



**Royal Commission**  
into Violence, Abuse, Neglect and Exploitation  
of People with Disability

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# Issues Paper

**Overview of responses to  
the Criminal Justice System  
Issues paper**

December 2020

Please be aware that the content in this Overview may be distressing or raise issues of concern for some readers. There are a range of services available if you require support after reading this paper. Contact details for these services are located at the end of this paper under the heading 'Counselling and support'.

## Outline

### The Justice Issues Paper

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) published the Criminal Justice System Issues Paper (Justice Issues Paper) on 14 January 2020 and invited responses by 20 March 2020. Responses were accepted after this date and the deadline was extended due to the impact of COVID-19.

The Justice Issues Paper sought information about the experiences of people with disability in the criminal justice system. The paper noted that people with disability, including First Nations people and young people, are overrepresented throughout the criminal justice system in Australia and are at higher risk of violence, abuse, neglect and exploitation within that system. The Justice Issues Paper outlined nine questions and responses were invited from the public.

### Purpose of this document

This document provides a brief summary of what we have been told in responses to the Justice Issues Paper. The respondents expressed a range of views. The Royal Commission is bound to receive and consider all of the views in the responses to Issues Papers. This overview is a summary of these views and reflects what we have received so far. It does not present the Royal Commission's final position on any justice related topic. The Royal Commission will carefully consider all information and perspectives before reaching conclusions on any issue.

### Scope of this document

This document does **not** summarise all we have been told in submissions, community forums, private sessions, public hearings or via research projects that relate to justice.

It is the case that all information provided to the Royal Commission informs our work. The Royal Commission will continue to consider the experiences of people with disability and the justice system and seek input in a number of different ways.

## Who responded?

At 2 November 2020, the Royal Commission had received 56 responses to the Justice Issues Paper. Responses represented a wide range of views from both people with disability and various entities, including government bodies, service providers, representative organisations and individuals. Some responses were very comprehensive, and highlighted the many forms of violence, abuse, neglect and exploitation that people

with disability may experience in the criminal justice system as victims, accused people or witnesses.

We received three responses from First Nations organisations. We did not receive any responses from culturally and linguistically diverse people with disability, or the peak bodies that represent them.

Many of the responses to the Issues Paper contained case studies and proposals for change. We will use this valuable information to inform our work.

## **What did the responses say?**

### **Nature and extent of violence, abuse, neglect and exploitation in the criminal justice system**

Responses to the Justice Issues Paper provided insights into the forms of violence, abuse, neglect and exploitation that people with disability can experience when they come into contact with the criminal justice system. The responses described experiences across the criminal justice system, such as interactions with police, the courts and prisons.

### **The overrepresentation of people with disability in the criminal justice system**

Respondents told us that people with disability are overrepresented throughout the criminal justice system. The Local Court of New South Wales told us that they regularly encounter people with disability as victims, accused persons, defendants and witnesses. Respondents also noted that while available data demonstrates the overrepresentation of people with disability in the system, there is no nationally consistent data. This gap presents difficulties when developing strategies for an effective response.

WWILD Sexual Violence Prevention Association told us that women and men with intellectual, learning and cognitive disabilities suffer extremely high rates of sexual violence in the community. Similarly, the response from the Northern Territory Office of the Public Guardian highlighted the overrepresentation of people with cognitive disability who are either accused of criminal offences or are victims of crime. Autism Spectrum Australia told us that people with autism face a higher risk of being victims of crime compared to people without autism, resulting in a higher rate of involvement with the criminal justice system.

Both the Supreme Court of Victoria and Macarthur Community Legal Centre noted the higher prevalence of disability among young offenders in the court system. The response from the Supreme Court of Victoria cited research by Monash University that examined the higher rates of disability, as well as the crossover of disability, adverse childhood experiences and engagement with the child protection system among young offenders. That study found that of the 300 children examined, 48% had an identifiable disability or impairment.

Several respondents highlighted the overrepresentation and disproportionate numbers of First Nations adults and youth with disability in the criminal justice system. The Australian Centre for Disability Law estimated that 95% of First Nations people charged with criminal offences who appear before courts have an intellectual disability, a cognitive impairment or a mental illness. The Northern Territory Office of the Public Guardian highlighted the over-representation of First Nations people in the Northern Territory's criminal justice system in general, explaining that at 30 June 2018, First Nations people accounted for 84% of the adult prison population in the Northern Territory.

A 2018 study conducted by the Australian Institute of Health and Welfare (AIHW) noted that people with disability make up 29% of Australia's prison population, despite forming only 18% of the general population. AIHW found that many prisoners with disability (46%) rated their level of restriction as 'moderate,' while 40% said that their disability was 'profound or severe.' The proportion was notably higher among First Nations prisoners, with 48% rating their disability as 'profound or severe'. National Aboriginal and Torres Strait Islander Legal Services (NATSILS) provided data from an Australian Bureau of Statistics' 2019 report, showing that First Nations people make up 28% of all prisoners in Australia, despite forming only 2% of the general population.

Respondents to the Justice Issues Paper explained the overrepresentation of people with disability in the criminal justice system with reference to limited access to appropriate support services and accommodations; lack of disability awareness and identification; cumulative disadvantage experienced by different groups of people; early life factors; historical trauma; recidivism; lack of diversionary options; barriers to access to justice; and barriers to reporting and investigating violence, abuse, neglect and exploitation.

### **Criminalisation of disability**

The Law Council of Australia reported that many people who are offenders have a long history of undiagnosed or untreated impairment, poor health and/or trauma. The Law Council also told us that conduct associated with people's impairment, health condition and/or trauma are often interpreted as difficult or defiant behaviours. This leads to disproportionate interactions with police and a 'criminalisation of disability'.

Respondents, such as the Queensland Office of the Public Guardian, the Victorian Office of the Public Advocate, Sisters Inside and Just Reinvest NSW, explained that 'criminalisation of disability' occurs when people with disability come into contact with the criminal justice system in circumstances where another system may have been better placed to respond. At times, the criminal justice system is invoked as a response to disability, health or trauma-related behaviours that have not been properly recognised and understood. For example, we were told that some residential service providers may call police as a default policy position, resulting in a person with disability's 'challenging' behaviour being criminalised rather than addressed by a therapeutic response.

We were told that children and young people with disability face a greater risk of being prosecuted by the criminal justice system, compared to children without disability. This is

because multiple service systems have failed to identify and respond appropriately to their needs, resulting in a prosecution. The Queensland Office of the Public Guardian explained that disability-related behaviours are often wrongly attributed to criminal intent. We were also told by the Australian Human Rights Commission (AHRC) that First Nations children with cognitive disability are likely to be charged with a first offence at a younger age than First Nations children without cognitive disability. The Aboriginal Medical Services Alliance of the Northern Territory's (AMSANT) response explained that hearing loss affecting many First Nations children is often linked to cognitive development, speech and language, behavioural issues, emotional wellbeing, social isolation, which in turn are factors often associated with young offending.

We were told that a significant proportion of children and young people with disability in youth detention have endured a range of adverse experiences in childhood that result in trauma. The youth detention system is ill-equipped to respond. Many responses highlighted the relationship between criminalisation and factors such as homelessness, socio-economic disadvantage and trauma resulting from sexual assault or domestic and family violence.

Dr Linda Steele (a disability law academic at University of Technology Sydney), Jesuit Social Services, the Northern Territory Office of the Public Guardian and the Law Council of Australia all identified other social determinants of incarceration which make people with disability more likely to become involved in the criminal justice system. Many people who have experienced criminalisation or incarceration may also be First Nations people, people from a low socio-economic status or people who have experienced other forms of violence in the past. Dr Steele explained that these cumulative factors suggest that violence in the criminal justice system does not occur in a 'vacuum' but in the context of 'lifelong structural violence'.

### **Lack of access to justice**

Respondents told us that people with disability who interact with the criminal justice system do not access justice on an equal footing to others – such as during interactions with police, in the courtroom, in detention settings and while engaging with complaints mechanisms. The AHRC drew attention to Australia's obligations under Articles 12, 13 and 14 of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD). They noted that if inclusion and accessibility were central tenets of justice, there would be a significant change to the violence, abuse, neglect and exploitation that people with disability currently experience in the criminal justice system.

We heard about the negative and discriminatory attitudes that people with disability can face in the system, and how systemic racism, discrimination and practices such as racial profiling can exacerbate violence and abuse. Respondents, such as the Law Council of Australia, told us that people with disability can be viewed as being unreliable or incapable of giving evidence, making legal decisions and actively participating in legal proceedings. We were told that people with cognitive disability are particularly vulnerable to systemic neglect with respect to participation in the justice system, such as giving

evidence or defending charges with proper legal representation. The Australian Lawyers Association told us that people with intellectual disability and acquired brain injury may face negative assumptions in court, such as negative assumptions about their credibility or reliability as a witness.

The Law Council of Australia also told us that stigma and misconceptions surrounding people with disability can become entrenched due to inadequate disability training. These can lead to a failure by lawyers, judges, police officers and corrections staff to respond to disability-related needs in an appropriate way and can result in an increased risk of miscarriage of justice.

Many respondents told us that Australia's criminal justice system was not designed to recognise or adapt to the needs of victims, accused persons, defendants and/or witnesses with disability. This is especially so for people who use non-typical communication methods or otherwise experience communication barriers. The Australian Sign Language Interpreters' Association (ASLIA) described the challenges of securing an interpreter and stated that police and court officers do not always provide certified interpreters where one is requested. This was said to be a particular issue in rural and regional communities. These shortcomings can affect the admissibility of evidence gathered from interviews with people who experience communication barriers or adduced in court proceedings. Delays and lack of resources can result in the use of unqualified interpreters, such as family members, which can lead to additional difficulties.

We have also heard that self-representation can be difficult for people with disability, and that legal assistance, including assistance in the form of specialised disability legal services, is often not available due to resourcing constraints. Limited access to funding can significantly impede access to justice for a person with disability. For example, limitations on legal aid funding can delay representation for clients with disability. The Australian Lawyers Association told us that it is not uncommon for people with mental illness, intellectual disability or acquired brain injury to plead guilty through their legal aid representation. That is especially so if the lawyer is unable to identify the client's disability or impairment due to inadequate training or time pressures. Queensland Law Society suggested that First Nations people with disability may feel pressure to plead guilty in order to 'get it over with' and avoid further adverse outcomes.

In its response to the Justice Issues Paper, the Australian Government recognised that access to legal assistance is an important element in accessing justice. The Australian Government stated that it has committed more than \$2 billion in funding over five years from 1 July 2020 for legal assistance services through the National Legal Assistance Partnership for legal aid commissions, community legal centres and Aboriginal and Torres Strait Islander legal services.

## Detention

Many respondents, such as Centacare Prisoners Services, Sisters Inside and NATSILS, told us that people with disability are overrepresented in prisons and in other forms of detention. These institutions can be settings of violence, abuse, neglect and exploitation.

Human Rights Watch (HRW) expressed concern that First Nations people with disability remain at serious risk of self-harm and preventable deaths in custody, despite almost 30 years having passed since the 1991 Royal Commission into Aboriginal Deaths in Custody. HRW highlighted that at least 437 First Nations people have died in the years since the Royal Commission, and that over 40% of cases examined involved a person with disability. HRW told the Royal Commission that more needs to be done to address conditions of detention in Australia; including addressing the inadequate access to support or mental health services and the overuse of solitary confinement. HRW provided eight case studies of deaths in custody that they had investigated, six of which were First Nations people. They found that corrective services had failed to adequately recognise or respond to the risks of self-harm and suicide in all cases.

The Victorian Office of the Public Advocate told the Royal Commission that prisons are the 'new disability institutions' and said that people with disability are often detained for a length of time that is disproportionate to the gravity of their offence. Many responses explained that a lack of disability and accessible criminal rehabilitation supports within those systems increases the likelihood of reoffending, recidivism and institutionalisation. Respondents voiced concern that people with disability can be vulnerable to violence and abuse and can be seen as 'easy targets' for other prisoners. The Northern Territory Office of the Public Guardian told us that people with cognitive disability are particularly vulnerable to abuse in custodial settings as a result of removal from regular support networks and systemic failures to address individual needs. We also heard strong criticism from the Queensland Office of the Public Guardian about the use of watch houses to detain children and young people with disability on remand.

Several respondents, such as Jesuit Social Services, the Human Rights Law Centre, Sisters Inside, Professor Peter Norden and Dr Astrid Birgden, condemned the use of restrictive practices, such as solitary confinement, in detention settings. We heard that solitary confinement is currently used in prisons to manage the behaviours of people with psychosocial and cognitive disability. Professor Peter Norden, an expert on social policy and prison reform, noted that data on the extent of the use of different forms of solitary confinement and prisoner segregation is not readily available because prison administrators and governments are generally reluctant to reveal it. The Human Rights Law Centre also expressed concern over the wellbeing of people with disability in detention during the COVID-19 pandemic. The Centre argued that the use of solitary confinement as punishment and as a means to contain the spread of the virus was both inappropriate and inhumane.

Respondents told us that factors such as age, sex and cultural background can heighten the risk of a person with disability experiencing violence and abuse in prison. knowmore

legal service submitted that women and children with disability face a particularly high risk of experiencing physical and sexual violence in detention settings. Children and Young People with Disability Australia told us that children and young people experience significant forms of maltreatment in detention settings, such as the use of restraints or verbal abuse.

We were also told that these settings are more likely to re-traumatise women with a history of family violence. NATSILS highlighted that First Nations women with disability are more vulnerable to sexual violence in prisons compared to women who are not First Nations. Furthermore, Australia's National Research Organisation for Women's Safety (ANROWS) told us that the detention of First Nations mothers can exacerbate intergenerational trauma and the disruption of communities. They told us that the incarceration of First Nations mothers can lead to emotional and behavioural impacts for their children, which, along with other long-term effects, can increase the risk of First Nations children and young people entering the child protection or justice systems.

### **Indefinite detention**

Multiple respondents, including the AHRC, Law Council of Australia, Jesuit Social Services and AMSANT identified the indefinite detention of people with disability as a serious and deeply troubling issue. Their concerns included children with disability detained indefinitely after being deemed unfit to stand trial.

Indefinite detention, as used in this paper, refers to the detention of a person in a prison or secure mental health facility without a specific release date, after being found unfit to plead or unfit to stand trial. The Local Court of New South Wales stated that fitness to plead is determined in New South Wales against the criteria set out in *R v Presser* [1958] VR 45. This requires the court to consider factors such as whether the defendant can understand the charge, the proceedings and the evidence, and whether they are able to provide instructions to legal representatives.

A finding of being unfit to stand trial can have significantly adverse outcomes such as protracted or indefinite detention. These laws can also lead to unnecessary incarceration for persons who plead guilty to charges to avoid the possibility of indefinite detention.

The AHRC pointed out that in some jurisdictions, a person may end up spending a significantly longer period of time in detention than they otherwise would have had they pleaded guilty to the offence. The Australian Lawyers Alliance suggested that fitness to plead laws, although intended to be protective, operate punitively because they provide an incentive to people to plead guilty to avoid a finding of unfitness. This leads to unfair and long term detention in prisons or secure hospital facilities. Several respondents, including Darwin Community Legal Services and the Australian Centre for Disability Law, indicated that the risk of being detained for an indefinite period of time is particularly high for First Nations people. According to data provided to the Senate Standing Committee on Community Affairs in 2016, as many as 50% of people in indefinite detention were First Nations people.



Respondents told the Royal Commission that they were concerned about current legislation, policies and practices in Australian jurisdictions that lead to the indefinite detention of people with disability. Respondents noted that custodial orders vary across jurisdictions. For example, Law Council of Australia noted that while in New South Wales and South Australia, custodial orders expire on a pre-determined date, in Western Australia, a person can be indefinitely detained 'at the Governor's pleasure'.

Respondents to the Justice Issues Paper attributed the indefinite detention of people with disability to several factors, such as unfitness to plead / unfitness to stand trial laws and other criminal responsibility laws. Other factors include the absence of:

- alternative accommodation options
- suitable diversionary pathways
- readily available mental health assessments
- limits placed on the period of detention
- conditions that orders are subject to regular periodic review.

The Law Council of Australia maintained that detention solely due to unfitness to plead is contrary to human rights, specifically article 9.3 of the *International Covenant on Civil and Political Rights (ICCPR)*. The AHRC recommended that the Commonwealth, state and territory governments work together to develop and implement initiatives aimed at ending the indefinite detention of people with disability deemed unfit to plead.

## **Potential enablers of violence, abuse, neglect and exploitation in the criminal justice system**

Respondents to the Justice Issues Paper told us that there are many factors that can enable violence, abuse, neglect and exploitation of people with disability in the criminal justice system. These include poverty, unemployment and lower education outcomes (often stemming from stigma), discrimination at all levels of the system and low levels of disability awareness.

### **Supports, services and funding**

Responses to the Justice Issues Paper outlined that access to disability services and support staff can be difficult to secure in the criminal justice system. Access to services and support can be particularly difficult for people with disability living in regional or remote areas, including First Nations people. Respondents also told us that the lack of adequate healthcare services in regional and remote areas increases the likelihood of a person with an undiagnosed or 'unmanaged' disability coming into contact with the criminal justice system. Just Reinvest NSW characterised 'unmanaged disability' as a disability that has not been managed with appropriate healthcare.

Women's Legal Service NSW noted that disability support can be expensive and the cost of support is often a barrier for people with disability trying to escape situations of domestic violence. They told the Royal Commission that increased support for victim-

survivors is crucial to help people with disability escape situations of domestic violence and recover from any resulting trauma.

We heard about the challenges people with disability face in prisons, including lack of access to National Disability Insurance Scheme (NDIS) funding, poor coordination between service providers in custodial settings and access to NDIS support during the post release period. Several respondents stated that services are poorly integrated and can be confusing to navigate. The AHRC highlighted that as a result of these issues, NDIS participants can remain in prison for longer than necessary. They considered the introduction of NDIS Justice Liaison Officers a welcome development that could improve coordination and better support those in the criminal justice system. The Victorian Ombudsman noted that complaints received by her office have pointed towards the issues surrounding disability assessment and supports provided in prisons.

The Uniting Church in Australia highlighted that prisoners with disability may have to rely on other prisoners for assistance due to the lack of supports available, and that it is unknown if any training is offered to these carers. They noted that without access to aids and assistance, access to medical care could be jeopardised. This contravenes the Mandela Rules and National Standards, which state that prisoners should receive the same standard of health care as that which is available in the community.

The National Disability Service, ermha365 and the Australian Community Support Organisation told us that people with disability may be detained in prison in part due to a shortage of alternative stable accommodation. Available accommodation and homelessness has implications for service delivery post release, as people with disability are unable to access NDIS Supported Independent Living (SIL) or other care packages without proof of accommodation. This means that people with disability may be disadvantaged when applying for bail and parole, as well as when being released into the community at the end of their sentence.

We heard that accessing appropriate support, including accessible information, is an issue across all justice settings – such as police stations, courts and detention settings. For example, ASLIA stated that deaf people in custody may face punishment for failing to follow procedures that were not communicated to them in an accessible way. Legal Aid Queensland also shared that courts may not be able to organise interpreting services in a timely manner. Not having an interpreter leaves clients with disability unable to adequately express their views and unable to actively participate in their proceedings. Responses from Dr Anita Mackay and Ms Jacqueline Giuffrida from La Trobe University and the Women's Legal Service NSW both discussed the importance of intermediaries for people with disability with communication difficulties, which was also the subject of a recommendation by the Royal Commission into Institutional Responses to Child Sexual Abuse.

Carers NSW submitted that carers of people with disability are often not contacted by legal professionals or service providers. Consequently, they are not involved in planning

and arranging disability supports. This can leave people with disability who are engaging with the criminal justice system without an appropriate level of care and support from their carers.

### **Disability awareness and systemic identification**

The Community Restorative Centre, the Queensland Law Society and the NSW Bar Association advised that the lack of systematic, reliable identification of people with disability can enable violence, abuse, neglect and exploitation of people with disability at all levels of the criminal justice system. These respondents also noted that people working within the criminal justice system may not be aware or informed about disability and disability-related needs, particularly different communication needs. Autism Spectrum Australia informed us that people with autism have reported being traumatised by their interactions with police officers, who may not know how to adjust their communication styles. Speech Pathology Australia told us that people with speech, language and communication needs are more likely to experience negative consequences when engaging with the criminal justice system as a result of the system's inability to provide alternatives to verbal communication.

The need for increased disability awareness training in all areas of criminal justice was a recurring theme in almost all responses. The Royal Commission was told that disability awareness training for police is particularly important because, as noted by the Australian Lawyers Alliance, contact with police is often the catalyst for further involvement with the criminal justice system. Many respondents stated that disability awareness and the systematic, reliable identification of disability remains critical in promoting diversionary options for people with disability away from the criminal justice system.

### **Considerations for particular groups of people with disability**

Several respondents, including AMSANT, told us that the criminal justice system is not designed to be responsive to the complex intergenerational trauma experienced by First Nations people. Darwin Community Legal Service told us that First Nations people with disability, many of whom may come into contact with the criminal justice system with an undiagnosed disability, are at a higher risk of becoming enmeshed in the system due to cumulative and intersectional disadvantage. Respondents described this as the 'double disadvantage' and discrimination that First Nations people with disability can face in the criminal justice system.

Respondents told us that women with disability have quite different experiences of violence, abuse, neglect and exploitation. ANROWS told us that one key concern for women with disability is their dependence on perpetrators for care, or dependence on a partner or caregiver to lodge complaints. Domestic Violence Victoria outlined a range of barriers to reporting family violence, such as difficulties in identifying the perpetrator of violence, difficulties in having reports believed and the justice system's 'one-size fits all' approach. Domestic Violence Victoria explained that this approach stems from a justice system that focusses on efficiency, rather than providing a nuanced consideration of the

complexities of family violence matters. ANROWS also told us that women with disability from culturally and linguistically diverse communities, lesbian, gay, bisexual, trans and gender diverse, intersex and queer (LGBTIQ+) women and women living in institutional settings are particularly disadvantaged when it comes to accessing supports and services.

Respondents noted that children with disability are far more likely to experience violence, abuse, neglect and exploitation than children without disability. Autism Spectrum Australia told us that children with autism are at a higher risk of being victims of physical, emotional and sexual abuse compared to children without autism. It was commonly reported that children with cognitive or psychosocial disability and First Nations children with disability are heavily overrepresented in the juvenile justice system.

## **Reporting and investigating violence, abuse, neglect and exploitation**

In the Justice Issues Paper we asked what is being done, or what should be done to encourage effective reporting and investigation of violence, abuse, neglect and exploitation. Respondents identified several barriers to reporting and investigating violence, abuse, neglect and exploitation. Overall, we heard that complaints mechanisms in the criminal justice system are not always accessible to people with disability.

### **Barriers to reporting**

Respondents identified that one of the biggest barriers to reporting and complaints mechanisms can be stigma and discriminatory attitudes. We were told that people with disability are not always believed or have their complaints taken seriously by people employed in the criminal justice system, such as police officers. For example, the NSW Ageing and Disability Commission stated that police officers are more likely to believe and interact with support workers and carers rather than the person with disability they care for. This results in the risk of support workers and carers inadvertently becoming the gatekeepers and interpreters to a person with disability's access to justice. The NSW Ageing and Disability Commissioner emphasised the importance of empowering a person with disability to identify and report abuse on their own terms.

The Royal Commission was told by advocacy organisations, including Advocacy Tasmania, that people with disability may experience fear of retribution, re-traumatisation or shame, and that this can prevent individuals from making a complaint or report. A common theme was that people with cognitive or developmental disability require a more flexible approach to ensure that diverse communication needs are identified and met. Many respondents emphasised this point, stating that complaints processes must be user-friendly to encourage reporting.

Respondents highlighted that women and girls with disability in particular can face additional barriers to reporting instances of violence, abuse, neglect and exploitation. WWILD Sexual Violence Prevention Association told us that, although women with

intellectual disabilities are more likely to experience sexual assault in their lifetime compared to women without disability, only a small number of victim-survivors file reports with police.

### **Barriers to investigation**

Respondents told us that police may not proceed with a thorough investigation or press any charges if a person with disability is viewed as being unreliable or not credible as a witness. In particular, the Sexual Assault Support Service stated that victim-survivors with disability may not be seen as reliable complainants, meaning their complaint may not progress at all. The Law Council of Australia also noted that failures in the court system to recognise and accommodate disability can lead to failed prosecutions. These issues can create low expectations of success among law enforcement officers and prosecutors, a reluctance to investigate and ultimately lead to a decrease in proper investigation of crimes against people with disability.

Dr Marg Camilleri, a Senior Lecturer in Criminal Justice at Federation University, stated that her research found police may be reluctant to intervene in cases of violence and abuse occurring in group homes, often placing responsibility for the safety of a person with disability in those settings with the service provider. This creates a dangerous cycle that can perpetuate instances of violence, abuse, neglect and exploitation of people with disability and deny them equal access to justice.

### **Transparency and oversight of reporting and investigation**

Some respondents told us that a lack of transparency in reporting instances of violence and abuse can exist in certain settings, such as prisons. Sisters Inside told the Royal Commission about the power imbalances that can exist between staff and women in custody, and how closed environments often operate with little external oversight and transparency. This can make it difficult for a woman with disability to make a confidential complaint. This sentiment was echoed by other respondents, such as the Law Council of Australia, who emphasised that transparency and external oversight of places of detention is especially important. That is pertinent given that the extent of human rights breaches in these settings has been raised as a serious concern in recent years.

### **Potential good practice responses to violence, abuse, neglect and exploitation**

Respondents to the Justice Issues Paper identified examples of good practice in the criminal justice system that respond to and prevent violence, abuse, neglect and exploitation of people with disability. These included:

- programs that allow for flexibility in courtrooms and other judicial settings
- specialist courts and programs established under therapeutic jurisprudence principles
- intermediary services
- trauma-informed and culturally appropriate supports and services.

## **In courtrooms**

A response from the Supreme Court of Victoria (on behalf of Victoria's criminal courts, the Judicial College of Victoria and Court Services Victoria), the Courts Administration Authority of South Australia, the Local Court of New South Wales, the Department of Justice and Community Safety Services Directorate ACT and the Law Council of Australia outlined specialised programs and procedures that can help people with disability access justice on an equal footing to others. Examples of potential good practice included:

- adjustments to conventional courtroom procedures for witnesses with cognitive disability, for example giving evidence-in-chief through a pre-recorded statement
- Specialist Courts and Programs (SCPs) based on principles of therapeutic jurisprudence. The Supreme Court of Victoria gave examples of SCPs across Victorian courts, which include the Koori Court, the Assessment and Referral Court List, the Children's Court Youth Diversion Service and the Mental Health Advice and Response Service
- specialised supports and services for people with disability in different parts of the criminal justice system. The Local Court of New South Wales gave examples of supports and services, including the Justice Advocacy Service, the State-wide Community and Court Liaison Service, the Witness Assistance Service, the Victims and Witnesses of Crime Court Support, Victims Services, Women's Domestic Violence Court Advocacy Services and Aboriginal Client Service Specialists
- various support programs, such as drug and alcohol rehabilitation programs and programs for defendants with a history of violent offences or domestic violence offences
- Drug Courts and Mental Health Courts which offer an alternative to imprisonment for certain offenders
- intermediary services to assist witnesses with a cognitive disability
- alternative sentencing options for people with disability, such as community service or other community-based options
- alternative sentencing options for First Nations people, such as circle sentencing
- inclusive and accessible courtroom design.

We also heard about training programs designed to assist lawyers to screen for mental health issues and intellectual disability. However, it was noted that these programs, while highly beneficial, are limited and underfunded.

## **Community-based support and services**

Respondents highlighted the need for services that help prevent people with disability from coming in contact with the justice system, and to support them when they do come into contact with the justice system. These include trauma-informed and culturally appropriate services for First Nations people with disability that are community-focused and community controlled. AMSANT gave examples of good practice involving integrated services and coordinated case management, including:

- the StrongBala Justice program for men – a culturally appropriate holistic health and justice program for men with a focus on diversionary measures and a reduction of recidivism and substance abuse
- the Danila Dilba Health Service – a service that runs a youth social support program where a health service acts as an independent advocate for young people in detention, while providing support, educational programs and throughcare
- services delivered by the Central Australian Aboriginal Congress (CAAC) – such as case management and psychology services that employ First Nations staff to support First Nations children aged 8 - 17 who are at risk of engagement, or reengagement, with the youth justice system
- throughcare programs that provide case management support to adults and young people in the Darwin and Alice Springs areas, such as the program run by NAAJA.

We also heard about localised, data driven justice reinvestment approaches. These approaches shift investment away from punitive measures within the criminal justice system towards community-led support and diversion measures for people with disability, including First Nations people and young people, supported by coordinated services. As one example, Just Reinvest NSW and the Law Council of Australia told us about the Maranguka Justice Reinvestment Project which aims to disrupt cycles of offending and disadvantage for individuals and communities.

### **Intermediary services**

The Victorian Office of the Public Advocate identified intermediary programs such as:

- the Independent Third Person Program (police support)
- the Corrections Independent Support Officers Program (in gaol disciplinary system support)
- the Communications Intermediaries Pilot Program (in court support)

They identified these programs as being beneficial for people with disability at all stages of the criminal justice system. Similarly, Dr Marg Camilleri outlined changes introduced in Victoria to improve responses to victims of crime, including the introduction of an Intermediary Pilot Program Victoria, while LaTrobe University highlighted legislative reform to extend a similar program to defendants in the ACT.

## **Proposals for Change**

Respondents to the Justice Issues Paper made many proposals for change. We will consider and investigate each of these proposals for change in the course of its work.

The proposals for change that were received can be broadly grouped into the following categories:

## Implementation of international human rights instruments

- that the Royal Commission consider the *CRPD* and the *ICCPR* and other relevant international human rights instruments and ensure that the recommendations regarding the criminal justice system align with the Australian Government's obligations under those instruments. The Law Council of Australia told us that the reform of unfitness to stand trial laws should be prioritised to ensure compliance with the *CRPD*
- that the Australian Government work with state and territory governments to implement the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) and establish an independent National Preventive Mechanism to conduct inspections of all places of detention and closed environments. The Law Council of Australia told us that it is important for Australia to adopt a broad definition of 'places of detention' to include both private and public institutions where people are subjected to care by or authority of others. This would ensure that all potential settings of violence, abuse, neglect and exploitation are captured by safeguarding and oversight frameworks.

## Improving access to justice for people with disability

- greater inclusion of people with disability in roles within the justice system, such as members of juries and witnesses, as well as in the administration of justice, including as police and lawyers
- disability awareness training for police, lawyers, judicial officers, court staff and prison staff
- wider adoption of Disability Justice Strategies across all jurisdictions, which should address themes including prevention services for people with disability and mental illness, early identification of disability, referral and multi-system responses, diversion, rehabilitation approaches and throughcare
- that the National Judicial College of Australia give consideration to the establishment of a disability committee with experts on disability to promote cultural change and improved training for the judiciary
- that robust complaints mechanisms be put in place to ensure that people with disability can make complaints without fear of repercussion
- improvement in data collection as to the extent of people with disability in contact with the criminal justice system.

## Supports and services

- specific legal assistance funding and tailored support for people with disability to fully participate in the legal system, including strategies to facilitate supported decision-making and accommodate diverse communication needs. This includes the provision of trauma-informed and culturally appropriate support



- increased community-based throughcare and integrated social and health programs to support First Nations people with disability transitioning from prison back into the community
- tailored support for people with disability in custodial settings, including appropriate mental health services and support for people with disability transitioning back into the community
- establishing protocols to review and maintain NDIS plans, particularly for people with disability in custodial settings.

## Diversivory pathways

- improved policies and screening and assessment practices to identify people with disability in the justice system with a view to diversion from a custodial setting, where appropriate
- targeted early intervention strategies to divert children and young people with disability away from the youth justice system
- review and amendment of all legislation pertaining to unfit to plead tests to ensure that people with disability are not held in indefinite detention
- assessment of the impacts of mandatory sentencing and stringent bail and parole laws, particularly on First Nations persons with disability, and pursuing reforms of such laws to avoid the disproportionate incarceration of First Nations people with disability
- amendment of laws, policies and guidelines that result in the indefinite detention of people with disability in custodial settings, as well as those that permit the solitary confinement and improper use of restrictive practices on people with disability in custodial settings and other closed settings
- investment in therapeutic and restorative approaches across the criminal justice system.

## Targeted proposals for key cohorts

- increased involvement from First Nations communities on the development and implementation of laws, policies and procedures relating to the legal processes that affect First Nations people with disability
- targeted legal assistance to deliver culturally informed and accessible services to people with disability from a culturally and linguistically diverse backgrounds
- raise the age of criminal responsibility to 14 years, in accordance with the United Nations *Convention on the Rights of the Child*. This is particularly important given the over-representation of young people with disability entering the criminal justice system at a very young age
- end the use of watch houses to detain children and young people with disability on remand.

## How will we use the information we received?

All information provided to us, including all responses to issues papers, is carefully considered by the Royal Commission. It informs our ongoing work, including public hearings, policy processes and our research agenda. It has informed the Interim Report and will inform the Final Report and helps us to make targeted findings and develop appropriate recommendations.

## Counselling and support

Blue Knot Foundation offers specialist counselling support and a referral service for anyone affected by the Disability Royal Commission.

For support please call their national hotline on **1800 421 468** (9am-6pm AEST Monday – Friday, 9am-5pm AEST Saturday, Sunday and public holidays).

In addition to the Blue Knot Foundation, the Australian Government provides support to assist people to engage with the Royal Commission. This support includes:

- free legal advisory services provided by National Legal Aid and the National Aboriginal and Torres Strait Islander Legal Services through the Your Story Disability Legal Service
- advocacy support services provided under the National Disability Advocacy Program.

Further information about these supports, including how to access them, is available on our website: [disability.royalcommission.gov.au/counselling-and-support](https://disability.royalcommission.gov.au/counselling-and-support)



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