

Chapter 6

Access to justice

6.1 This chapter examines the experience of engaging with the criminal justice system for people with disability. It highlights that people with disability experience significant barriers to engaging with the criminal justice system, including reporting to police and participating in investigations and court proceedings.

6.2 Building on recent reports by the Australian Human Rights Commission (Human Rights Commission) and the Australian Law Reform Commission (Law Reform Commission), this chapter examines a series of measures put forward by witnesses, that seek to ensure Australia meets its international obligations to improve access to justice for people with disability and its moral obligation to protect people with disability from violence, abuse and neglect.

Access to justice

6.3 The committee heard that people with disability are particularly disadvantaged in seeking access to justice and are not adequately supported by existing legal systems.¹ A number of submissions recommended legislative and system reforms in the justice system to provide better support for people with disability.²

6.4 The committee notes two recent national inquiries by the Law Reform Commission and the Human Rights Commission into the issue of access to justice for people with disability. These inquiries have identified significant barriers for people with disability in reporting crime, and made a series of recommendations to improve Australia's criminal justice system. These issues are discussed later in this chapter.

International obligations

6.5 Under Article 13 of the Convention on the Rights of Persons with Disabilities (Disability Convention), Australia is obliged to:

...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, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.³

1 See: QAI, *Submission 43*, p. [7].

2 OPA Queensland, *Submission 73*, pp 20-21. Some of the organisations which echoed this view include: Communication Rights Australia and the Disability Discrimination Legal Service, *Submission 78*; NSW Council for Intellectual Disability, *Submission 103*; Deakin University, *Submission 109*; Law Council of Australia, *Submission 139*.

3 United Nations Convention on the Rights of Persons with Disabilities (Disability Convention), Article 13, <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 21 August 2015).

6.6 This includes promoting 'appropriate training for those working in the field of administration of justice, including police and prison staff'.⁴

6.7 The 2012 *Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (Civil Society Report) noted that people with disability experience significant barriers in participating in Australian legal systems 'with many finding access to justice too difficult, hostile or ineffectual'.⁵ The report made a series of recommendations to improve access to justice for people with disability, including:

- incorporating compulsory modules on working with people with disability into training programs for police, prison officers, lawyers, judicial officers and court staff;
- developing comprehensive, gender and culture specific social support programs and systems to identify and prevent the circumstances that contribute to children and young people with disability coming into contact or entering the juvenile justice system; and
- implementing a range of gender and culture specific diversionary programs and mechanisms and community-based sentencing options that are integrated with flexible disability support packages and social support programs to prevent adults with disability coming into contact or entering the criminal justice system.⁶

6.8 In its concluding observations on the initial report of Australia, the United Nations Committee on the Convention on the Rights of Persons with Disabilities (UN Disability Committee) expressed concern about access to justice for people with disability, particularly:

...the lack of training for judicial officers, legal practitioners and court staff on ensuring access to justice for persons with disabilities, as well as lack of guidance on how to access justice for persons with disabilities.⁷

6.9 The UN Disability Committee recommended a number of measures to improve access to justice for people with disability, including:

- that state and territory legislation and policy be amended to incorporate standard and compulsory modules on working with persons with disabilities

4 Disability Convention, Article 13.

5 Disability Representative, Advocacy, Legal and Human Rights Organisations, *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*, August 2012, p. 74, <http://www.pwd.org.au/issues/crpd-civil-society-shadow-report-group.html> (accessed 24 September 2015).

6 *Disability Rights Now*, p. 82.

7 United Nations Committee on the Rights of Persons with Disabilities (UN Disability Committee), *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, 4 October 2013, p. 4. See: Attorney-General's Department, Convention on the rights of persons with disabilities, <http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/UnitedNationsConventionontherightsofpersonswithdisabilities.aspx> (accessed 24 September 2015).

into training programs for police, prison officers, lawyers, judicial officers and court staff;

- that persons with disability are provided equal substantive and procedural guarantees as others in the context of criminal proceedings to ensure that no diversion programs are implemented that transfer individuals to mental health services rather than providing such services on the basis of the individual's free and informed consent; and
- that all persons with disabilities who are accused of crimes and are currently detained in jails and institutions without a trial are promptly allowed to defend themselves against criminal charges and are provided with required support and accommodation to facilitate their effective participation.⁸

Barriers and challenges

Barriers to access to justice

6.10 In February 2014, the Human Rights Commission's report, *Equal Before the Law: Towards Disability Justice Strategies*, found that access to justice for people with disability is a 'significant issue in every jurisdiction in Australia', particularly for people with multiple support needs.⁹ The report identified the following key barriers to access to justice for people with disability:

- community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disabilities;
- people with disabilities do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes;
- negative attitudes and assumptions about people with disabilities often result in people with disabilities being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings;
- specialist support, accommodation and programs may not be provided to people with disabilities when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead'); and
- support, adjustments and aids may not be provided to prisoners with disabilities so that they can meet basic human needs and participate in prison life.¹⁰

8 UN Disability Committee, *Concluding observations*, 2013, pp 4–5.

9 Australian Human Rights Commission (Human Rights Commission), *Equal Before the Law: Towards Disability Justice Strategies*, February 2014, p. 1, <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law> (accessed 24 August 2015).

10 Human Rights Commission, *Equal Before the Law*, p. 8.

6.11 Similar barriers were identified by the Law Reform Commission in its August 2014 report on equal recognition and legal capacity for people with disability under Commonwealth legal frameworks, *Equality, Capacity and Disability in Commonwealth Laws*.¹¹ The Law Reform Commission report identified the following barriers for people with disability:

- communication barriers;
- difficulties accessing the necessary support, adjustments or aids to participate in the justice system;
- issues associated with giving instructions to legal representatives and capacity to participate in litigation;
- the costs associated with legal representation; and
- misconceptions and stereotypes about the reliability and credibility of people with disability as witnesses.¹²

6.12 In 2014 the Productivity Commission's (PC) inquiry into Australia's civil justice system, *Access to Justice Arrangements*, highlighted widespread concerns that Australia's civil justice system is 'too slow, too expensive and too adversarial'. The report highlighted that '[d]isadvantaged Australians are more susceptible to, and less equipped to deal with, legal disputes' and that '[g]overnments have a role in assisting these individuals'.¹³

6.13 The PC's inquiry found that the 'complexities of the civil justice system may be particularly challenging to navigate for people experiencing disadvantage and for some people with disabilities'.¹⁴ The PC noted that particular groups require specific assistance to develop legal capacity, including the homeless, people with disability and Aboriginal and Torres Strait Islander people:

People with disabilities find many aspects of the civil justice system, and the mainstream services offered, difficult to access. Even where mainstream services have attempted to cater for people with disabilities, these services may still be inaccessible.¹⁵

11 See: Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Law Reform Commission Report 124, August 2014, **Error! Hyperlink reference not valid.** (accessed 21 August 2015).

12 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, p. 192.

13 Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, volume 1, no. 72, 5 September 2014, p. 2, <http://www.pc.gov.au/inquiries/completed/access-justice/report> (accessed 21 October 2015).

14 Productivity Commission, *Access to Justice Arrangements*, p. 133.

15 Productivity Commission, *Access to Justice Arrangements*, Box 5.1, p. 154.

6.14 Barriers to access to justice were also highlighted by a number of submitters to this inquiry.¹⁶ Dr Jessica Cadwallader, representing People with Disability Australia as part of the Australian Cross Disability Alliance (Disability Alliance), told the committee that eliminating these barriers is integral to ensuring crimes against people with disability are prosecuted:

Without actually making access to justice for people with disability a responsibility of the justice system, you will not get people with disability able to come forward and give reports, have those reports taken and have them taken seriously, investigated and recommended for prosecution. Without those kinds of pathways through the justice system, you wind up with administrative responses often being the primary response to what is, in fact, a crime...Unless access to justice is addressed across Australia for all people with disability, then you are not going to see the kinds of change within the service system that you need. Unless there are actual criminal responses to violence against people with disability, you are not going to see the level of deterrence that exists for the rest of the community. We know that perpetrators will target those who they can get away with targeting and, unless access to justice is addressed across the board, that will remain the case.¹⁷

6.15 The committee heard that Aboriginal and Torres Strait Islander peoples with disability experience particular barriers to access to justice. The Human Rights Commission highlighted the significant barriers to accessing advocacy and legal services, especially in regional and remote areas, noting:

For Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds with disabilities access to culturally competent services with disability expertise, and Aboriginal legal services, was even harder.¹⁸

6.16 Both the Human Rights Commission and the Law Reform Commission recommended strategies to overcome barriers to access to justice. These strategies are examined further in this chapter.

Barriers to reporting to police

6.17 A number of submitters and witnesses highlighted the challenges faced by people with disability when seeking to report allegations or incidents directly to

16 See: Anti-Discrimination Commissioner, Tasmania, *Submission 40*, pp 19–20; Women with Disabilities Victoria, *Submission 53*, pp 46–47; Women with Disabilities Victoria, *Submission 53*, pp 46–47; Northcott, *Submission 58*, p. 6; Queensland OPA, *Submission 73*, pp 20–21; Advocacy for Inclusion, *Submission 83*, pp 30–31; Disability Services Commissioner Victoria, *Submission 86*, pp 22–23; Dr Linda Steele, *Submission 94*, p. [4]; p. 20.

17 Dr Jessica Cadwallader, Advocacy Project Manager, Violence Prevention, People with Disability Australia; Australian Cross Disability Alliance (Disability Alliance), *Committee Hansard*, Sydney, 27 August 2015, p. 50.

18 Human Rights Commission, *Equal Before the Law*, p. 20.

police. These submitters highlighted that due to these barriers, crimes are often not reported.

6.18 Some submitters cited a 2012 report on the National Survey on Abuse of People with Disabilities in the United States that found nearly half of victims with disabilities did not report abuse to authorities. For those who reported abuse, nearly 54 per cent said that nothing happened and in fewer than 10 per cent of reported cases was the perpetrator arrested.¹⁹ It is telling that submitters quoted overseas reports, but were unable to cite relevant Australian studies. The lack of reliable Australian statistical data has been discussed previously in chapter three.

6.19 A 2014 report by Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Beyond Doubt*, on the experiences of people with disabilities reporting crime highlighted that level of crime experienced by people with disability in Victoria and across Australia is 'substantial...in spite of – and sometimes the result of – systems that are designed to provide support and protection'.²⁰ It found that the under-representation of people with disability in the available recorded victims of crime data indicates that cases are either not reported, not making it through the justice system or that disability has not been identified.²¹

6.20 The *Beyond Doubt* report found that people with disability face significant and complex barriers when reporting crime to police, including:

- lack of access to information about how to identify and report a crime;
- feelings of shame and embarrassment;
- fear of retribution from the alleged perpetrator;
- lack of support for people with communication needs;
- fear of consequences for victims by families and carers; and
- fear of not being believed or seem as lacking credibility when reporting a crime to police.²²

6.21 The *Beyond Doubt* report made a series of recommendations for the Victoria Police, Office of the Public Advocate, courts, Departments of Justice and Health and Human Services that aim to:

19 Quoted in: Queensland Advocacy Incorporated, *Submission 43*, p. [7]. See: Nora J Baladerian, Thomas Coleman and Jim Stream, *Abuse of People with Disabilities – Victims and their families speak out: a Report on the 2012 National Survey on Abuse of People with Disabilities*, Disability and Abuse Project, 2013, <http://disability-abuse.com/survey/media-release.htm> (accessed 25 September 2015).

20 Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Beyond doubt: the experiences of people with disabilities report crime – Research Findings*, July 2014, p. 6, <http://www.humanrightscommission.vic.gov.au/index.php/our-projects-a-initiatives/experiences-of-people-with-disability-reporting-crime> (accessed 24 September 2015).

21 VEOHRC, *Beyond doubt*, p. 7.

22 VEOHRC, *Beyond doubt*, pp 8–9.

...establish clear processes for support and referral and to build community and organisational partnerships to assist Victoria Police to increase capability, to understand the expectations about making reasonable adjustments and to do its job more effectively.²³

6.22 Evidence to the committee, including the Victorian Ombudsman's 2015 report, suggests that that it is not clear how these recommendations have been incorporated into internal police mechanisms in Victoria or other jurisdictions. Submitters and witnesses highlighted that people with disability continue to experience challenges in reporting to police.

6.23 The committee heard that in some cases, police treat reports of violence from people with disability differently if they are perceived to be 'cared for' in an institution or residential setting. The Disability Alliance highlighted that:

Police often treat reports of violence, abuse and neglect experienced by people with disability differently to people without disability. This is particularly the case where there is a perception that the person with disability is already being 'cared' for in an institutional or residential setting, even when the violence, abuse and neglect has been reported as occurring in that facility. There is an assumption that the facility deals with people with disability and that it is not a police matter. In many cases, people with disability are returned back to these facilities, and these incidences remain 'hidden' and unacknowledged.²⁴

6.24 Where incidents are reported, the committee heard that people with disability are not supported by police to seek further investigation or conviction in relation to reports of violence, abuse or neglect. In many cases, witnesses with disability and the evidence they provide are not perceived as 'credible'. Disability Alliance provided the committee with evidence from over 70 victims of abuse, violence or neglect, many of who attempted to report to the police. In most cases, these investigations did not proceed due to a perceived lack of evidence or credibility of witnesses with disability (see Box 6.1 and Box 6.2).

23 VEOHRC, *Beyond doubt*, p. 15.

24 Disability Alliance, *Submission 147*, p. 56.

Box 6.1: Experience of reporting to police

Christine, a 39 year-old woman with intellectual disability, was repeatedly raped and bashed in one week by several different men...Christine was too scared to tell the [residential facility] worker what had happened to her because she thought she would 'get into trouble'. Two days later, the woman disclosed the rapes to her friend who helped her report the rapes to the police. Three of the five police initially involved in interviewing her and taking her statement, asked her friend if the woman might be 'making it up'. The detectives investigating the case admitted that, although there was now clear evidence that the rapes occurred, there was 'little likelihood' of a conviction due to the fact that the woman 'has an intellectual disability'.

Frances was physically beaten by a group of young girls at a regional TAFE [Technical and Further Education] institute. The violent attack was captured on CCTV[closed-circuit television] footage. The local police advised Frances not to pursue charges because she was 'mentally retarded' and there would be 'no chance of any conviction' against the perpetrators.

Peta has intellectual disability and lives in supported accommodation. She was raped by a support worker. The police were notified, and although believing Peta's evidence, they felt that they wouldn't be able to obtain a conviction against the support worker because Peta's testimony would be deemed unreliable by the court. Consequently, the police didn't pursue the investigation. The support worker is still working for the same organisation, but at a different facility.

Source: Australian Cross Disability Alliance, Supplementary Submission 147, pp 2–7.

Box 6.2: Experience of reporting to police – Ms Kobie Hicks

Ms Kobie Hicks, who has an intellectual disability, told the committee of her experience reporting incidents of sexual abuse to police:

I reported a sexual abuse that happened to me when I was a child. It was happening, from what I can remember, from grade four right up until I was 19. The police were saying there was no evidence, but I can give a description of the house, what I was wearing. I found that the police did not help me very much. They did not want to listen to me...They wrote everything in the report, but they asked the person who did it to me and that is when they turned and said that there was no evidence...They said, 'The case is closed. There is no evidence. Don't bother.' That is how I was spoken to by a police officer. They were not going to go any further, so 'drop it'. There is no point.

Ms Hicks recommended to the committee greater support for people with disability when dealing with police and the justice system:

I think the police should give them a bit more time or ask them to get someone in to help them, with making a statement, like an advocate. They should look into it a lot more. Someone reporting a rape or crime—or verbal abuse, like I did when I was a child; no-one looked into it. They just left me in there. They should open up a case and keep an eye on the child or adult, whatever it comes down to. I do think the police should ask for someone from a service provider to help them all, another member of the family or something.

Source: Ms Kobie Hicks, Committee Hansard, Sydney, 27 August 2015, p. 51.

6.25 The committee heard that in some cases, people with disability are able to access vulnerable witness support services. For example, in Queensland, children and

people with 'impairment of the mind' have access to a recorded interview undertaken by specially trained police officers and with a support person under section 93A of the *Evidence Act 1977*.²⁵ Ms Leona Berrie, manager of Working Alongside People with Intellectual and Learning Disabilities – Sexual Violence Prevention Association (WWILD) explained how the process is meant to work in practice, noting that she has not yet seen a victim progress to the court stage:

If it is a sexual offence, a female police officer is offered as a matter of course and/or an appointment is made for when a female officer can be made available. At this point, you might raise issues of disability, capacity and any particular issues of cognitive capacity or intellectual disability. On this basis, a 93A, as it is called in Queensland, or a recorded interview, is offered without any further proof of the person's disability.

This type of interview is similar to interviews with child witnesses and is conducted by people who are trained in that area, and then a support person is also made available or offered to the person—somebody suitable who they may wish to be there. The interview is conducted, and it is done in a safe and respectful way that avoids unnecessary re-traumatisation, and, perhaps, from there an investigation is conducted.

There may be little evidence to proceed—and, if that is the case, this is communicated to the client in a sensitive way by the police themselves and not left to others to pass this information on—or the matter is investigated and charges are laid. Charges are laid and sent to the DPP, and they agree to prosecute the case without extensive psychological testing to assess witness credibility. The person pleads guilty and the trial is avoided, in the ideal set of circumstances; or a trial is set and special witness provisions are put in place to avoid traumatising the victim further through that process. Special witness provisions are agreed to easily and readily without extensive psychological assessment being required. The perpetrator is found guilty and sent to jail for the appropriate amount of time. That is when things go well.²⁶

6.26 Other jurisdictions offer similar support programs for 'vulnerable witnesses', including people with disability. For example, the New South Wales (NSW) Office of the Director of Public Prosecutions (ODPP) may refer vulnerable adult witnesses, including people with disability, to the Witness Assistance Service (WAS). Under the WAS Early Referral and Case Management Best Practice Protocol, prosecution witnesses with a disability are referred to the WAS at the 'earliest opportunity'. The WAS aims to 'minimise stress and potential re-traumatisation' and 'enable witnesses to give their evidence to the best of their ability. Services provided by WAS include:

- Information about rights, entitlements, the legal process and services available;

25 See: *Evidence Act 1977* (Queensland), section 93A.

26 Ms Leona Berrie, Manager, Working Alongside People with Intellectual and Learning Disabilities – Sexual Violence Prevention Association (WWILD), *Committee Hansard*, Brisbane, 16 October 2015, p. 15.

- Assessment and case management planning, including referral for ongoing counselling and other support services and liaison with prosecutors;
- Preparation and coordination of court support, including crisis counselling and support in relation to the impact of the legal process.²⁷

6.27 Similarly, the South Australian ODPP noted that it provides WAS to ensure that all witnesses of crime and their immediate family have access to information and support services, and are aware of their rights and responsibilities when dealing with the criminal justice system.²⁸ South Australia has recently developed a further set of guidelines, *Supporting vulnerable witnesses in the giving of evidence: guidelines for securing best evidence*, as part of their *Disability Justice Plan 2014–2017* (Justice Plan) (see below). The new guidelines 'aim to make the criminal justice system more accessible and responsive to the needs of people with disability'.²⁹

6.28 More commonly, however, the committee heard that there were limited supports available for people with disability, particularly for people who require communication assistance. In some cases, people with a physical disability who require communication assistance may be subjected to psychological testing to determine their capacity to provide evidence, even though they have no psychological impairment (see Box 6.3).

Box 6.3: Experience of reporting to police – Ms Jules Anderson

Ms Jules Anderson, a former resident at Yooralla, told the committee of the experience of reporting incidents of abuse by staff to the police. As Ms Anderson has cerebral palsy, she was required to undergo a psychological assessment to determine whether she had the intellectual capacity to give evidence:

It was a very foreign environment, and I was scared. I thought a lot of it was to do with the fact that, having a disability, a lot of it I struggled with, having to go into such detail and things. I did not know why I had to go to a special ... psychologist for assessment. I would not lie about a thing like that. I still did have to go through that, which was humiliating, to say the least.

Ms Anderson's support person told the committee:

Jules questioned why she had to go through that process when she is quite capable of making decisions for herself and on behalf of herself.

Source: Miss Jules Anderson, Committee in camera Hansard, Melbourne, 30 June 2015, pp 12-13.

6.29 Evidence to the committee suggested that the experience of reporting to police is commonly characterised by a lack of appropriate support, and that these supports are not systematically available. Ms Berrie from WWILD outlined the more common response from police in responding to allegations of sexual abuse from women with disability:

27 NSW ODPP, *Submission 82*, pp 2–3.

28 South Australian ODPP, *Submission 136*, p. 1.

29 South Australian ODPP, *Submission 136*, p. 2.

A police officer—usually a male—may refuse to make an appointment time and encourage you to just come down and, even though someone of the same sex should be offered to take the statement according to interagency guidelines around responding to a report of sexual assault, a female detective is not made available. The VoC [victim of crime] worker may then request a female detective and the worker is told by the officer perhaps something along the lines that they have been in the force for 20 years and there is nothing that they could be told that has not been heard before or that would shock them and that they are going to need to get used to telling the story to men because there will be a lot of men involved if it goes to trial. A support person is not offered or, if it is suggested, it is discouraged or denied blanketly when requested.

At this point, you may also raise issues of intellectual disability or cognitive capacity, and at this stage somebody, a detective or an officer, may state that they would require proof of this disability before agreeing to record the interview. When we raise that we are concerned about somebody's capacity, we may be told something completely inappropriate around people being old enough to know—as in one instance, with one officer saying to us, 'She's old enough to know that people shouldn't touch her boobies.' Parents are asked if they are sure they want to report it, because, 'There isn't much in this.' So there is that discouraging that happens before you have even had the interview.³⁰

6.30 Ms Berrie noted that another common situation is that disability is not recognised at the point of contact and the person is not offered any support, resulting in a 'poorly examined written statement' being taken:

...once it has been done badly there seems to be little going back. If it was just taken in the first instance and a really bad job has been done of it, no-one then seems to offer a retaking of a statement. That seems to be the end of the road and it is pretty hard to push beyond that.

In the instance where an interview is not conducted, the victim may make a decision not to go ahead in making a formal statement, which is understandable considering the discouragement they might have had up to that point. The message is clear: it is not a crime worth reporting; it is too complicated; it probably did not happen; consent is straightforward; if it did happen, a person probably consented; it is too hard to investigate and, even if we did, we would not find anything, and, even if we did find something, it has zero chance of getting a conviction. If the interview is conducted and the 93A interview has not been granted, they are likely to be interviewed by someone who does not have the training to interview a vulnerable witness, the person's communication needs are not taken into account and a less-than-optimum statement is taken from the witness.

The police may, after this point, still decide to investigate and they may speak to the accused person. The accused person denies it. The police tell the family member, the VoC [victim of crime] worker, the person

30 Ms Leona Berrie, Manager, WWILD, *Committee Hansard*, Brisbane, 16 October 2015, p. 16.

supporting their son or daughter or the person with a disability things like, 'I got a good vibe off the person we interviewed and he seemed really concerned; his version doesn't seem to match your version,' and so on and so forth. So no genuine attempts to investigate, and the accused person's version of events being held up as the true account.

From that point, often what happens is the police may still say that there is not enough evidence, and that may be the case, or they may say, based on the belief of this contradicting account by the accused person, that the case is unfounded, which is more to say that it did not happen. The significance of that is that then people do not have the ability to seek financial resources, say, from Victims Assist Queensland, because they are making a decision based on probabilities and if the police are saying not just that there is not enough evidence but that it did not happen...³¹

Committee view

6.31 Evidence presented to the inquiry shows that people with disability experience significant barriers in seeking access to justice, particularly Aboriginal and Torres Strait Islander peoples and people from culturally and linguistically diverse communities. These barriers include challenges in reporting abuse, violence and neglect to police, which is likely to result in crimes going unreported or not adequately investigated.

6.32 The committee is concerned that the currently available supports for vulnerable witnesses are under-utilised and that people with disability are discouraged from reporting crimes, or subjected to discriminatory tests to prove their legal capacity.

6.33 The committee is concerned that there are not enough supports for people with disability seeking to access justice.

6.34 The committee recognises recommendations of VEOHRC report highlighting the importance of training and support for police in assisting people with disability, and suggests these recommendations should be considered nationally.

Strategies to address barriers

Access to justice strategies

6.35 To address the barriers people with disability face in seeking access to justice, the Human Rights Commission report, *Equal Before the Law*, recommended that each jurisdiction should develop 'holistic, over-arching' disability justice strategies that focus on the following outcomes:

- safety of people with disabilities and freedom from violence;
- effective access to justice for people with disabilities;
- non-discrimination;

31 Ms Leona Berrie, Manager, WWILD, *Committee Hansard*, Brisbane, 16 October 2015, p. 16.

- respect for inherent dignity and individual autonomy including the freedom to make one's own decisions; and
- full and effective participation and inclusion in the community.³²

6.36 The Human Rights Commission report emphasised that strategies should address the following core set of principles:

- Appropriate communications – Communication is essential to personal autonomy and decision-making. Securing effective and appropriate communication as a right should be the cornerstone of any Disability Justice Strategy.
- Early intervention and diversion – Early intervention and wherever possible diversion into appropriate programs can both enhance the lives of people with disabilities and support the interests of justice.
- Increased service capacity – Increased service capacity and support should be appropriately resourced.
- Effective training – Effective training should address the rights of people with disabilities and prevention of and appropriate responses to violence and abuse, including gender-based violence.
- Enhanced accountability and monitoring – People with disabilities, including children with disabilities, are consulted and actively involved as equal partners in the development, implementation and monitoring of policies, programs and legislation to improve access to justice.
- Better policies and frameworks – Specific measures to address the intersection of disability and gender should be adopted in legislation, policies and programs to achieve appropriate understanding and responses by service providers.³³

6.37 The report highlighted that the Justice Plan in South Australia is a best practice example of the disability justice strategies and urged all jurisdictions to:

...consult with South Australia and to learn from experiences there. If we coordinate, inform and monitor in a planned manner barriers will be removed faster and gaps bridged sooner. The services we have will be improved and new and better ones developed. The human rights of people with disabilities will be better respected, their standard of living will improve and the criminal justice system will become less of a presence in their lives.³⁴

Case study – South Australia – Disability Justice Plan

6.38 The South Australian Government is currently progressing wide-ranging reforms to its justice system. The Justice Plan was launched in 2014 and aims to make

32 Human Rights Commission, *Equal Before the Law*, p. 6.

33 Human Rights Commission, *Equal Before the Law*, p. 7.

34 Human Rights Commission, *Equal Before the Law*, p. 17.

the criminal justice system more accessible and responsive to the needs of people with disability.³⁵ During his second reading speech on the Statutes Amendment (Vulnerable Witnesses) Bill 2015 (the Bill), the South Australian Attorney-General, the Hon. John Rau, noted the Bill was developed in close consultation with the disability sector. Mr Rau noted the South Australian government had committed \$3.246 million over four years to implement the Justice Plan.³⁶

6.39 The development of the Justice Plan was a recommendation by the former Social Inclusion Board's report: *Strong Voices: A Blueprint to Enhance Life and Claim the Rights of People with Disability in South Australia (2012–2020)*.³⁷ The Social Inclusion Board undertook an extensive two-year consultation process which 'identified a need for reform to better identify and respond to the needs of people with disability in the criminal justice system, whether they are a victim, witness or a person accused of a crime'.³⁸

6.40 The Justice Plan has four key aims:

- uphold, protect and promote the rights of people with disability;
- support vulnerable victims and witnesses in the giving of evidence;
- support people with disability accused or convicted of a crime; and
- continuously monitor and improve performance.³⁹

6.41 A number of key priority actions under the Justice Plan were introduced in the Bill 2015. The Bill was passed by the South Australian Parliament on 2 July 2015 and incorporates major changes to the *Evidence Act 1929*, which aims to ensure that people with disability, whether as victims, witnesses, suspects or defendants, are better served by the justice system.⁴⁰

6.42 According to the South Australian Attorney-General's Department, the key changes are to:

35 South Australian Attorney-General's Department, *Disability Justice Plan 2014–2017*, <http://www.agd.sa.gov.au/initiatives/disability-justice-plan> (accessed 20 August 2015).

36 The Hon. John Rau, *House of Assembly Hansard*, 6 May 2015, p. 1036, <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-11-19527> (accessed 20 August 2015).

37 See: Department for Communities and Social Inclusion, *Strong Voices*, <http://www.dcsi.sa.gov.au/services/disability-sa/disability-sa-publications/plans-and-reports/strong-voices> (accessed 21 August 2015).

38 *Disability Justice Plan 2014–2017*, p. 2.

39 *Disability Justice Plan 2014–2017*, p. 4.

40 South Australian Attorney-General's Department, *Statutes Amendment (Vulnerable Witnesses) Bill 2015*, <http://www.agd.sa.gov.au/initiatives/disability-justice-plan/statutes-amendment-vulnerable-witnesses-bill-2015> (accessed 20 August 2015).

-
- provide victims, witnesses or defendants with complex communication needs a general entitlement to have a communication assistant present for any contact with the criminal justice system;
 - minimise the number of times vulnerable witnesses have to recount their experiences by providing alternative measures for their evidence to be presented to the court, including the use of pre-recorded evidence and investigative interviews at trial;
 - tackle the misconception that disability denotes 'unreliability';
 - enhance the supports available for vulnerable victims, witnesses and defendants, both in and out of court;
 - allow the evidence of vulnerable witnesses to be taken in informal surroundings; and
 - extend the priority listing of sexual assault trials to those where the complainant has a disability that adversely affects their capacity to give evidence.⁴¹

6.43 Representatives from the South Australian Attorney-General's Department told the committee that the Justice Plan has strong support from people with disability and is being implemented in close consultation with the community:

The plan is being implemented in close consultation with people with lived experience, so we are directly involving them and hearing their feedback in terms of driving the plan forward through whatever consultative or governance mechanisms are in place. I sit here with cautious optimism, but certainly we are grateful that there has been very wide support for the plan, bearing in mind that it will take four years in some instances to have full evidence of what outcomes have been achieved over those four years. I am a believer that significant change has occurred and significant further change will occur. But ultimately what has been at the heart of this, apart from receiving some outstanding expert advice, is direct engagement of people with the lived experience.⁴²

6.44 A significant aspect of the Justice Plan includes assisting police to better identify and respond to the needs of people with disability. Representatives from the South Australian Police highlighted the importance of specialised training for police officers in assisting people with disability, and expressed support for the new specialist training programs that will be introduced under the Justice Plan:

You need ongoing training. You need refresher training. You need constant assessments and feedback so you do not fall back into bad habits. It is always continual learning. I think that is what we are hoping for with this

41 South Australian Attorney-General's Department, *Statutes Amendment (Vulnerable Witnesses) Bill 2015*, <http://www.agd.sa.gov.au/initiatives/disability-justice-plan/statutes-amendment-vulnerable-witnesses-bill-2015> (accessed 20 August 2015).

42 Mr Greg Weir, Executive Director, Strategy and Reform, South Australian Attorney-General's Department, *Committee Hansard*, Adelaide, 28 August 2015, p. 35.

specialist training. There is not a lot of research in interviewing people who are nonverbal; but, hopefully, working with the training provider, we can come up with recognised techniques.⁴³

6.45 Ms Kelly Vincent, a South Australian Member of Parliament who was instrumental in driving these reforms, pointed out to the committee that 'legislation alone will not make all the difference and there remain significant social barriers to overcome and end violence against people with disabilities.'⁴⁴

6.46 Ms Vincent went on to describe a range of other issues that must be addressed as a whole of issue move to end violence against people with disabilities, including:

- accessible information on personal safety;
- support for people with disability from services that assist people in leaving situations of violence;
- accessibility of transport to improve independence;
- neglect from mainstream health services; and
- economic disadvantage.

6.47 Support for a national implementation of similar justice strategies was recommended by a few different submitters.⁴⁵

Committee view

6.48 The committee recognises the need for sector wide reforms, as proposed by the Human Rights Commission, to improve the ability of police and the justice system to identify and respond to allegations of abuse, and support people with disabilities in reporting and investigating.

6.49 The committee commends the positive work undertaken in South Australia as part of the Justice Plan as an excellent step towards ensuring people with disability are able to engage more effectively with the criminal justice system

6.50 The committee believes there is a critical need for these reforms to be considered nationally, drawing from evidence-based research on the needs of people with disability.

Supported-decision making

6.51 Another key aspect to improving access to justice is providing assistance to increase the legal capacity of people with disability to provide evidence.

43 Sergeant Susan Lock, Investigations Supervisor, Special Crimes Investigation Branch, Victim Management Section, South Australia Police, *Committee Hansard*, Adelaide, 28 August 2015, p. 47.

44 Ms Kelly Vincent MP, *Committee Hansard*, Adelaide, 28 August 2015, pp 57-58.

45 See JFA Purple Orange, *Submission 12*, p. 30; Australian Lawyers for Human Rights, *Submission 99*, p.10; and Children with Disability Australia (CDA), *Submission 144*, p. 41.

6.52 The Law Reform Commission report, *Equality, Capacity and Disability in Commonwealth Laws* investigated the issue of legal incapacity and how it impacted on a person's access to justice, particularly around their deemed capacity to provide evidence in criminal matters.

6.53 The key recommendation of that report was the implementation of a Commonwealth supported decision-making model based on the role of 'supporters' and 'representatives', including that the existing tests of a person's capacity to exercise their legal rights or participate in the legal process be reformed, consistent with the national decision-making principles.⁴⁶ The Law Reform Commission highlighted that these legal reforms need to be accompanied by appropriate support services for people with disability:

Legal reform is likely to have limited practical impact if people do not have access to the support necessary to enable them to participate in legal processes.⁴⁷

6.54 Some of the Law Reform Commission's key recommendations to improve participation by people with disability in the legal process at the Commonwealth level include:

- providing for witnesses who need support to have a support person present while giving evidence;
- providing for witnesses who need support to provide evidence in a way that enables them to understand questions and communicate answers; and
- providing guidance for judicial officers on how courts can support people with disability to give evidence.⁴⁸

6.55 The recommendations of the Law Reform Commission report were supported by the UN Disability Committee, which recommended in its 2013 concluding observations that:

- the current inquiry process be effectively used to take immediate steps to replace substitute decision-making with supported decision-making and provides a wide range of measures which respect the person's autonomy, will and preferences; and
- provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges, and social workers, on the recognition of the legal capacity of persons with disabilities and on the

46 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, pp 13–14, p. 192.

47 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, p. 194.

48 Human Rights Commission, *Equality, Capacity and Disability in Commonwealth Laws*, pp 17–19.

primacy of supported decision-making mechanisms in the exercise of legal capacity.⁴⁹

Registered intermediaries

6.56 One aspect of a supported decision-making model includes the use of intermediaries, such as those used in the United Kingdom (UK). Ms Mary Woodward, who worked as a Registered Intermediary in the UK between 2009 and 2011, recommended the introduction of a similar program in Australia, noting that evaluations of the UK program:

...have been overwhelmingly positive, with a number of reported emerging benefits, including the potential to assist in bringing offenders to justice; increase access to justice; contribute to cost savings; assist in identifying witness needs; and inform appropriate interviewing and questioning techniques.⁵⁰

6.57 In England and Wales, vulnerable witnesses may be assisted to give evidence in criminal proceedings by registered intermediaries (see Box 6.4). In 2013, Northern Ireland piloted a registered intermediary scheme to assist vulnerable victims, witnesses, suspects and defendants with significant communication deficits. The pilot was extended through 2015 following an evaluation of the pilot in November 2014.⁵¹

Box 6.4: United Kingdom – Registered intermediaries

The UK *Youth Justice and Criminal Evidence Act 1999* allows for a range of special measures for cases involving vulnerable and intimidated witnesses to give their best evidence in court, including the use of an intermediary. In 2004, the UK government piloted the Witness Intermediary Scheme (WIS). In 2008, the WIS was implemented nationally and is available across England and Wales.

The role of the registered intermediary is to facilitate:

...two-way communication between the witness and any other participants in the criminal justice process to ensure that communication with the witness is as complete, coherent and accurate as possible. This includes communication at meetings between the witness and the police and/or the Crown Prosecution Service (CPS), in the ABE [Achieving Best Evidence] interview, during any identification procedures and during the trial process. It may also include communication at meetings between a defence witness or a defendant and the defence solicitor.

An intermediary appointed through the WIS must be a professional who has been recruited, selected and accredited by the Ministry of Justice and registered on the WIS national database. Intermediaries are impartial and neutral and are obliged to serve the court.

49 UN Disability Committee, *Concluding observations*, 2013, p. 4.

50 Ms Mary Woodward, *Submission 36*, p. [5].

51 Department of Justice, Northern Ireland, Registered Intermediary Scheme, <http://www.dojni.gov.uk/registered-intermediary-schemes> (accessed 17 September 2015).

Box 6.4 (continued)

The functions of Registered Intermediaries in the criminal justice system may include:

- the police officer or CPS lawyer in the case identifies that the witness might benefit from the assistance of a Registered Intermediary;
- the police officer or CPS lawyer contact the WIS Matching Service run by the National Policing Improvement Agency (NPIA) which identifies and contacts a Registered Intermediary with the necessary skill sets available to conduct the work;
- the Registered Intermediary conducts the assessment and provide the interviewing police officer with a preliminary report to enable planning for the ABE interview and is present in order to advise and assist with communication if required;
- prior to trial the Registered Intermediary may attend the witness on their court familiarisation visit and will inform the Witness Service of any relevant matters regarding the witness's care and well-being;
- before the witness gives evidence the Registered Intermediary must be involved in a 'ground rules' hearing with the trial judge and advocates to agree all the matters regarding the witness giving evidence with the Registered Intermediary's assistance;
- Registered Intermediaries assist during the giving of evidence, usually sitting alongside the witness as they give evidence from the TV link room at the court. The extent to which they intervene during the evidence of the witness depends on the witness and also the extent to which the Ground Rules are followed; and
- Registered Intermediaries have also been asked to assist in matters which are ancillary to the trial, namely, to help a witness who is giving a victim impact statement (either by video or a written statement) and to help in the explanation to a witness about the outcome of the case.

Section 104 of the *Coroners and Justice Act 2009* (not yet implemented) will allow for certain vulnerable accused to give oral evidence at trial with the assistance of an intermediary.

Source: United Kingdom Ministry of Justice, *The Registered Intermediary Procedural Guidance Material*, February 2012, pp 3-13, http://www.cps.gov.uk/publications/docs/ri_procedural_guidancemanual_2012.pdf (accessed 17 September 2015).

6.58 Ms Woodward told the committee of one example where she had assisted a person with communication difficulties during a trial:

I was called in at the pretrial stage to facilitate the communication with a 45-year-old lady who had borderline personality disorder and post traumatic stress disorder. At the time, she was sectioned under the Mental Health Act in a secure psychiatric hospital due to significant risks of self-harm and suicide. She disclosed, alongside her sibling, historical sexual abuse by her father. She had already given five videoed police interviews by the time I was called in, and they were used as her evidence-in-chief. The Crown Prosecution Service...were concerned that her significant mental health difficulties would prevent her from being able to participate in the trial proceedings...they knew how an intermediary could help facilitate the communication of someone with significant mental health difficulties...I conducted an assessment of her communication and found that she was superficially a very articulate lady. She did have some difficulties processing more complex language but, as her mental health deteriorated, so did her communication skills—to the extent that when it got

really bad she would just completely shut down. Obviously, if that were to happen during questioning she would not be able to continue. I advised the court on the impact of her mental health on communication and told them about some strategies that might be adopted to enable her to give evidence. The judge agreed to all my recommendations and, with my assistance, she was cross-examined via video link from her hospital; she was not safe to leave the hospital. Largely as a result of her evidence, the defendant was convicted of 22 out of 23 counts and sentenced to 14 years in prison. At sentencing, the judge commended everyone who had enabled her to give evidence, including me as the intermediary.⁵²

6.59 The committee notes that an intermediary role, called a 'communication assistant', will be introduced in South Australia as part of the Justice Plan. Ms Woodward raised concern that the proposed model of support in South Australia was voluntary:

While I love to think that we are all altruistic, I have a lot of experience in this and I would not do that role for free. It carries a lot of responsibility and it is high stakes and high pressure. I do worry about whether they would be recruiting to that role people with the right motivation, expertise and experience.⁵³

6.60 Dr Stephen Brock from the South Australian Attorney-General's Department told the committee the South Australian government was still refining the 'communication assistant' role:

At this point in time we are still working through and still refining it. We will also be looking at further refining it with our partner from the NGO sector, once that has been identified...The communication assistance scheme is one component of the broader Disability Justice Plan, and we will be working closely with the implementation of the specialist training.⁵⁴

Committee view

6.61 The committee supports the recommendations made by the Law Reform Commission on the importance of introducing supported-decision making models.

6.62 The committee recognises the need for reforms to the criminal justice system that give agency to people with disability to enable them to speak for themselves, and for their evidence to be considered and acted upon.

Needs of specific groups

Women and girls

6.63 The committee was particularly concerned by evidence that shows that women with disability experience particularly high rates of violence, including family

52 Ms Mary Woodward, *Committee Hansard*, Sydney, 27 August 2015, pp 31–32.

53 Ms Mary Woodward, *Committee Hansard*, Sydney, 27 August 2015, p. 34.

54 Dr Stephen Brock, Senior Policy Officer, Strategy and Reform Division, Attorney-General's Department South Australia, *Committee Hansard*, Adelaide, 28 August 2015, p. 39.

and domestic violence. In its concluding observations, the UN Disability Committee expressed particular concern about reports of 'high rates of violence perpetrated against women and girls living in institutions and other segregated settings'. The UN Disability Committee recommended that Australia:

...orders investigation, without delay, into situations of violence, exploitation and abuse experienced by women and girls with disabilities in institutional settings, and to take appropriate measures on the findings.⁵⁵

6.64 Evidence to the committee shows that domestic and family violence occurs both outside and within institutions and residential settings. The Disability Alliance highlighted that legislation aimed at addressing violence against women offers little protection for people with disability in residential settings:

It is generally understood in the context of 'domestic', 'spousal', 'intimate partner' or 'family' violence, and this conceptualisation is reflected in most domestic and family violence legislation in Australia. However, domestic and family violence legislation differs across States and Territories - providing different levels of protection and definitions of what constitutes 'domestic violence' and/or 'family violence' and what constitutes a 'domestic relationship'. Some broader definitions include residential settings, such as group homes and institutions, where people with disability often live and interact domestically with co-residents, support workers, service managers, visitors and a range of other staff. However, even where there are broader definitions, domestic and family violence legislation is rarely utilised, largely because violence perpetrated against people with disability in institutional and residential settings is not characterised as domestic/family violence and rarely are domestic violence related interventions deployed to deal with this type of violence. Where narrower definitions apply, which is the case in most domestic and family violence legislation, people with disability in institutional and residential settings are completely excluded from these protections.⁵⁶

6.65 Dr Jessica Cadwallader from the Disability Alliance told the committee:

...often legislation will wind up being used in ways that imply that if violence occurs in a disability service that perhaps police do not need to respond in quite the same way or the services do not need to be brought in. The referral pathways do not necessarily map together in ways that ensure that people with disability have access to the same kinds of supports as anyone else.⁵⁷

6.66 The Human Rights Commission urged the committee to consider the outcome report of the Stop the Violence Project's (STVP) 2013 national symposium on violence against women and girls with disability funded by the Australian

55 UNCRPD, *Concluding observations*, 2013, p. 6.

56 Disability Alliance, *Submission 147*, p. 59.

57 Dr Jessica Cadwallader, *Committee Hansard*, Sydney, 27 August 2015, p. 41.

Government under the *National Plan to Reduce Violence against Women and their Children 2010-2022* (National Plan).⁵⁸

6.67 The STVP outcome report noted that women and girls with disability experience violence at 'higher rates, more frequently, for longer, in more ways, and by more perpetrators'.⁵⁹ For women with disability in institutions, the President of Women with Disabilities Australia, Ms Karin Swift, noted:

Women and girls with disabilities who live in institutions experience, and are at significant risk of violence. For many, violence is a day to day reality of their lives and frequently involves sustained and multiple episodes. Yet violence perpetrated against women and girls with disabilities in institutions is rarely characterised as domestic violence and rarely are domestic violence related interventions deployed to deal with this type of violence.⁶⁰

6.68 The STVP outcome report recommended a range of strategies to address violence against women and girls with disability, including strengthening justice and legal workforce training to recognise and support disclosure and redress of incidents of violence, particularly family and domestic violence, and improving access to justice for women and girls with disability experiencing or at risk of violence.⁶¹

6.69 However, the Disability Alliance was critical that the STVP was 'limited in scope':

...as its contracted focus was on building the evidence base to reform service provision for women with disability who are experiencing or at risk of violence. The STVP was unable to 'address the myriad issues and complexities inherent in the multiple forms of violence perpetrated against women with disabilities'.⁶²

6.70 A number of witnesses and submitters highlighted the need for improved access for people with disability to a range of mainstream family violence support services. For example, under existing domestic violence legislation in most states and territories (except NSW) does not recognise residential facilities for people with disability as places that domestic violence may occur. Ms Christina Ryan, General Manager at Advocacy for Inclusion, told the committee that in most states and territories:

...you cannot actually stick your hand up and say, 'I've got violence happening in my home that needs to be responded to.' There is no way that you can access the services that are appropriate to getting outcomes through that. We struggle enormously with that barrier. There are some real

58 Human Rights Commission, *Submission 57*, pp 2–3.

59 Stop the Violence Project, *Report of the Proceedings and Outcomes*, National Symposium on Violence against Women and Girls with Disability, 25 October 2013, p. 13, <http://www.stvp.org.au/National-Symposium.htm> (accessed 24 September 2015).

60 STVP, *Report of the Proceedings and Outcomes*, p. 14.

61 STVP, *Report of the Proceedings and Outcomes*, p. 26.

62 Disability Alliance, *Submission 127*, p. 63.

solutions that we could find. In fact, in New South Wales, where these households are recognised under the domestic violence legislation, they are able to change some of those outcomes. It also has raised enormous awareness around the fact that this is violence, naming it. People do not see that it is a form of violence. They do not get that it is abuse.⁶³

6.71 The committee heard that under the National Plan, the Australian Government is undertaking a series of initiatives to address family violence for people with disability. The Department of Social Services submitted that the second action plan (2013-2016) of the National Plan:

...has a strong focus on better understanding and responding to people's diverse experiences of violence, including for people with disability. It also includes initiatives to help better identify, support and respond to women with disability experiencing, or at risk of, family and domestic violence and sexual assault.⁶⁴

6.72 However, a number of submitters argued that the National Plan is not integrated with the National Disability Strategy and does not adequately address family violence for people with disability in residential settings. WWILD submitted that within the National Plan:

...there is little emphasis on girls with disabilities, it focuses only on traditional notions of domestic/family violence and sexual assault (in the context of intimate partner relationships only), and fails to address the many other forms of violence perpetrated against women and girls with disabilities, such as violence in institutions and residential settings. These forms of violence fall 'outside' the scope of the National Plan.⁶⁵

6.73 Likewise, the Disability Alliance submitted that the National Plan:

...has significant limitations in addressing and preventing violence against women and girls with disability in institutional and residential settings. It focuses on traditional notions of domestic/family violence (ie: intimate partner/spousal violence) and sexual assault, and has little emphasis on girls with disability. It fails to address the many forms of violence perpetrated against women and girls with disability (such as sexual and reproductive rights violations; restrictive practices; forced treatment; seclusion and restraint; deprivation of liberty) and the many settings and spaces in which violence against women and girls with disability occurs (such as institutions, service settings, out-of-home care). These forms of violence and settings currently fall 'outside' the scope of the National Plan.⁶⁶

6.74 Ms Carolyn Frohmader, representing Women with Disability on the Disability Alliance, highlighted the problem of 'policy siloing':

63 Ms Christina Ryan, General Manager, Advocacy for Inclusion, *Committee Hansard*, Canberra, 21 August 2015, p. 12.

64 Department of Social Services, *Submission 104*, p. 23.

65 WWILD, *Submission 127*, p. [11].

66 Disability Alliance, *Submission 127*, p. 63.

The National Disability Strategy is not connected to the national violence plan...we have a national framework to prevent violence against women, which does not deal well with disability, does not include particular settings and has a focus on intimate partner violence. We have a national child protection framework that is actually about child protection. So we have this policy siloing where, yes, we know these things but this one is not connected to this one is not connected to this one. And it is just incredibly problematic.⁶⁷

6.75 Submitters suggested that the National Plan should be better integrated with the National Disability Strategy and directly address violence against women and girls in institutions. WWILD recommended that the second action plan on the National Plan include specific focus on 'the violence perpetrated against women and girls with disabilities, such as violence in institutions and residential settings'.⁶⁸

Committee view

6.76 Evidence to the inquiry shows a need for the integration of domestic violence programs with disability services to ensure people with disability have access to the same supports.

6.77 The committee believes the National Plan should include specific actions to address violence against women and girls in residential settings, including ensuring access to mainstream services and specialist disability services.

Children and young people

6.78 The committee heard that children and young people experience particular barriers and challenges in reporting to police and seeking access to justice.

6.79 The Human Rights Commission urged the committee to consider the interim report of the Royal Commission into Institutional Responses to Child Sexual Abuse which noted that:

...children with disability are more vulnerable to sexual abuse than children without disability, and that vulnerability to violence may be increased when disability intersects with other attributes, for example, Aboriginal and Torres Strait Islander children with disability.⁶⁹

6.80 The interim report noted that children with disability are more likely to have experienced repeated incidents of sexual abuse by the time they are 18 years of age. Vulnerability to abuse is compounded due to children with disability being segregated to varying degrees from the mainstream community, having special communication

67 Ms Carolyn Frohmader, Executive Director, Women with Disabilities Australia; Disability Alliance, *Committee Hansard*, Sydney, 27 August 2015, p. 44.

68 WWILD, *Submission 127*, p. [13].

69 Human Rights Commission, *Submission 57*, p. 3.

needs and receiving inadequate education about sex, inappropriate touching and abuse.⁷⁰

6.81 Children with Disability Australia (CDA), a national representative organisation for children with disability representing 5000 members, highlighted that children with disability are three times more likely to be abused than their peers, and those with communication difficulties and high behaviour support needs have a heightened risk of abuse.⁷¹ CDA submitted that children and their families experience particular barriers when reporting violence and abuse:

It has been reported to CDA on numerous occasions that when children, young people and families make complaints regarding abuse, service providers and institutions become extremely defensive and adversarial. For example, families have reported feeling attacked and ostracised by schools for making complaints about their children's experiences. In some instances, schools have taken out intervention orders against parents, which appears to be a way of avoiding accountability about issues of concern.⁷²

6.82 As with all people with disability, violence and abuse against children and young people is often not identified as a crime, particularly when perpetrated by care providers such as schools. CDA submitted that:

In these cases, abuse may be seen as an incident that can be addressed within an organisation, rather than making appropriate referral to police. In addition, police often do not recognise abuse experienced by children and young people with disability as a crime. An example reported to CDA involved a four year old being trapped under a chair by his Principal at school. The boy's mother went to the police after the school refused to recognise what had occurred, however the police refused to take her statement.⁷³

6.83 The Disability Alliance provided a number of case studies of children and young people with disability who experienced significant challenges in reporting incidents of abuse to police (see Box 6.5).

70 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report, Volume 1*, 30 June 2014, pp 112–113, <http://www.childabuseroyalcommission.gov.au/about-us/our-reports> (accessed 24 September 2015).

71 CDA, *Submission 144*, p. 5.

72 *Submission 144*, p. 30.

73 *Submission 144*, p. 30.

Box 6.5: Case study – Children and young people with disability

Rose is eight, has limited mobility and limited verbal communication. She suffered a broken hip at an after school hours care program...Rose eventually named the staff member who was responsible for her injury, and she was interviewed by the police. However, her mother was not allowed to act as her support person, as the police deemed that she would be able to interpret too much of Rose's unspoken communication, and this would be inadmissible as evidence. Instead, an independent advocate accompanied Rose during the police interview.

The interview was a very stressful process for Rose. She spoke to the police through Assistive and Alternative Communication. Rose was unable to disclose any details about the nature or origin of her injury during the interview. The advocate suggested that a different form of questioning, such as using more contextual questions concerning Rose's injuries, be attempted, but the police deemed that all communication strategies had been exhausted. The police stated that Rose, her communication methods and her story were not reliable enough to take the investigation further. They claimed that her interview would not be admissible in a court of law, and ceased investigating the issue.

Source: Australian Cross Disability Alliance, Supplementary Submission 147, p. 12.

6.84 CDA highlighted that children and young people experience particular barriers to access to justice, including:

...a lack of protection services for people with disability, the failure of the justice system to provide support and adjustments to assist people with disability participating in the system and discriminatory attitudes that position people with disability as incapable of making reliable statements.⁷⁴

6.85 In particular, CDA expressed concern that:

...police have been unwilling to take a statement from a child either based on the assumptions of capacity regarding making a statement or because there is no communication support available if required...The perpetuation of the stereotype that people with disability make 'poor witnesses' inhibits prosecution of crimes against children with disability. The curtailed opportunity to demonstrate credibility as a witness in a court of law further perpetuates this view.⁷⁵

6.86 In its submission, the Commissioner for Children and Young People Western Australia (CCYPWA) highlighted the need to develop child-safe principles for organisations to 'promote a culture where the safety, wellbeing and participation of children and young people are reflected in policies and day-to-day practices', and implement child-friendly complaints processes. The CCYPWA noted that a child-friendly complaints process 'is a vital component of a complaints system and should be carefully considered when designing the broader system for handling complaints'.⁷⁶

6.87 The committee notes concerns that the *National Framework for Protecting Australia's Children 2009-2020* (Child Protection Framework) does not adequately

74 CDA, *Submission 144*, p. 40.

75 *Submission 144*, pp 40–41.

76 Commissioner for Children and Young People Western Australia, *Submission 32*, pp [2–4].

address responding to violence against children and young people with disability. The Department of Social Services submitted that the Child Protection Framework 'is an ambitious, long-term approach to ensuring the safety and wellbeing of Australia's children, and aims to deliver a substantial and sustained reduction in levels of child abuse and neglect over time'.⁷⁷

6.88 The Disability Alliance argued that the Child Protection Framework:

...contains very limited reference to disability...Essentially, this means that the only appearance that children with disability make in the National Framework for Protecting Australia's Children is where their disability is treated as a cause of the violence and abuse they experience: a clear case of blaming the victim. Although the research priorities under the Framework include disaggregating by disability, much of the research has excluded those settings where children with disability are overrepresented and where violence is endemic, including for example, out of home care run by disability service providers, psychiatric facilities and hospitals.⁷⁸

6.89 Similarly, CDA submitted that the Child Protection Framework contains 'minimal considerations of the specific vulnerabilities children with disability have to experiencing abuse and neglect':

Often, the safety and wellbeing of children with disability is positioned as being the responsibility of the disability sector, rather than included and embedded in mainstream children's policy and services. As a result, children with disability are often excluded from policy considerations and the segregation of services remains unchallenged. By continually leaving children with disability out of policy considerations and reform, there can be minimal impact on day to day experiences of abuse.⁷⁹

6.90 The Disability Alliance and CDA recommended that the Child Protection Framework include particular targets and measures to prevent the abuse of children and young people with disability.⁸⁰ Families Australia recommended that the inquiry focus on the particular issues faced by children and people with disability aged 0 to 25 years of age, and that consideration be given to including a 'national priority aimed at achieving better outcomes for children and young people with disability from relevant national frameworks and strategies'.⁸¹

77 Department of Social Services, *Submission 104*, p. 23.

78 Disability Alliance, *Submission 147*, pp 63–64.

79 CDA, *Submission 144*, p. 36.

80 See: CDA, *Submission 144*, p. 36; Disability Alliance, *Submission 147*, p. 14.

81 Families Australia, *Submission 3*, p. [2–3].

Committee view

6.91 The committee is disturbed by evidence to the inquiry which shows that barriers to access to justice are particularly acute for children. The committee considers that the Child Protection Framework must be amended to capture the specific needs of children with disability

6.92 The committee stresses that any reforms to the criminal justice system (including legal support services and evidence legislation) and police training must take into special consideration the needs of children and young people.

Aboriginal and Torres Strait Islander people with disability

6.93 The committee was particularly concerned by evidence highlighting the challenges Aboriginal and Torres Strait Islander peoples with disability face in engaging with the criminal justice system.

6.94 The North Australian Aboriginal Justice Agency (NAAJA) submitted that Aboriginal and Torres Strait Islander peoples with disability, particularly in remote areas, do not have access to appropriate disability support services. NAAJA argued that the lack of services amounts to 'systemic neglect' and contributes to a high vulnerability to violence and abuse:

It is NAAJA's consistent experience that an absence of supports for Aboriginal people with disability, such as access to mental health services or supported accommodation for people with cognitive impairment, leads to a range of serious problems. These include neglect, exploitation and violence towards people with disability and it also means that people are removed from their home community, losing the support of family and culture. It also leads to increased contact with the criminal justice system - often through their own violent conduct - and child protection system.⁸²

6.95 In particular, NAAJA highlighted that in the Northern Territory, Aboriginal and Torres Strait Islander peoples with disability are significantly overrepresented in the criminal justice, child protection and adult guardianship systems. NAAJA noted that the lack of support services available to Aboriginal and Torres Strait Islander peoples in the criminal justice system contributes to high levels of incarceration:

NAAJA is often called upon to represent people with mental illnesses and cognitive impairments who have committed serious violent acts after a long history of escalating offending while their underlying cognitive/intellectual/mental health issues have gone unaddressed. It is often the case that the family and community of the person have found themselves unable to cope with the support needs of the person.

Where people with cognitive impairment and mental illness find themselves before the courts for criminal matters, the absence of supports also often leads to their incarceration. This is because the person may be considered to be a danger to community safety without support and/or supervision in their community. This can see people remanded in custody and then subject to

82 NAAJA, *Submission 138*, p. 5.

custodial supervision under the NT Criminal Code. In the absence of a forensic mental health facility in the NT, custodial supervision means imprisonment in a maximum security prison.

Transition to community from prison is also made more difficult by the lack of support services in the community. Once a person 'goes in', they are likely to face significant challenges 'getting out' because reducing the risk of their release requires options for supervision and support that are simply not available to Aboriginal people in the NT, particularly in remote communities.⁸³

6.96 The Disability Alliance provided case study examples of Aboriginal people with disability who experienced incarceration due to the lack of available support services (see Box 6.5).

Box 6.6: Case study – Aboriginal and Torres Strait Islander people with disability

Dave is a young Aboriginal man with intellectual disability. He was found 'unfit to plead' in a criminal matter. He was indefinitely detained in a maximum security prison. Dave does not have access to the intensive rehabilitation programs he needs to address the causes of his offending behaviour.

He is often isolated in his cell for approximately 16 hours a day, and frequently shackled during periods he is outside his cell. In response to repeated banging of his head causing bleeding, prison officers strap him to a chair and inject him with tranquilizers until he is unconscious. This has happened on numerous occasions.

The government corrections department responded to complaints by stating that it has a 'duty of care' to prevent the man from hurting himself, and that the prison is not equipped to manage people with cognitive impairment.

Source: Australian Cross Disability Alliance, *Supplementary Submission 147*, p. 4.

6.97 Citing a report by the Aboriginal Disability Justice Campaign, the Disability Alliance highlighted that Aboriginal and Torres Strait Islander peoples account for one third of the 150 people detained under mental impairment legislation around Australia. Further, an estimated 50 Aboriginal and Torres Strait Islander people are currently detained indefinitely in prisons and psychiatric units.⁸⁴

6.98 The issue of the incarceration of Aboriginal and Torres Strait Islander peoples with disability was highlighted by the UN Disability Committee which specifically recommended that Australia:

Ends the unwarranted use of prisons for the management of unconvicted persons with disabilities, focusing on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention.⁸⁵

83 NAAJA, *Submission 138*, pp 5–6.

84 Disability Alliance, *Submission 147*, p. 39.

85 UN Disability Committee, *Concluding observations*, 2013, p. 5.

6.99 Mr Damian Griffis, representing First Peoples Disability Network Australia on the Disability Alliance, told the committee that for Aboriginal and Torres Strait Islander peoples with disability, there are a lack of early intervention supports available to prevent adverse interactions with the criminal justice system:

The way we see it is on a spectrum of experience, if you like. On one hand there is the soft discrimination of low expectations, and at the other end we have the institutional racism. Experience sort of sits in there somewhere. In a disability context, we talk about this syndrome we call the 'bad black kid' syndrome. There is a kid in the back of the classroom acting up. They might be very frustrating in the classroom. They get suspended and expelled. And then they might end up hanging around the local shops. The police start telling them to move on. They end up having interactions with the juvenile justice system. And it turns out they have a disability of some kind.

This is a very common experience for us. They may have hearing impairment or vision impairment; they may come from a home where they do not sleep a lot, for example. We would frame that clearly as neglect on the part of the education system, which is not properly recognising their needs. We think that is a major issue for a lot of our young people. The lack of early intervention and specialist supports around their disability is a very significant consequence which can lead to a trajectory which we see quite regularly of interactions with criminal justice and a journey which takes them in a particular direction, when there is a very clear opportunity early on to make an intervention and provide appropriate support.⁸⁶

6.100 Mr Griffis highlighted that in remote communities the police are the only real service providers in town and not equipped to provide disability specific support:

If you live in regional or remote Australia—or even if you live beyond the Blue Mountains here in New South Wales—your first interaction is going to be with a police officer. If you have a mental health episode and you are not going particularly well, you usually end up in the back of a paddy wagon. In some parts of our country, as you know, the police are really the service provider in town—and this is not necessarily to run down the police force either, because that is not what they are supposed to be doing. Then you see this trajectory of: go before a magistrate maybe, and the magistrate might not be particularly attuned to your mental health needs, for example. Then you are on this trajectory of indefinite detention.⁸⁷

6.101 Mr Griffis noted that the provision of appropriate services could prevent the incarceration of unconvicted Aboriginal and Torres Strait Islander peoples with disability:

86 Mr Damian Griffis, CEO, First Peoples Disability Network Australia; Disability Alliance, *Committee Hansard*, Sydney, 27 August 2015, p. 39.

87 Mr Damian Griffis, *Committee Hansard*, Sydney, 27 August 2015, p. 47.

...if you can start addressing disability more appropriately, there is an opportunity here to reduce the Aboriginal prison population by 10 to 20 per cent in Australia.⁸⁸

6.102 The committee heard that another specific challenge is identifying disability in Aboriginal and Torres Strait Islander communities, particularly Foetal Alcohol Spectrum Disorder. NAAJA noted that:

There is no comparable word in many Aboriginal languages to 'disability'. This adds a significant barrier in identifying the numbers of Indigenous Australians with a disability or combating any disadvantage suffered as a result of a disability.⁸⁹

6.103 To address this issue, the Law Council of Australia recommended:

...that all governments invest in methods to ensure the detection and treatment of hearing impairment, FASD [Foetal Alcohol Spectrum Disorder] and other disabilities which can potentially lead to adverse outcomes in the criminal justice system, particularly for Indigenous Australians.⁹⁰

Committee view

6.104 The committee is deeply concerned about the challenges Aboriginal and Torres Strait Islander peoples with disability experience in engaging with the criminal justice system, particularly the use of prisons as accommodation.

6.105 The committee recognises the need for specific services for Aboriginal and Torres Strait Islander communities, particularly in remote regions, to divert people with disability from the criminal justice system to disability specific support services.

6.106 The committee recognises the need for better identification of disability, including hearing and vision impairment, in Aboriginal and Torres Strait Islander communities to ensure people with disability are referred to the appropriate services.

Indefinite detention

6.107 The issue of the indefinite detention of people with disability was raised as an issue with the committee, particularly when people with a mental health or cognitive disability intersect with the criminal justice system. The Disability Alliance outlined the process by which people with a mental health condition or cognitive impairment who have been charged with an offence and found not fit to stand trial or not guilty by reason of their disability, are then detained indefinitely, sometimes within the prison environment itself:

All Australian jurisdictions have in place legislation that addresses a defendant within the criminal justice system and their fitness to stand trial.

88 Mr Damian Griffis, *Committee Hansard*, Sydney, 27 August 2015, p. 51.

89 NAAJA, *Submission 138*, p. 6.

90 Law Council of Australia, *Submission 139*, p. 22.

These justice diversion provisions are applied when people with cognitive or psychosocial disability are deemed 'unfit' to stand trial. An unfitness test may arise as an issue before or during the trial process. These justice diversion provisions have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that may significantly exceed the maximum period of custodial sentence for the offence.⁹¹

6.108 The Human Rights Commission expressed concern with the negative consequences this has for vulnerable people:

The Commission is also concerned that the practice of indefinite incarceration in prison, if not considered to be a form of violence, exposes people with disability to violence in an institutional setting. This practice is particularly experienced by Aboriginal and Torres Strait Islander people with cognitive impairment and was reported on by the Social Justice Commissioner in his 2012 Social Justice Report.⁹²

6.109 NAAJA provided evidence to the committee about the over-representation of Aboriginal people in the Northern Territory criminal justice system, pointing out that many of those people had a long history of escalation of behaviour while their underlying cognitive impairment or mental health issues went untreated.⁹³ The Disability Alliance has also provided evidence that Aboriginal and Torres Strait Islander peoples are disproportionately affected by this form of arbitrary detention.⁹⁴

6.110 The UN Disability Committee has made comment on the practice of indefinite detention after a finding of 'unfitness' and found in relation to the Disability Convention that:

The Committee has established that declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.⁹⁵

Committee view

6.111 The indefinite detention of people with disability is an issue of serious concern to the committee. This is made more serious by the sometimes arbitrary nature of such detention without appropriate periodic review, and where that detention occurs in a criminal justice facility.

91 Disability Alliance, *Submission 147*, p. 47.

92 Australian Human Rights Commission, *Submission 57*, p. 4.

93 NAAJA, *Submission 138*, pp. 5-6.

94 Disability Alliance, *Submission 147*, p. 47.

95 UN Disability Committee, *Guidelines on article 15 of the Convention on the Rights of Persons with Disabilities*, September 2015.

6.112 The committee is of the view that if a person is detained in indefinite detention, then there is an obligation on the part of the state to provide therapeutic treatment in a facility not attached to the criminal justice system. To do any less would result in the state imposing criminal justice punishment on people as a direct result of them having a disability.

Concluding committee view

6.113 The committee notes that it is not clear whether recommendations made by the UN Disability Committee on improving access to justice for people with disability have been implemented across jurisdictions. The evidence we have received would suggest they haven't or if they have they are inadequate to effect change.

6.114 This would indicate that Australia is not fulfilling its international human rights obligations in relation to providing access to justice.

6.115 The committee is deeply concerned by the evidence presented to this inquiry which shows that people with disability who are victims of crime, face significant barriers to having those crimes appropriately reported, investigated and prosecuted.

6.116 The committee is further concerned that problems with access to justice for people with disability is not an unknown issue to the Australian Government. Multiple reports have highlighted the critical need for reform to Australia's legal systems. These reports, discussed earlier in this chapter, include the 2012 Civil Society report to the UN Disability Committee, the 2013 UN Disability Committee observations on Australia's implementation of the Disability Convention, the 2014 Human Rights Commission report and the 2014 Law Reform Commission report.

6.117 Of particular concern to the committee, is the apparent lack of impetus to implement the recommendations of those expert reports on access to justice, which range from core legislative reform through to improved training for police and judicial officers and diversionary programs for people with disability.

6.118 Given the wide terms of reference for this inquiry, the committee was unable to investigate all aspects of the multi-faceted issue of barriers to access to justice for people with disability. However, the evidence gathered by this inquiry clearly shows that this is a widespread problem. More clearly understanding the specific barriers in each jurisdiction is a fundamental step to reducing the prevalence of violence, abuse and neglect of people with disability.

