appear to go beyond interaction with the justice system by people with an intellectual disability relating to violence, to include all civil and criminal law matters.

The LIV considers that access to justice generally for people with all types of cognitive disability is a critical issue that requires further examination. For example, we are concerned about access to legal representation in guardianship and administration matters and have raised these concerns in our submissions to the Victorian Law Reform Commission's Review of Guardianship Laws. We recommend that the Attorney General refer to the Victorian Law Reform Commission a broad inquiry into access to justice for people with cognitive disabilities for thorough investigation.

In this submission, we limit our comments to the criminal justice system. We note that we seek only to outline issues of high priority within the criminal law jurisdiction that have been raised by LIV members and are not able to provide a comprehensive response in the time available.

## **Identification of People with Intellectual Disability**

The LIV is concerned to ensure that people with an intellectual disability are identified early in their interaction with the criminal justice system, so that appropriate adjustments can be made and offenders are able to access appropriate diversion programs and other supports.

Victorian Department of Justice figures from 2006 suggest that people with an intellectual disability are disproportionately represented in the prison population. In 2007, the Department of Justice released a paper titled, 'Intellectual Disability in the Victorian Prison System - Characteristics of prisoners with an intellectual disability released from prison in 2003-2006' which detailed a study of the characteristics of male prisoners with an intellectual disability who were released from prison in Victoria between 1 July 2003 and 30 June 2006 compared with the characteristics of a random sample of prisoners without an intellectual disability released during the same period.<sup>2</sup> The study examined 346 of the total 7805 prisoners released during this period and found that 102, or 29 per cent, of the study cohort had an intellectual disability.

The LIV is of the view that early identification of and provision of support for people in the criminal justice system with an intellectual disability is crucial to channelling offenders with intellectual disability into appropriate diversion facilities and programs and possibly reducing recidivism.

### ***Identification by police***

The LIV is concerned to ensure that police properly identify individuals with an intellectual disability when they are dealing with suspects, victims or other witnesses. As there is little publicly available information on how such assessments are made, we are unable to comment on whether the

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<sup>2</sup> 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. Department of Justice, 'Intellectual Disability in the Victorian Prison System - Characteristics of prisoners with an intellectual disability released from prison in 2003-2006' (Melbourne, 2007) [http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/1/0/10b66a80404a9f2394cbfff5f2791d4a/Intellectual\\_Disability\\_in\\_the\\_Victorian\\_Prison\\_System.pdf](http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/1/0/10b66a80404a9f2394cbfff5f2791d4a/Intellectual_Disability_in_the_Victorian_Prison_System.pdf) at 26 September 2011, 1.

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process for identification has improved in recent years or suggest any improvements to current training. For example, we are unable to assess whether the Victorian Police Manual (VPM) accurately reflects the assessment process undertaken by police officers or whether appropriate factors are taken into account.

The LIV notes that the VPM provides guidance to Victorian police officers when interviewing individuals who may need particular support, for example, because of their age, communication difficulties or “mental disorder”.<sup>3</sup> The purpose of the guidelines is to ensure fair process and respect for human rights for individuals who are interviewed by Victorian police officers.<sup>4</sup>

Section 3 of the VPM - *Procedures and Guidelines* entitled ‘Interviewing specific categories of person’ informs police officers that they are to identify that a person has a ‘mental disorder’ by “their words or actions, by asking the person directly, by checking police records of any previous interactions, or by contacting their nearest Mental Health Triage to check whether the person is, or has been, a client of a mental health service”.<sup>5</sup> The VPM does not define mental disorder, although it states that an independent third person is to be present at the interview of any person “with an impaired mental state or capacity”<sup>6</sup> and refers later to “people demonstrate [sic] cognitive impairment”,<sup>7</sup> which suggests that the guidelines include people with an intellectual disability.

Without further information about training received by police, the VPM guidelines seem inadequate and do not clearly direct police to consider intellectual disability. It is unclear whether police officers are adequately equipped to identify signs of intellectual disability through an individual’s ‘words or actions’ and whether training reflects developments in psychiatric and psychometric testing. The LIV is also concerned to ensure that assessment procedures protocols and questioning comply with human rights and equal opportunity legislation. We therefore recommend that the inquiry seek further information from Victoria Police and consider whether changes are required to police training and the VPM to better protect access to justice for people with intellectual disabilities.

## **Identification by lawyers**

Lawyers have an important role to play in identifying clients who might have an intellectual disability, to ensure that appropriate legal advice and representation is given. Under the *Professional Conduct and Practice Rules 2005*, lawyers are required to seek to assist their clients to understand the issues of their case to enable them to provide proper instructions.<sup>8</sup> However, while lawyers are required to assess their client’s capacity to give instructions on any particular legal matter or transaction, they are unlikely to be able to identify intellectual disability without expert assistance.

The LIV recognises that understanding and appropriately responding to a client’s capacity is a vital skill for lawyers. We have hosted a number of CPD activities on capacity, including “Incapacity and representing your client” in 2009 and “Capacity: Clients’ Instructions & Lawyers’ Skills and Duties” in 2011. We will continue to offer and promote CPD activities in this area. The LIV’s *Specialist Accreditation Application Guidelines 2010* for criminal law also notes ‘mental impairment’ as an assessable topic in relation to sentencing, however, we will request the Accredited Specialisation Board to consider whether Criminal Law Specialisation should assess skills relating to capacity as it relates to criminal law more broadly.

We note that often, calls are made for compulsory training of lawyers in response to concerns about particular issues, such as the identification of intellectual disability. However, the current rules (the Law Institute CPD Rules 2008) do not accommodate the nomination of specific topics. We refer you to LIV correspondence to the Committee of 22 December 2009 regarding “compulsory professional development for legal practitioners” in the context of the inquiry into powers of attorney (attached for your reference).

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<sup>3</sup> *Victorian Police Manual – Procedures and Guidelines*, p1 (Victorian Police Manual).

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> [3.2].

<sup>7</sup> [3.8].

<sup>8</sup> Rule 12.2 <http://www.lsb.vic.gov.au/documents/LSBLIVRules2005.pdf> (at 3 October 2011).

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The LIV is of the view that additional training for lawyers is not the only way of facilitating the identification of intellectual disability. The LIV notes that clients who receive a grant of legal aid may be able to receive an additional grant for a psychological or psychiatric assessment providing the solicitor has evidence of the client's medical or personal history which clearly indicates a belief "that the [psychological or psychiatric] report will confirm the existence of an undiagnosed condition, evidence of which may reasonably be expected to lead of a substantial benefit for the client on the plea".<sup>9</sup>

Although we understand reasonable limitations must be imposed on the availability of such funding, the LIV considers the current requirements set out in Victoria Legal Aid guidelines to be overly prescriptive and place too much emphasis on the relevance of intellectual disability to the particular charge, rather than seeing early identification of intellectual disability as one factor in preventing the commission of future offences and diverting individuals with intellectual disability away from the criminal justice system. The current guidelines also assume that a lawyer always has access to evidence that their client has sought relevant medical treatment or that the client has been willing to provide personal information which indicates the presence of intellectual disability. The LIV considers that, with appropriate training, lawyers should be able to make an assessment of their client's behaviour which justifies funding for a psychological or psychiatric report in the absence of supporting evidence of medical or personal history.

As such, the LIV recommends review of the current guidelines relating to funding for a psychological or psychiatric report to facilitate early identification of intellectual disability and give appropriate weight to a preliminary assessment of a client's intellectual capacity undertaken by their lawyer. We also recognise that such an amendment to the current guidelines must be coupled with additional funding from government to enable VLA to broaden its criteria to fund psychological or psychiatric reports requested by lawyers who have undertaken client capacity training and hold a 'reasonable suspicion' that their client may have an intellectual disability.

## **Neighbourhood Justice Centre**

The LIV notes the success of the Neighbourhood Justice Centre (NJC), a three year pilot project of the Department of Justice (Vic) which aims to enhance community involvement in the criminal justice system and provide a holistic response to crime through the delivery of dispute resolution, support and education services at one location. Offenders also benefit from one Magistrate presiding over all aspects of their case, which provides defendants a greater opportunity to explain their personal circumstances that led to the commission of the offence and, therefore, potentially facilitate identification of any impairment such as intellectual disability.

While we understand that it may not be feasible to replace the Magistrates' Court System with similar facilities, we recommend that the government investigates the integration of certain aspects of the NJC into the current court system such as the Client Services team that coordinates treatment and support services and provides a comprehensive approach including assessment and screening, individual treatment plans and counselling. The LIV submits that, while the NCJ is a more resource-intensive model, the overall economic and social benefits of this system will assist in early identification and efficiently address issues of intellectual disability.

The LIV notes the release of 'Evaluating the Neighbourhood Justice Centre in Yarra, 2007-2009' which outlines the impact of the NJC in Yarra since its commencement including, a 10 per cent increase in the completion rate for Community Based Orders compared with the statewide average and a 12 per cent reduction in crime in Yarra.<sup>10</sup> The LIV strongly recommends the government evaluates the economic impact of the NCJ, particularly the economic benefits of its capacity to prevent recidivism and reduce the number of sentences resulting in imprisonment and take this information into account when considering the economic feasibility of incorporating features of the

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<sup>9</sup> Victoria Legal Aid, Psychologist/psychiatrist report worksheet, <http://www.legalaid.vic.gov.au/handbook/754.htm> (at 4 October 2011).

<sup>10</sup> Neighbourhood Justice Centre, 'Evaluating the Neighbourhood Justice Centre in Yarra, 2007-2009' (February 2010).

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NJC into the Magistrates' Court system. In addition, the LIV also recommends that government considers studies undertaken in other jurisdictions about the economic impact of early intervention. The LIV also reiterates calls for the replication of the NCJ in other suburbs in Melbourne which experience higher instances of criminal offending, such as Frankston, Dandenong, Sunshine and Morewell.<sup>11</sup>

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

The ARC list system developed by the Department of Justice and the Magistrates' Court of Victoria is another process the LIV endorses which meets the needs of accused persons who have a mental illness and/or a cognitive impairment.

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

The ARC list operates on a 'problem-solving Court model', which provides an informal approach, similar to that of the NJC, where the Magistrate hears the matter and reviews the participant's progress on the program from the Bar Table, along with ARC List staff and the participant.

Currently, the list is only available at Melbourne Magistrates' Court. The LIV agrees with the principles of the ARC list and looks forward to its evaluation.

## **Sentencing and Intellectual Disability**

LIV notes that, upon a finding of guilt, a court may request a plan of available services for an offender who is deemed by the Department of Human Services to have an intellectual disability within the meaning of the *Disability Act 2006* (Vic).<sup>12</sup> We commend recent increases in the provision of residential treatment orders for sexual offenders with intellectual disability.

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<sup>11</sup> The LIV has recommended this in a number of submissions including LIV Submission to Attorney-General of Victoria, Robert Clark, 'Mandatory Minimum Sentencing' (30 June 2011), 18 at <http://www.liv.asn.au/Membership/Practice-Sections/Criminal-Law/Submissions/Mandatory-Minimum-Sentencing?glist=0&rep=1&sdiag=0> (accessed 1 October 2011).

<sup>12</sup> Sentencing Act 1991 (Vic), s 80.