

## **Response to Disability Justice Strategy Public Discussion Paper – Justice and Services Sectors**

Advocacy for Inclusion is a not-for-profit non-government community human rights organisation in the Australian Capital Territory (ACT). We provide individual, self and systemic advocacy to people with disabilities to promote their human rights and inclusion in the community.

We welcome the ACT Government's ongoing commitment to the Disability Justice Strategy.

Our advocacy works to ensure that both victims, offenders and parents with disabilities have a clear understanding of their rights and a fair justice process. We also welcome that the Strategy will be inherently based on human rights to participate in the justice process, in which we hope will extend to ensure that people with disabilities receive the right supports and advocacy opportunities under the Convention on the Rights of Persons with Disabilities (CRPD).

Article 13(1) of the CRPD points that:

*States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.<sup>1</sup>*

Speaking under the CRPD, Advocacy for Inclusion recognise that for the Disability Strategy to work, the accommodations must create opportunities and enable people to have an effective role in their own justice proceedings. We also advocate for the awareness and cultural change in how people with disabilities are addressed in the eyes of the law by those working within the administration of justice, police, correctional services, guardianship officials and child protection workers to have appropriate training in line with the CRPD.<sup>2</sup>

We also recognise and stand by that justice needs of people with disabilities spreads across a spectrum of the justice and civil justice sector as people with disabilities are highly marginalised in our society. Their marginalisation feeds back into the housing and homelessness sectors, mental health awareness, education, decision-making and guardianship restraints, employment and the involvement of the NDIS.

### **The Barriers Faced by People with Disabilities – Our Key Areas**

The barriers to justice experienced by people with disabilities extend across a range of areas. In the ACT, people with disabilities have significantly higher prevalence of legal problems overall and substantial, multiple and diverse legal problems. People with disabilities are the only disadvantaged group with significantly lower levels of finalisation of legal problems.

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<sup>1</sup> *Convention on the Rights of Persons with Disabilities*, article 13(1).

<sup>2</sup> *Ibid*, article 13(2).

In our advocacy work and experiences, the barriers<sup>3</sup> that prevent people with disabilities participating fully in legal and justice system processes include:

- a) communication and cognitive barriers associated with giving instruction to legal representatives<sup>4</sup>
- b) costs associated with legal representation;
- c) to understand and know of their legal rights, including their right to silence, particularly where no specific communications support is made available during the process.<sup>5 6</sup>
- d) difficulties accessing necessary support, adjustment or aids;<sup>7</sup> (a shortage of funding to legal assistance services severely undermines their capacity to meet the legal needs of specific and vulnerable groups, particularly people with disabilities);<sup>8</sup>
- e) Child removal from the child protection system<sup>9 10 11 12 13 14 15 16 17 18 19 20 21</sup>

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<sup>3</sup> Australian Human Rights Commission (2018) *A Future Without Violence: A Report: Quality, safeguarding and oversight to prevent and address violence against people with disability in institutional settings*; Australian Human Rights Commission. (2014). *Equal before the law: Towards disability justice strategies*; Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings*; Queensland Advocacy Incorporated (2015) *dis-abled Justice: Reforms to the justice for persons with disability in Queensland*; NSW Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system*; Victorian Ombudsman (2015) *'Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting* (Report, December 2015) p.31.

At <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports>; Community Affairs References Committee (2015) *The Australian Senate, Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, pp.37-38.

At [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect) (viewed 13 June 2018).

<sup>4</sup> Please refer to Advocacy for Inclusion (2018) Response to the Charter of Rights for Victims of Crime Options Paper, Position Statement in which referred to recommendations to ensure that victims have a clear understanding of their rights and a fair justice process

<sup>5</sup> Bartels, L. (2011). *Police Interviews with Vulnerable Adult Suspects*. Research in Practice Report No. 21. Australian Institute of Criminology, Canberra, ACT. 13p.

<sup>6</sup> Cockram, J. 'People with an Intellectual Disability in Prisons' (2005) 12 *Psychiatry, Psychology and Law* 163, 170.

<sup>7</sup> Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws – Final Report*, ALRC Report 124, p192.

<sup>8</sup> The Law Council of Australia (2014) *Submission to Inquiry into Equality, Capacity and Disability in Commonwealth Laws*. Office of the Public Advocate Victoria (2011) *Submission to the Inquiry into Access to and Interaction with the Justice System by People with Intellectual Disability and their Families and Carers*, 20-21.

<sup>9</sup> Llewellyn, G., McConnell, D. & Ferronato, L. (2003). Prevalence and outcomes for parents with disabilities and their children in an Australian court sample, *Child Abuse & Neglect*, 27(3), 235-251. doi: 10.1016/S0145-2134(03)00004-8;

<sup>10</sup> Llewellyn, G., McConnell, D., Honey, A., Mayes, R., & Russo, D. (2003). Promoting health and home safety for children of parents with intellectually disability: A randomised controlled trial, *Research in Developmental Disabilities*, 24(6), 405-431. doi: 10.1016/j.ridd.2003.06.001

<sup>11</sup> Monsen, K., Sanders, A., Yu, F., Radosevich, D., & Geppert, J. (2011). Family home visiting outcomes for mothers with and without intellectual disabilities, *Journal of Intellectual Disability Research*, 55(5), 484-499. doi: 10.1111/j.1365-2788.2011.01402.x

<sup>12</sup> Tarleton, B., & Ward, L. (2007). "Parenting with support": The views and experiences of parents with intellectual disabilities. *Journal of Policy and Practice in Intellectual Disabilities*, 4(3), 194-202. doi: 10.1111/j.1741-1130.2007.00118.x

<sup>13</sup> Feldman, M. (2010). *Parenting education programs*. In G. Llewellyn, R. Traustadóttir, D. McConnell, & H. Bjög Sigurjónsdóttir, *Parents with intellectual disabilities: Past, present and futures*. West Sussex, UK: John Wiley & Sons.

<sup>14</sup> Lamont, A., & Bromfield, L. (2009). *Parental intellectual disability and child protection: Key issues*. National Child Protection Clearing House, (31), 1-18. [www.aifs.gov.au/nch/pubs/issues/issues31/issues31.html](http://www.aifs.gov.au/nch/pubs/issues/issues31/issues31.html)

<sup>15</sup> McConnell, D., Llewellyn, G., & Ferronato, L. (2000). *Parents with a disability and the NSW Children's Court*. Sydney: University of Sydney.

<sup>16</sup> Booth, T., & Booth, W. (2005). *Parents with learning difficulties in the child protection system: Experiences and perspectives*. *Journal of intellectual disabilities*, 9(2), 109-129

<sup>17</sup> Mildon, R., Matthews, J., & Gavidia-Payne, S. (2003). *Understanding and supporting parents with learning difficulties*. Melbourne: Victorian Parenting Centre

<sup>18</sup> Llewellyn, G., McConnell, D. & Ferronato, L. (2003). Prevalence and outcomes for parents with disabilities and their children in an Australian court sample, *Child Abuse & Neglect*, 27(3), 235-251. doi: 10.1016/S0145-2134(03)00004-8

<sup>19</sup> Office of the Public Advocate (2015) *Rebuilding the village: Supporting families where a parent has a disability: Child Protection*, file:///G:/Useful%20papers%20and%20submissions/Parenting/Rebuilding%20the%20Village%20Report%202015%20VIC.pdf

<sup>20</sup> Llewellyn, G. & McConnell, D. (2005). As above.

<sup>21</sup> AIHW (2016) *Child Protection in Australia 2014-2015*

- f) highly formalised and ritualised procedures and complicated legal language that people with cognitive disabilities find confusing, incomprehensible, alienating or intimidating;<sup>22</sup> and, cognitive and/or sensory impairments not being required extra time and specialist assistance.
- g) more likely to be victims of crimes than their non-disabled peers and more likely not to report the violence.<sup>23 24 25 26 27</sup>
- h) significant and complex barriers when it comes to reporting crime or participating in the court system. In some cases, a lack of access to information means that victims do not know how and where they can report a crime.
- i) considered easily influenced and the complainant's story is not a credible account, creating assumption as whether they are unable to be witnesses during trial.<sup>28 29</sup>

We agree and acknowledge the analysis and feedback within the Discussion Paper that has been by far themes and priorities in which to be addressed under the Disability Justice Strategy.

## Priority actions required

### 1. Information and Communication

We continue to question how people with disabilities in institutional and residential care settings,<sup>30</sup> prisons or other areas where they face justice, are receiving information on reporting crime and community support upon entering or leaving the justice system.<sup>31</sup>

Akin to providing information in an accurate and timely manner to victims of crime about justice processes and their case, the opportunity for victims to participate in the justice process is necessary to ensure that

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<sup>22</sup> Parliament of Victoria Law Reform Committee (2013) *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers- Final Report*. quoting the Submissions of the Legal Services Commissioner, Villamanta Disability Rights Legal Service, Victorian Advocacy League for Individuals with Disability Inc xxiv, 103, 178, 205.

<sup>23</sup> Community Affairs References Committee (2015) as above, p. 27

<sup>24</sup> National Cross-Disability Alliance. (2014). *Senate Standing Committee on Finance and Public Administration: Inquiry into domestic violence in Australia: Joint submission from National Cross-Disability Disabled People's Organisations*.

<sup>25</sup> Attard, M., & Price-Kelly, S. (2010) *Accommodating Violence: The experience of domestic violence of people with disability living in licensed boarding houses*, PWDA, NSW.

<sup>26</sup> Dowse, L., Soldatic, K., Didi, A., Frohmader, C. and van Toorn, G. (2013) *Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia*. Background Paper. Hobart: Women with Disabilities Australia

<sup>27</sup> Victorian Ombudsman (2015) *Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting* (Report, December 2015) p.31. At <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports>

<sup>28</sup> Fogarty, B. (2010) 'Improving legal representation for people with intellectual disability', *Precedent* 96.

<sup>29</sup> Case Study from South Australia in 2011 emphasized why this is necessary when charges of sexual abuse against a bus driver were dropped because the victims had communications difficulties and were unreliable witnesses. The victims were seven children with intellectual disability who had little or no speech, but could all communicate through other means, such as sign language. The prosecutors were concerned the victims could not adequately communicate what happened to them. The rules of evidence did not allow for an interpreter to help a person with disability in a court of law. The prosecutors tendered 'no evidence', meaning the case could not proceed and the charges were dropped. Case Study example taken from the Australian Human Rights Commission (2013) *Access to Justice in the Criminal Justice System for People with Disability: Issues Paper*, 2013, p. 10

<sup>30</sup> Institutions include: Community based homes accommodating usually around 1 - 6 people with disabilities, which are run by services providing disability supports (group homes); Sheltered workshops, where people with disabilities are congregated together in a segregated workplace; Special schools or units – a segregated school environment or program for children with disabilities, both separate from and inside mainstream schools; Respite houses, where people with disabilities stay together for a short period to give their unpaid carers a break from caring responsibilities; Day centers, where people with disabilities are congregated together in a supported service setting to participate in recreational activities.

<sup>31</sup> Community Affairs References Committee (2015) *The Australian Senate, Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, pp.37-38.

At [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect) (viewed 13 June 2018).

communication supports are available. This is imperative that modifications are made to assist people with disabilities to give their best evidence in investigative interviews.<sup>32</sup>

Information produced in forms of Easy English (with pictures and short, simple phrases) and Plain English (simplifying information and jargon) are tools that need to be resourced and created for people with disabilities navigating the justice system. The police wallet card created and printed by Advocacy for Inclusion has been a key element of preventing further interactions with police, with the flipside, educating and making aware to police staff how a simple directive such as the card can assist them with their understanding of disability.

In addition, Advocacy for Inclusion has recently completed a Justice Orientation Project which had included illustrations of the appropriate court etiquette<sup>33</sup> and working with people with disabilities (both offenders or victims) in navigating and understanding the justice process through individual and self-advocacy tools. The justice process has not just been narrowed to the police and court systems but also guardianship tribunals and child protection processes.

Other information and communication support, including to have a support person chosen by the person with disability and present at police interviews and trial processes, should be provided in addition to the involvement of witness intermediaries. This will ensure a smooth and equitable justice process for people with disabilities.

## 2. Training and Guidance

Current justice processes, including meetings with legal representatives, lack the time that is required to ensure full participation by a person with significant cognitive or communication barriers. The *ability to communicate* verbally and physically has been a barrier for people with intellectual or speech impediments to be able to communicate with police, judicial administration and lawyers of their case.<sup>34</sup>

In reference to the recent Royal Commission into Child Sexual Abuse in Institutional Settings, the recommendations should be adopted to the Disability Justice Strategy as an example of best practice to improve the response of the justice system.

*Each Australian government should ensure that its policing agency responds to victims and survivors with disability, or their representatives, who report or seek to report child sexual abuse, including institutional child sexual abuse, to police in accordance with the following principles:*

- a. Police who have initial contact with the victim or survivor should be non-judgmental and should not make any adverse assessment of the victim or survivor's credibility, reliability or ability to make a report or participate in a police investigation or prosecution because of their disability.*
- b. Police who assess or provide an investigative response to allegations made by victims and survivors with disability should focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant, and they should not make any adverse assessment of the victim or survivor's credibility or reliability because of their disability.*

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<sup>32</sup> Case Study from South Australia in 2011 emphasized why this is necessary when charges of sexual abuse against a bus driver were dropped because the victims had communications difficulties and were unreliable witnesses. The victims were seven children with intellectual disability who had little or no speech, but could all communicate through other means, such as sign language. The prosecutors were concerned the victims could not adequately communicate what happened to them. The rules of evidence did not allow for an interpreter to help a person with disability in a court of law. The prosecutors tendered 'no evidence', meaning the case could not proceed and the charges were dropped. Case Study example taken from the Australian Human Rights Commission (2013) *Access to Justice in the Criminal Justice System for People with Disability: Issues Paper*, 2013, p. 10

<sup>33</sup> Currently under publication

<sup>34</sup> Susan Hayes, 'A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities' (2005) 17 *Current Issues in Criminal Justice* 69, 71. M Henshaw and S Thomas, 'Police Encounters with People with Intellectual Disability: Prevalence, characteristics and challenges' (2011) *Journal of Intellectual Disability Research* 1.

c. Police who conduct investigative interviewing should make all appropriate use of any available intermediary scheme, and communication supports, to ensure that the victim or survivor is able to give their best evidence in the investigative interview.

d. Decisions in relation to whether to lay charges for child sexual abuse offences should take full account of the ability of any available intermediary scheme, and communication supports, to assist the victim or survivor to give their best evidence when required in the prosecution process.<sup>35</sup>

The advocacy cases and stories that our clients have experienced indicate that people with disabilities are unbelievably hard to speak to or denied support they need to provide a statement as a victim of crime. The cases in which we have been involved in have shown that it is imperative that all possible effect need to be made to prevent people with high intellectual/cognitive disabilities or those in need of communication assistance to give evidence on multiple occasions. Such processes lead to lengthy delays and duplications, increasing the trauma experienced by the victim.

We support the Disability Justice Plan implementation of South Australia, “provide appropriate training to staff and practitioners in the criminal justice system in disability awareness. Where practicable, the training should involve people with lived experience of disability in its development and/or delivery.”<sup>36</sup> This is a critical component that can be implemented into the ACT model.

In particular, pre-recording of evidence<sup>37</sup> should be allowed on one occasion when deciding possible option of reforms for victims of crime. For a person with disability, this can be implemented with the assistance of a support worker or trusted individual *chosen by* the person to be used in legal proceedings at different evidence occasions and at different time. The only time a person should be asked to clarify or expand their evidence should be granted when necessary to the investigation to avoid multiple recounting of events, which is both traumatic and difficult for an individual with intellectual/cognitive or communicative difficulty.

In addition, the effect of pre-recording should be thoroughly explored in relation to other proposed reforms where people with disabilities are included in the justice processes, assessing how these different changes might improve processes for all victims with or without disabilities.

### 3. Data, Research and Review

Until the commitment of national data collection in 2022<sup>38</sup>, there remain no national or Territory data to back the ‘overrepresentation’ of people with disabilities in criminal justice and child protection systems – this is something the ACT Government can lead on from a human rights point of view under the Disability Justice Strategy.

The development of standard variables for the collection of data by ACT criminal justice agencies relating to people with disability to facilitate the planning, monitoring and improvement of services would be instrumental to ensuring that an accurate and transparent picture is captured.

### 4. Identification and Screening

We strongly support the necessity for disability to be identified, assessed and recorded for data, gaps and linkage purposes. Increasing identification and screening of people with disabilities involved in the justice process will

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<sup>35</sup> Recommendation 15 of the Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, *Executive Summary and Parts I-II*, page 30.

<sup>36</sup> South Australia Disability Justice Plan 2014-2017 *Support vulnerable victims and witnesses in the giving of evidence: priority areas*, p.9

<sup>37</sup> As recommended in Advocacy for Inclusion (2018) *Response to the Charter of Rights for Victims of Crime Options Paper*, p.3

<sup>38</sup> Standing Committee on Justice and Community Safety (2017) *Discussion Paper: Domestic and Family Violence – Policy Approaches and Responses*, p.5 (2.12)

enable transparency and information sharing of how many people are in the 'system', what is the prevalence of disability and the development of resources to accommodate and ensure early intervention.

## 5. Service Gaps and Linkages

In addition to the five key recurring themes and priorities identified as possible address, the Disability Justice Strategy should promote its approach to human rights in ensuring that a quality, safeguarding and oversight mechanism is individual-focus. The Strategy should design to empower people to have choice and control in the decisions that affect them when engaging with the justice process, whether from the beginning or the end – that is the goal.

The frontline and systemic experience of Advocacy for Inclusion see the benefit of increasing services and closing the gap where people's needs remain unmet. It is becoming acknowledged that not all people with disabilities in the ACT can or want to access the NDIS. Many of these people are beginning to fall through the gap where services and linkages are reliant on the NDIS funding of the individual, removing the capacity and availability of services for those who are ineligible.

In our experience, people with intellectual and cognitive disabilities are likely to remain unidentified and unsupported when they return to the community. This is most concerning when the NDIS is designed to provide *all* people with disabilities to access services, support to allow full self-determination and participation in their justice processes.

Whilst the NDIS is a Commonwealth model, the ACT is in the full rollout phase and the Disability Justice Strategy should be working alongside the NDIA and services supporting that are ineligible to the NDIS to ensure that the NDIS process and services available are fully pointed towards before an individual is reintegrated back into the community.

In our experience, people with disabilities who have not previously reported crimes against them, a well-connected and integrated quality, safeguarding and oversight mechanism is necessary and important as people with disabilities encounter ACT Government run or funded disability support and services, with multiple ways to report violence against them and seeking appropriate levels of support – if they are knowledgeable that such a pathway exists.

It is vital that these systems are and remain accessible, inclusive of and approachable to people with disability, and that they are well connected to ensure they have a range of options available to assist them through the justice process. Essential in advancing these rights is ensuring a focus on a truly independent oversight of institutional settings, with community visitors and advocacy — both independent and systemic — as key mechanisms to achieve this independence.

Whilst the intended Commonwealth NDIS Quality and Safeguards Commission is underway, there is a need for the complaint and oversight mechanism of the Strategy to remain separate where people with disabilities make a complaint towards quality or treatment of their justice process, with the focus a complaints management system, remedy and oversight mechanism that is removed from the NDIS umbrella. The anticipated model of the NDIS Quality and Safeguards Commission only represent those on the NDIS and service providers. For those without NDIS packages, a complaints and oversight mechanism are needed to ensure that the NDIS is viewed a viable and only option.

The function of the official community visitor is a viable safeguarding mechanism that is currently in place – this is most useful when community visitors can enter institutional residential living, service providers and the broader community without announcement. The role of the official community visitors has been instrumental in ensuring that people with disabilities are provided with information of advocacy and complaint mechanisms. The role of the community visitors is vital at ensuring at identifying and addressing issues of violence, abuse and neglect against people with disabilities.

Finally, gathering the right data on crimes reported against people with disabilities and on the functioning of the quality, safeguarding and oversight systems within the ACT is also critical. That data should be used for

continuous improvement of systems and responses and, ultimately, for protecting the lives of people with disability who are victims of crime.

## Conclusion

Advocacy for Inclusion supports the implementation of the ACT Disability Justice Strategy to set standard directions for the ACT to ensure an equal and fair justice process for all people with disabilities.

We further recommend:

1. The ACT Government consider the South Australian and Queensland models by fair to develop a best-practice model that is designed for the ACT justice system and processes.
2. Consider amending legislation to provide a procedure by which recorded police interviews with vulnerable witnesses can be reviewed, assessed or checked for training purposes, including by external specialists for quality assurance.
3. Provide general disability awareness training that involves people with lived experience of disability to all staff in ACT criminal justice agencies. Advocacy for Inclusion is well placed and experienced in delivering this.
4. Continue the creation and building of resources through civil society and advocacy organisations to ensure that Easy English and Plain English formats remain accessible for people with disabilities.

With the Disability Justice Strategy underway, we believe a person who is more engaged and understanding of any process and outcome will also be a person who is better able to accept that outcome, whatever it is.<sup>39</sup> This is a rarity in the current system as the assumption is made that the person cannot participate, rather than on assuming that they require support to participate as an equal.

Advocacy for Inclusion welcomes the opportunity to offer this submission and look forward to continuing our stakeholder engagement regarding the Disability Justice Strategy.

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<sup>39</sup> For an examination of how being supported to participate in legal processes affects perceptions of fairness and consequently wellbeing, see: Beaupert, F. (2009) 'Mental Health Tribunal Processes and Advocacy Arrangements: "Little Wins" are No Small Feat' 16 *Psychiatry, Psychology and the Law* 90, 93. Winick, B.J. (1999) 'Therapeutic Jurisprudence and the Civil Commitment Hearing' 10 *Journal of Contemporary Legal Issues* 37, 54. Tyler, T. R. (1992) 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' 46 *Southern Methodist University Law Review* 433.