

Response to the Charter of Rights for Victims of Crime Options Paper

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 commitment to enhance the ACT Charter for Victims of Crime (the Charter) to ensure that victims have a clear understanding of their rights and a fair justice process. We also welcome that the Charter will be inherently based on human rights, 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.¹

Speaking under the CRPD, Advocacy for Inclusion have conducted highly-successful individual, self-advocacy and systemic advocacy around the issues faced by people with disabilities in the ACT who have are victims of crime. We welcome the questions in which have been asked and requested for feedback by the Charter.

Recommendations

Recommendation 1: Pre-recording of evidence and the use of registered witness intermediaries in the ACT be made more widely available to people with disabilities to ensure that evidence is collected in as a measure of a timely and fair manner.

Recommendation 2: Communication supports, including having a support person present in police interviews and trial processes, be provided in addition to the involvement of registered witness intermediaries.

Recommendation 3: ACT Court Information to improve its accessibility to people with disabilities in written and spoken contexts. Disability awareness needs to be incorporated into the training of police, court staff and others involved in the criminal justice system; and

Recommendation 4: JACS and ACT Government to continue working with Advocacy for Inclusion to ensure judicial directions and information be improved.

¹ UNCRPD Article 13 - Access to Justice, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-13-access-to-justice.html>

Recommendation 5: Quality, safeguarding and oversight mechanisms in the disability and mainstream sectors should incorporate and implement the essential elements of a quality, safeguarding and oversight system that Territory managed and not dependent on the NDIS.

Recommendation 6: The ACT Government and law enforcement should increase collaborative efforts to ensure that relevant quality, safeguarding and oversight mechanisms can operate effectively to ensure that people with disability have access to effective quality, safeguarding and oversight mechanisms as part of the Charter.

Recommendation 7: JACS and ACT law enforcement (police and courts) to collaborate and gather data on people with disabilities who have come forth as victims of crime.

The Barriers Faced by People with Disabilities

"People with a disability are not second-class citizens, they are not people to be ignored, and if they have an act of violence committed against them, why are we treating them differently?"²

People with disabilities face 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.³ There is a great deal of research documenting and analysing the over-representation of people with disabilities in criminal justice systems, particularly victims of crime.⁴ People with disabilities are more likely to be victims of crimes than their non-disabled peers and more likely not to report the violence.^{5,6}

This is most apparent for people living in socially isolated or institutional arrangements may not make a report as they do not realise what happened or continues to happen to them is a crime. In supported disability service settings, people with disabilities are often alone with support workers to provide a range of personal supports, such as showering, toileting and dressing which, in our experience, has been the emphasizes of some cases of abuse. There remains no available data on how many of those people are currently in institutional care or how many have experienced violence in such settings thus is unknown if and how these people are receiving information on reporting crime and victim support.⁷

Many people that are supported through individual and self-advocacy at Advocacy for Inclusion have limited education or exposure regarding healthy sexual relationships, information and support to their human right to report a crime or abuse. They often do not recognise the violence that is perpetrated against them is a crime are unaware of how to seek assistance or support. Even if, and when, they can disclose, they are unable to be believed and are often actively prevented from seeking help and support. In such setting, victimizing behaviour is normalised.⁸

² Alistair McEwin (Australian Disability Discrimination Commissioner) quoted in *ABC News Online*, 'Human rights report calls for new approach to tackle violence against people with disabilities', 17th July 2018: <http://mobile.abc.net.au/news/2018-07-17/human-rights-commission-report-abuse-of-people-with-a-disability/9998706?pfmredir=sm>

³ There is no available data on how many of those people are currently in institutional care or how many have experienced violence in such settings thus is unknown if and how these people are receiving information on reporting crime and victim support.

⁴ 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*.

⁵ Community Affairs References Committee (2015) as above, p. 27

⁶ 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>

⁷ 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 (viewed 13 June 2018).

⁸ Please see Appendix A of two Case Study examples from Advocacy for Inclusion's *Submission to the Senate Inquiry into violence, abuse and neglect against people with disability*, pp.22-25

The emotional toll of making a report can also prevent people from making a report, particularly if the perpetrator is a family member, support worker or carer and their main support. There is also an emphasis of limited access to reasonable communication or decision-making supports, including communication devices and AUSLAN interpreters. As such, people must be provided with appropriate supports around their decision to report abuse, including decision-making support where necessary.

1. Providing information in an accurate and timely manner to victims of crime about justice processes and their case

Advocacy for Inclusion finds that police officers, lawyers, and court staff do not have specific skills for working with people with disabilities, despite the best of intentions. Their focus is on applying their specialist area of expertise, and this is as it should be. Just like many other members of the community, assumptions are made that people with disabilities are unable to be engaged, to make a credible statement, or give evidence, even with supports.⁹

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. When people with disabilities do access legal representation, lawyers are ill-equipped to respond to their individual needs; for example, allowing the client time to process information, or communicating in ways that support their comprehension and involvement. People with disabilities may need:

“more time to understand and answer questions or... a support person to explain things to them and ensure that they are not overwhelmed by the stress of a new and confronting situation (like a court or police station)”¹⁰

For example, lawyers often prefer to speak with family members instead of directly to the person with disability about their case. This saves time, but it results in people with disabilities not being directly represented or heard, and as such their rights are discarded.

Advocacy for Inclusion refers to the recent Royal Commission into Child Sexual Abuse in Institutional Settings recommendation¹¹ in response to barriers faced by people with disabilities in the justice process. Despite the report recommendations being directed to reporting of child sexual abuse, the recommendations should be adopted to the Charter as an example of best practice ensure that Australian Federation Police and ACT Police are responsive to and inclusive of all people with disability.

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.*
- c. Police who conduct investigative interviewing should make all appropriate use of any available intermediary scheme, and communication supports, to*

⁹ See Appendix A Case Study, *Police Investigation*.

¹⁰ Fogarty, B. (2010) 'Improving legal representation for people with intellectual disability', *Precedent* 96.

¹¹ 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.

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.

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.

Pre-recording of evidence should be allowed on one occasion when deciding possible options 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 times. 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.

2. Opportunities for victims to participate in the justice process

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 communication supports are available. This is imperative that modifications are made to assist people with disabilities to give their best evidence in investigative interviews.¹²

In addition, communication supports, 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.

Advocacy for Inclusion has recently completed a Justice Orientation Project which had included illustrations of the appropriate court etiquette¹³ 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.

Such participation can be aided with disability advocacy, in an individual (one on one) or self-advocacy (teaching of skills) capacity. Advocacy for Inclusion is often a contact service for people with disabilities, both offenders or victims, and in turn works quickly to ensure reasonable and appropriate supports are put in place to aid the process.

¹² 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 communication 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

¹³ Currently under publication

3. Appropriate complaint management, remedy and oversight mechanisms for victims of crimes

The Charter should promote its approach to human rights in ensuring that a quality, safeguarding and oversight mechanism is individual-focus, particularly when people with disabilities are concerned. The Charter 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.

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 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 Charter 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 current 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.

Advocacy for Inclusion supports the implementation of the ACT Charter for Victims of Crime to set standard directions for the ACT, in consultation with those with relevant expertise.

We would like to thank the ACT Government for the opportunity to provide feedback on this discussion paper and welcomes any further consultation on this topic.

Appendix A

Direct personal stories of violence, abuse and neglect^{14 15}

Advocacy for Inclusion gained permission from two people to share their direct experiences of violence, the impact upon them and the responses they received.

Zafir's story (course language included)

Zafir was a young man in his mid-twenties. He attended a day center for a few hours three days a week and he needed support to do most things throughout the day. Zafir did not use much verbal communication, but he could express himself using vocal sounds and hand gestures, and occasionally some words.

The senior support worker, Paul, had been an employee at the day centre for 17 years. The CEO had already contacted the police, who advised her to contact Zafir's legal guardian or advocate to support him to make a police report at the time of incident.

Deidentified day centre staff incident report

Today Zafir was verbally and physically abused by my team leader, Paul. Zafir had finished eating his carrots and was banging the container on the table. Paul yelled "stop banging that fucking container" and grabbed Zafir and pulled him out of his chair and pushed him across the room. Then Paul yelled at him again "get in the fucking corner you Muslim fuck." Zafir immediately went to the corner and looked at Paul over his shoulder. Then Paul yelled "don't look at me". Then he went and placed his hand on the back of Zafir's head and banged it into the wall. It was hard enough that I saw the gyprock wall break free from the corner.

There have been other instances involving Zafir:

- Zafir got dropped off to [day centre] and Paul was quite polite and gave Zafir a friendly touch of the knuckles and said, "how are you going mate?" Later that same day Zafir came up to Paul and held out his fist for a friendly touch again and Paul threw his hand and said, "no don't fucking touch me".*
- We were at Macdonald's for a morning snack and Paul threw Zafir's pancakes in front of him. As Zafir was putting the butter on them and he gave a cough in Paul's general direction. "Don't cough on me" Paul said, then he went around to Zafir and gave a large cough in his face and then again on his pancakes.*
- Paul and I were going for a walk with Zafir with one of his peers when I saw up ahead that there was someone walking two large dogs. Knowing Zafir feared dogs I suggested we change the plan of the walk. Paul disagreed and said, "nah fuck him". When we were getting closer Paul told Zafir to stay close.*
- We went for a walk it was winter and quite cold. Zafir had no jumper and jacket and I suggested we should not go, fearing Zafir might get a cold. Paul said not to worry about Zafir, "fuck him". I took my jacket off and gave it to Zafir and Paul said I was too kind.*
- We were at Macdonald's and we were having lunch. Zafir was tapping both his legs. This was annoying Paul and he made Zafir get up and stand facing the wall.*

¹⁴ Both case studies are excerpts from Advocacy for Inclusion's 2015 submission to the Community Affairs References Committee, *The Australian Senate, Violence, abuse and neglect against people with disability in institutional and residential settings*

¹⁵ All individual names (including Zafir and Paul) have been changed by request

- *Many times, Zafir is very verbal in the car. Paul always gets very mad at this and says things like “black boy shut up, stop your Muslim fucking wailing, ZAFIR SHUT THE FUCKING HELL UP”.*
- *We were at the park for lunch and Zafir was taking his time with his lunch. Paul got impatient and threw his lunch on the ground. This happened a couple of times.*
- *Zafir was sitting on the couch being very verbal. Paul got mad and picked the side of the couch up tipping Zafir off the couch and the couch landed on top of him.*
- *We were off on a program and Zafir went to sit in the front seat and Paul said, “no fuck you get in the back – my country, my rules”.*
- *We were bowling and Zafir went to pick up a bowling ball and Paul said “no pick up that ball” pointing at it. I didn’t understand what was wrong with Zafir choosing his own ball. Paul hasn’t done the same with [other clients].*

Zafir experienced an intersection of race based and disability-based violence, for example by Paul withholding appropriate supports, applying force and physical violence while undertaking his support responsibilities, intimidating him because of his communication style, at the same time as using racial slurs.

The violence was emotional, psychological and physical and occurred at least over the course of around 9 months. It is apparent that Zafir’s increased “challenging behaviour” were in response to the abuse targeted at him by Paul. However, support workers did not take serious action until the final assault by Paul against Zafir when Paul slammed Zafir’s head into the wall.

Staff members who did report to Paul felt intimidated by his behaviour and did not know how to respond in an effective and appropriate manner, for example by contacting the police in response to criminal offenses, including racial vilification and physical assault.

Response by senior manager

The CEO took appropriate action by contacting the police and dismissing Paul immediately.

Police investigation

The advocate at Advocacy for Inclusion worked closely with Zafir and his mother, who is his legal guardian, throughout the police investigation. Zafir became visibly distressed at the police station when his mother was being interviewed, indicating he had some understanding that they were discussing Paul’s violence against him.

Despite the two support workers willing to come forward as witnesses, the police decided not to charge Paul and instead give him a warning. The police said that the reason they would not charge Paul was because there was not enough evidence; Zafir was not a reliable witness because of his cognitive and communication impairments, and he could not make a statement in conventional formats. They noted that Paul expressed significant remorse and suggested that the process would be too stressful for Zafir and his family.

As a result, Paul was not held to account through a court hearing.

Michelle’s story¹⁶

I live in a group house and sometimes it’s ok. Some of the staff are nice. But some of them are horrible. They call me names. I’m sick of living there and I want to move out.

I was sexually assaulted by a worker in my bedroom. I reported it to the police and it went to court. One of the workers told the court that it didn’t happen. They didn’t believe me and the man who abused me got let off.

¹⁶ Ibid

I never got any closure. I saw him one day in public. It made me cry. Why did he get let off? He got fired but I wonder if he's working with other disabled people now. I worry for their safety.

My house brings up painful memories. It hurts a lot. It makes me quite upset. I moved into a different bedroom so that I don't have to remember it so much. I can make my own decisions about where I live, but for now I am stuck there.

Sometimes I get frustrated. But I am ok now. I am a very strong woman and I know I can do it.

Advocacy for Inclusion provided advocacy support to Michelle for several years to achieve the living arrangement she wanted over a period of five years to ensure she was removed from the presence of her abuser. Without the NDIS at the time, the lack of access to individualised funding had caused her to be trapped in her then living arrangement. She was unable to simply move into another home, even if one was made available to her.

Michelle experienced gender based as well as disability-based violence. She referred to some of the staff who are "horrible" and call her names, and she also referred to the long-term impacts of trauma and facing constant reminders in her living environment where the assault happened several years earlier.

Her support worker abused his power, as someone in a position of trust and responsibility, at a time when there were no other support workers nearby to stop him. Michelle was unable to access justice through the court system, as the absence of other witnesses meant that her case was viewed as not having enough evidence. Michelle was also assumed to be an 'unreliable witness' by police in terms of evidence. She did not have communicative supports in place to assist her report.

Michelle is now living in a new group home away from her abuser where she has been provided necessary supports and reasonable accommodations to her daily living.