



**OFFICE OF THE
PUBLIC ADVOCATE**

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

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Contact:

John Chesterman
Manager, Policy and Education
Office of the Public Advocate
Ph: (03) 9603 9567
Email: john.chesterman@justice.vic.gov.au

Prepared by:

Lois Bedson and Liane Hartnett
Policy and Research Officers
Office of the Public Advocate

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Glossary of acronyms

ABI	Acquired Brain Injury
ARC	Assessment and Referral Court List
CISO	Corrections Independent Support Officer
CRU	Community Residential Unit
CV	Community Visitor
CVP	Community Visitor Program
DHS	Department of Human Services
DOJ	Department of Justice
ID	Intellectual Disability
ITP	Independent Third Person
OPA	Office of the Public Advocate
SRS	Supported Residential Service
STO	Supervised Treatment Order
VCAT	Victorian Civil and Administrative Tribunal
CISP	Court Integrated Services Program

1. Introduction

1.1 The Victorian Office of the Public Advocate (OPA) has considered the terms of reference for the inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers and welcomes the opportunity to comment.

About OPA

1.2 OPA is an independent statutory body working to protect and promote the rights, interests and dignity of those with cognitive disability. OPA provides a number of services to achieve this vision, and to meet legislative requirements outlined in the Guardianship and Administration Act 1986 (Victoria). These services – some of which are listed below – offer us unique insight into the manifold issues faced by people with cognitive disability and their families and carers in accessing and interacting with the justice system.

- Advice Service: is an advice and information service for people enquiring about matters including powers of attorney, guardianship, Victorian Civil and Administrative Tribunal (VCAT) applications, and consent to medical/dental treatment. Where necessary, the service provides referrals to appropriate complaints bodies and legal services. Last financial year the advice service handled 13,243 calls.
- Advocate/Guardian Program: provides statutory guardianship, investigation and last resort advocacy for Victorians who cannot make decisions for themselves. The program also offers support to private guardians. OPA was involved in 1,730 guardianship matters, 563 investigations and 476 cases requiring advocacy in the last financial year.
- Community Visitors Program (CVP): is a program staffed by volunteers who work with OPA to help protect and advocate for the rights of people with disabilities. The volunteers visit Victorian accommodation facilities for people with cognitive disability (including mental illness). Last year the program supported 312 volunteers who donated 84,942 hours visiting these facilities.
- Independent Third Person Program (ITP Program): is a program where volunteers assist people with cognitive disability during police interviews or when making formal statements to Victoria Police. ITPs attended 1,958 interviews in the last financial year.
- Corrections Independent Support Officers (CISOs): aim to assist prisoners with an intellectual disability in governor's disciplinary hearings in prisons. Like ITPs, their role is to facilitate communication with the prisoner. CISO volunteers attended 136 hearings in the last financial year.

- Disability Act Officer: mainly advocates in relation to people with cognitive disability subject to detention. This service also refers matters involving inappropriate use of residential notices to a specialist community legal centre.
 - OPA Duty Officer: is an on-site, on-duty advocate at VCAT. The advocate is available to: people who are the subject of an application; and to VCAT, to assist it in solving problems and avoiding the appointment of guardians and administrators where other solutions are available.
- 1.3 Drawing on its strengths in this area, OPA with the Disability Advocacy Resource Unit organised a forum on Cognitive Impairment and the Justice System on 19 August 2011. The purpose of the forum was to generate interest and to provide guidance on making submissions to this Inquiry. The forum drew about 60 people including advocates, disability service professionals, lawyers, police, academics and private individuals.

Conceptual framework

- 1.4 The “bio-psycho-social model” of disability informs OPA’s submission. In essence, cognitive disability is understood as resulting from “the interaction between persons with (cognitive) impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on equal basis with others” (UN General Assembly, 2006, Preamble (e)).
- 1.5 In this submission, unless expressly stated, OPA does not differentiate between intellectual disability and other cognitive disability, including mental illness. OPA is of the view that despite the heterogeneity of cognitive disability, people with cognitive disability have a shared experience of alienation from the justice system. OPA would like to clarify that this shared experience, however, does not warrant a “one-size-fits-all” approach to addressing the issues faced by people with cognitive disability in the justice system.
- 1.6 The importance of this Inquiry into the lives of people with cognitive disability arises not because they are a small group disenfranchised by the traditional justice system but because they are core-service users. While the data is contested, it is evident that people with cognitive disability have heightened need for, or interaction with, the justice system.
- Between 50-99% of people with cognitive disability are subjected to sexual assault at some point in their lifetimes (French, 2007, p. 18).
 - People with intellectual disability are “twice as likely to be the victim of a crime directed against them ... and one and a half times more likely to suffer property crimes than non-disabled aged-matched cohorts” (Wilson and Brewer, 1992 as cited in Hayes, 2004, p. 2).
 - “A United Kingdom study ... reported that 9% of suspects interviewed by police had an intellectual disability and a further 42% had a borderline intellectual disability” (Lyall et al, 1995 cited in French, 2007, p. 27).

- Research on NSW courts revealed that 24% of people appearing before a court had a disability and this figure rose to 43% for Aboriginal and Torres Strait Islander accused persons (Hayes, 2000, p. 67).
 - A Victorian study published in 2003 found that 51% of prisoners reported they had been assessed by, or had received treatment from, a psychiatrist or doctor for an emotional or mental health problem (Victorian Department of Justice 2003 as cited in French, 2007, p. 26). People with an acquired brain injury (ABI), in particular, are substantially overrepresented in the Victorian prison population with 42 per cent of male prisoners and 33 per cent of female prisoners in a recent research sample having an ABI (Jackson et al, 2011, p. 6).
- 1.7 The correlation between cognitive disability and the other causal factors, which explain heightened need for or interaction with the justice system, are beyond the scope of this submission. However, there appear to be:
- Environmental barriers, for example, poverty, violence, social isolation, discrimination, inadequate or inappropriate accommodation, dysfunctional childhoods, poor education outcomes and unemployment (Martin, 2011, p. 5); and
 - Attitudinal barriers, of family, friends, carers, advocates, and/or other service providers central to facilitating access to justice.
- 1.8 OPA is of the view that there is an excellent existing framework promoting access to justice and disability rights at the international, national and state levels. Some measures include:
- At the international level – *Convention on the Rights of Persons with Disabilities 2006* (“the Convention”) and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006*, the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1993*, the *International Covenants of Civil and Political Rights 1966* and the *International Covenant on Economic, Social and Cultural Rights 1966*.
 - At the national level – the *Disability Discrimination Act 1992* (Commonwealth), the National Disability Strategy and the Productivity Commission’s final report on Disability Care and Support.
 - At the Victorian level – the *Charter of Human Rights and Responsibilities Act 2006* (Victoria), the *Equal Opportunity Act 2010* (Victoria) and the current government’s anti-violence policies, elder abuse strategies and the Victorian Law Reform Commission’s review of Victoria’s guardianship laws.
- 1.9 OPA argues that despite these measures people with cognitive disability are being denied access to justice because of systemic discrimination, which fails to recognise their status “as human rights bearers and citizens with an entitlement to opportunities and outcomes equivalent to others” (French, 2007, p. 13). One consequence of this is that people with cognitive disability are often unaware of their rights.

- 1.10 Using the rights enshrined in the Convention as a benchmark, this submission seeks to tell the stories of some of OPA’s clients in their quest to access justice. We discuss access to justice issues on the peripheries of the system and within the system. For ease of reading, we construct a linear narrative, which traces access issues from causal factors to systemic issues at different access points of the justice system. In doing so, we also highlight how existing supports may assist with navigating the system.
- 1.11 It is important to note that this submission is not an audit of the strengths and limitations of the justice system in its entirety. Nor do its recommendations pretend to eradicate barriers to justice encountered by people with cognitive disability. Rather by pointing to the gap between the Convention and some examples of existing practice, it imagines a way forward, which mainstreams disability and enhances service delivery in the justice system.

The Convention and the justice system

- 1.12 OPA draws on the Convention as the benchmark for assessing the accessibility of the justice system for people with cognitive disability. The reasons for this are twofold. Although equality and non-discrimination, equal recognition before the law, and access to justice form a keystone of the Australian legal system, the Convention places a positive obligation on the state to ensure these rights are “effective” for people with cognitive disability. Additionally, a Convention-based approach promotes a holistic response to the causal factors which put people with cognitive disability on the boundaries of, or within, the justice system.
- 1.13 The table contains some of the rights enshrined in the Convention, which offer protection to people with cognitive disability when accessing and interacting with the justice system

Equality and non discrimination	Article 5
Awareness raising	Article 8
Equal recognition before the law	Article 12
Access to justice	Article 13
Freedom from torture or cruel, inhuman or degrading treatment or punishment	Article 15
Freedom from exploitation; violence and abuse	Article 16
Living independently and being included in the community	Article 19
Respect for privacy	Article 22
Respect for home and the family	Article 23
Health	Article 25
Adequate standard of living and social protection	Article 28

OPA's policy and research work

1.14 OPA would like to draw the Committee's attention to recent policy and research work undertaken by OPA that are relevant to this Inquiry. This includes the following reports and submissions:

- Magdalena McGuire – Breaking the Cycle: Using Advocacy Based Referrals to assist people with disabilities in the Criminal Justice System – Soon to be completed.
- OPA – Submission to the Victorian Law Reform Commission in Response to the Guardianship Consultation Paper – 2011
- OPA – Submission: Protecting Victoria's Vulnerable Children Inquiry - 2011
- Lois Bedson, Magdalena McGuire and Brian Walkinshaw – Supervised Treatment Orders in Practice: How are the Human Rights of People Detained under the Disability Act 2006 Protected? – 2010
- Liz Dearn – Long Stay Patient Project – 2009

1.15 Of particular relevance to this Inquiry is Janine Dillon's paper "Violence Against People with Cognitive Impairments" (Dillon, 2010). Based on evidence provided by OPA's guardians, the report documents 86 cases of violence perpetrated by parents, partners of parents, intimate partners, staff at accommodation services and strangers. The key message of the report, as expressed by the Public Advocate, is that "People with disabilities are more likely than others to be victims of interpersonal violence and less likely than others to receive proper assistance to deal with it and prevent its reoccurrence" (OPA, Press Releases, 2011). The paper made a series of recommendations, but sought the government's support for the following reforms:

- greater support for people with cognitive disability and/or mental illness to make complaints of violence through the criminal justice system;
- more responsive services that offer immediate protection, including provision of alternative accommodation, when violence against a person with a cognitive impairment and/or mental illness is disclosed or suspected; and
- improved prevention initiatives (including public education, improved reporting of inappropriate or dangerous behaviour, and more risk-conscious housing decisions).

2. Summary of recommendations

2.1 This submission makes the following recommendations:

Recommendation 1: That the definition of “child” in the *Children Youth and Families Act 2005 (Victoria)* be amended to include all minors aged under 18. However, the legislation should allow for age and maturity to be relevant considerations in the granting of protective orders.

Recommendation 2: That supported accommodation facilities incorporate improved risk conscious frameworks into placement decisions, that particularly engage the issue of the compatibility of residents. This process also needs to ensure that ‘difficult’ residents are not further excluded from supported accommodation.

Recommendation 3: That government facilitate the development of more appropriate supported accommodation to meet the needs of people with different cognitive disabilities, including Acquired Brain Injury and Autism Spectrum Disorder.

Recommendation 4: That the Department of Human Services evaluate the extent to which current cross sectoral approaches between sexual assault, family violence, mental health; disability and aged care services are succeeding in promoting effective access to justice and service delivery.

Recommendation 5: That legislation mandates that residential notices be issued for all proposed relocations from residential facilities.

Recommendation 6: That government increase funding to community legal centres providing services to people with cognitive disability.

Recommendation 7: That legislation is developed to standardise Victorian Court rules around the appointment of litigation guardians.

Recommendation 8: That government fund a co-ordinated litigation guardian service.

Recommendation 9: That the right of people with cognitive disability to use Independent Third Persons in police interviews be legislatively articulated.

Recommendation 10: That police establish a “first response” disability unit equipped to work with victims, witnesses and alleged offenders with disabilities involved in criminal matters.

Recommendation 11: If the pilot of the Assessment and Referral Court is evaluated as successful, that the government roll out the model across Victoria.

Recommendation 12: That all people with cognitive disability accessing the justice system receive case-management. This could be facilitated through the standardising and mainstreaming of a court integrated support program.

Recommendation 13: That police be required to advise any person with an apparent cognitive disability who is served with an Intervention Order about OPA's Advice Service.

Recommendation 14: That government provide supported accommodation options for people being paroled or bailed.

Recommendation 15: That routine assessments of cognitive disability be conducted for all people entering the prison system, including juvenile facilities.

Recommendation 16: That the Department of Human Services ensure that everyone subject to civil detention in gazetted residential services (who meet the legislative criteria) have their rights protected pursuant to the STO regime set out in the *Disability Act 2006* (Victoria) .

Recommendation 17: That government fund the provision of peer education and self-advocate rights awareness training programs for people with cognitive disability, and for their families and carers.

Recommendation 18: That government fund self-advocacy groups to provide disability awareness training programs for the, police, lawyers, prison staff and other service providers in the justice system.

Recommendation 19: That police improve data collection relating to people with disabilities as victims of crimes or alleged offenders.

Recommendation 20: That OPA be supported to provide improved advocacy services to people with cognitive disability who are involved in the justice system.

Recommendation 21: That Department of Human Services provide improved disability appropriate emergency accommodation for victims of crime.

Recommendation 22: That the Department of Justice establish a witness support service for people with cognitive disability.

3. On the margins

“States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.” [Article 16(1)]

Families and carers

- 3.1 The support provided by families and carers to many people with disability should not be understated. They are often the first to listen, advocate and empower. There is no way of quantifying the positive contribution they make to the lives of people with cognitive disability, or to society.
- 3.2 Sometimes, however, families and carers play a negative role as gatekeepers to the justice system. This is because people with cognitive disability often rely on families and carers as intermediaries to receiving police or legal assistance (Dillon, 2010, p. 12). This situation may be deeply disempowering as it effectively allows for a third party’s needs, wishes and interests to dictate whether a person with cognitive disability accesses the justice system.
- 3.3 Case study – Sarah

‘Sarah’ is a fifty year old woman with cerebral palsy and a moderate intellectual disability. She requires a motorised wheelchair for mobility and is largely non-verbal. To communicate, Sarah uses some words and gestures. One day, Sarah was very distressed and confided to a staff member that as she was getting dressed in the morning, she was raped by a staff member. The police and Sarah’s elderly parents were contacted.

Sarah’s parents refused to consent to a police interview or forensic examination. When queried by an OPA advocate about why an adult woman’s consent would not suffice, the police informed the advocate that it was “process”. When police sought to meet Sarah, her parents were dismissive of the crime. Despite Sarah asserting herself with comments like “Me talk, me talk”, the police deferred to Sarah’s parents for consent to proceed. Sarah’s parents in turn suggested Sarah was lying and made comments like “Telling lies is not good”.

Although with OPA’s advocacy, Sarah’s matter was finally escalated to the Sexual Offences and Child Abuse Unit (SOCAU), it was too late to gather forensic evidence and there was no further investigation.

3.4 As evident in Sarah's case (paragraph 3.3) and again in Laura's story (paragraph 3.5) below, the service system tends to conflate the interests of parents and carers with those of the person with cognitive disability. Perceptions which facilitate this practice include:

- Sympathy for families and carers who have the "burden" of caring for a family member with cognitive disability.
- Relegation of the "private tragedy" of disability and any associated abuse, violence or neglect to the "private" sphere away from "public" responsibility.
- Concerns about an inability to provide alternative support should an informal care relationship become destabilised (French, 2007, p. 25).

3.5 Case study – Laura

OPA was involved as an advocate for 'Laura', a sixteen year and eight month old girl, who had become pregnant to a forty-two year old friend of her father. An intervention order had been taken out against the father's friend because he had been violent towards Laura.

The OPA advocate sought the involvement of Child Protection staff who did not recognise Laura's rights to protection as a person under 18, but focussed instead on the perceived protective needs of Laura's unborn child and the young children in her home. OPA sought the involvement of a disability case manager but as this is a voluntary service it required the consent of Laura's father. As VCAT's jurisdiction on special procedures (e.g. sterilisations or terminations) only applies to people aged 18 and above, the decision on whether to terminate or keep the pregnancy also ultimately fell to Laura's father, who arguably failed to protect her. There were concerns that his decision for Laura to keep the pregnancy was motivated by the government's baby bonus payments.

3.6 Laura's story, however, highlights a systemic gap for minors in the sixteen to eighteen year old cohort. For the purposes of the *Children Youth and Families Act 2005* (Victoria), a child is defined as a person under 17 years of age unless they are on a pre-existing child protection order. Similarly the Guardianship and Administration Act 1986 (Vic) only applies to persons aged 18 years and above. Effectively, the legislation creates a gap in protective services available to minors around the age of 17. While the maturity of a minor ought to still influence the appropriateness of a child protection order, OPA holds concerns for minors with cognitive disability. As disability services provides a voluntary service there are few safeguards around the substitution of an adult's consent over that of a minor. Indeed, in Laura's case, the person who was authorised to make such decisions was the very person who arguably failed to protect her in the first place.

Recommendation 1: That the definition of "child" in the *Children Youth and Families Act 2005* (Victoria) be amended to include all minors aged under 18. However, the legislation should allow for age and maturity to be relevant considerations in the granting of protective orders.

Supported Accommodation

“States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community including by ensuring that...(p)ersons with disabilities have access to a range of in home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.” [Article 19(b)]

- 3.7 Appropriate housing and support services are central to people with cognitive disability realising their right as equal citizens to full inclusion and participation in the community.
- 3.8 In OPA’s experience there appears to be a nexus between a shortage of appropriate accommodation service models and behaviours which may lead to the commission of crime. As is demonstrated in Benjamin’s case (paragraph 3.12), problems accessing appropriate support and accommodation can not only extend incarceration times, but also, arguably, can exacerbate the likelihood of future offences.
- 3.9 OPA understands that service provision for people with multiple diagnoses and complex needs is fraught with challenges. However, at present it appears these people fall between the cracks of the service system with little accommodation and support designed to meet their needs (CV Annual Report, in press).
- 3.10 An associated problem is that of inappropriate placements: where incompatible residents are placed together in the same accommodation. As is evident in John’s case (paragraph 3.12) and the situation described at paragraph 4.36, this can provide a catalyst for violence and aggression.
- 3.11 The following case studies highlight some of the implications of poor accommodation placements. While these case-studies draw on particular service gaps with meeting the needs of persons with ABI and autism spectrum disorder, it is important to note that the discussion of other service-gaps are beyond the scope of this submission.

3.12 Case studies – Benjamin and John

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

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

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

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

John is a 19 year old man with autism. He is living in a group home with four much older men. When John comes home from his day program, he returns to an environment where the other residents are either watching television or getting ready for an early night. All he wants to do in his spare time is to go out. John has poor communication skills and has recently assaulted a staff member. The other residents are terrified of John. There is a foreboding sense for all involved that John is likely to commit a more serious crime because he is unable to communicate his needs and he is in the wrong environment.

Recommendation 2: That supported accommodation facilities incorporate improved risk conscious frameworks into placement decisions, that particularly engage the issue of the compatibility of residents. This process also needs to ensure that 'difficult' residents are not further excluded from supported accommodation.

Recommendation 3: That government facilitate the development of more appropriate supported accommodation to meet the needs of people with different cognitive disabilities, including Acquired Brain Injury and Autism Spectrum Disorder.

3.13 We would like to emphasise that we are not suggesting that in the absence of a solid evidence-base, accommodation decisions should be made solely on the basis of disability, life-stage and/or gender. Neither are we suggesting that inappropriate housing is the sole determinant of violence or crime. Indeed, challenging behaviours such as aggression are often symptomatic of unaddressed mental health issues (Thomas et al, 2010, p. 4). Interventions such as provision of health care or the use of behaviour-management strategies, therefore, can often mitigate the likelihood of people with cognitive disability coming into contact with the criminal justice system. The two contrasting cases of Julia and Jason illustrate this point.

3.14 Case studies – Julia and Jason

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

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

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

‘Jason’ is a young man with a mental health condition. He has resided in care since he was seven and has never lived independently. He has no social supports. There have been many reports of Jason’s inappropriate behaviour towards staff members including that he was not respectful of their personal space. It has been alleged that he viewed child pornography on his computer. He then allegedly sexually assaulted a resident. Jason’s behaviours escalated with him stabbing another resident with a knife in her throat. Although arguably none of his troubled behaviours could have enabled anyone to predict the stabbing, his underlying behavioural issues were unsuccessfully addressed. Jason had no criminal priors but now finds himself in Thomas Embling.

Service provision culture

“States Parties undertake to adopt immediate, effective and appropriate measures...to combat stereotypes, prejudices and harmful practices relating to persons with disabilities...in all areas of life.” [Article 8(1)(b)]

3.15 OPA is of the view that an un-coordinated response to service delivery seriously disadvantages people with cognitive disability seeking access to the justice system. This may manifest itself in the phenomena of:

- a “victim” who is eligible for numerous services but accesses none (see Laura’s case study at paragraph 3.5)
- a “repeat offender” who despite being linked to numerous service providers, receives such an un-coordinated response that it fails to address any of the challenging behaviours (see Benjamin’s case study at paragraph 3.12 and Chris’s case study at paragraph 4.41).

3.16 Janine Dillon offers reasons for this un-coordinated response which include:

- “An individual sector approach to service provision” arising from community services in Victoria being organised into “silos”. For example, mental health, disability, aged care, family violence and sexual assault often operate as distinct sectors (Dillon, 2010, p. 9).
- Different, and at times conflicting, theoretical underpinnings to each sector: for example, Disability Services appears to favour a welfare-model to service delivery while domestic violence response services favour a human rights based approach (Dillon, 2010, p. 9).

3.17 Silos prevent effective and collaborative responses to service delivery. The guardian in Simone’s case (briefly discussed at paragraph 4.10), spoke of her frustration with these “silos”. Her response was to spend considerable time and effort organising case conferencing with numerous service providers (including police, disability services, family violence, alcohol and drug services, counselling services, acquired brain injury services, disability support and emergency services) in order to facilitate a co-ordinated response to the Simone’s problems. While this effort is truly commendable, it is not within the ambit of a guardian’s role.

3.18 Similarly, the theoretical underpinnings of a welfare model to service delivery are particularly problematic in facilitating access to justice. They promote a response of seeking to harmonise problems through casework intervention, which is positive (French, 2007, p. 17). However, by understanding persons with disability as “passive and dependent recipients” of care, they effectively diminish their status as bearers of human rights (French, 2007, p. 13). If human rights violations remain disguised as “incidents”, they are less likely to be recorded or responded to appropriately. Indeed, a lack of data often impedes systemic change.

3.19 A welfarist culture also facilitates the privileging of the rights of employees over those with cognitive disability. This double-standard is evident in the language used to name human rights violations. Hence, “terms such as maltreatment, neglect, victimisation, bullying, abuse, sexual assault, exploitation” of people with cognitive disability get reduced to “incidents” in the service sector (Frawley et al. 2009 as cited in Dillon, 2010, p. 9). However, “occupational violence” is

used to refer to violence perpetrated by people with cognitive disability against staff (Dillon, 2010, p. 9).

- 3.20 This leads to a differential approach in the treatment of staff and residents. As a result, community visitors provide anecdotal evidence that violence perpetrated by a resident against a staff member is more likely to be reported to police than violence perpetrated by a staff member against a resident or a resident against a resident. Disturbingly, this also results in staff members being “behaviour managed” rather than treated as perpetrators of crime. As a result, the alleged sexual offender in Sarah’s case (see paragraph 3.3) was dismissed by his employer, but continues to work in the disability service sector. Similarly, in the case of Immanuel (see paragraph 4.12), this resulted in the prioritisation of a workplace investigation over reporting the criminal matter to the police.
- 3.21 This dismissal of the rights of people with cognitive disability is often evident in flawed incident reporting systems. This was highlighted in the Ombudsman’s report on the assault of a non-verbal man in supported accommodation (Victoria Ombudsman, Parliamentary Reports, 2011). The Public Advocate would like to commend Minister Wooldridge for effecting a major cultural shift at DHS in response to such “incidents”. Since the Ombudsman’s report, OPA has noticed a more transparent and collaborative response from DHS and hopes this continues into the future. However, this would be greatly facilitated through the abandonment of a welfarist model to disability service-provision.

Recommendation 4: That the Department of Human Services evaluate the extent to which current cross sectoral approaches between sexual assault, family violence, mental health; disability and aged care services are succeeding in promoting effective access to justice and service delivery.

Legal barriers

“No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence.... Persons with disabilities have the right to the protection of the law against such interference or attacks.” [Article 22(1)]

Residency rights

- 3.22 OPA believes tenancy rights of people with cognitive disability living in supported accommodation, including Shared Supported Accommodation, Supported Residential Services and boarding houses, are either inadequately legislated for or that people are inadequately supported to access legal pathways to civil dispute resolution.
- 3.23 Through our work on the implementation of *Disability Act 2006* (Victoria) (“*Disability Act*”) a number of issues have been identified relating to its tenancy protection provisions, which

include recourse to VCAT review to residents of gazetted residential services who have been given “notice”.

- 3.24 Currently the *Disability Act* grants DHS discretion in issuing residential notices. As a result, current DHS policy is to only make residential notices when a proposed move is contested. The issuing of a residential notice gives a person a right to recourse at VCAT. It also results in OPA being notified, which often flags advocacy and legal assistance may be required. Effectively, it gives a person an avenue to defend their right to their home.
- 3.25 However, current DHS policy deepens a power imbalance. People with disabilities and their families and carers are reluctant to contest moves, because of fears this may negatively impact on day-to-day service provision. Indeed, last financial year, OPA received only nine (eight temporary relocation and one notice to vacate) notifications, a tiny proportion of all moves made within DHS gazetted residential services.
- 3.26 OPA is also concerned about the reasons motivating eviction notices. In the last few cases OPA and Villamanta Legal Service have been involved in, eviction notices were not the result of standard tenancy issues like property damage or falling behind with rent, but longstanding behavioural issues that services had not attempted to address.

Recommendation 5: That legislation mandates that residential notices be issued for all proposed relocations from residential facilities.

- 3.27 OPA’s Advice Service receives several calls a week about residency rights issues arising from a lack of a legal mechanism to evict a family member or friend who “moves in” with a person with cognitive disability and financially abuses them. Sometimes, this living arrangement results in services disengaging either because of the behaviours of the family member/friend or because of the perception that the family member/friend is meeting the care-needs of the person with cognitive disability. Unfortunately, unless there is a threat of violence, the police are unable to intervene.

“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others...in all legal proceedings, including at investigative and other preliminary stages” [Article 13(1)]

Lawyers

- 3.28 OPA’s Advice Service staff have identified gaps in disability-awareness with some lawyers. The Advice Service often receives calls from lawyers clarifying issues relating to disability. While this is positive and ought to be encouraged, it highlights limited understanding of disability and disability rights.
- 3.29 The Advice Service also receives calls from family members and carers of people with cognitive disability who are unable to obtain legal advice on their behalf. While it is important to maintain client-solicitor confidentiality and ensure only a client provides instructions to the solicitor,

refusing to provide information or advice on the telephone or in person to concerned parties, can effectively exclude people with cognitive disability from the justice system.

3.30 In relation to specialist community legal centres, the Advice Service's concerns relate to their ability to offer advocacy and casework. Specialist community legal centres often provide very good legal advice but tend to be under-resourced. As a result, a person with limited means is often unable to proceed further because of the difficulties of navigating the justice system unaided. In these situations poverty imposes another barrier to accessing justice.

Recommendation 6: That government increase funding to community legal centres providing services to people with cognitive disability.

Litigation guardians

3.31 The role of the litigation guardian is to provide instructions to a solicitor on behalf of a person with a disability. However, calls to OPA's Advice Service suggest that people often misconceive the role of the litigation guardian by assuming, for example, that litigation guardianship is a cost-free substitute for legal representation, a synonym for advocacy or appropriate for any client who appears to have a disability.

3.32 That litigation guardianship is fraught with uncertainty is unsurprising, given that:

- There are no uniform rules relating to the appointment of litigation guardians in Victoria. It is currently a matter for the rules of each Court.
- There is a lack of alignment between the appointment of administrators and litigation guardians.

3.33 Additionally, there is a vacuum in service-provision in this area for the following reasons:

- There is neither a funded scheme to provide litigation guardians nor is there a coordinated program e.g. administered by Legal Aid or PILCH.
- Litigation guardians may incur legal expenses and court ordered costs on behalf of the person with a disability, which acts as a significant deterrent.
- The separation of the functions of guardian and administrator into lifestyle and legal arenas prevents some administrators from pursuing or defending matters which may be classified as lifestyle-related, for example, contact with a child.

3.34 As is evident in Sean's case (paragraph 3.35) below, these factors work together to deny people with cognitive disability access to the justice system.

3.35 Case study - Sean

'Sean' was involved in civil litigation. The court stayed the proceedings until a litigation guardian was appointed. Sean was unable to locate someone who was prepared to be his litigation guardian. The Public Advocate spent considerable time trying to locate someone to accept this role. In effect, Sean's access to the justice system was stayed and made subject to a condition that could not necessarily be fulfilled.

Recommendation 7: That legislation is developed to standardise Victorian Court rules around the appointment of litigation guardians.

Recommendation 8: That government fund a co-ordinated litigation guardian service.

4. In the system

The front end: Police

“In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police....”[Article 13(2)]

Identifying cognitive disability

4.1 As previously discussed (see paragraph 1.6), people with cognitive disability have increased need for and interaction with the justice system. However, while people with “highly visible” needs tend to be detected this is not always the case for people with mild to moderate disabilities (Burton et al, 2006, cited in Smith and Tilney 2007, p. 9). Possible reasons for this may include:

- the complex circumstances with which people present to the police;
- the tendency for people to conceal their disability due to social stigma; and
- limited police training.

4.2 The main implication of this is that people with cognitive disability are not being linked into services and programs in the justice system that are tailored to meet their needs; for example, the ITP program. While there is extensive anecdotal evidence about this phenomenon, there is no data.

4.3 Case study - Eloise

'Eloise' was a young woman with cognitive disability who was charged for minor offences. An ITP was asked to attend a police interview. However, Eloise refused to meet with the ITP. When Eloise saw the ITP was a person with a visual impairment, she became more embracing.

Eloise invited the ITP into the interview room. In the course of their meeting Eloise informed the ITP that she had a brother, James, in the adjacent room with mental health issues who would benefit from seeing the ITP. When the ITP raised this issue with police, the police said James had numerous priors and seemed "fine". His mental health issues had not been raised with the police prior to this. After persisting, the ITP gained access to James who engaged with the ITP service.

4.4 OPA is encouraged by the dramatic increase in the number of ITPs requested to attend police interviews over the past few years. Indeed, in the past five years, there has been almost a 40 per cent increase in the number of OPA ITPs requested to attend police interviews. OPA sees this as indicative of growing disability-awareness in the police force. It supports the assertion made by the police that they tend to "err on the side of caution" when assessing people's support needs (Department of Justice, 2011, p. 189). This trend may also be seen as a direct benefit of OPA's involvement in providing training at the police academy.

4.5 Despite this, OPA is concerned about widespread anecdotal evidence that police may not be following their own policies and procedures. This may be reflected in decisions to not utilise an appropriate ITP as stipulated in the police manual or in discriminatory attitudes towards people with cognitive disability. The following case studies highlight some of these problems.

4.6 Case studies – Samuel and Naomi

An ITP was supporting 'Samuel', a man with an acquired brain-injury at a police interview. During the interview the police mentioned that Samuel had numerous outstanding charges and priors. However, OPA's ITP database revealed that no calls had been logged for any of those interviews.

An Independent Person was supporting 'Naomi', a young woman in a police interview. This Independent Person was also a volunteer with OPA's ITP program. At the end of an interview, when Naomi mentioned which school she attended, the Independent Person realised she had an intellectual disability. The Independent Person raised Naomi's disability with the police and asked them to record it on their system, so an ITP would be contacted if Naomi was in contact with the justice system again. The police refused to record Naomi's disability stating "you have to be stupid to commit a crime".

Recommendation 9: That the right of people with cognitive disability to use Independent Third Persons in police interviews be legislatively articulated.

4.7 OPA is currently conducting extensive research into addressing some of the issues facing repeat users of the Independent Third Person program. The report by Magdalena McGuire is entitled “Breaking the Cycle: Using Advocacy Based Referrals to assist people with disabilities in the Criminal Justice System”. It will be forwarded to the Inquiry upon completion. The project recommends that OPA be funded to develop and implement a referral and advocacy service for ITP clients who are ‘repeat presenters’ before the program.

Responding to cognitive disability

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

- Behaviours like defensiveness, failure to make eye-contact or acquiescence are wrongly interpreted as signs of guilt in persons with cognitive disability. These behaviours, however, are often displayed by people with cognitive disability when encountering authority figures (Hayes, 2004, p. 5).
- Police often assume people with cognitive disability who have had repeated contact with the justice system are aware of their rights because they are able to repeat these rights verbatim. However, when probed by an ITP, few of these clients can explain what their rights mean.

4.9 Limited understanding of cognitive disability also results in inappropriate responses to people with cognitive disability.

4.10 Case studies – Simone and Brian

‘Simone’, a woman with ABI, intellectual disability and alcohol addiction was married to a person who was physically, financially and psychologically abusive towards her. She had repeated contact with the police. On one occasion, Simone contacted the police reporting an assault to the head. The police attended the scene, but owing to their repeated contact with Simone, took no further action. A few hours later, Simone went to hospital and was diagnosed with a perforated eardrum arising from the head injury.

Brian is a man from a CALD background with an intellectual disability. Brian sought to hold up a bank with a vegetable knife, in order to buy himself some food. He was supported in the interview by an ITP. When Brian refused to be finger-printed, four large police officers came into the interview room with their guns drawn. It was later revealed that Brian was missing a finger.

4.11 At the service end of the justice system, police have tremendous power to facilitate access to justice. However, they often assume the role of “judge and jury” choosing not to investigate a matter or press charges. Some reasons for this may include:

- A utilitarian morality which places diminished value on the suffering of people with cognitive disability (Hayes, 2004 ,p. 2);
- A culture of failure, based on past experience of people with cognitive disability in the justice system (French, 2007, p. 25);
- The deterrent of the possibility of court-ordered costs being awarded against the police should a prosecution fail, can result in the police dismissing people with cognitive disability as unreliable witnesses.

4.12 Case studies – Hannah and Immanuel

'Hannah' is an older woman with an intellectual disability. She was allegedly assaulted by a male worker in a supported accommodation. OPA became involved when an anonymous caller complained about the lack of follow up from the police and the accommodation service.

When Hannah was driven to the police station, she became increasingly distressed, and refused to leave the car. The police attended the car and sought to take a statement from Hannah with no independent person or support person present. Hannah was so distressed that she denied all allegations.

Two persons working in a supported accommodation witnessed a resident, 'Immanuel', being physically assaulted. There was a delay lodging a complaint to the police because of an internal workplace investigation. When the police finally became involved, they decided not to press charges. When OPA advocates pursued this matter with the police, the police were dismissive and suggested that because Immanuel had a mental illness and a criminal record, he was unlikely to be considered as a "credible witness".

4.13 Police decisions not to pursue matters have consequences for clients which relate to and extend beyond the justice system.

- As a result of inappropriate responses to violence or crime, people may not be linked into support services or get access to emergency accommodation.
- Without a police report, people may be ineligible to apply for victims of crime compensation.
- A decision not to investigate a matter or take a witness statement, for example, impacts data collection on crimes involving people with disabilities. This makes an informed and systemic response to these problems less possible.

4.14 As police constitute the front-end of the justice system, they largely shape the nature, extent and effectiveness of people with disabilities' interaction with the justice system. While police training plays an important role, OPA feels that a specialist disability police unit trained to respond to the needs of people with disability is critical to realising the rights of core-users of the justice system.

Recommendation 10: That police establish a “first response” disability unit equipped to work with victims, witnesses and alleged offenders with disabilities involved in criminal matters.

Community policing

4.15 Although the previous cases paint the picture of a police force disengaged from people with cognitive disability, the reality is that there are also numerous good-practice examples, which are not reported. Police can and do play an important role in facilitating positive interaction with the justice system. Often, this requires a shift from the law and order model of policing to the community model.

4.16 Case study – Suzanne, Simon and Jacinta

An older woman, ‘Suzanne’, had a son who was at times violent and abusive towards her. She informed the police about this and they had a chat to her son about his behaviour. When the police went back for a welfare check, Suzanne indicated that his behaviour had improved significantly.

The police regularly attend a facility to warn a young man with complex needs, ‘Simon’, about his behaviour. The police never charge Simon but their presence has a calming influence on him.

The police drove a woman with cognitive disability, ‘Jacinta’, to another police station so she could access an ambulance, because the ambulance service in her regional town was many hours away.

Going to court

“States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.” [Article 12(1)]

Process

4.17 The formality of the court environment with its own set of rules and language is alienating and intimidating for many of OPA’s clients.

4.18 Characterisations of a ‘reasonable’ person, rules of evidence which have a tendency to exclude a witness with cognitive disability as unreliable, and the privileging of expert evidence over those of a person with cognitive disability mean that when it comes to courts, a person with cognitive disability is an “outsider”. The nature of the adversarial proceedings further

compounds this exclusion, as it leads people with disabilities to perceive themselves incorrectly as “wrongdoers”.

4.19 Some of these issues surrounding alienation are also present in therapeutic jurisdictions, as is evident from the comments below (paragraph 4.20). OPA’s STO project (Bedson et al, 2010) identified problems arising from a lack of person-centred court processes. It recommended that VCAT processes “be refined in order to enhance the opportunity for people with intellectual disabilities to participate in STO hearings, to improve their comprehension of the proceedings, and to promote ownership of the problems and issues that emerge during the hearings”. This finding is applicable to all people with cognitive disability in all jurisdictions.

4.20 Interview comments – STO clients (Bedson et. al, 2010, p. 70).

“They didn’t ask me any questions [at VCAT]. I just listened. I stayed there until they finished talking”.

“Most of them I can’t really remember. I try not to remember them because they’re just like bullshit. [Why?] Because they yak, saying the section a, b. What the hell are they talking about? So I basically just sit there and look around the room. And eventually they get around to me and say ‘Do you have any input on this?’ I say ‘not really, because I don’t understand a word you say’...[Do they ask you things like ‘Are you happy to be on the STO?'] Yeah. I’ll say ‘no, I don’t really want to be on it’ and they’ll say ‘oh, but we’ve got to put you on it anyway’. So what’s the point of asking me?”

4.21 OPA is also concerned that in regional areas VCAT hears matters in Magistrates’ Courts. This is confusing for OPA’s clients. For instance, some of OPA’s clients wrongly believe they are in trouble when they attend VCAT for a guardianship order hearing, perhaps because they attended the same court previously for criminal charges.

Attitudes of decision makers

4.22 In OPA’s experience, a decision-maker's understanding of disability has a tremendous impact on the outcomes of each case and the wellbeing of a person with cognitive disability. A decision maker is in a unique position to set the scene for the proceedings, and can to some extent alleviate the sense of alienation a person with cognitive disability may experience in the court system. The cases of Catherine (paragraph 4.23) and Stephen (paragraph 4.27) highlight the anxieties and alienation which arise from a decision-maker's denial of the impact of cognitive disability on the lives of people.

4.23 Case studies – Catherine and Thomas

'Catherine' is a young woman in her 20s with a mild to moderate intellectual disability. Her matter is known to OPA through the Advice Service, who received a call from her mother for guidance.

Catherine has a supportive family and lives independently in a flat and is well resourced. Catherine was in an "on again off again" relationship with Craig, who also has an intellectual disability. Craig was physically, psychologically and financially abusive towards Catherine.

Catherine told her mother, who is also her plenary guardian, about the ongoing abuse. After all other attempts to resolve the abuse were unsuccessful, Catherine's guardian sought an intervention order against Craig. Being supportive of her daughter's right to choose relationships, Catherine's guardian requested an intervention order that allowed her to have contact with Craig so long as they did not reside together.

The Magistrate only granted an interim intervention order and demanded that Catherine be present at the next hearing. He challenged the guardian's authority to make such a decision and did not seem to have an understanding of the role and authority of an appointed guardian.

The Magistrate would not rely on the information about Catherine having an intellectual disability. He fluctuated between a position of suggesting Catherine was unreliable because of her intellectual disability and suggesting that as an adult was capable of making decisions herself. Her guardian was concerned about how Catherine would be treated when she appeared before this Magistrate for a decision about a final intervention order.

'Thomas' is a man with acquired brain injury, dementia and alcohol-dependency. He had spent his entire life in a regional town and had had troubled contact with the local authorities and his parents. Despite his guardian providing documentary evidence to the court of Thomas's attachment to his home and his inability to connect action with consequence, a judge created bail conditions that prohibited Thomas from returning to his town. As a result, Thomas was constantly found to be in breach of his bail conditions.

4.24 The following case-studies, however, are in stark-contrast to those of Catherine and Thomas. For example, they highlight how judges can help mitigate the structural injustices faced by individuals seeking access to the court system.

4.25 Case studies – Lisa and Chris

'Lisa' is a woman from a CALD background who at the time of the trial had an undiagnosed mental illness. Her ex-husband sought custody of their child who had developmental delay. Lisa's language barriers, lack of familiarity with a Western legal system/family law, experience of domestic abuse and undiagnosed schizophrenia all impacted on her interaction with the legal system. She had difficulties retaining solicitors and sent the court large volumes of often unintelligible written materials. The matter came before the court on numerous occasions and the judge presiding over the matter was reluctant to proceed unless Lisa had the opportunity of having a litigation guardian. The Office of the Public Advocate acted as Lisa's litigation guardian.

During the trial, Lisa would often interrupt the court proceedings demanding for her perspective to be heard. As unorthodox as that was, the judge engaged Lisa and sought to understand her concerns.

In 'Chris's' case (see paragraph 4.41), the judge took the decisive step of threatening to subpoena DHS to find suitable accommodation for Chris, a man with significant intellectual disability remanded in a maximum security prison. The judgment came after a year of the judge requesting DHS find suitable accommodation for Chris.

Guardians in court

4.26 OPA's guardians play an integral role in advocating for the rights of people with cognitive disability in the court process. The following case-studies highlight two examples in which guardians have fulfilled this role:

- In Stephen's case (see paragraph 4.27), a guardian highlighted the impact of disability on his life.
- In Elizabeth's case (see paragraph 4.27), a guardian presented a victim impact statement on her behalf.

4.27 Case studies – Stephen and Elizabeth

'Stephen' is an Aboriginal man who has an acquired brain injury after being hit by a truck when he was young. He has severe alcohol-dependency and has numerous criminal priors. Stephen has historically been treated with hostility by authorities who tend to focus on his alcohol-dependency and troubled behaviour. The guardian sent a letter to the court explaining Stephen was hit by a truck and has cognitive issues arising from his acquired brain injury. Prior to this, his disability was never raised in court. The judge sent a letter to thank the guardian for this crucial information. As a direct result of this advocacy, the Court requested Disability Services to provide a Justice Plan proposal for Stephen.

A social worker contacted OPA for advice on securing a late-term abortion for 'Elizabeth', a young woman with intellectual disability. OPA advised that an application had to be made to VCAT in order to proceed with the abortion. Further, OPA suggested that the social worker establish whether there was a hospital willing to conduct the termination.

Less than a week from the initial inquiry, OPA was notified by the social worker that Elizabeth's father had called to inform her that there was no longer a need to proceed with the VCAT application. At the time of his phone call, he advised Elizabeth was having an abortion in a clinic, without VCAT consent. OPA reported the matter to the police, following concerns surrounding Elizabeth's pregnancy. The nature of Elizabeth's intellectual disability was such that it was unclear whether she could have consented to sexual intercourse. The police followed up with the abortion clinic and conducted DNA testing on the foetus, which revealed Elizabeth's father had raped her. Elizabeth's father was charged with incest and rape and convicted.

Elizabeth's guardian presented a victim impact statement as part of the sentencing process, which revealed the profound impact this crime had on Elizabeth's life. Not only was she displaced from her home without an understanding of what had happened, but owing to the abuse of trust she was unlikely to ever learn protective behaviours. In addition, there was no way of knowing whether Elizabeth had also been raped by others and what was needed to keep her safe. Further, the abortion was a deeply traumatic and painful experience.

The judge commended the guardian on the victim impact statement, which was also referred to in the Court of Appeal decision.

Assessment and Referral List

4.28 OPA is interested to see the outcomes of the Assessment and Referral Court List (ARC) pilot and to consider whether this program has application on a wider scale. The Assessment and Referral List is a specialist court list in Victoria, which works collaboratively with the Court Integrated Services Program (CISP). It is currently a pilot and aims to tailor the court-system to meet the holistic needs of people with cognitive disability. To be eligible to have a matter heard before the ARC, a person must:

- Be charged with a criminal offence that is not violent (as described in section 6 B(1) of the *Sentencing Act 1991* (Victoria)).
- Have one or more of the following:
 - A mental illness
 - An intellectual disability
 - An acquired brain injury
 - Autism spectrum disorder
 - A neurological impairment, including but not limited to dementia.

- Have a neurological condition which leads to substantially reduced capacity in at least one of these areas – self-care, self-management, social interaction or communication.
- Be likely to benefit from a problem solving court process and individual support plan
- Consent to participate in the list (Magistrates’ Court of Victoria, Assessment and Referral Court List, Undated)

4.29 OPA’s limited experience with the ARC list has in general been positive. However, it is important to note that the ARC ought not be viewed as a panacea, as the court system alone does not have the capacity to address the numerous forms of structural injustice impacting on the lives of people with disabilities.

4.30 Case study - Peter

'Peter', a man with an intellectual disability, is charged with the commission of numerous petty crimes. Peter is usually very intimidated by police and authority figures and usually struggles to communicate in those settings. However, the informal setting and the plain clothed police prosecutor and judge on the ARC list enabled Peter to engage with the system.

Recommendation 11: If the pilot of the Assessment and Referral Court is evaluated as successful, that the government roll out the model across Victoria.

Recommendation 12: That all people with cognitive disability accessing the justice system receive case-management. This could be facilitated through the standardising and mainstreaming of a court integrated support program.

After court: on the outside

“States Parties shall ensure that persons with disabilities, on an equal basis with others:...Enjoy the right to liberty and security of person;...are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.” [Article 14(1)]

Community Based Orders

4.31 OPA does not have much contact with people with cognitive disability who are subject to community based orders (CBOs). While this in part reflects the disability profile of our client group, we suspect that this may also highlight a gap in sentencing options for people with cognitive disability. They may be deemed unsuitable for CBOs on the basis that their disability makes it more difficult for them to meet the requirements of many CBOs (for example, that involve keeping appointments, or participating in group activities). In situations where people with cognitive disability breach their CBO due to difficulties meeting their obligations (particularly

where they lack the support of a carer) they can end up receiving a more severe sentence (Martin, 2011, p. 16).

4.32 The Australian Human Rights Commission (AHRC) cited the findings of Hayes and Hayes that 'offenders with an intellectual disability are more likely to receive custodial sentences than non-disabled offenders, and these sentences are likely to be of a longer duration (AHRC, *The Rights of People with Disabilities*, undated). OPA concurs with the AHRC that this may be the result of a lack of non-custodial sentencing options.

Intervention orders

4.33 OPA has made a series of recommendations in the context of the review of Victoria's mental health laws regarding detention and involuntary treatments. These recommendations extend to the criteria for involuntary treatment; the presumption of capacity; the preparation of treatment plans; the making of an inpatient treatment order and the criteria for a community treatment order (OPA, 2010, pp. 14-15).

4.34 An intervention order is one of the few legal options available to protect victims from likely future violence and abuse, and as such is an essential part of the toolkit available to people with cognitive disability who are seeking safety from violence, and for those trying to protect them.

4.35 There are, however, some issues that we would like to highlight relating to intervention orders that have yet to be resolved satisfactorily for people with cognitive disability.

- OPA holds concerns for people with cognitive disability who are experiencing violence or abuse and who are unaware that they could seek an intervention order. Research shows that more women than men are likely to be in this situation (and this is indeed OPA's experience), however, men with cognitive disability are at greater risk than other men. For example, men who were in relationships before having an accident that resulted in an acquired brain injury can be at risk of abuse from their partners and not know that they could take out an intervention order.
- OPA is concerned that people with cognitive disability are not receiving sufficient information, delivered in an appropriate format, about intervention orders made against them. Intervention orders are quite complex and people can unwittingly breach them, for example by accepting a telephone call or dinner invitation from the person who took out the order. Independent Third Persons could potentially be called on to go through the details of an intervention order when the person being served with the order has a cognitive disability.

Recommendation 13: That police be required to advise any person with an apparent cognitive disability who is served with an Intervention Order about OPA's Advice Service.

4.36 OPA is concerned about the increasing use of intervention orders [under the *Family Violence Protection Act 2008* (Vic) to regulate abusive behaviours between co-residents in supported accommodation facilities. OPA is of the view that more risk conscious housing options coupled with the employment of behaviour management interventions may mitigate the need for such orders in supported accommodation facilities. In effect, such orders prevent people residing under the same roof from engaging in certain behaviours towards the applicant/s. OPA knows of one example where a person seeking an intervention order actually ended up being locked in

a secure area of a CRU in order to keep him safe from the behaviours of a co-resident. In effect, his freedom of movement was constrained in order to ensure his safety.

4.37 Case study – Jeanette

Jeanette is a woman with an intellectual disability who was in a relationship with a violent man. Staff at her drop-in centre suspected Jeannette's partner was prostituting her but did not want to become involved. Jeannette was supported by a family violence worker but was not receiving other support services and was without a case manager. The family violence worker successfully applied for a guardian to be appointed.

Jeannette has not had very positive experiences in her dealings with the police: she once went to the police station in tears and they sent her away because they couldn't understand her. And later, after making a statement to police accusing her partner of sexual assault and then being pressured by her partner to rescind the statement, she was threatened that she may be charged with making a false statement.

Jeannette's contact with the courts has been more positive. An intervention order was made against Jeannette's partner and he was ultimately charged with breaching the order after they were seen together by a social worker who knew the couple. Only after charges were laid did he take the order seriously and stop seeing Jeannette.

Prior to the breach being reported, the police and Jeannette's supporters were aware that Jeannette was continuing to have contact with her partner. But without a 'reliable' witness (one without a cognitive disability) who reported the breach to Jeannette's guardian (who then reported it to the police), the man would not have been prosecuted. Jeannette also made a statement under oath at the proceedings confirming that she had been with her partner on that day.

Empowered by these experiences, Jeannette has subsequently been to court to get the intervention order extended. Further, after starting a new relationship with a man who then assaulted her, she went to court and initiated an application for an intervention order against him as well.

After court: Detention

“States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.” [Article 15(2)]

Prisons

- 4.38 The majority of OPA’s contact with prisoners with cognitive disability occurs via advocacy requests and through our Community Independent Support Officer (CISO) program, which supports prisoners registered with DHS as having an intellectual disability at internal prison disciplinary hearings.
- 4.39 The main issues affecting the experiences and rehabilitation outcomes of prisoners with cognitive disability are the dearth of support services and rehabilitation programs for this group and the time they spend waiting to be bailed or paroled because of a lack of appropriate supported accommodation. Research by the Department of Justice (2007, p. 25) corroborates OPA’s experience that the availability of appropriate accommodation is a key reason for delayed parole for prisoners with an intellectual disability. OPA’s advocacy work for prisoners is largely concerned with these issues. For example, we are involved with one man with an intellectual disability who is facing a detention supervision order. Legal Aid is providing legal support and we anticipate providing advocacy around service provision in prison if the order is made.
- 4.40 OPA has advocated for at least three prisoners with cognitive disability whose physical and mental condition has seriously deteriorated during their time in prison. The prison environment, time spent in seclusion (sometimes for their own protection) and a lack of targeted supports were identified as key factors in these cases. In one man’s case, he was only in prison at all because Disability Services could not provide appropriate supported accommodation.

4.41 Case study – Chris

Having lost his remaining parent and his connection with the home and community he grew up in, 'Chris', a man with a moderate to severe intellectual disability and paranoid schizophrenia was charged with trying to kiss a young girl and assaulting a boy who teased him because he had a disability.

Chris was found unfit to plead on the basis of mental impairment and the judge suggested that he needed accommodation where he received 24 hour support. Disability Services said they had no appropriate accommodation for Chris and so, with nowhere else to go, he was remanded to prison.

In prison, unable to understand why he was there or comply with prison regulations like providing a urine sample on demand, Chris's behaviour became very difficult to manage. After months in remand, periodically attending court to be told Disability Services still had no supported accommodation for him, he was being held in seclusion 23 hours a day, shackled during his one hour out of seclusion, and regularly drugged to manage his behaviour.

Ultimately, the judge in Chris's case threatened to subpoena the DHS Secretary if appropriate accommodation was not found for Chris within 10 days. Chris was placed in supported accommodation within days.

In total, Chris was imprisoned for one year. As a result of his prison experiences, Chris became agoraphobic, depressed and now shows signs of post-traumatic stress disorder. It took a year after his release for Chris to feel comfortable about going down to the local shops to do his shopping and banking.

Recommendation 14: That government provide supported accommodation options for people being paroled or bailed.

4.42 OPA is concerned that no routine assessment for cognitive disability is undertaken on reception to the prison system. Instead, the system relies on individual prison staff to notice a person's cognitive disability and refer them for assessment. If, however, the person has an intellectual disability and is a Disability Services client, they will be flagged on entry to the corrections system. This is not the case for Disability Services clients with other forms of cognitive disability.

Recommendation 15: That routine assessments of cognitive disability be conducted for all people entering the prison system, including juvenile facilities.

4.43 OPA is funded by Corrections to deliver the CISO program. The CISO supports the person by explaining their rights in the situation and what the court hearing process will look like and can talk to them about what might happen if they decide to plead guilty or to contest the charge. Issues for prisoners identified by CISOs include:

- High levels of uncertainty around the likely form of punishment, as decisions about appropriate punishment are at the discretion of the prison governor hearing the matter.

- Punishments are more keenly felt – cancelled visitors and fines have more impact on people with limited support networks and not much money.
- Power imbalances resulting in prisoners with an intellectual disability ‘copping’ to charges for things they did not do and receiving the punishment.
- Being charged for breaches of prison regulations that they are unable to comply with as a result of their disability (See Chris’ case study at paragraph 4.41)

4.44 Case study – Joe.

A prison officer caught ‘Joe’, a prisoner with a cognitive impairment, carrying contraband across the prison yard. The officer believed that Joe had been asked to carry it for another person but had to follow through with charges nonetheless.

A CISO attended the hearing and was able to support Joe, who had decided to plead not guilty, to think about what he might do to best present his defence. With this support Joe was able to cross-examine the informant (the officer) who came and gave evidence, and make the point that the contraband was not his.

Joe was found guilty and fined \$20. He was also warned that although they were sure he was ‘set up’ by other prisoners, he needed to be made aware that if he chose to hang around the wrong people things like this would keep happening. Joe was not happy at being found guilty.

“States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation”.
[Article 14(2)]

Supervised Treatment Orders

- 4.45 The Supervised Treatment Order (STO) regime was enshrined in the *Disability Act*. The *Disability Act* sets out a legal framework for the civil detention and compulsory treatment of people with an intellectual disability who ‘pose a significant risk of serious harm to others’ (Section 183, *Disability Act*). Under the legislation, the Public Advocate must be notified of all STO applications (Sections 191 (4) and 196 (2), *Disability Act*).
- 4.46 As well as the ongoing work of OPA’s Disability Act Officer (funded by DHS) to support the implementation of the *Disability Act*, OPA received funding from the Office of the Senior Practitioner to undertake research into the human rights implications of the STO regime (Bedson et al, 2010, p. 7).
- 4.47 The research found that a very small cohort of 41 people had been subject to an STO application and that 30 orders were made between 1 July 2007 and 31 July 2009 (Bedson et al,

2010, p. 49). Although the STO regime affects very few Victorians, its implications for the lives of those people are such that it warrants consideration here.

4.48 Key issues identified through the work of the Disability Act Officer and by the research project that are particularly relevant to this inquiry are touched on below. For a full discussion of these issues please refer to our report 'Supervised Treatment Orders in practice: How are the human rights of people detained under the Disability Act 2006 protected?' (Bedson et. al, 2010).

- One finding in particular has serious implications for access to justice for all people with cognitive disability, not just those subject to an STO. The STO research found that while lawyers and many other professionals involved in the implementation of the STO legislation were operating on the assumption that the person's participation in VCAT hearings was beneficial to them, the person who was the subject of the hearing reported feeling confused and indifferent about attending VCAT hearings. (See STO interview quotes, paragraph 4.20)
- Hence, the report's recommendation that VCAT processes 'be refined in order to enhance the opportunity for people with intellectual disabilities to participate in STO hearings, to improve their comprehension of the proceedings, and to promote ownership of the problems and issues that emerge during the hearings' (Bedson et al, 2010, p. 71). Arguably this is relevant to all court matters involving people with cognitive impairment.
- We believe that the *Disability Act 2006* (Victoria) as it stands does not place enough emphasis on the key concepts of 'treatment' and 'benefit to person', which are necessary to justify the restrictions imposed on the person's liberty; instead focusing on detention as a means to reduce 'the significant risk of serious harm to another person' (Bedson et al, 2010, p. 76). Further, clearer definition and guidelines are required for both concepts of 'treatment' and 'benefit' to ensure that therapeutic treatment, not behaviour management strategies devoted to managing risk alone, is provided.
- We recommended that the legislation incorporate safeguards against STOs being used to enable indefinite detention. For example, imposing a five year time limit on detention would allow time for compulsory treatment without detention to become a long-term risk management option. (Bedson et al, 2010, p. 81).
- The STOs regime has promoted access to civil justice for those people previously detained in disability services accommodation without a legislative framework or any oversight. Key positive outcomes identified include: the expert oversight the Office of the Senior Practitioner brings to the treatment of people with an intellectual disability who have complex needs and challenging behaviours; and the improved access to clinical assessments, services and supports that being under an STO facilitated (at least during the research period).
- The legislation limits the scope of the STO regime, among other things, to people with an intellectual disability who pose a risk to others and who are 'unable or unwilling to consent to treatment'. While the research was unable to examine the potential for the STO regime to benefit a wider group of people it is very likely, at least for people with an intellectual disability who want to have treatment, that access to the services and supports available to those on STOs would serve to minimise their future contact with the criminal justice system. OPA believes research into extending the STO regime to people with other types of cognitive impairment who pose a risk to others, as promised by Minister Garbutt in 2006, should be

undertaken as a matter of priority (Bedson et al, 2010, p. 85). This is likely another example of where the chronically underdeveloped service system for people with an ABI is preventing their access to justice.

4.49 Risk assessments play a central role in VCAT determinations of whether a person meets the 'dangerousness' criteria set out in the *Disability Act* [Section 191(6)]. Many questions have been raised about the reliability of risk assessments as a predictive tool for future offending, particularly when applied to people with cognitive disability (Bedson et al, 2010, p. 18-23). These findings have wider implications as risk assessments may be relied upon by parole boards and other bodies making decisions that affect the lives of people with cognitive disability. OPA is aware of work being undertaken by Frank Lambrick and collaborators on developing a validated risk assessment tool tailored to the circumstances of people with an intellectual disability. This tool is currently being trialled in Victoria. We look forward to the completion of this work and its use with this population group.

4.50 Case study – Richie

Richie is a young man with an intellectual disability and attachment disorder. Richie became a ward of the state after being severely neglected by his parents in his early childhood. In his late teens Richie was charged with armed robbery for threatening a worker at his residential service with a screwdriver after she refused to give him his cigarettes and he decided to demand hers as well. Richie's guardian believed that this altercation would not have happened if the worker was someone who knew Richie better, and could more successfully manage his demands.

Richie spent 9 months on remand awaiting his hearing. In that time his mental health deteriorated and he had to be transferred from the remand centre to Port Phillip Prison's disability unit to manage his increased self harming behaviours.

After his hearing, Richie was moved to a locked unit in a residential institution in accordance with his justice plan. Richie has often said that he feels safer in a locked environment – where he can't get out and no one can get in. This has made it very difficult for services to help Richie take even small steps towards living more independently in the community.

Also, it seems that when Richie is anxious, he takes 'every opportunity' to run away from his day program support staff and catch the train into the city. Without any money, or a plan, he often begs for cigarettes and money to buy coffee and sleeps rough. He is at significant risk of violence and exploitation on the streets; he has been beaten up and mugged. Once he had no contact with services for 10 days, no one knew where he was or if he was ok.

On these trips, Richie frequently comes in contact with public transport officers (who have fined him for travelling without a ticket), police (he is on summons for providing a false name and address and has been arrested for break and entry) and emergency departments.

When the STO legislation came in, Richie's guardianship order was revoked and he was made subject to an STO. Richie's STO was revoked after an updated risk assessment found that he no longer posed a significant risk to others.

This presented a new challenge to the services trying to support Richie. When he was subject to an STO police could be called on to apprehend Richie and return him to his residential service. Now, if Richie refused to go with police, they had no power to make him even if he was in a vulnerable situation. DHS decided to apply for a guardian to make accommodation decisions, who, if they believed it in Richie's interests, could decide to apply for a 'Section 26' order (*under the Guardianship and Administration Act 1986*) from VCAT to give the police the legal authority to apprehend him.

Richie's guardian is concerned about Richie's safety and is very unhappy that a guardian's 'Section 26' power is presently all that is available to reduce the likelihood of Richie ending up in hospital or, if the petty offences continue to mount, jail. OPA believes a coordinated and proactive service response is urgently required and, ideally, a concerted effort to identify and address the root cause of his 'absconding' behaviour. Only then will any progress towards more independent living be possible for Richie.

- 4.51 While OPA's research on STOs did not shed light on whether there were additional people who would have benefited from the STO regime, OPA is aware of at least one person detained in a locked residential service, and subject to constant supervision when accessing the community, who we suspect may meet the legislative criteria for an STO. OPA believes there may be more people unknown to us currently residing in gazetted residential services who may also warrant VCAT consideration for the making of an STO.

Recommendation 16: That the Department of Human Services ensure that everyone subject to civil detention in gazetted residential services (who meet the legislative criteria) have their rights protected pursuant to the STO regime set out in the *Disability Act 2006* (Victoria) .

Involuntary Treatment Orders

- 4.52 OPA's Advice Service gets a significant number of calls from people on involuntary orders in mental health facilities who do not have a clear understanding of their rights or the review processes available to them, and this includes people who have legal representation. If they don't already have legal representation the Advice Service generally refers them to the Mental Health Legal Centre, who can help them access Legal Aid. The Advice Service also offer to refer the matter to the Community Visitors Program, who can send a Community Visitor out to see them. OPA finds that the Community Visitors are often called on to explain to people their rights and options for appeal or review. While the Community Visitors can play an essential role in ensuring people's human rights are met, as demonstrated in Hugh's case below (paragraph 4.53), it is concerning that people's rights are not more adequately and routinely explained by the service system.

4.53 Case study – Hugh.

A patient in a mental health facility, 'Hugh' contacted the OPA advice service to request a visit from a Community Visitor. The patient had expressed concern about his involuntary detention in a highly restrictive environment and the adjournment of his Mental Health Review Board (MHRB) hearing. The patient's MHRB hearing, which is to be heard within 8 weeks of a person becoming an involuntary patient as prescribed by the *Mental Health Act 1986*, had been adjourned and the patient had lodged an appeal.

After another adjournment at the advice of the patient's Legal Aid representative (to ensure a smooth transition from one unit to another) the delays were raised by the Community Visitor at a liaison meeting with the Area Mental Health Clinical Service. When the service reported that they were unable to facilitate the MHRB hearings in alternative locations for people with high level needs, triggering another adjournment, the Community Visitor escalated the issue to the Director of the Mental Health Clinical Services, on the basis that the patient's charter right to recognition and equality before the law had been compromised. (OPA, 2011, p. 8)

- 4.54 OPA's Long-Stay Patient Project (Dearn, 2009) and follow-on advocacy work addressed an issue that OPA has been concerned about for some time: that of 'Community Visitor reports on patients in mental health facilities who have stayed long past the time when they need treatment ... some of whom have lived in institutional settings for between 10 and 20 years' (Foreword from the Public Advocate in Dearn, 2009, p. 3). The research found that while mental health units are not intended to provide lifelong accommodation and support, many involuntary patients appear to be living out the course of their lives in locked psychiatric settings because there is nowhere else for them to go. OPA believes this constitutes a breach of the civil and political rights outlined in the *Charter of Human Rights and Responsibilities Act 2006* (Victoria) as it is not reasonable to limit a person's rights where their circumstances are dictated by a service system failure to meet their needs. For more details please refer to the full report (Dearn, 2009) which is available to download from our website.
- 4.55 One person identified by the Long-Stay Patient project highlights a key systems gap limiting access to justice for people with complex needs. His case study, below, demonstrates that in at least this case the *Mental Health Act 1986* (Victoria) ("*Mental Health Act*") detention mechanism is being used to justify his detention in a locked psychiatric facility, despite evidence that he no longer meets the legislative criteria for detention.

4.56 Case study – Dan

'Dan' is a man in his forties who has been a patient in a locked psychiatric unit for the past ten years and, prior to this, lived in institutions. Dan has profound autism and his behaviour is made more difficult by his present environment. Attempts at managing Dan's behaviours are currently limited to psychiatric medication and physical restraints.

As Autism was previously considered to be a mental illness Dan was detained on an involuntary order under the *Mental Health Act*. In 2008 the government acknowledged Autism Spectrum Disorder is a neurological impairment, opening access for people with autism to DHS disability services (DHS, 2009). Furthermore, Dan's disability meets the criteria for 'intellectual disability' under the *Disability Act*.

There have been several occasions on which it has been determined that Dan does not meet the criteria for involuntary detention and treatment under the *Mental Health Act*. The first was from the Mental Health Review Board in 1989, which reported that Dan 'did not satisfy the criteria in the Mental Health Act for continued involuntary detention'. The most recent was in November 2010, when a file review undertaken by the Office of the Senior Practitioner found that 'it would be difficult to argue that (Dan) fulfils the criteria for involuntary psychiatric treatment and he, therefore, should be discharged without unnecessary delay to existing disability supported accommodation in the community'.

Disability Services are now seeking an alternative location for Dan. However, it is worth noting that he has been placed on the Disability Services CRU waiting list since 1992.

5. Support to navigate the justice system

- 5.1 To close this submission OPA would like to highlight the following as areas central to the goal of promoting the rights of people with cognitive disability, who are, in contact with the justice system.

Rights and disability awareness training

- 5.2 People need to be aware of their rights before they can even take their first step towards justice. Families and carers and people who work in the justice system, equally require awareness of and respect for the rights of people with disability. It is essential that government embed a culture of disability awareness and disability rights through the provision of training to people with disability, their families and carers and service providers.

Recommendation 17: That government fund the provision of peer education and self-advocate rights awareness training programs for people with cognitive disability, and for their families and carers.

Recommendation 18: That government fund self-advocacy groups to provide disability awareness training programs for the, police, lawyers, prison staff and other service providers in the justice system.

Improved identification

- 5.3 OPA is concerned both with people already in the justice system who are ‘flying under the radar’ and with people suffering abuse not able to speak out for themselves by virtue of their disability. In neither case are people accessing the supports or services they require to address their circumstances and enable healing and/or rehabilitation.
- 5.4 For people suffering abuse who are not being heard, because they did not know their rights or because they are unable to speak up, Community Visitors provide one of the few safeguards for people with cognitive disability living in supported accommodation. As such, Community Visitor volunteers perform essential and challenging work protecting this very vulnerable group of people. People with cognitive disability residing outside these services, for example in private accommodation, aged care services and prisons, are without even this level of protection.
- 5.5 In OPA’s submissions to the Guardianship Review, we have called for an extension of the powers of the Public Advocate to investigate cases of alleged abuse involving people with cognitive disability. The Victorian Law Reform Commission is likely to recommend this expansion of powers.

Recommendation 19: That police improve data collection relating to people with disabilities as victims of crimes or alleged offenders.

Access to advice

5.6 Advice for people with cognitive disability and their families and carers on how to proceed, where a matter is not a police matter, or after initial police report has been made, is essential. OPA's Advice Service promotes justice outcomes for people with cognitive disability, in particular around guardianship and administration matters, through information and, where relevant, referrals to appropriate support services, advocacy and complaints bodies. Competent legal advice, particularly in disability specific areas of law, can be difficult to access. Exceptions to the rule include the services provided by Villamanta Disability Rights Legal Service, the Mental Health Legal Centre and the Disability Discrimination Legal Service.

Tenacious (self-)advocates

5.7 Tenacious advocates are the key to pursuing justice for people with cognitive disability in a justice system established without their needs in mind. The self-advocacy movement is essential to real progress in reshaping the justice system to meet the needs of people with cognitive disability.

5.8 OPA believes there are serious gaps and funding shortfalls in the area of disability advocacy in general.

Recommendation 20: That OPA be supported to provide improved advocacy services to people with cognitive disability who are involved in the justice system.

5.9 In our research for this submission, family violence workers and, in some cases, guardians frustrated by a lack of effective case management for their clients have emerged as particularly tenacious advocates. This tenacity, and focus on their clients' future, is essential when working with people whose issues are often seen as 'too hard' and dismissed.

5.10 Guardians, while they have no official role in relation to their clients' (represented persons') access to the justice system, have nevertheless acted as advocates for their clients in ways that have promoted the person's rights and access to justice. Guardians do this, for example, by reporting crimes against their client that they become aware of to police, or by proactively engaging with police and courts in the interests of their client (see for example Stephen's case study at paragraph 4.27)

5.11 As an advocate, the Public Advocate has assisted people in contact with the justice system, both victims of crime and offenders, promoting just outcomes for our clients (see, for example, Elizabeth's case study at paragraph 4.27)

Responsive systems

5.12 OPA believes that much engagement of people with cognitive disability with the criminal justice system could have been prevented had they been better supported throughout their lives to fulfil their life goals and engage with the community on equal terms with others, or, indeed, on their own terms.

5.13 OPA sees a person-focused and responsive service system as key to promoting the rights and life chances of people with cognitive disability.

5.14 The justice system also needs to be more responsive and flexible in its dealings with people with cognitive disability. While awaiting a full evaluation, the ARC list and CISP appear welcome steps towards this goal. The provision of supported accommodation, as mentioned earlier in relation to alleged offenders, is essential for good outcomes for people in contact with the justice system.

Recommendation 21: That Department of Human Services provide improved disability appropriate emergency accommodation for victims of crime.

5.15 Flexible service delivery needs to be complemented by specific service responses where appropriate. Current examples in the justice system that assist people with cognitive disability include the Independent Third Person Program and CISO Program. One area that requires a specific service response is support for witnesses with cognitive disability. As noted earlier, court processes are frequently alienating and people with cognitive disability may benefit from support in attending court on the right dates and having someone there to explain court processes.

Recommendation 22: That the Department of Justice establish a witness support service for people with cognitive disability.

Bibliography

Australian Human Rights Commission, *The Rights of People with Disabilities: Areas of need for increased protection*, Accessed on 25-08-2011 at

<http://www.hreoc.gov.au/disability_rights/hr_disab/areas/ch5.htm#recs>

Camilleri, M, 2009, *[Dis]Abled Justice: Why Reports of Sexual Assault Made by Adults with Cognitive Impairment Fail to Proceed through the Criminal Justice System*, University of Ballarat

Bedson, L, McGuire, M & Walkinshaw, B, 2010, *How are the Human Rights of People Detained under the Disability Act 2006 Protected?*, Office of the Public Advocate, Victoria.

Dearn, L., 2009, *Long Stay Patient Project*, Office of the Public Advocate, Victoria.

Department of Human Services, 2009, *Autism State Plan*, Department of Human Services, Victoria.

Department of Justice, 2011, *Sexual Assault Reform Strategy: Final Evaluation Report*, Department of Justice, Victoria.

Dillon, J., 2010, *Violence Against People with Cognitive Impairments*, Office of the Public Advocate, Victoria.

Fegen, D, 1988, *The right to be heard: Obtaining evidence from Intellectually Disabled People*, Office of the Public Advocate, Victoria.

French, P, 2007 *Disabled Justice: The barriers to justice for persons with disability in Queensland*, Disability Services Research Institute for Queensland Advocacy Incorporated

Hayes, S, 2000, "Needle in a haystack: Identifying the offender with intellectual disability" in Shaddock, A.; Bond, M; Bowen, I and Hales, K, *Intellectual Disability & the Law: Contemporary Australian Issues*, Australian Society for the Study of Intellectual Disability Inc, NSW.

Hayes, S., 2002, "The Road Ahead for Research into Criminal Justice Issues for People with Intellectual Disability", Keynote Address presented at the Victorian Conference of the Australian Society for the Study of Intellectual Disability, Melbourne, 28 August 2002.

Hayes, S., 2004, "People with intellectual disabilities as victims of crime – the police and judicial response", Paper presented at the 39th Annual Conference of the Australasian Society for the Study of Intellectual Disability, 9-12 November 2004, Adelaide SA.

Jackson, M, Hardy, G, Peterson, P & Holland, S, 2011, *Acquired brain injury in the Victorian Prison System*, Corrections Research Paper Series, Paper No. 4, April 2011, Department of Justice, Victoria.

Johnson, K; Andrew, R and Topp, V, 1988, *Silent Victims: A Study of People with Intellectual Disabilities as Victims of Crime*, Office of the Public Advocate, Victoria.

Martin, W. (2011). Mental Health and the Judicial System. Western Australia Supreme Court (1861-2011) Arafmi Breakthrough Series. 1 August 2011. Accessed on 25 August 2011 at

http://www.supremecourt.wa.gov.au/publications/pdf/Mental_Health_and_The_Judicial_System_0108_2011.pdf.

Magistrates' Court of Victoria, *Assessment and Referral Court List*, Accessed on 25-08-2011 at <<http://www.magistratescourt.vic.gov.au/wps/wcm/connect/justlib/magistrates+court/home/court+support+services/magistrates+-+assessment+and+referral+court+list>>

Office of the Public Advocate, Victoria, 2011, *Submission: Protecting Victoria's Vulnerable Children Inquiry*, Office of the Public Advocate, Victoria.

Office of the Public Advocate, Victoria, 2011, *Submission to the Victorian Law Reform Commission in Response to the Guardianship Consultation Paper*, Office of the Public Advocate, Victoria.

Office of the Public Advocate, Victoria, 2011 *Submission to the Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, Office of the Public Advocate, Victoria.

Office of the Public Advocate, 2010, *Submission in Response to the Mental Health Bill Exposure Draft 2010*, Office of the Public Advocate, Victoria.

Office of the Public Advocate, 1987, *Finding the way: the criminal justice system and the person with intellectual disability*, Office of the Public Advocate, Victoria

Osnan, L.M, 1988, *Finding new ways: a review of the services to the person with intellectual disability in the Victoria Criminal Justice System*, Office of the Public Advocate, Victoria.

Smith, K and Tilney S, 2007, *Vulnerable Adult and Child Witnesses*, Oxford University Press Inc, New York.

Thomas, S; Corkery-Lavender, K; Daffern, M; Sullivan, D and Lau, P, 2010, *Senior Practitioner Disability, mental health and medication: implications for practice and policy*, Department of Human Services, Victoria.

UN General Assembly, Convention on the Rights of Persons with Disabilities, adopted by the General Assembly, adopted on 13 December 2006, available at <<http://www.un.org/disabilities/convention/conventionfull.shtml>>

Victoria Ombudsman, 2011, *Ombudsman Investigation Assault of a Disability Services Client by Department of Human Services Staff*, Victoria Ombudsman, Victoria.