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**Submission made by
Julia Farr Association**

**Select Committee on Disability Access and
Interaction with the Justice System**

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1.0 PURPOSE

This submission is in response to a request for evidence by the South Australia Parliament *Select Committee on Disability Access to and Interaction with the Criminal Justice System in South Australia*. Its purpose is to provide evidence regarding the experience and perspectives of people living with disability, and their family, carers and support networks in accessing and interacting with the South Australian Criminal justice system.

2.0 SUMMARY OF RECOMMENDATIONS

Recommendation 1

That professionals working in the criminal justice system access professional development to build their capacity to understand the implications of intellectual disability/cognitive impairment and/or communication disorders for understanding and communicating during legal processes.

Recommendation 2

That identification of a person living with disability triggers consideration of, and early referral where appropriate to, a magistrate court diversionary program or appropriate community-based options¹.

Recommendation 3

That all police officers are provided with training to enable them to understand the implications of living with an intellectual disability/cognitive impairment and the implications of a communication disorder, and what this means for officer practice during the judicial process.

Recommendation 4

That all relevant police procedures be reviewed and modified to ensure that alleged offenders living with disability receive the appropriate support to enable them to understand what is being asked or said and the significance of actions such as signing a record of interview or surrendering the right to silence.

¹ Refer to section 6.4.5 of this submission.

Recommendation 5

That core procedures within the justice system be refined so there is attention to the possible need for a support worker (or significant, trusted other) familiar to the person to be in attendance at all key stages of the person's connection with the criminal justice system.

Recommendation 6

That police be provided with training about the nature of intellectual disability/cognitive impairment, and communication disorders, their support needs and how to access them, and the implications for interactions with the justice system.

Recommendation 7

That people living with intellectual disability/cognitive impairment or related circumstances are not questioned by police without a familiar and trusted person being present.

Recommendation 8

That provision be made at the commencement of a jury trial for the jury to receive an awareness briefing and associated reference materials on the considerations relating to a person living with impaired capacity to understand the judicial process and /or give testimony.

Recommendation 9

That judges, magistrates, barristers and lawyers be provided with adequate training in engaging in court with people living with intellectual disability/cognitive impairment or related circumstances. This should have an emphasis on assessing and identifying appropriate support to enable the person to fairly engage with the justice system in a manner which upholds their rights.

Recommendation 10

That people living with intellectual disability/cognitive impairment or related circumstances are supported by a familiar person or trusted other at all stages of the court process.

Recommendation 11

That the justice system makes available a Supported Decision-Making methodology such as that currently being trialled at the Office of the Public Advocate. This will assist people living with disability to make decisions and provide testimony throughout the judicial process.

Recommendation 12

That magistrates be provided with training so that they are aware of the nature and effects of disability (including its psychological and socioeconomic dimensions), any relationship between lack of support services and offending behaviour, and the appropriateness and impact of diversion and sentencing options for offenders living with disability.

Recommendation 13

Development of procedures to ensure Magistrates have available to them adequate time and expert input for cases involving persons living with a degree of disability that has a material impact on their understanding of, and participation in, judicial proceedings.

Recommendation 14

The urgent review of any current South Australian legislation to remove/replace content that may be contributing to a view that people living with certain types of disability are deemed unreliable witnesses simply because of the naming of that disability. Any legislation so revised needs to acknowledge that any person living with disability has the potential, with appropriate support where necessary, to give authentic testimony.

Recommendation 15

That the court explore and develop procedural options for appropriately supporting people living with intellectual disability/cognitive impairment and/or related circumstances so they can give authentic and reliable testimony. This may include the participation in court of a trusted significant other in the person's life who can contribute to the court's understanding of the person's testimony; accessing such supports could be included as routine court procedure when dealing with people living with these disabilities.

3.0 INTRODUCTION

Julia Farr Association Inc and its predecessor organisations have been involved with the disability community for 130 years. The organisation holds that the following values should inform policy development in this area:

- Personhood – where people living with disability have and exercise control over the decisions in their lives²;
- Citizenship– where people living with disability are included as active citizens in the life of the wider community²;
- Capacity-building – where people living with disability, through access to experiences and support, are growing presence in Personhood and Citizenship, and where the wider community is growing its capacity to be welcoming, inclusive and supportive of people living with disability².

JFA is a non-government, self-funded, social profit entity based in South Australia that fosters innovation, shares useful information, and promotes policy and practice that supports vulnerable people to access the good things in life. We are not a service provider – we deliver research, evaluation and information services that are anchored upon the stories and experiences shared by people living with disability and other people in their lives. As such, we feel we are in a good position to offer comment and analysis without vested interest.

The human rights of people living with disability are recognised in international law, and to a varying extent in Australian domestic law, policy and related practices. The International Covenant on Civil and Political Rights (the ICCPR) states that all people are equal before the law and shall be equal before the courts and tribunals³. In 2007 Australia signed the UN Convention on the Rights of Persons with Disabilities⁴. The UN Convention reaffirms that people living with disability have the right to recognition everywhere as persons before the law. It requires that all states in Australia through the ratification of the UN Convention by Australia in July 2008 ensure effective access to justice of people living with disability. The Julia Farr Association believes that fundamental reforms to the South Australian criminal justice system are necessary in order to address inequities for people living with disability. This inquiry is critical given our awareness that people living with disability may not always be treated equitably under the current system as valued citizens.

The Julia Farr Association has prepared this submission to attend to various matters relating to people living with disability and the justice system, in particular:

² Williams, R.(2010) *Model of citizenship support: Discussion paper*, Julia Farr Association- JFA Purple Orange

³ *International Covenant on Civil and Political Rights*. Accessed 5/3/2012: <http://www2.ohchr.org/english/law/ccpr.htm>

⁴ *United Nations Convention on the Rights of Persons with Disabilities*. Accessed 5/3/2012: <http://www.un.org/disabilities/convention/conventionfull.shtml>

- a) Participants' knowledge of their rights;
- b) Availability and use of appropriate service supports;
- c) Dealings with the police;
- d) The operations of the courts;
- e) How South Australia compares with other states and countries in terms of access to the justice system for people with disabilities, and what measures could be taken to enhance participation in, and thereby provide people with disabilities with, just and equitable access to our justice system; and
- f) Any other related matter.

3.1 Definitions

Since this submission frequently refers to people living with intellectual disability/cognitive impairment and/or complex communication needs it is important to define what we mean by these terms.

Such concepts are multifaceted, with medical, scientific and social perspectives. Each circumstance does not exist in isolation, but is impacted by other factors in the person's life including the effects of being in an unfamiliar environment. It is impossible to specify precise boundaries for such conditions and it is common for people to experience more than one condition. Further, it cannot be assumed that all people living with the same diagnosed condition will experience similar impact on capacity and lifestyle.

Intellectual disability and cognitive impairment

The DSM-IV defines intellectual disability as “significantly sub-average intellectual functioning (an IQ of approximately 70 or below)” and “concurrent deficits or impairments in adaptive functioning in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, a national academic skills, work, leisure, health, and safety”⁵.

Broadly speaking a cognitive impairment relates to “a loss of brain function affecting judgement, resulting in decreased ability to process, learn and remember information. A cognitive impairment may be associated with conditions such as Alzheimer's, Dementia, Autism and Autistic Spectrum disorders, Multiple Sclerosis and Acquired Brain Injury”⁵. It is important to highlight that the concepts of intellectual disability and cognitive impairment are often confused.

Evidence suggests people living with intellectual disability/cognitive impairment are overrepresented in the criminal justice system and do not receive equitable

⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (4th ed, 2000)* (“DSM-IV”), p.41 & 153

treatment⁶. Consequently they are seriously obstructed from attempts to live their life as independently as possible. The Julia Farr Association is concerned not with the medical nature of these impairments, but with the apparent failure of social systems to support people to participate fully in the community as valued citizens.

Complex communication needs

Complex communication needs include the experience of difficulties with communication and related areas such as oral motor function. Such difficulties can range from simple sound substitutions to the inability to understand or use language, or use the oral motor mechanism for function of speech and feeding. The causes of communication disorder are varied including hearing loss, neurological disorders, drug abuse, physical impairments such as cleft lip or palate, brain injury or intellectual disability⁷.

Many people living with complex communication needs report frustration that non-disabled people wrongly assume the person has a cognitive deficit and has diminished capacity to make decisions.

Cerebral Palsy

Cerebral Palsy is an umbrella term for a group of non-progressive disorders of movement and posture caused by damage to the developing brain. Varying degrees of disability related to functional mobility (movement and posture), daily living skills and communications/socialisation skills result from these impairments. No two individuals are affected in the same way. Some people suffer minor motor skill problems while others may be physically dependent. People living with Cerebral Palsy can commonly experience symptoms such as clumsiness, involuntary muscle movements, slurred speech or no speech, stiffness or paralysis⁸. These symptoms have frequently been mistaken for drunkenness, and there has been recent media coverage in South Australia on the consequences of this for the person concerned.

4.0 JULIA FARR ASSOCIATION'S UNDERSTANDING OF ISSUES ASSOCIATED WITH ACCESS AND INTERACTION OF PEOPLE LIVING WITH DISABILITY WITH THE CRIMINAL JUSTICE SYSTEM

The key issue for people living with disability with the criminal justice system is not the fact of any personal impaired capacity but on the inadequacy of current support arrangements. People living with disability are citizens like anyone else, and should be able to expect fair support to access the justice system. We don't think this

⁶ Correction Victoria (2007), *Intellectual Disability in the Victorian Prison System: Characteristics of prisoners with an intellectual disability released from prison in 2003-2006*, Corrections Research Paper Series Paper No. 02 September 2007, Department of Justice. - This research found that people with an intellectual disability are more likely to be in prison, more likely to re-offend, more frequently categorised as a higher security risk and less likely to receive early parole.

⁷ National Dissemination Centre for Children with Disabilities (NICHCY) *Speech Impairments (Communication Disorders)*. Accessed 16/3/2012: <http://www.catherineshafer.com/speech.html>

⁸ *Cerebral Palsy Australia, the Facts*. Accessed 16/3/2012: <http://www.cerebralpalsyaustralia.com/index.php/site/learningcentre/thefacts/whatiscp>

currently happens in South Australia. Therefore, people who are already experiencing significant challenges of marginalisation and reduced opportunity because of their personal circumstances are at risk of being further disadvantaged when attempting to access justice. This increases the possibility of poor outcomes, which can consolidate vulnerability to victimhood (whether the person was the alleged victim or alleged perpetrator in any particular situation). This in turn will reduce the person's chances of living an ordinary valued life as a citizen in their community.

4.1 People living with intellectual disability/cognitive impairment

This particularly may be the case for people living with intellectual disability and/or cognitive impairment. The justice system appears not to adequately recognise particular support needs associated with living with an intellectual disability/cognitive impairment which may lead to a denial of the right to justice resulting in sometimes detrimental life outcomes.

As highlighted by French (2007) in the report *Disabled Justice*, people living with an intellectual disability are more likely to be arrested, questioned and detained for minor public order offences. They are more likely to receive harsh penalties and have less access to the sentencing options that are available to other offenders^{9 10}. They may experience disadvantage when questioned by police or when threatened with court because they don't understand what is happening and what is being said. They do not fare well in prisons.

It is of no surprise to Julia Farr Association that people living with an intellectual disability/cognitive impairment are overrepresented in the criminal justice system both as victims and offenders¹¹, and we think it is possible to theorise a link with inadequate supports for community living. The report *Enabling Justice* focuses on the experience of alleged offenders living with intellectual disability in the local court, identifying problems and recommending reforms. This report recognises the role of a social disadvantaged background in the overrepresentation of people living with intellectual disability in the criminal justice system. Typically these people come from impoverished socio-economic backgrounds. They may have left the education system early, have unstable accommodation or homelessness, live in poverty and experience other social problems such as alcohol and drug abuse. Typically they lack positive relationships, role models and advocates in their network of family and friends. Families are often struggling to cope with a family member living with disability because adequate supports are not available¹¹.

⁹ French, P. (2007). *Disabled Justice: The barriers to justice for persons with Disability in Queensland: Queensland Advocacy Incorporated*. Accessed 19/3/2012: http://www.gai.org.au/images/stories/docs/1987-2007/doc_199.pdf

¹⁰ Intellectual Disability Rights Service Inc. *People with Intellectual Disabilities and the Criminal Justice System: The Framework Report*. Accessed 5/3/2012: http://www.ncoss.org.au/bookshelf/conference/download/scales_of_justice/people_with_intellectual_disabilities.pdf

¹¹ Intellectual Disability Rights Service. *Enabling justice*. Accessed 19/3/2012: http://www.idrs.org.au/pdf/enabling_justice.pdf

Given this scenario, it is not surprising to find that some people living with intellectual disability/cognitive impairment become involved in committing minor offences. The point we want to highlight is that these people and their families lack adequate support for ordinary life opportunities. Stronger investment in ordinary life supports might in turn reduce the likelihood of offending.

Once involved with the justice system the possibility of lack of support at all stages of the judicial process increases the risk of a poor outcome for the person, which in turn might increase the risk of re-offending and recycling through the justice system.

4.2 People living with communication disorders and sensory impairment

Other people significantly affected by the lack of support from the criminal justice system include people living with complex communications needs and people living with sensory impairment. The critical issue for such people is early access to appropriate support. Mason and Robb (2007) advocate the importance of prevention and early intervention for people living with disability in the criminal justice system from an economic perspective¹². Julia Farr Association is concerned that essential support needs are not adequately recognised or accommodated by the justice system which increases the risk of obstruction or denial of fundamental human rights.

4.3 Julia Farr Association's conclusions regarding access and interaction of people living with disability with the criminal justice system

Based on the conclusions of other authors and what we have seen for ourselves, the Julia Farr Association believes the key opportunities include:

1. Addressing the inadequacy of supports for people living with disability to live an ordinary valued community life, which we believe would reduce the likelihood or emergence of victim experiences or offending behaviour^{13 14};
2. Provision of appropriate personalised support services as required once people living with disability have come into contact with the criminal justice system and at all stages of the judicial process^{13 14}.

This is supported by the results of the work of the Magistrate Court Diversionary Program in South Australia (as detailed in section 6.4.5 of this submission), a program which is underpinned by the principle that early access to support may prevent or reduce offending behaviour for people living with mental health

¹² Mason & Robb (2007), *Pathways for People with a Disability in the Criminal Justice System: Using a Benefit Cost Analysis to Reframe the Approach to Policies and Programs*. Accessed 19/3/2012:

<http://www.wild.org/Victims%20of%20Crime/Downloads/Research/Experiences%20of%20the%20Criminal%20Justice%20System/Mason%20et%20al--2009.pdf>

¹³ Senate Select Committee on Mental Health, Parliament of Australia, *A national approach to mental health – from crisis to community: Final Report (2006)* 20.

¹⁴ *Intellectual Disability Rights Service*. Enabling justice. Accessed 19/3/2012: http://www.idrs.org.au/pdf/enabling_justice.pdf

conditions/cognitive impairment. There have been at least two evaluations of the Magistrate's Court Diversion Program. The second evaluation report investigated whether the program had reduced recidivism among program participants and identified the factors that predicted the likelihood of post-program offending. The evaluation found that a majority of offenders who had participated in the diversionary program were not apprehended for offending in the following 12 month period¹⁵. The report's authors concluded that the diversionary program was likely to be having a positive effect on program participants.

5.0 THE NEED FOR EARLY IDENTIFICATION OF PEOPLE LIVING WITH INTELLECTUAL DISABILITY/COGNITIVE IMPAIRMENT AND/OR COMMUNICATION DISORDERS

It is not easy to recognise that a person does not understand. There are often no obvious characteristics that indicate impaired ability to understand. People living with intellectual disability/cognitive impairment and/or communication disorders do not routinely identify themselves as having a disability. Depending on the individual, a person with an intellectual disability/cognitive impairment may:

- Take longer to absorb and to comprehend information;
- Have difficulty understanding questions, abstract concepts or instructions;
- Have difficulty with numbers and other measures such as money, time and dates;
- Have a shorter attention span;
- Have difficulty with short and/or long term memory;
- Find it difficult to maintain eye contact;
- Find it difficult to adapt to new environments and situations;
- Find it difficult to plan ahead or solve problems;
- Find communication over the phone difficult; and
- Have difficulty expressing their need^{16 17}.

Frequently magistrates, lawyers and police may not be aware of the nature and consequence of a person's disability¹⁸. Some authors recommend a screening tool for identifying people living with intellectual disability/cognitive impairment. However, the Julia Farr Association points out that any screening tool is only as good as the

¹⁵ Richardson, E. (2008), *Rethinking Mental-Health Laws: Mental health courts and diversion programs for mentally ill offenders: the Australian context*. Accessed 19/3/2012: <http://www.law.monash.edu.au/centres/calmh/rmhl/docs/lr-iafmhs-160708.pdf>

¹⁶ NSW Law Reform Commission (2010), *Consultation paper 5. People with mental health and cognitive impairments in the criminal justice system. An overview*. Accessed 5/3/2012: http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref120

¹⁷ *People with Disabilities, November 2009 First Edition*. Accessed 22/3/2012: http://www.supremecourt.wa.gov.au/publications/pdf/equality_before_the_law_chapter4.pdf

¹⁸ *Australian Human Rights Commission the rights of people with disabilities: Areas of Need for Increased Protection . Chapter 5: Criminal Justice System*. Accessed 5/3/2012: http://www.humanrights.gov.au/disability_rights/hr_disab/areas/Ch5.htm

person administering it and no screening instrument will be 100% accurate in identifying the nature and consequence of any impairment. Instead of wholly relying on a screening tool, the Julia Farr Association prefers to emphasise the importance of key personnel within the justice system having the capacity to recognise when a person requires support to understand and engage with the justice system. This includes the police, lawyers and magistrates and judges. This has implications both for professional development opportunities on matters relating to disability and for identifying and initiating support requirements. The earlier this identification and assistance happens for any person living with disability who is in contact with the justice system, the more helpful it is likely to be. For example, in writing about the legal rights of people with intellectual disability in South Australia, Bidmeade (2004) highlights the variation in the way that police may respond to first contact with an alleged offender living with disability. He suggests that being aware of a person's disability may significantly affect the way police use their discretion¹⁹.

A general provision exists in South Australia empowering the court to require a person “to undergo an examination by a psychiatrist or other appropriate expert, the results of such examination to be reported to the court”²⁰. This power may be exercised on the application of either party, or on the judges own initiative if he or she considers it necessary “to prevent a possible miscarriage of justice”²¹. The Julia Farr Association advocates the application of this provision using an appropriate expert in the relevant areas of disability.

Recommendation

The Julia Farr Association recommends:

- R1: That professionals working in the criminal justice system access professional development to build their capacity to understand the implications of intellectual disability/cognitive impairment and/or communication disorders for understanding and communicating during legal processes.
- R2: That identification of a person living with disability triggers consideration of, and early referral where appropriate to, a magistrate court diversionary program or appropriate community-based options²².

¹⁹ Bidmeade, I (2004), *Justice for all : the legal rights of people with intellectual disability in South Australia*. Accessed 5/3/2012: <http://catalogue.nla.gov.au/Record/834558>

²⁰ *Criminal Law Consolidation Act 1935 (SA) s 269F(A)(1)(b), 269G(B)(1)(b)*.

²¹ *Criminal Law Consolidation Act 1935 (SA) s 269F(A)(1)(b), 269G(B)(1)(b)*.

²² Refer to section 6.4.5 of this submission.

6.0 ISSUES RAISED BY THE TERMS OF REFERENCE

The Julia Farr Association will now address the terms of reference.

6.1 “(a) Participants knowledge of their rights”

When people living with intellectual disability/cognitive impairment enter the justice system they are entering an unfamiliar, possibly confusing, environment and this may work to compromise the person’s capacity to comprehend and navigate their way through the judicial process. The language used and the concepts involved in judicial processes are such that a person living with intellectual disability/cognitive impairment may not understand the information being given, including information about their rights (and for a person living with complex communication needs, this may extend to the way their responses (or lack of responses) are interpreted by officers).

For example, all people have a right to silence during questioning by police and must receive a verbal warning that anything they say can be used as evidence against them. Police are required to give this caution to a person who is accused of an offence, yet are under no obligation to take special measures to make sure that it is properly understood²³. For a person living with an intellectual disability/cognitive impairment or related circumstances, this caution may contain language and concepts that are profoundly unfamiliar to the person. He or she may not understand that they are lawfully entitled to say nothing. Similarly, a person may not comprehend the implications of signing a written statement and police are under no obligation to ensure that the person understands the statement before he or she signs it²³.

This is an example of how the criminal justice system may not be providing effective support to enable people living with intellectual disability/cognitive impairment and/or communication disorders to participate in the legal process in a manner which upholds their rights. The Julia Farr Association sees a current situation where police officers do not appear to be required to ensure there is adequate communication support, so the person living with disability understands the proceedings. As such, the current situation is not sufficient to uphold a person's rights.

Similarly, people living with communication disorders and/or sensory impairment may require appropriate tailored support in order for them to understand what is being communicated and to respond accordingly. This may include such considerations as having a person who is familiar with the person's communication style present,

²³ *Australian Human Rights Commission the rights of people with disabilities: Areas of Need for Increased Protection. Chapter 5: Criminal Justice System.* Accessed 5/3/2012:
http://www.humanrights.gov.au/disability_rights/hr_disab/areas/Ch5.htm

providing a hearing loop, or ensuring that questioning occurs in time-limited periods to manage fatigue, etc.

Recommendations

The Julia Farr Association recommends:

- R3: That all police officers are provided with training to enable them to understand the implications of living with an intellectual disability/cognitive impairment and the implications of a communication disorder, and what this means for officer practice during the judicial process.
- R4: That all relevant police procedures be reviewed and modified to ensure that alleged offenders living with disability receive the appropriate support to enable them to understand what is being asked or said and the significance of actions such as signing a record of interview or surrendering the right to silence.

6.2 “(b) Availability and use of appropriate service supports”

Many people living with intellectual disability/cognitive impairment and/or related circumstances have multiple and complex needs and will likely benefit from a range of supports in their daily life. The Julia Farr Association believes that the proper availability of such supports may significantly reduce the likelihood of contact with the justice system. We argue this on the intuitive basis that, if people have access to fair and reasonable support in their daily lives, they are less likely to have motive to engage in antisocial or criminal activity, and are less likely to become the victims of crime because of the presence of natural and intentional safeguards.

Our view is that currently there is not sufficient support of this nature, which reduces the opportunity for people living with disability to take up roles as valued citizens. Further, any support that is currently available often involves multiple workers assisting with separate issues such as mental health, drugs, alcohol or physical health from multiple locations²⁴. Unfortunately, despite the best intentions of such efforts, these supports often are not well-coordinated, for example in relation to planning and to the sharing of information. Often people have no continuity of key worker or case manager and support needs spanning more than one agency or sector may not be well-coordinated. Given this fragmentary approach, services may find it difficult to provide a measured, coordinated response for a person in a situation involving the criminal justice system. It is not difficult to imagine how individuals may

²⁴ Intellectual Disability Rights Service Inc. *People with Intellectual Disabilities and the Criminal Justice System: The Framework Report*. Accessed 5/3/2012: http://www.ncoss.org.au/bookshelf/conference/download/scales_of_justice/people_with_intellectual_disabilities.pdf

not receive vital support at such a critical time when their support networks are so complex²⁵.

Our understanding is that the assessment of support needs of people living with disability seldom occurs in the criminal justice system without a special order; this means there is a risk that there will be people living with disability in the justice system who are not being adequately supported because the circumstance of their disability has not been identified and addressed.

Recommendation

Therefore Julia Farr Association recommends:

- R5: That core procedures within the justice system be refined so there is attention to the possible need for a support worker (or significant, trusted other) familiar to the person to be in attendance at all key stages of the person's connection with the criminal justice system.

6.3 “(c) Dealings with the police”

A person's initial experience with the criminal justice system is most likely to be the police. In our experience hearing the perspectives of people living with intellectual disability/cognitive impairment and/or communication disorders and their families/carers, they feel extremely disadvantaged when being questioned by the police. They report that sometimes police do not realise that the person has a disability²⁶. Further, there is a concern police may not understand the impact of living with disability on engagement with judicial processes²⁷.

For example people living with intellectual disability/cognitive impairment and/or communication disorders are less able to comprehend information when they are fatigued. Not having access to regular breaks in questioning may reduce their ability to meet the requirements of police questioning.

The implications of this are deepened because when people are arrested they often do not have access to a support person²⁸.

²⁵ Intellectual Disability Rights Service. *Enabling justice*. Accessed 19/3/2012:

http://www.idrs.org.au/pdf/enabling_justice.pdf

²⁶ Intellectual Disability Rights Service. *Enabling Justice*. Accessed 5/3/2012:

http://www.idrs.org.au/pdf/enabling_justice_easy_english.pdf

²⁷ Australian Human Rights Commission *the rights of people with disabilities: Areas of Need for Increased Protection*. Chapter 5: *Criminal Justice System*. Accessed 5/3/2012:

http://www.humanrights.gov.au/disability_rights/hr_disab/areas/Ch5.htm

²⁸ Intellectual Disability Rights Service Inc. *People with Intellectual Disabilities and the Criminal Justice System: The Framework Report*. Accessed 5/3/2012:

http://www.ncoss.org.au/bookshelf/conference/download/scales_of_justice/people_with_intellectual_disabilities.pdf

Effectively, this means that some people living with intellectual disability/cognitive impairment or related circumstances may not get the support they need in a situation where they are dealing with the police. It seems reasonable to suggest that if there are stereotypes and prejudices about people living with disability held by the wider community^{29 30}, then it is possible these same attitudes are present among the police. Such attitudes affect how people behave, and so if these attitudes are present among some members of the police, then it will affect how they behave towards people living with disability. This could lead to a person being further disadvantaged.

Recommendations

Therefore the Julia Farr Association recommends:

- R6: That police be provided with training about the nature of intellectual disability/cognitive impairment, and communication disorders, their support needs and how to access them, and the implications for interactions with the justice system;
- R7: That people living with intellectual disability/cognitive impairment or related circumstances are not questioned by police without a familiar and trusted person being present.

6.4 “(d) The Operation of the Courts”

The court can be a confusing and frightening place for any person including people living with intellectual disability/cognitive impairment and/or communication disorders. A person may need assistance to comprehend the court process, to give instructions to lawyers and to give evidence in court³¹. This suggests there is a real need for judges, magistrates and lawyers to be able to recognise when the circumstance of a person’s disability means they may not have sufficient understanding of court processes, their role in those processes and to ensure there is provision of appropriate support or diversion. Lawyers typically may not have the time and skill needed to assist people, and people often see different lawyers which can be confusing³². The person may have to go over their story several times.

²⁹ Cockram et al., (1993), *Perceptions of the judiciary And Intellectual Disability*. *Journal Of Intellectual and Developmental Disability Vol 18*, pp. 189-200.

³⁰ French, P. (2007), *Disabled Justice: The barriers to justice for persons with Disability in Queensland*: Queensland Advocacy Incorporated. Accessed 19/3/2012: http://www.qai.org.au/images/stories/docs/1987-2007/doc_199.pdf

³¹ Intellectual Disability Rights Service. *Enabling Justice*. Accessed 5/3/2012: http://www.idrs.org.au/pdf/enabling_justice_easy_english.pdf

³² Hayes, S.(2006), *People with Intellectual disabilities in the criminal justice system – when is disability a crime?* Accessed by/3/2012: [click here](#)

6.4.1 Parent concerns

The *Parents Forum* is hosted by the Julia Farr Association and provides an opportunity for parents of children (who are aged between 5-18) and who live with disability to access and share information about concerns, ideas and opportunities relating to their children getting a 'fair go'. A focus of the parent group is identifying pathways towards helpful change.

The Julia Farr Association notes concerns reported via the group about parents attempting to navigate their way through the justice process. During consultation with the Julia Farr Association Parent Forum, Parent Z, the mother of a boy who had experienced sexual abuse, describes the experience of being in court:

“He's had to go to an adult court. He was frightened and traumatised from the abuse. It was very difficult for him to participate. He is only six years old, has intellectual disability and complex communication needs. There was no support for him”.

The Julia Farr Association believes such experiences are unacceptable.

6.4.2 Preparation of Jurors

For jury trials where the alleged offender, alleged victim, or witness, is a person living with impaired capacity to understand the process or give testimony, the jury should be given guidance at the outset of the trial on how to engage with that person's circumstances and testimony. This is of paramount importance since the jury is being asked to determine whether the evidence for the prosecution is proven or not. While systematic capacity-building of law professionals is viable because of their ongoing involvement in the industry, juries vary with each trial and so there needs to be a different type of capacity-building, typically in the form of a briefing at the start of the proceedings.

Recommendations

The Julia Farr Association makes the following recommendations:

- R8: That provision be made at the commencement of a jury trial for the jury to receive an awareness briefing and associated reference materials on the considerations relating to a person living with impaired capacity to understand the judicial process and /or give testimony.
- R9: That judges, magistrates, barristers and lawyers be provided with adequate training in engaging in court with people living with intellectual disability/cognitive impairment or related circumstances. This should

have an emphasis on assessing and identifying appropriate support to enable the person to fairly engage with the justice system in a manner which upholds their rights.

R10: That people living with intellectual disability/cognitive impairment or related circumstances are supported by a familiar person or trusted other at all stages of the court process.

6.4.3 Giving evidence

South Australian law regards people living with disability as unreliable witnesses who would not cope with cross-examination³³. This could significantly undermine a person's right to fair access to justice.

In South Australia there have been several alleged sexual assault cases against young people living with intellectual disability. These cases were dropped before going to trial, apparently because the persons concerned were assumed to have difficulty communicating what had happened to them and therefore not be seen as reliable witnesses³⁴.

The Julia Farr Association has spoken with a number of concerned persons about this situation and the impact it has had on their lives. For example, Parent Z describes the frustration experienced by herself and her husband:

“The teacher had 58 pages representing six children who had told her what this man had done to each of them. But the court did not consider them to be credible witnesses. The case was dropped and he walked away without any consequences. We were so frustrated and angry. We are still living with the consequences of our son being sexually abused. The person who did this got off 'scot free' ”.

Parent X echoes similar concerns when she describes how the family have had to take extra precautions to ensure their 18 year old daughter is not exposed to the risk of sexual abuse. They know that if this should happen, the justice system would not consider their daughter to be a credible witness therefore she would not have access to justice. Parent X explains:

“We cannot let our daughter travel in a taxi or bus that is driven by a stranger. That means the family have to drive her everywhere she needs to go. We have to be

³³ *South Australian Evidence Act*. Accessed 5/3/2012:
<http://www.legislation.sa.gov.au/LZ/C/A/EVIDENCE%20ACT%201929.aspx>

³⁴ *Current Affairs Documentary: intellectual disability legal loophole*. Accessed 14/4/2012:
<http://www.abc.net.au/radionational/programs/breakfast/2012-01-04/3757678>

constantly vigilant about her environment. This places considerable stress on the family which are already coping with a daughter/sister who has an intellectual disability and is non-verbal. There is no backup for us”.

Parents suggest that perpetrators know that children living with intellectual disability and/or related circumstances are not considered to be credible witnesses and this makes the children 'easy targets'. As reported by the ABC³⁵, child protection expert Frieda Briggs suggests that the time has come for urgent reform to prevent adults and children living with disability from becoming targeted by predators. She suggests the criminal justice system is not set up appropriately for children living with disability who are the victims of alleged sexual assault.

Ms Briggs goes on to point to an alternative arrangement which could provide all children including those living with disability with stronger access to justice. She refers to the report released by National Association for Prevention of Child Abuse and Neglect (NAPCAN) which recommends that all child sexual abuse cases be removed from the criminal system and be heard in a court which would be inquisitorial along the lines of a coronial inquiry. Further, she suggests that people with expertise in child development and child abuse be included in such processes.

The impact of sexual assault continues to be experienced long after the abuse has actually happened. Parent Z reports that her son has become withdrawn, anxious and will not leave the house without becoming very upset. She says he has new problems of nightmares and night-time incontinence. She describes how distressing this is for the whole family.

It seems clear that the inherent problems of not recognising people living with intellectual disability/cognitive impairment and/or communication disorders as reliable witnesses can and does have a dramatic impact on people living with disability and their families. The Julia Farr Association is concerned that this places additional burden on parents and families who are already experiencing significant challenges.

6.4.4 Supported decision-making model

Supported decision-making (SDM) is an approach targeting people who may need help with decision-making because of disability such as a brain injury, stroke, intellectual disability or any other neurological condition. It reflects an element of the UN Convention on the Rights of Persons with Disabilities that people living with disability should be assisted to make their own decisions wherever possible.

³⁵ *Current Affairs Documentary: intellectual disability legal loophole*. Accessed 14/4/2012: <http://www.abc.net.au/radionational/programs/breakfast/2012-01-04/3757678>

SDM is being piloted in South Australia through collaboration between the Office of the Public Advocate and the Julia Farr group of agencies. Evaluation material is showing valued gains for the people involved, in terms of how people are supported to engage with information about choices and make decisions.

Therefore, we believe it is a methodology that could be very helpful to people living with disability in contact with the justice system.

We recommend:

R11: That the justice system makes available a Supported Decision-Making methodology³⁶ such as that currently being trialled at the Office of the Public Advocate. This will assist people living with disability to make decisions and provide testimony throughout the judicial process.

6.4.5 The Impact of Custodial Sentences and Diversionary measures

When a person living with intellectual disability/cognitive impairment is convicted of an offence, sentencing principles and options apply in the same way as for other offenders. Sentencing laws need to allow the courts to handle in a socially responsible way the setting of consequences for people living with disability who have offended. This is critical for people where there is a question about their capacity for criminal responsibility or for whom, in the interest of justice and rehabilitation, it is preferable to direct them to a diversionary program or appropriate community-based support options within the social service system. Section 32 provides magistrates and judges with an opportunity to divert people away from custodial sentences toward necessary support services. Research indicates that magistrates lack clarity about using this opportunity³⁷. This could be resulting in an underuse of this option, which in turn may be detrimental for the person concerned³⁸.

In South Australia the Magistrate's Court Diversion Program is intended to improve the way the court sets consequences for offenders living with intellectual/cognitive impairment. Participants have their case adjourned while assessment, treatment and support services are put in place through a treatment plan. The program aims to provide access to early assessment and intervention that address the needs of people living with disability and/or mental illness, and to help prevent further

³⁶ Office of the Public Advocate. *Supported Decision-Making Model*. Accessed 19/3/2012:

http://www.opa.sa.gov.au/cgi-bin/wf.pl?pid=&hi=&mode=show&folder=../html/documents/09_Publications/Supported%20Decision%20Making&file=1-Summary%20of%20Supported%20Decision%20Making.htm

³⁷ Richardson, E. (2008), *Rethinking Mental-Health Laws: Mental health courts and diversion programs for mentally ill offenders: the Australian context*. Accessed 19/3/2012: <http://www.law.monash.edu.au/centres/calmh/rmhl/docs/lr-iafmhs-160708.pdf>

³⁸ French, P. (2007). *Disabled Justice: The barriers to justice for persons with Disability in Queensland: Queensland Advocacy Incorporated*. Accessed 19/3/2012: http://www.qai.org.au/images/stories/docs/1987-2007/doc_199.pdf

offending behaviour. Research has indicated that magistrates experience some uncertainties regarding eligibility and benefit to the community of using diversionary measures³⁷.

The program is said to be most effective when the person is referred as early as possible in the process, ideally at the time that charges are laid. An evaluation of the program conducted in 2004 demonstrated that it was likely that it was having a positive effect on offenders and reducing recidivism³⁷. The Julia Farr Association believes that opportunities for this program to be considered at the earliest stage of contact with the criminal justice system could bring significant benefit to people living with intellectual disability/cognitive impairment and their families.

Recommendations

Therefore The Julia Farr Association recommends;

- R12: That magistrates be provided with training so that they are aware of the nature and effects of disability (including its psychological and socioeconomic dimensions), any relationship between lack of support services and offending behaviour, and the appropriateness and impact of diversion and sentencing options for offenders living with disability;
- R13: Development of procedures to ensure Magistrates have available to them adequate time and expert input for cases involving persons living with a degree of disability that has a material impact on their understanding of, and participation in, judicial proceedings.

6.4.6 Women who have experienced violence

Women with Disabilities Australia (WWDA) Inc. is the national peak body for women living with disability in Australia. It is led by a diverse group of women living with disability. They emphasise that credibility is a major issue for many women living with disability when reporting acts of domestic violence and seeking protection orders. They suggest that powerful myths and stereotypes inform the behaviour of police and legal professionals resulting in their story not being believed and a tendency to focus on the disability rather than the abuse. They report concerns this could lead to the disability being blamed for the abuse, and the introduction or maintenance of inappropriate service provision and a consequential reinforcing of their vulnerability as women who have been abused. WWDA calls for a review of current legislation and its implementation to provide women with adequate protection from violence, and improved access to the criminal justice system. This is

particularly the case for women from diverse backgrounds including indigenous women and women from non-English speaking backgrounds³⁹.

Recommendations

The Julia Farr Association strongly endorses the call for reform and recommends:

- R14: The urgent review of any current South Australian legislation to remove/replace content that may be contributing to a view that people living with certain types of disability are deemed unreliable witnesses simply because of the naming of that disability. Any legislation so revised needs to acknowledge that any person living with disability has the potential, with appropriate support where necessary, to give authentic testimony.
- R15: That the court explore and develop procedural options for appropriately supporting people living with intellectual disability/cognitive impairment and/or related circumstances so they can give authentic and reliable testimony. This may include the participation in court of a trusted significant other in the person's life who can contribute to the court's understanding of the person's testimony; accessing such supports could be included as routine court procedure when dealing with people living with these disabilities.

7.0 COMPARISONS WITH OTHER STATES AND COUNTRIES

Our research indicates there has been increasing international, national and local recognition of the need for more appropriate responses and services for individuals living with intellectual disability/cognitive impairment who come in contact with the criminal justice system. In some jurisdictions in Australia the defendant may be required by the court to be examined by a psychiatrist or other health professional. Such provisions apply in ACT, South Australia, Western Australia, and Tasmania. Some jurisdictions (Victoria) make provision for assessment orders prior to sentencing in order to determine the person's suitability for mental health sentencing options. For example if a person appears to have an intellectual disability the court may request the Department of Human Services to prepare a statement that the person has an intellectual disability, a plan of available services and a pre-sentence

³⁹ Jennings, C (2005), *Disability in The Criminal Justice System Achievements and Challenges conference presentation*. Accessed 2/4/12: <http://www.wvda.org.au/jennings4.pdf>

report. Similar powers to assessment orders prior to sentencing exist in the ACT and Queensland⁴⁰.

In England and Wales the court is obliged to obtain and consider a medical report before imposing custodial sentence on a person living with or who appears to live with mental impairment. In New Zealand a court on application by the defence and prosecution or on the courts own initiative may order an assessment report by a 'health assessor' in order to assist the court in determining whether the person is fit to stand trial, the type and length of sentence that might be imposed and associated conditions or requirements. In Canada the court has similar powers to make an assessment order at any stage of proceedings⁴¹.

Given the current situation in Australia increasing the power to order assessments would appear to be a desirable option for facilitating assessment of people living with disability at critical stages throughout the criminal justice process.

8.0 CONCLUSION

The Julia Farr Association values this opportunity to provide evidence to the Select Committee on Disability Access to the Justice System, and we have attempted to identify those measures that we believe can make helpful contribution to people living with disability in contact with the justice system.

We are mindful of the rights-based framework for people living with disability, and we are deeply committed to the underlying values. We believe that any attempt to address the needs of people living with disability in the criminal justice system must be properly anchored in a broader context where people living with disability are properly supported to have a fair go at what life has to offer, including being active participants in mainstream community life.

We believe the most helpful changes to the justice system will be those that:

- 1) Remove any distinctions that diminish the value, rights and potential of people living with disability as participants in the process;

⁴⁰ NSW Law reform commission (2010), *Consultation paper 5. People with mental health and cognitive impairments in the criminal justice system. An overview*. Accessed 5/3/2012:

http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref120

⁴¹ NSW Law reform commission (2010), *Consultation paper 5. People with mental health and cognitive impairments in the criminal justice system. An overview*. Accessed 5/3/2012:

http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref120

- 2) Provide relevant, timely support during a person's contact with the criminal justice system;
- 3) Strengthen the capacity of justice system professionals and jurors in relation to disability experiences and issues.

We request the opportunity to make a verbal presentation the Select Committee to supplement the content of this written submission.

Also, the Julia Farr Association is available to assist the South Australian Parliament design new arrangements that strengthen the likelihood of a positive helpful experience for people living with disability in contact with the criminal justice system.

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