

Submission to the
Productivity Commission

Access to justice arrangements for people with a communication disability

2013

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PART 1

Case Examples indicating areas for reform

The following case scenarios are drawn from the advocacy work of Communication Rights Australia. Each case represents the interaction between someone with a communication disability and the justice system. In each case we have addressed the following questions:

1. *Events* - the facts of the case, the role of Communication Rights Australia and the outcome
2. *What the case reveals* - what systemic issues and gaps in the service system are evident
3. *Areas for reform* - what positive changes would ensure access to justice in similar situations

Case 1: Ongoing Violence in a Community Residential Unit

i) Events

A man with autism and little speech had lived for many years in a group home run by the Department of Human Services. A new resident was moved into the home who began physically and verbally assaulting the man. This continued on a regular basis over many months. The assaults were witnessed by both house staff and members of the man's family. Documented assaults against the man included:

- Being struck in the face with no provocation
- Being choked, resulting in unconsciousness for 4-5 minutes
- Assaults with household objects
- Attempted assaults with a hammer and pieces of broken dinner plates
- Regular threats, shouting and other verbal abuse

Despite the man's family making repeated requests to the Department of Human Services for the other resident to be removed, this did not occur. Instead the pattern of violent assault continued, and the man was placed on anti-anxiety medication by the GP to help him endure what was occurring. The family became increasingly concerned about emotional and neurological damage to their son due to the violent abuse.

Once engaged, Communication Rights Australia obtained case-note records which confirmed the above abuse. Communication Rights advocated extensively with the Department for the relocation of the offender, however no timeline was provided. The Communication Rights advocate then provided representation at the Magistrates' Court to support the individual's mother to obtain an interim Intervention Order on her son's behalf. This order was difficult to obtain. The magistrate was reluctant to grant it and it was only made for a five-meter radius which did adequately protect the victim. However the additional pressure resulted in the relocation of the other resident to accommodation with appropriate mental health support.

ii) **What this case reveals**

A different standard is applied to violence and abuse against a person with a disability compared with other members of the community.

1. The Department of Human Services permitted a situation of documented ongoing client-to client violence to continue for eight months. **Incident reports were not completed for the majority of incidents.**

The incident reporting system introduced by the Department of Human Services in 2012 provides for incident reporting in the following two scenarios:

Category 1	Category 2
<p>All assaults of or by a client that led to serious injury and hospitalisation as an 'inpatient'.</p> <p>Assaults involving a weapon regardless of injury.</p> <p>All assaults or alleged assaults of a client by a staff member or volunteer carer regardless of injury</p>	<p>Assault of or by a client that:</p> <ul style="list-style-type: none"> • results in medical attention being sought or required for the victim and/or • presentation at a hospital emergency department and/or • threatens health, safety or wellbeing. <p>Threatened assault of or by a client that has potential to cause harm.</p>

Source: *Critical client incident management summary guide and categorisation table: 2011*, page 17

These categories provide **no mandated reporting for client-to-client violence that does not involve a weapon or require medical attention.** Although the Department's intention may have been to eliminate low-level violence from the reporting system (such as occasional shoving between clients), actual practice demonstrates that regular punching, scratching and other physical assault of residents is also not being reported.

The definition of a Category 2 assault as including that which "threatens health, safety or wellbeing" **leaves too much discretion for reporting up to the individual carer who has witnessed the assault.**

Carers are often casual employees with minimal training. Faced with competing demands for their time and attention it is evident that carers **will avoid completing incident reports unless mandated to do so.**

2. Over the six month period in which the abuse occurred, the police were generally not contacted by the Department. On the few occasions when police allegedly were contacted, they did not investigate. This meant that when court advocacy was

required, the police were unable to provide recommendations to strengthen the application.

3. Without the service of a disability advocacy organisation such as Communication Rights Australia, the victim would still be suffering regular physical and emotional violence. *Communication Rights Australia is funded for one full time advocate for the state of Victoria.*
4. Despite the Magistrate's Court's regular practice of issuing interim intervention orders in domestic violence cases, the magistrate indicated a reluctance to issue an interim intervention order because *it related to a resident residing in a Department-run house.*

iii) Areas for reform indicated

1. The Department of Human Services (and all other equivalent state and federal departments) must ensure *that client-to-client violence becomes a mandatory reportable incident in all cases.*
2. Reported incidents must be responded to by the Department (and funded service provider if applicable)
3. Case-notes and incident reports must be made available to affected clients, their families and advocates upon request. *'Privacy' must not be used to block access to information when a client is suspected of being a victim of abuse*
4. Ongoing client to client violence must result in the relocation of offenders to appropriate alternative accommodation.
5. The police must be contacted by Department (and funded service provider if applicable) in cases of physical violence and in cases of ongoing, significant verbal abuse and threats
6. Police must investigate reports of abuse in group homes on the same basis as if the alleged offences occurred elsewhere.
7. Clients and their families must be provided with information on disability advocacy services
8. Disability advocacy must receive funding commensurate with the level of need.
9. Clients and their families should be provided with information on legal options available
10. Courts should be educated in the importance of applying consistent standards to violent behaviour irrespective of whether that behaviour occurs in the community, in the family home or in a disability group home or other setting for persons with disabilities.

Case 2: Alleged assault in nursing home

i) Events

A man with severe cerebral palsy and little speech was living in an aged care facility where he was allegedly physically assaulted by a staff member.

Despite the man's family raising the issue with the facility, threats, harassment and intimidation continued following the incident. Communication Rights Australia was contacted by one of the family members. The police were contacted and the man was able to give the police an overview of what happened. The police recommended that the man and his advocate proceed to the courts to obtain an Intervention Order, which was done and the immediate safety concerns were addressed.

Unfortunately the police considered the man unable to give a full statement as he did not yet have an electronic communication device and instead relied on answering 'yes/no' questions and an out-dated communication book with minimal words and pictures. The police stated that he had to be able to provide a full statement of events without the police asking leading questions, as it would not be accepted in a court of law. No further action was taken regarding the alleged physical assault towards the man.

ii) What this case reveals

Police lack training in how to work with the marginalised and vulnerable members of our community who have little or no speech. They often do not know what to do when a person with communication difficulties wants to make a statement regarding an incident.

Reasonable adjustments to the statement-making process are not offered to enable people with little or no speech to fully access the justice system. A communication support worker, speech therapist or advocate are not acknowledged or allowed to support the person's communication to enable them to exercise their right to freedom of expression. This highlights the existence of discrimination against those with communication difficulties who seek equal access to justice.

People with communication difficulties rely on independent advocacy to ensure that they have access to communication in their interactions with the police.

Communication support workers are relied upon to work with the individual to relay what they are saying to the police, lawyers and courts.

iii) Areas for reform indicated

1. Greater adjustments need to be made for people with little or no speech when reporting and making statements about abuse and assault to the police.
2. Police stations need to have generic communication boards to enable people with communication difficulties to communicate independently with the police.
3. Training about communicating with people with little or no speech and taking their statements must be conducted at each police station and the academy.
4. Greater adjustments need to be made for people with little or no speech for victims of crime throughout the justice system.

Case 3: Alleged sexual assault by staff member**i) Events**

A man living in shared supported accommodation who has severe cerebral palsy was allegedly sexually assaulted by one of the staff who worked in his unit.

Upon the house management reporting this to the police, the investigating officer visited the unit and said that the police could not take a statement from the individual as he did not have a clear enough method of communicating and describing exactly what happened. The police said that until he had a clearer method of communicating what had happened they could not do anything, and left. The police did not request that the man be taken to hospital, be examined or that counselling be provided.

ii) What this case reveals

Some police do not take allegations of sexual assault against those with a disability as seriously as they may do in other cases. Police did not even try to obtain evidence regarding the assault for any further investigations or future proceedings. The individual had no access to justice.

Without forthright disability advocacy, police can dismiss the severity of crimes committed and fail to serve and protect some of the most vulnerable and marginalised members of the community – those with little or no speech.

iii) Areas for reform indicated

1. Each report made to the police must be fully explored and referral information needs to be provided to the victims of crime without discrimination.
2. In cases where an individual wishes to make a report and police are unsatisfied with their communication method, police must engage the service of speech therapists,

communication specialists or communication support workers to ensure a statement can be made.

3. An independent communication support worker booking service needs to be established for the above to occur and for use throughout the justice system.

4. Case 4: Alleged sexual assault – Full Trial

i) Events

An individual with no speech was alleging sexual abuse and seeking to access justice

The individual had cerebral palsy and communicated with their eyes, using a form of Augmentative and Alternative Communication known as an ‘e-tran’. This is a transparent alphabet board held by a communication support worker in front of the person, enabling them to choose letters with their eyes to spell sentences.

Communication Rights Australia supported the individual to access the police and make several statements, then liaised with police over an extensive period to ensure a proper investigation proceeded and was not compromised in any way due to the individual’s communication disability or uninformed assumptions concerning their capacity. We attended meetings, wrote letters and also sourced letters of support regarding the individual’s communication method. We also had to twice submit a complaint to Area Commands in different regions to ensure the investigation did not stall.

Communication Rights Australia then liaised extensively with the Office of Public Prosecutions, helping to educate the solicitors, barrister, social worker and judge about the individual’s chosen method of communication. We also assisted the individual to investigate and attend an appointment for a new communication technology with a view to it being used in court.

During this whole time we met regularly with the individual to relay information from the police and solicitors and to help answer questions and address concerns. We also had to liaise with DHS and attendant care providers to ensure the individual had adequate attendant care on court days

Communication Rights Australia then identified, employed, trained and coordinated a team of six speech therapists who acted in court as communication support workers for the person (who was cross-examined for seven days during committal). To do this we had to ensure the OPP would pay for this service, which set a new precedent for the Department of Justice. The outcome was a successful committal hearing in 2009, and a full jury trial in 2010. We have subsequently been involved in organising access to Victim Support, counselling and a compensation tribunal for the individual. The Department of Justice considers this case to be ground-

breaking in terms of access to the justice system for a person with complex communication needs.

ii) What this case reveals

The evidence was compromised early in the investigation by absence of a communication support worker service. As a result the individual's parent provided communication support at the initial statement taking and the individual was uncomfortable stating everything that had occurred and therefore omitted key information. A second statement that was made was inconsistent with the first and this created issues at committal

The entire process required intensive advocacy by a disability advocacy service (Communication Rights Australia). The justice system is only accessible for someone with little or no speech if they are really prepared to fight. In this case the individual was. Even then, it was a gruelling, exhausting process for them and required much support.

A key difficulty was the fact that Communication Rights Australia had to provide a tailored Communication Support Worker booking service for the Department of Justice, particularly when the court wanted qualified Speech Pathologists which required higher rates of pay.

Communication Rights Australia is not a service provider yet there is no one else providing such a service to the community.

iii) Areas for reform indicated

1. **There is an urgent need for an Independent Communication Support Worker (ICSW) booking service to exist in every state.** The service could be modelled on the Auslan interpreter booking service. *Individuals with a communication disability require access to such a service on the same basis as members of the deaf community or others who requires an interpreter.*

Further details on the recommendation for an ICSW can be found in the Appendix to this submission

2. **There must be greater accountability for police to complete investigations.** On two separate occasions the investigation in this case stalled due to police inaction, and was only recommenced after Communication Rights Australia submitted a complaint to area command.

3. **Flexibility in methods of taking evidence and other court practices is required.** The following recommendations from AGOSCI Inc. are directly relevant to the experience of the individual in this case:

- i) **Human supports as valid forms of access** “It is extremely important to give consideration to human supports as a valid form of access. Physical access such as a ramp is typically an acceptable accommodation for someone with a disability, but supports to address other aspects of disability are less so. Education and awareness as to the reasons for human support (such as partner assisted scanning of a communication book or interpreting speech that is difficult to understand) are essential to reforms in this area” (AGOSCI Inc.).¹
- ii) **Recognition that people with CCN may use strategies to reduce the physical demand on them when expressing themselves** i.e. allowing words to be completed by their communication support person, using Partner Assisted Scanning.
- iii) **Recognition by the courts of the need for extra time when people with CCN are giving evidence or being cross examined.** The experience in this case was that it went several days longer than legal professionals predicted because of the extra time required for communication.
- iv) **The need for all members of the court to address the person with the disability directly**

¹ Submission on behalf of AGOSCI Inc. to the Select Committee on Disability Access to the Justice System, available Internet: http://www.agosci.org.au/docs/WrittenSubInquiryDA_to_Justice_in_%20SA.pdf

PART 2

People with a communication disability and the justice system – submission and recommendations

This Part goes to the following:

1. Availability of appropriate services and supports;
2. Dealings with the police;
3. The operation of the courts;
4. Consideration as to whether the findings of the inquiry have broader application to people with a disability other than an intellectual disability, for example those with an acquired brain injury or neurological condition leading to cognitive disability.

About Communication Rights Australia

Communication Rights Australia is the only specialist advocacy and information service for people with little or no speech within Australia. It has been working with and on behalf of people with little or no speech for over 30 years. It is funded by the Department of Human Services and is grounded in a Human Rights framework.

Speech Pathology Australia's statistics indicate that at least 1.1 million Australians are living with a communication disability.² Causes of communication impairment include neuro-developmental disorders such as autism, Down syndrome and cerebral palsy, other medical conditions such as cleft palate and vocal nodules, hearing impairment, degenerative neurological conditions such as Alzheimer's or Parkinson's Disease, and damage to the brain due to accident, stroke or illness.

People with little or no speech, although not homogenous, are a distinct group and are eligible for Communication Rights Australia's services. These people include people with impairment in the following areas of communication:

- Expressive language
- Speech
- Pragmatics
- Fluency
- Voice

² Speech Pathology Australia (2012), Senate Community Affairs References Committee Briefing.

It is not clear what percentage of this group have an intellectual disability because assessments rely on their ability to communicate.

Definitions

Acronym:	Meaning:
AAC	Alternative and Augmentative Communication ³
CCN	Complex Communication Needs ⁴
VCAT	Victorian Civil and Administrative Tribunal
VCHRR	Victorian Charter of Human Rights and Responsibilities

Summary

When access to justice is considered much of the focus is understandably given to the communication required to ensure vulnerable individuals understand their position, options, and the process being undertaken. However as important as such understanding is, for true participation in the system it is equally important that individuals are afforded their best chance of communicating to the system as well as having it communicate to them.

The justice processes within society necessarily involve many steps. Any of these steps can present a daunting challenge to individuals with complex communication needs (CCN). In proceeding through these steps an individual must communicate with many people which can include police, specialists, solicitors, prosecutors, judges, tribunals, and juries. Failures in communication at any point have the potential to undermine the chance of a just outcome.

³ <http://www.asha.org/public/speech/disorders/AAC.htm> Augmentative and alternative communication (AAC) includes all forms of communication (other than oral speech) that are used to express thoughts, needs, wants, and ideas. We all use AAC when we make facial expressions or gestures, use symbols or pictures, or write.

People with severe speech or language problems rely on AAC to supplement existing speech or replace speech that is not functional. Special augmentative aids, such as picture and symbol communication boards and electronic devices, are available to help people express themselves. This may increase social interaction, school performance, and feelings of self-worth.

AAC users should not stop using speech if they are able to do so. The AAC aids and devices are used to enhance their communication.

⁴ <http://www.communities.qld.gov.au/resources/disability/community-involvement/communication/documents/complex-communication-needs.pdf>

Presently there is concern among many individuals with CCN that the police are either unwilling or unable to access systems allowing these individuals to communicate with the police in a full and timely manner. The establishment and official recognition of a system for quickly obtaining the services of appropriately qualified people and the education of the police force about the system could greatly reduce the barriers faced by individuals with CCN who have reason to approach the police force.

There is presently a lack of clarity in what safeguards the law provides to ensure individuals with CNN can communicate fully with courts and tribunals. Incorporation of a specific right to utilise an augmentative and alternative communication method of the witness's choice would reduce legal the possibility for legal argument around the current provisions and encourage judges to use their discretion in a way that makes formal hearings more accessible to individuals with CNN. **Establishment of a system for registering and contacting independent communication support workers would also encourage their use in court.**

The need for legal clarity is even more pronounced in the tribunal system where the exclusion of the law of evidence risks stripping the already uncertain safeguards from this already vulnerable group.

Many injustices are the result of ignorance or misunderstanding rather than malice, which can often be resolved through communication without requiring the involvement of the formal justice system. Without the ability to access independent communication support workers for issues outside of the formal justice system, individuals with CCN will be forced to either unnecessarily suffer the stress of the formal justice system or abandon their attempts to obtain justice.

First Contact

The first contact with the police can be a hard step for many to take, however it is even more daunting for those with difficulty making themselves understood. Unless they can have confidence that there is a system in place to ensure that they can communicate promptly, effectively and without necessarily relying on people close to them, there is an unacceptable risk that they will not even try.

Presently many individuals with CCN who approach the police are left with a strong impression that dealing with their grievance has been deemed 'too hard' and has therefore not been investigated thoroughly or sometimes even at all.

Those individuals who do approach the police successfully do so through their carers, who are often also family. In close relationships, particularly family relationships, people are often wary of revealing issues that they might consider shameful or embarrassing and this can affect their openness with police if they cannot communicate with them in confidence from the people they have to deal with in their everyday lives. Even more concerningly there is the risk that the behaviour of the carer/family member is the source of the

individual's grievance meaning that without a widely-known and easily accessible system for accessing independent communication support workers being available to the police, there is an unacceptable risk that victims of this kind of betrayal of trust will be left unable to seek assistance.

An established system for accessing independent communication support workers would also provide a valuable tool for police investigations. The more rapidly a communication support worker can be brought in, the fresher the individual's recollection will be when it is communicated to the police. Additionally it could reduce the uncertainty that police may face in determining how to use their discretionary powers in situations involving people with CCN.

Case example

An individual with cerebral palsy and little speech alleged sexual abuse and sought access to the criminal justice system. The absence of an independent communication support worker service meant that the individual's first statement to the police was made with their parent providing the communication support. Due to the individual's embarrassment over the subject matter, incomplete evidence was given which then became problematic, requiring further statements to be made and explanations to be given in court.

Courts:

Many of the issues of justice that arise in the real world are effectively dealt with by the police without requiring court proceedings, and with a properly prepared and equipped police apparatus this would hopefully hold true for people with CCN too. However particularly serious issues will always involve the courts.

Formal legal proceedings provide yet another daunting set of challenges to someone with CCN. Even before any formal appearance they must deal with explaining themselves once again to the relevant barristers and/or solicitors, quite possibly multiple times as the process of building a case usually involves returning to questions a number of times to ensure that nothing has been missed, by the lawyers or by the witness.

If a formal appearance is required then people with CCN must deal with a number of challenges in addition to the trepidation felt by nearly all people involved in the court system. The adversarial system can be especially daunting to those who have experience of trouble making themselves understood, particularly as our legal system is built upon the primacy of oral evidence and the unquantifiable measure of whether a witness is 'credible', which will often become a focus of opposing barristers.

As such it is vital that the court does everything practical to ensure that people with CCN can express themselves to the best of their ability and are not left unfairly vulnerable to opposing counsel on the basis of their communication requirements.

Case example 1

An individual with no speech alleged significant theft of their money by a carer who was in possession of the individual's bank book. They sought an intervention (stalking) order against the carer pending police investigation. However with no communication support worker service to assist them it was impossible to negotiate the magistrates court nor to convey the messages typed on their communication device to the courtroom.

Case example 2

An individual who was the alleged victim of a serious assault was cross examined in front of a jury. Although cross examination was originally estimated to last two days, the speed of the individual's answers provided through Alternative and Augmentative Communication (AAC) and the approach of the defence resulted in cross examination extending for seven days. The absence of a communication support worker booking service meant that neither the court nor the OPP was able to book support workers directly for this period. Great logistical difficulties were encountered in the effort to ensure that the individual had communication support on a day by day basis as the trial extended.

Current Law:

Legally the courts are bound by the rules and regulations found in various statutory instruments (including the uniform evidence act and rules of court) and by accumulated common law, with some level of additional input from international conventions and other general sources of law.

Statutory:

Section 30 of the Uniform Evidence Act provides that:⁵

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

This provides a right to an interpreter so long as the court accepts that an individual with CCN's ability to speak English is insufficient. It is unclear however on whether "interpreter" includes an AAC specialist interpreting a different mode of English, or whether the witness has a right to choose the mode of communication used for interpretation.

⁵ *Evidence Act 2008* (Vic) s 30, *Evidence Act 1995* (Cth) s 30.

Section 31 of the Uniform Evidence Act provides that “A witness who cannot speak adequately may give evidence by any appropriate means.”⁶ however this is qualified by a judicial discretion to “give directions concerning [...] the means by which a witness may give evidence under subsection (2)”.⁷ This also provides a relevant right, however the interpretation of “adequate” raises similar issue to that of “sufficiently” in section 30, and additionally the discretion to give directions makes it unclear whether the right applies to the witnesses preferred mode of communication or merely a mode they are capable of communicating through.

Common Law

Determining the position of interpretation for an individual with CCN under the common law is more difficult as the precedents available almost uniformly deal with translation of language and therefore tend to focus on communication to the individual rather than from the individual. It could even be argued that interpretation does not cover AAC on the basis of points such as the separate consideration in sections 30 and 31 of the Uniform Evidence Act (discussed above) however precedents dealing with mute witnesses suggest that interpretation between modes of English fall within the common law concept of interpretation,⁸ although these once again tend to deal more with communication to rather from the individual. Of uncertain impact is the judicial conversation regarding the input of the interpreter.⁹ Unlike most foreign language interpretation, most forms of AAC do provide the potential for a form of word-for-word mechanical translation, this would be a positive aspect for the use of AAC in court,¹⁰ however it also presents an opportunity for AAC to be distinguished from interpretation and therefore deprive individuals with CCN of the benefit of the common law accumulated around the use of interpreters in court.

Should Alternative and Augmentative Communication be considered equivalent to interpretation, it is still controversial that there is no automatic right to an interpreter,¹¹ however failure to allow one when one is required could be grounds for appeal.¹²

The problem then becomes the exact form of communication. Many people with CCN are capable of multiple modes of communication, however the stress and consequence of court proceedings makes it critical that those individuals are allowed to provide testimony via their preferred mode if at all possible and not merely the mode that is convenient to the court. It is difficult

6 *Evidence Act 2008* (Vic) s 31(2).

7 *Evidence Act 2008* (Vic) s 31(2).

8 *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414

9 *Gaio v R* (1960) 104 CLR 419, *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.

10 *Filios v Morland* (1963) 63 SR (NSW) 331

11 *Dairy Farmers Cooperative Milk Co Ltd v Acquilina* (1963) 109 CLR 458

12 *R v Tran* [1994] 2 SCR 951, *Dietrich v R* (1992) 177 CLR 292

to predict how common law precedent would view this, if a particular mode was considered the standard (analogous to English) then a witness could not have recourse to their preferred mode if they were passably capable of communicating through the standard mode.

General Sources of Law

There are further sources of law of broad application that may apply, notably the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and international instruments such as the *Convention on the Rights of Persons with Disabilities* which Australia has ratified.

The *Charter of Human Rights and Responsibilities* is quite clear that defendants in criminal matters are entitled to be “informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands”¹³ (though this noticeably fails to mention communication to the court) and “to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance”¹⁴. Note that this does not extend to parties other than criminal defendants or non-party witnesses. More generally everybody has a right to freedom of expression “in any other medium chosen by him or her”¹⁵ however the more general phrasing of this provision means it is vulnerable to extensive interpretive debate. Additionally the Charter is subject to continuing uncertainty regarding its mechanism of application to many areas, adding another level of uncertainty.

The ratified *Convention on the Rights of Persons with Disabilities* states that the parties agree to take all appropriate measures to ensure freedom of expression including:

Accepting and facilitating the use of sign language, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;¹⁶

Of particular note in this article is the specific mention of official interactions, which incontrovertibly includes court proceedings and should also include interactions with officials such as the police. Another important aspect is the use phrase “accepting and facilitating” implying an agreement to go beyond merely allowing such communication systems to be used and instead actively supporting their implementation and use. Although ratification officially indicates that Australia has agreed to implement the convention in domestic law, the direct influence of the convention on domestic law is limited to an

¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(a).

¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(j).

¹⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15(2)(e).

¹⁶ *Convention on the Rights of Persons with Disabilities* article 21(b).

unclear level of influence on the interpretation of statutes and/or common law concepts.

Ultimately the lack of clarity in all the above sources of law means that without an explicit provision being incorporated within a statutory instrument that provides a right to access their preferred mode of AAC individuals with CCN run a real risk of having the justice system become side-tracked when dealing with them as these issues are either thrashed out or compromised over. This uncertainty is likely to increase the already significant stress on the individual and the inevitable delay will prolong its duration, potentially leading to a failure of justice if the individual cannot handle the increased burden.

What is certain from the considerations above is that judges already possess the discretionary power to implement appropriate systems to accommodate for individuals with CCN, however there are real concerns as to whether there is presently the awareness of the systems available, let alone the ability to use them. For instance the Federal Magistrates Court policy on “speech impaired clients”¹⁷ only envisages supporting AUSLAN and CART (a form of shorthand typing), both of which are woefully inadequate for many people with complex communication needs. For judicial discretion to properly enable access to justice in this area there must be an increased understanding of the availability of alternative and augmentative communication (AAC); confidence in the ability to access competent and independent experts; and confidence that the law supports such use of this discretion.

Tribunals

While the courts are likely to deal with the most significant individual matters of justice for individuals with CCN it should not be forgotten how much of the volume of access to justice occurs through the tribunal system, most notably the Victorian Civil and Administrative Tribunal (VCAT). A great deal of what is relevant to courts (above) is also relevant to VCAT, however VCAT is expressly “is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures”¹⁸ although it is “bound by the rules of natural justice”¹⁹. As this excludes the application of section 30 and 31 of the uniform evidence act, which presently represent the strongest argument for the rights of people with CCN, individuals must rely on the common law construction of “natural justice”, which leads back to the common law uncertainty described above. This uncertainty can be even more perilous in the context of tribunals as they are less likely have the combination of time, expertise and confidence to undertake a court-like review of esoteric concepts and apply them to the matter at hand.

17 Federal Magistrates Court Interpreter and Translator Policy s (5)
<<http://www.fmc.gov.au/services/html/interpreters.html>>

18 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b).

19 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(a).

Section 102 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) states that “The Tribunal must allow a party a reasonable opportunity to [...] give evidence and [...] to make submissions to the tribunal”²⁰. This provision presents an opportunity to provide individuals with CCN recourse to their required assistance, however as with “natural justice” the common law construction of “reasonable opportunity” is far from simple and is subject to the same concerns as above.

It is also notable that although VCAT can hear all or part of a hearing on the basis of documents rather than oral testimony (which could at least present a preferable alternative for many individuals with CCN) this is limited to where both parties agree, and is therefore vulnerable to obstruction by opposing side.²¹

Case example

An individual with no speech was taken to VCAT by a landlord who alleged outstanding money for repairs, which the individual was disputing. The absence of a communication support worker service meant that VCAT had no direct means of ensuring the individual could communicate at the Tribunal. A speech pathologist agreed to provide the services but this was an ad hoc arrangement for the day.

Ancillary Requirements

Surrounding the pivotal institutions of the justice process are many smaller aspects, both required and merely helpful. These can be as significant as mediations or formal assessments by specialists or as simple as dealing with administrative issues with court staff outside of hearings. It is critical that these are included in any consideration of access to the justice system as they are vital for making full use of the system as a whole.

Whereas in interpretation before a court or tribunal there are reasons for trying to avoid using an interpreter with an ongoing relationship with a witness, in the myriad of small interactions that may be required to seek justice around and outside of courts or tribunals it would be a significant burden on an individual with CCN if they had to seek a new communication support worker for each interaction. Often family or existing carers can perform this role admirably, but it would be unfair to assume this is always the case, and, as noted above, there may be instances where pre-existing relationships have been the source of the grievance for which justice is sought.

The ability to access an independent and ongoing communication support worker if required would greatly assist those people unwilling or unable to have people close to them act in this role. Recourse to an independent communication support worker could also enable individuals to engage more fully in seeking justice through methods other than the

²⁰ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 102(1).

²¹ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 100(2).

formal justice system, such as presenting their position directly to lawyers, trustees or others they may have a difference of opinion with. Enabling this sort of engagement has the potential to both avoid the stress the formal justice system inflicts on all parties and also prevent otherwise avoidable cases ending up in the hands of police, courts or tribunals because they could not be solved earlier through independent communication.

Proposals:

1. Inclusion in statute of a clear and specific right for individuals with complex communication needs appearing before a court or tribunal to utilise an augmentative and alternative communication mode of their choosing.
2. Establishment of an official system for registering and contacting people qualified to facilitate augmentative and alternative communication methods. Run either by a specifically created body or under the auspices of an appropriate existing body.
3. Education of police, judicial officers, tribunal members, ombudsmen and other official office holders of the existence of augmentative and alternative communication methods and of how to access qualified practitioners (whether through the system mentioned above or otherwise).
4. Establishment of a system entitling individuals with complex communication needs to access an appropriate independent communication support worker when required.

PART 3

Specific recommendations regarding an Independent Communication Support Worker Service

A central recommendation throughout this submission has been the need for an Independent Communication Support Worker (ISCW) service to be established in each State and Territory

The establishment of such a service would address a key systemic barrier to people with a communication disability accessing the justice system.

The following specific recommendations were developed by **AGOSCI Inc.** in 2012.²² They provide further guidance on this topic:

- 1. First and foremost, a program that allows people to access a communication assistant (or intermediary) is paramount, with the following considerations**
 - **An interim option should be set up until a more comprehensive program is created. A list of qualified practitioners/professionals to act in this role should be developed to provide a quick response to this problem. We cannot put people with CCN²³ in the vulnerable position of not being able to give evidence on their own behalf while the process and logistics of a more comprehensive program are being organised. This should be an initial and immediate step.**
 - **The communication assistant program should include a training course, registration, peer or supervisory support, and a clear job description. It should have its own organisational structure so that it is accessible to those who need to use it. An ad hoc program where the person themselves is required to find a suitable communication assistant and organise for their involvement would just add to the stress, frustration and anxiety of the user, and would create a risk that the communication support person would not have the required competencies to provide support in an appropriate and reliable manner.**

²² Established in 1981, AGOSCI is an inclusive group interested in enhancing the participation of all people with complex communication needs. AGOSCI's membership includes individuals with complex communication needs, family and community members, teachers, speech pathologists and other professionals.

Recommendations available at:

http://www.agosci.org.au/docs/WrittenSubInquiryDA_to_Justice_in_%20SA.pdf

²³ Complex Communication Needs

- Communication assistants should be appropriately remunerated for the expertise and skill set they bring to the situation.
- The communication assistant training program could be best supported as a coursework component of various university training programs such as Speech Pathology, Disability Studies; or Social Work. Within their degree, students could take on this course as an additional qualification; however the training module could also be available as an additional post graduate course (assuming appropriate background skills).
- The communication assistant program should also be adopted and used within other government departments and become a service that operates across all sectors. Communication assistants would have a valuable role to play in promoting access to health, social services, advocacy, education, and many other areas.
- This needs to happen quickly! The current situation is that people with CCN are much more vulnerable given their presumed inability to provide evidence or testify in court. We cannot let this continue. There is urgency in the resolution of this matter, and interim measures should be put in place e.g. a register of qualified people with experience supporting the communication of the people with CCN who can be contracted to provide support until a more robust program for communication assistants is created.
- Currently in Canada, Barbara Collier is working on a feasibility study to establish communication intermediaries (assistants) within legal and justice services across Canada. This report is due in June / July and will include the barriers and accommodations required within not just the criminal system but also the police contexts and legal contexts (legal capacity; power of attorney, mediation etc. etc.). The inquiry should consider this information as soon as it is available.

In addition it is important that Independent Communication Support Workers be sourced Australia-wide with appropriate national standards and accreditation.