

advocacy for inclusion

Submission to:
Senate Community Affairs Reference
Committee Inquiry to address outcomes of
National Disability Strategy 2010-2020

About Advocacy for Inclusion Home of the Disability Rights Law Centre

Advocacy for Inclusion acknowledges the Ngunnawal people as the traditional owners of the land on which we work.

Advocacy for Inclusion is a not-for-profit Disabled People's Organisation (DPO) in the Australian Capital Territory (ACT), Australia. We provide individual and systemic advocacy services to people with disabilities to promote their human rights and inclusion in the community. We act with and on behalf of individuals in a supportive manner, or assist individuals to act on their own behalf, to obtain a fair and just outcome for the individual concerned.

Advocacy for Inclusion works within a human rights framework and acknowledges the *United Nations Convention on the Rights of Persons with Disabilities*, and is signed onto the *ACT Human Rights Act*.

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Suggested Recommendations

Recommendation 1: Nationally consistent data collection on people with disabilities in the criminal justice system is an essential element to guiding policy development in eliminating overrepresentation of people with disabilities entering the justice system.

Recommendation 2: Ensure all criminal justice agencies in each jurisdiction to monitor and evaluate the participation rates of people with disabilities as victims of crime, witnesses and offenders as equal participants in the justice system.

Recommendation 3: Request a system for data collection about the disability status of parents and children subject to child protection interventions in each Australian jurisdiction as a useful addition to policy makers and advocacy organisations involved in child protection services and support.

Recommendation 4: At a national level, the *National Disability Strategy 2010-2020* is to ensure national data monitoring of guardianship rates, including the type and level of guardianship.

Recommendation 5: The Australian Government consider the ongoing establishment of the *National Disability Strategy 2010-2020*, and its commitment to Outcome 2 to be required to work in collaboration with existing and emerging state and territory justice mechanisms for improvement.

Recommendation 6: Ensure an equal process to justice is achieved in all Australian jurisdictions by improving systemic barriers to justice for people with disability through the National Disability Strategy, including legal capacity for both offenders and victims, supported decision-making processes, parenting and representation in the justice space.

Recommendation 7: The National Disability Strategy to address the presumption of support for people with disabilities in the justice system under legislative reform to better recognise disability and the need for reasonable adjustment for any participant in the justice system, whether victim, advocate or offender.

Recommendation 8: The Australian Government to work with state and territory governments to explore initiatives in the creation of an assessment protocol that assists police, court officials, law professionals and child protective agencies in identifying people with disabilities. Where identified, it will need to be demonstrated that all reasonable steps have been taken to avoid outcomes of imprisonment, child removal and removal of independent decision-making rights.

Recommendation 9: Develop a national training mechanism targeted at police, court officials, law professionals and child protective agencies on responding to people with disabilities in the different stages of justice processes, engaging in self-advocacy and support mechanisms to reduce the number of people with disabilities in the justice system.

Recommendation 10: Training targeted towards police, court officials, law professionals and child protective agencies needs to ensure national consistency with training levels to be conducted in collaboration with people with disability and the disability sector, with a view of increasing requirements to a mandatory level to understand and acknowledge disability at the front end of justice processes.

Recommendation 11: Develop mechanisms to increase Easy-English publications of justice processes in all jurisdictions, including bail conditions and charges for offenders with disabilities to fully understand and abide by legal processes.

Recommendation 12: Establish a national audit and assessment to improve the accessibility of the criminal justice system for victims with disabilities. This must take into account intersecting factors such as age, gender, racial, cultural and linguistic status.

Recommendation 13: Creation of oversight and accountability mechanisms, such as a statutory complaints body, and community based disability advocacy remain vital in helping to balance out power inequalities, and to support people with disabilities to have their voices heard in a context that is currently extremely inequitable and challenging in the justice process.

Recommendation 14: Establish a Royal Commission into the abuse, violence and neglect of people with disabilities.

Recommendation 15: The *National Disability Strategy 2010-2020* must further advocate a provision to routinely collect demographical data from child protection service users nationally, including whether or not the parent/s and/or child have disability. This should be done along with the collection of other pertinent data such as cultural background to identify and address intersecting areas of disadvantage.

Recommendation 16: The Australian Government must acknowledge that parents with disabilities have disability specific support needs, to which Care and Protection Services of each State and Territory must be sensitive and responsive in order to prevent out of home care placements and promote successful restoration with these families.

Recommendation 17: Legal representation needs to be standard, not rare. The Australian Government use the Outcome 2 of the NDS as model to move away from substitute decision-making towards a nationally consistent supported decision-making model to ensure people with guardianship orders are provided their full right to equal participation in the justice process.

Recommendation 18: Increase collaboration between government and advocacy organisations, to develop a formal system that ensures all people subject to guardianship applications can readily access advocacy support, independently of the guardian, before, throughout and after a guardianship order is in place.

Recommendation 19: Ensure compliance with Article 12 of the CRPD by removing guardianship as an option to ensure that people with disabilities are given the right to make their own choices without coherence.

Introduction

The *National Disability Strategy 2010-2020* (NDS) is the foundation of Australia's work to advance disability rights and recognises the experiences and needs of people with disabilities and their families are central to the Strategy, its vision and its principles'.¹ The Strategy is the national policy framework for guiding Australian governments to meet their obligations under the UN *Convention on the Rights of Persons with Disabilities* (CRPD) and to implement the CRPD across a range of key outcome areas.

Advocacy for Inclusion works on the frontline with the most marginalised and isolated people with disabilities in the ACT. There are very few specialist disability advocacy services to respond to the people we work with, and very limited outcomes have been implemented on a government level to complement these efforts. There are certainly none that are by and for people with disabilities – Advocacy for Inclusion is unique in the ACT, and one of very few organisations across Australia working in this area.

We are concerned with the implementation of the National Disability Strategy and the actions that have been implemented through Outcome 2 'Rights protection, justice and legislation'. Bluntly, very little has been done to implement Outcome 2, and few outcomes have been recorded as achievements either Australia-wide or in the ACT. There has been more focus on the National Disability Strategy outcome areas around employment, personal and community support, economic security and health and wellbeing, particularly with the implementation and rollout of the National Disability Insurance Scheme (NDIS).

The issue of people with disabilities in prisons and the justice system is now critical. People with disabilities are highly marginalised and over represented in areas such as child removal, criminal justice, and guardianship. It is unlikely that they will be afforded equal participation in any justice process. It is already known that the rate of Indigenous imprisonment is 13 times greater than that of non-Indigenous prisoners based on a snapshot of the prison population.² The inequality has increased by 50% between 2001 and 2016,³ with many of those released returning to prison within two years, embarking on a cycle of recidivism. Prisoners from severely disadvantaged backgrounds with cognitive disabilities, and a history of abuse are grossly overrepresented in the Australian prison population, and a large percentage is Indigenous Australians^{4 5}.

Advocacy for Inclusion has now redesigned our organisational resources solely to address the urgent demand for independent disability advocacy for justice matters. Despite very limited and uncertain funding, our key areas of work include:

- Support offenders with disabilities to respond to police, courts and lawyers.
- Support victims with disabilities including those escaping violence.
- Support parents with disabilities responding to child protection matters.
- Recognise that all people with disabilities, including people viewed as having 'significant' disabilities, have the right to participate as equals in their own justice process and the right to be supported by independent disability advocacy to do so.
- Advocating for data collection to document the real situation in areas such as child removal from parents with disabilities, people with disabilities in the prison system and guardianship.

The National Disability Strategy must fulfil its intention to ensure marginalised people with disabilities have access to their basic human rights to be active and valued contributors, by providing access to specialist solutions as required. The National Disability Strategy *can* plan for improved, more equitable, justice processes under Outcome 2 by requiring the collection of appropriate data across all areas of justice operations Australia-wide so that it is possible to recognise where people with disabilities are engaging with the justice system.

¹ Commonwealth of Australia (2011), *National Disability Strategy 2010-2020*, Canberra

² ABS (2016), *Prisoner Population Snapshot, 4517.0 - Prisoners in Australia*, Canberra

³ Baldry, E. and Russell, S. (2017), *The Booming Industry Continued: Australian Prisons: A 2017 Update*, UNSW.

⁴ *Ibid*

⁵ NSW Law Reform Commission (2012), *People with cognitive and mental health impairments in the criminal justice system: Diversion*, NSW Law Reform Commission, Sydney

Data Collection

It is incomprehensible that there remain absolutely no indicators and/or measurements and/or data collection and/or qualitative monitoring built into the National Disability Strategy to identify, address or monitor people with disabilities in criminal justice processes, of child removal from parents with disabilities, or guardianship applications and reviews Australia-wide or individually in States and Territories. Without data collection in place to nationally record the number of people with disabilities involved in criminal and civil justice processes it is difficult to understand, and therefore address the significant over representation of people with disabilities, nor to introduce early intervention prevention measures.

There has been insufficient time dedicated to the consideration of marginalised groups, including parents with disabilities, in existing child protection and adoption systems. No data is systematically collected on the prevalence of disability in parents, and the lack of disability disaggregated data collection or monitoring by child protection agencies Australia-wide means the features of this population group are not understood. This creates a high risk of adoption being considered because factors relating to disability have not been considered.

Without data, appropriate policies and programs cannot be developed to address and prevent child protection issues for parents with disabilities and to meet the needs of children and families involved in the out of home care system. Advocacy for Inclusion is concerned that a lack of acknowledgement of people with disabilities as parents and the particular barriers they face will result in the continued exclusion of people with disabilities as valued family participants under Outcome 2 of the National Disability Strategy.

Article 31 of the CRPD features Statistics and Data Collection; yet, it is evident that the lack of data to support the implementation of the Convention is universal.⁶ It is difficult for Australia to report on CRPD implementation without benchmarking critical data, despite the UN making it clear that Australia must develop nationally consistent measures for data collection and public reporting of disaggregated data across the full range of obligations contained in the CRPD.

There is no evidence of action in the area of data collection centred on people with disabilities in prisons, child removal from people with disabilities, and levels or types of guardianship. There is no data collection in the ACT on the nature of recidivism, disaggregated by disability, so there is no way of understanding whether disability is a factor in that recidivism.

There has been no systematic data collection by the Australian Government, or by state and territory governments unless referred to academic data conducted in research analysis and this is not enough to develop a clear, national picture. Australia needs a more robust picture to better understand the epidemic of people with disabilities in the justice system, and to analyse measures and outcomes to reduce marginalisation and inequality under Outcome 2 of the National Disability Strategy.

Recommendation 1: Nationally consistent data collection on people with disabilities in the criminal justice system is an essential element to guiding policy development in eliminating overrepresentation of people with disabilities entering the justice system.

Recommendation 2: Ensure all criminal justice agencies in each jurisdiction to monitor and evaluate the participation rates of people with disabilities as victims of crime, witnesses and offenders as equal participants in the justice system.

Recommendation 3: Request a system for data collection about the disability status of parents and children subject to child protection interventions in each Australian jurisdiction as a useful addition to policy makers and advocacy organisations involved in child protection services and support.

⁶ Committee on the Rights of Persons with Disabilities (2013) Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013); see UNDoc: CRPD/C/AUS/CO/1

Recommendation 4: At a national level, the *National Disability Strategy 2010-2020* is to ensure national data monitoring of guardianship rates, including the type and level of guardianship.

Recognising Marginalisation in the Justice System

People with disabilities are placed at an extreme disadvantage when interacting with justice systems – whether as victims, offenders or as parents, they are victimised, wronged or discriminated against, caught up in inadvertent processes of criminalisation, or simply excluded from accessing mechanisms and supports necessary to achieve just legal outcomes. Governments have failed to implement strategies and recommendations to address Outcome 2. This means Australia is failing to implement several articles of the CRPD.

Justice processes, inflexible systems and procedures often fail to respond to a person's disability and their associated needs or to identify their disability needs, and this leads to discrimination against them. For instance, being assessed as having cognitive impairment, and subsequently being found unfit to plead, directly contributes to the indefinite detention of people with disabilities in prisons and within the justice system.⁷⁸

The ACT criminal justice system, as with other Australian jurisdictions, engages with a person's disability at the end of their trial period, when it finally assesses their fitness to plead, rather than at the front of the process when police intervention occurs. Rather than recognising and responding to their disability at the point of entry into the justice system (when arrested), it is left until a point close to the end before imprisonment occurs. A very small number of people with disabilities⁹ are able to access an advocate through the poorly funded National Disability Advocacy Program.¹⁰ Advocacy for Inclusion each year turns away more than triple the number of people than we are able to support. This has been the case for many years due to poor funding and a lack of recognition of the benefits of independent advocacy.¹¹

Most people with disabilities are not supported to participate as equals in their own justice process; instead, these processes further marginalise them and reinforce their "wrongness". There is no presumption of support and justice systems, and agencies are ill-equipped to accommodate disability. This leaves a gap in response, but it also leaves a gap in implementation of the National Disability Strategy. There is also a common assumption that the NDIS will address ALL issues faced by people with disabilities in the justice system by addressing marginalisation in areas of reasonable support, accommodation and employment – but it cannot address the systemic issues faced by people with disabilities in everyday circumstances when in contact with the police or parole system. The NDIS is not a fix-all, rather it must be recognised as a single dot point in the larger National Disability Strategy, and it is the National Disability Strategy that must be used as a tool to address the significant inequalities faced by people with disabilities in the justice system.

Recommendation 5: The Australian Government consider the ongoing establishment of the *National Disability Strategy 2010-2020*, and its commitment to Outcome 2 to be required to work in collaboration with existing and emerging state and territory justice mechanisms for improvement.

Recommendation 6: Ensure an equal process to justice is achieved in all Australian jurisdictions by improving systemic barriers to justice for people with disability through the National Disability Strategy, including legal capacity for both offenders and victims, supported decision-making processes, parenting and representation in the justice space.

⁷ Aboriginal Disability Justice Campaign, 'Position Statement on the Inappropriate Incarceration of Aboriginal People with Cognitive Impairment', (Position Paper, People With Disability Australia, October 2008) <www.pwd.org.au/systemic/adjc.html>.

⁸ Sotiri, M, McGee, P, & Baldry, E (2012) *No End in Sight. The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*. Sydney: University of NSW.

⁹ The current resource available in the ACT equates to less than 40 people per year supported with justice processes.

¹⁰ Department of Social Services (2015) *National Disability Advocacy Programme (NDAP)*. <https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/national-disability-advocacy-program-ndap>

¹¹ Advocacy for Inclusion (2015) *Submission to the Senate Inquiry into community sector funding*. <http://advocacyforinclusion.org/index.php/2014-09-22-05-11-32/publications-home/funding>

Recommendation 7: The National Disability Strategy to address the presumption of support for people with disabilities in the justice system under legislative reform to better recognise disability and the need for reasonable adjustment for any participant in the justice system, whether victim, advocate or offender.

The Need for Equal Participation in the Justice Process

The systemic barriers to justice experienced by people with disabilities extend across a range of areas.¹² In the ACT, people with disabilities have significantly higher prevalence of legal problems overall and substantial, multiple and diverse legal problems.¹³ People with disabilities are the only disadvantaged group with significantly lower levels of finalisation of legal problems.¹⁴ A large body of research documents and analyses the over-representation of people with disabilities in criminal justice systems.¹⁵ ¹⁶ During arrest and questioning, people with cognitive disabilities often face barriers to understanding their legal rights, including their right to silence, particularly where no specific communications support is made available during the process.¹⁷

The barriers that prevent people with disabilities participating fully in legal and justice system processes include:

- a) communication and cognitive barriers associated with giving instruction to legal representatives;
- b) costs associated with legal representation;
- c) difficulties accessing necessary support, adjustment or aids;¹⁸ (a shortage of funding to legal assistance services severely undermines their capacity to meet the legal needs of specific and vulnerable groups, in particular people with disabilities);¹⁹
- d) highly formalised and ritualised procedures and complicated legal language that people with cognitive disabilities find confusing, incomprehensible, alienating or intimidating;²⁰ and,
- e) cognitive and/or sensory impairments require extra time and specialist assistance to address.

These barriers are likely to influence the sentencing stage, and therefore contribute to the high number of prison orders imposed on people with disabilities.²¹ In the first instance, disability may not be readily evident

¹² Coumarelos, C. et al. (2013), *Law and disorders: illness/disability and the experience of everyday problems involving law*, Justice Issues Paper 17. Law and Justice Foundation of New South Wales..

¹² Ibid, 19.

¹³ Ibid. xv.

¹⁴ Ibid. xix.

¹⁵ Baldry, E. and Russell, S. (2017), *The Booming Industry Continued: Australian Prisons: A 2017 Update*, UNSW.

¹⁶ Australian Human Rights Commission. (2014). *Equal before the law: Towards disability justice strategies*.

<https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>. See also Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings* (2014).

Queensland Advocacy Incorporated (2015) *dis-abled Justice: Reforms to the justice for persons with disability in Queensland*. NSW

Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system*. Intellectual

Disability Rights Service, (2008) *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders*

with Intellectual Disability from the New South Wales Local Courts System. Brown, S. and Kelly, G. (2012) *Issues and inequities facing*

people with acquired brain injury in the criminal justice system: Report prepared for Victorian Coalition of ABI Service Providers Inc.

(VCASP). Cockram J, (2005), *Equal justice? The experiences and needs of repeat offenders with intellectual disability in Western*

Australia. Activ Foundation Inc.

¹⁷ Bartels, L. (2011). *Police Interviews with Vulnerable Adult Suspects*. Research in Practice Report No. 21. Australian Institute of

Criminology, Canberra, ACT. 13p.

¹⁸ Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws – Final Report*, ALRC Report 124, p192.

¹⁹ The Law Council of Australia (2014) *Submission to Inquiry into Equality, Capacity and Disability in Commonwealth Laws*. Office of

the Public Advocate Victoria (2011) *Submission to the Inquiry into Access to and Interaction with the Justice System by People with Intellectual Disability and their Families and Carers*, 20-21.

²⁰ Parliament of Victoria Law Reform Committee (2013) *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers- Final Report*. quoting the Submissions of the Legal Services Commissioner, Villamanta Disability Rights Legal Service, Victorian Advocacy League for Individuals with Disability Inc xxiv, 103, 178, 205.

²¹ Cockram, J. 'People with an Intellectual Disability in Prisons' (2005) 12 *Psychiatry, Psychology and Law* 163, 170.

and police, and other first responders, often fail to identify its presence.²² In most circumstances, disability status is not questioned, for data collection purposes or otherwise, so appropriate responses remain absent.

Recommendation 8: The Australian Government to work with state and territory governments to explore initiatives in the creation of an assessment protocol that assists police, court officials, law professionals and child protective agencies in identifying people with disabilities. Where identified, it will need to be demonstrated that all reasonable steps have been taken to avoid outcomes of imprisonment, child removal and removal of independent decision-making rights.

The current system works somewhat retrospectively. Once a legal process has reached a certain point, late in the proceedings, a great deal of effort is then put into assessing a person's legal capacity. Once a person with disability and their capacity to participate is called into question, the final stages of the case often progress differently. In our experience, when people with disabilities do access legal representation, we find that law professionals are ill-equipped to respond to particular individual needs of people with disabilities; for example, allowing the client time to process information, or communicating in ways that support their comprehension and involvement. People with disabilities may need:

“more time to understand and answer questions or... a support person to explain things to them and ensure that they are not overwhelmed by the stress of a new and confronting situation (like a court or police station)”²³

Current justice processes, including meetings with legal representatives, do not allow for the amount of time that is required to ensure full participation by a person with cognitive or communication barriers. The need for support is not considered – instead, legal presumptions and processes are applied to remove or downgrade the client's legal personhood, such as through substitute decision-making (guardianship).²⁴

Lawyers often prefer to speak with family members instead of directly to the person with disability about their case, because it saves time. Unfortunately, this also results in people with disabilities not being directly represented or heard, and as such their rights are discarded. Many people with disabilities tell Advocacy for Inclusion that they do not understand what is happening, have not had it explained to them, and are overlooked in favour of guardians when seeking information because of communication barriers or a need to access information in a more appropriate format for them.

In child protection cases children are removed from their families on the basis of parental disability and lack of disability responsive parenting supports. We know this from our direct frontline advocacy experience, as well as from research literature²⁵. Advocacy for Inclusion has experience with parents who have maintained positive relationships with their children, despite them being under 18 year orders, and whose children have expressed a wish to return to the care of their parent. However, because the child is on 18 year orders courts are extremely reluctant or unwilling to consider restoration of custody, and child protective agencies are unwilling to explore how the parent might be supported despite access to support funds under the NDIS and the ACT *Out of Home Care Strategy*.^{26 27 28} Any further justice process to review 18 year orders is ruled out, despite the NDIS now being available, and legal assistance is denied as unlikely to succeed.

²² Susan Hayes, 'A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities' (2005) 17 *Current Issues in Criminal Justice* 69, 71. M Henshaw and S Thomas, 'Police Encounters with People with Intellectual Disability: Prevalence, characteristics and challenges' (2011) *Journal of Intellectual Disability Research* 1.

²³ Fogarty, B. (2010) 'Improving legal representation for people with intellectual disability', *Precedent* 96.

²⁴ The current review of the *Guardianship and Management of Property Act 1991* has illustrated the vital need to overhaul ACT laws around adults making decisions. ACT Law Reform Advisory Council (2015) *Tell us what you think – Adults making decisions in the ACT: Reform of guardianship arrangements for adult people with disabilities in our community - Response Booklet*.

²⁵ McConnell, D., Llewellyn, G., & Ferronato, L. (2002). Disability and decision-making in Australian care proceedings. *International Journal of Law Policy and the Family*, 16(2), 270-299. doi: 10.1093/lawfam/16.2.270

²⁶ ACT Community Directorate (2015), *Out of Home Care Strategy*, http://www.communityservices.act.gov.au/__data/assets/pdf_file/0009/682623/CSD_OHCS_Strategy_web_FINAL.pdf

²⁷ Advocacy for Inclusion (2013) *Counting them in: Parents with disabilities and the ACT Child Protection System, Response to the Community Services Directorate 'Out of Home Care Strategy' Discussion Paper 2015-2020*,

²⁸ Advocacy for Inclusion (2014) *Supports for Parents with Disabilities and the NDIS*, http://www.advocacyforinclusion.org/Site%20Data/Publications/parenting/Supporting_parents_with_disabilities_and_the_NDIS_May2014FINAL.pdf

There has been no attempt in the ACT to address the high levels of removal of children from parents with disabilities. This remains another failure to address key elements of Outcome 2 of the National Disability Strategy.

Assumptions are made that people with disabilities are unable to be engaged or participate, to make a credible statement or argument, or give adequate evidence in a justice process, even with supports. Advocacy for Inclusion finds that police officers, lawyers, child protection staff and court officials do not have specific skills for working with people with disabilities, despite the best of intentions, and that more training and attention is required in these areas. Nor has this area of specific training been addressed in the National Disability Strategy during the first seven years of its implementation. Justice system workers focus on applying their specialist area of expertise within law enforcement and social protection, and this is as it should be; however, these processes must also be accessible to people with disabilities as offenders, parents or victims. People with disabilities should not be denied equal access to justice for simply not understanding their conditions, social expectations or because they are a victim of crime.

Recommendation 9: Develop a national training mechanism targeted at police, court officials, law professionals and child protective agencies on responding to people with disabilities in the different stages of justice processes, engaging in self-advocacy and support mechanisms to reduce the number of people with disabilities in the justice system.

Recommendation 10: Training targeted towards police, court officials, law professionals and child protective agencies needs to ensure national consistency with training levels to be conducted in collaboration with people with disability and the disability sector, with a view of increasing requirements to a mandatory level to understand and acknowledge disability at the front end of justice processes.

1. Being an offender

Shifting the support emphasis to the beginning of any justice process, by assuming that appropriate communication supports must be provided at the time of initial contact will ensure that people with disabilities enjoy effective equal access to justice at all stages of their legal process. It will also support the implementation of Australia's obligations under the *Convention on the Rights of Persons with Disabilities* Article 13, which insist that all people with disabilities have a right to equality of access to justice, and reasonable accommodations are made in the legal process to ensure effective participation of persons with disabilities in the justice system.²⁹

It is time to disrupt the Australian criminal justice system to address the overrepresentation of people with disabilities as a means to achieving a fairer community under the National Disability Strategy. Between 2014-2015, the ACT justice system spent \$304.26 per prisoner in the AMC per day in open imprisonment plus periodic detention.³⁰ Although the cost has been lowered since the 2013-2014 release of expenditure from \$396 per prisoner,³¹ the ACT is still spending more on prisoners than the rest of Australia. In our experience, the overrepresentation of people with disabilities, which includes Indigenous people with disabilities, in the ACT prison structure is costing the ACT Government a large sum of money, particularly when the problem could be readily addressed by using specialist disability advocacy services as an early intervention mechanism.

The frontline experience of Advocacy for Inclusion illustrates that the benefits to a person with disability of accessing advocacy services are enormous. Recently we completely disrupted our advocacy delivery to

²⁹ United Nations *Convention on the Rights of Persons with Disabilities* articles 12 and 13, http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf

³⁰ Productivity Commission (2016) Report on Government Services (Corrective Services), table. 8A.7, p.55

³¹ Thomas, J (2015), 'How much does it cost to keep people in Australian jails?', SBS News, 2nd February 2015, <http://www.sbs.com.au/news/article/2015/02/02/how-much-does-it-cost-keep-people-australian-jails>

develop a wraparound³² intensive model which provides a supportive framework to someone from their first engagement with the justice system, through imprisonment, until they reintegrate into the community. With several significant recent successes including preventing imprisonment, it is clear that this approach has a great deal to offer the ACT community and other jurisdictions, and most importantly the right of people with disabilities to reasonable adjustment from the system.

By shifting the support emphasis to the beginning of any justice process and assuming that appropriate communication supports must be provided at the outset for any person whose legal capacity is in question, will provide a more holistic response to all people including people with disabilities. It will also align more readily with Australia's obligations under the *Convention on the Rights of Persons with Disabilities* articles 12 and 13, which insist that all people with disabilities have a right to equality of access to justice through holistic advocacy.³³

Case study 1

Robert has cognitive and physical disabilities. He has been engaged with the criminal justice system in the ACT for over 10 years. Robert has been working with Advocacy for Inclusion for one year and has been piloting the new intensive advocacy approach for nine months. During his first six months of receiving advocacy, he had multiple bail breaches, custodial periods in the ACT Alexander Maconochie Centre, police interventions and court appearances.

In the most recent incident, he was charged with assault, arrested and bailed to appear in court.

Robert has become increasingly frustrated with the police approaching him in the community, keeping him in a cell as a measure of 'safety' and not explaining to him what his rights or restrictions are as listed in his bail conditions. Robert can't understand why he keeps being picked up by the police and he wants to confront them about his treatment.

According to Robert, the lawyers involved in his case had made assumptions about his disability when it came to whether he was 'fit to plead'. They also did not have the time to explain his case in full to Robert, or in a way that he understood. Effectively, Robert was excluded from participating in his own legal defence.

Working with Robert to explain the court and police processes, his advocate outlined his rights in Easy English using a guide developed by Advocacy for Inclusion. She also used this as a tool to explain the lawyer's motivations for asking certain questions and to clarify what the presiding judge was ordering. For the first time, Robert finally understood what was happening, and he has attributed this to having advocacy support. As a result, Robert has not breached his bail or been taken to the AMC for six months.

Robert has engaged with the new wrap-around intensive model of advocacy offered by Advocacy for Inclusion and has been supporting directly to communicate through individual advocacy while being trained in specific skills like emotional responses and assertiveness by the self-advocacy training team. In less than one year, Robert understands his rights and his bail conditions due to the advocacy team working closely with him and other services. He is able to abide by the bail conditions and has not returned to the AMC.

This case study is an example of the importance of the holistic model of individual advocacy that we have devised, piloted, and rolled out with significant success. A person with disability who is supported to participate in their justice process from the outset will be in a better position to instruct their lawyer, respond to police or prosecution staff, and ultimately better understand any outcome. A person who is more engaged and understanding of any process and outcome will also be a person who is better able to accept that outcome,

³² While we use the term wraparound, this should not be confused with existing terminology which associates "wraparound" with case management. Advocacy is not case management. We are describing an intensive blend of individual and self-advocacy delivery which provides an holistic response to a person to address their barriers to equality.

³³ United Nations *Convention on the Rights of Persons with Disabilities* articles 12 and 13, http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf

whatever it is.³⁴ This is a rarity in the current system as the assumption is made that the person cannot participate, rather than on supporting them to participate as an equal.

Case study 2

Bob was supported by a disability advocate throughout his court proceedings. The advocate recognised the need to rewrite Bob's bail conditions into Easy English as Bob kept breaching his conditions unintentionally due to not understanding or remembering them. The court was really confusing, and Bob didn't understand what was being said as it all happened really fast and there were too many things to remember at once.

When the advocate wrote the Easy English bail conditions for him, they still covered all the information that the court was ordering, but they suddenly became clear and made sense. She also spent time explaining them in an environment that was less scary.

Bob had been unaware that he must remain in his place of residence as a bail condition that he had 'agreed' to during the complex court proceedings. The advocate also explained this to Bob so that he understood. She then explained to Bob that he could be arrested if he was found to be in breach of his bail conditions. This helped Bob to understand why he kept getting picked up by police when he was trying so hard to do the right thing.

Because he had an independent disability advocate Bob has stopped breaching his bail conditions because he now understands them.

Recommendation 11: Develop mechanisms to increase Easy-English publications of justice processes in all jurisdictions, including bail conditions and charges for offenders with disabilities to fully understand and abide by legal processes.

Several recent success stories arising from the new Advocacy for Inclusion model of advocacy illustrate that this new wrap around intensive approach is highly effective in reducing marginalisation by lifting equality of participation in justice process for people with disabilities. These successes prove that simple specialist responses can save the justice system court and police time, legal and police resources, and imprisonment rates. In one recent month Advocacy for Inclusion prevented the imprisonment of two people with disabilities with previous high exposure to the justice system.

Nothing has been implemented by either the ACT or Australian Governments to ensure more effective responses from the criminal justice system to people with disability who have complex needs or heightened vulnerabilities. There have been no measures or attempt to support people with disabilities that have been released from custodial facilities to reduce recidivism since the introduction of the National Disability Strategy seven years ago.

Outcome 2 of the National Disability Strategy has been largely unaddressed.

It is vital that emphasis on early identification, diversion and support be offered, and put in place at the beginning of any justice process so that implementation of Outcome 2 can commence.

2. Being a victim

Advocacy for Inclusion suggests a new presumption that all people with disabilities require access to independent specialist disability advocacy support when involved in criminal investigations and processes. This is true for both victims with disabilities and people with disabilities who come into contact with the justice system. For victims with disability, there is limited access to legal representation, and many people with

³⁴ For an examination of how being supported to participate in legal processes affects perceptions of fairness and consequently wellbeing, see: Beaupert, F. (2009) 'Mental Health Tribunal Processes and Advocacy Arrangements: "Little Wins" are No Small Feat' 16 *Psychiatry, Psychology and the Law* 90, 93. Winick, B.J. (1999) 'Therapeutic Jurisprudence and the Civil Commitment Hearing' 10 *Journal of Contemporary Legal Issues* 37, 54. Tyler, T. R. (1992) 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' 46 *Southern Methodist University Law Review* 433.

disabilities do not know their rights, so do not ask for reasonable adjustments.³⁵ Often it is family members who are given the choice of whether or not to proceed and not the person with disability who has been the victim of a crime.³⁶

Many people with disabilities, in particular, people with cognitive disabilities and psychosocial disabilities also report that they are being interviewed without appropriate support persons. More generally, the Judicial Commission of NSW has observed:

People with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have preconceived views regarding a person with an intellectual disability. For example, they may fail to attach adequate weight to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability.³⁷

The failure of the justice system to identify disability, provide reasonable accommodations and adjustments or take disability into account at the beginning of the process, compounded with negative attitudes and assumptions about people with disabilities often results in victims with disabilities being seen as not credible and their evidence as not reliable.³⁸ For victims with disability this means that police do not proceed with charges.

Case study 3

An advocate at Advocacy for Inclusion worked closely with Zafir and his mother, who is his legal guardian, throughout a police investigation involving a residential support worker. Zafir became visibly distressed at the police station when his mother was being questioned, indicating that he understood that they were discussing the worker's violence against him.

Although Zafir could not explicitly articulate his personal wishes in terms of pursuing the case at the time, Zafir's mother was determined to follow this through for him and for other people with disabilities who may have been supported by the worker at the time and in the future. Despite two support workers willing to come forward as witnesses, the police decided not to pursue charges against the worker and instead gave him a warning. The police said that the reason they will not pursue was that there was not enough evidence.

It was decided that Zafir was not a reliable witness because of his cognitive and communication impairments, and he could not make a statement in conventional formats. The police noted that the worker expressed significant remorse and also suggested that the process would be too stressful for Zafir and his family³⁹. Zafir continues to indicate that he wanted the worker to face the consequences, but there is no mechanism available to make this happen.

Advocacy for an individual with disability making the first step to engage with the justice system is crucial. Victims with disabilities must not be disadvantaged because they face barriers to participation in the justice process without support, nor should they be denied justice simply because supporting them is perceived to be difficult.

³⁵ Australian Human Rights Commission and University of NSW roundtable: Access to Justice in the Criminal Justice System for People with Disability (22 April 2013); Claire Hansen, Submission 13.

³⁶ Australian Human Rights Commission Access to Justice Public Meeting, Canberra (26 June 2013); ACT Disability, Aged and Care Advocacy Service, Submission 20; Communication Rights Australia, Submission 73.

³⁷ 'Equality before the Law Bench Book' (Judicial Commission of New South Wales, 2006) 5301

³⁸ New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) p.25

³⁹ Excerpt from Advocacy for Inclusion' submission to the *Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings*, July 2015
http://www.advocacyforinclusion.org/Site%20Data/Publications/Submissions/2015/Submission_to_Senate_Inquiry_into_institutional_violence_against_FINAL.pdf

For victims of crime, there is almost nothing being done to ensure that they are active participants in a fair and equitable process. Reasonable accommodation within the police and courts process remains non-existent due to lack of training for police, law professionals, court officials and child protection workers to make accommodations where communication may be a barrier for people with disabilities to engage and participate in justice processes fairly and equitably.

Recommendation 12: Establish a national audit and assessment to improve the accessibility of the criminal justice system for victims with disabilities. This must take into account intersecting factors such as age, gender, racial, cultural and linguistic status.

In Outcome 2, the National Disability Strategy 2010-2020 specifies that people with disability need to be safe from violence, exploitation and neglect. Advocacy for Inclusion has repeatedly highlighted the circumstances of people with disabilities in institutional settings who face significant levels of violence and are more likely to be victims of crime. These locations are specifically hazardous for women who face increased risks.^{40 41}

The ACT Government has welcomed the new *The Family Violence Act 2016* to provide victims of violence in domestic relationships a “greater level of protective response”. The new Act does not recognise the household relationships common among people with disabilities as “domestic” and consequently excludes them from this “greater level of protective response”. For example, relationships in disability supported accommodation (such as group homes) and informal arrangements such as home-sharing. People in these relationships are not covered by ACT domestic violence legislation or that of most Australian jurisdictions.

Whilst these relationships are not covered in the new legislation, people with disabilities living in supported accommodation are at even higher risk. In these settings, they often live with one or more co-residents on a permanent basis, interact daily, build highly personal relationships, share living space, groceries, and jointly own furniture. They also share this space with paid support workers or staff for up to 24 hours a day. These are undoubtedly domestic relationships, which can become violent. Violence occurs between co-residents and is also perpetrated by support staff against people with disabilities. People with disabilities can become unsafe in their own homes.

Although violence, abuse and neglect also happen to people with disabilities in the general community, such as in private homes and mainstream schools, the institutional nature of disability specific settings acts as an incubator for violence. The idea that shared living arrangements in group homes run by service providers protect people with disabilities is a common and dangerous misconception. Although traditional large-scale institutions have almost disappeared from the Australian landscape, institutional practices have been carried over to contemporary disability support systems and contexts.⁴² All institutional models of support, including respite houses, smaller group homes, day centres, sheltered workshops, special schools, etc. – are inherently flawed and must be phased out.

Australian Governments must recognise that control and choice for people with disabilities is an important violence prevention strategy. Where people with disabilities have no control over where and with whom they live, this fosters unhealthy power dynamics and violent relations, and it traps people with disabilities in violent households which they cannot escape because their access to adequate support is tied to their co-resident.

⁴⁰ Australian Bureau of Statistics. (2012). *Personal Safety, Australia, 2012 - 44906.0*. Table 11 – Experience of violence during the last 12 months, Disability Status. People with disability were found to be more likely to experience violence (a physical or sexual assault or threat) in the preceding 12 months. It was noted that those with severe communication disabilities would be under represented by the survey and people residing in non-private dwellings, such as institutions, were excluded – therefore, the populations of people with disabilities most likely to experience violence were not captured by this survey.

⁴¹ Dowse, L., Soldatic, K., Didi, A., Frohmader, C. and van Toorn, G. (2013) *Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia. Background Paper*. Hobart: Women with Disabilities Australia; Frohmader, C Dowse, Frohmader, C., Dowse, L. and Didi, A. (2015) *Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective*. Hobart: Women with Disabilities Australia.

⁴² Advocacy for Inclusion (2015) Submission to the Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings G:\Systems Advocacy\Final Publications\Submissions\2015\Submission to Senate Inquiry into institutional violence against FINAL.pdf

With three years remaining, the *National Disability Strategy 2010-2020* brings new opportunities to finish the process of deinstitutionalisation that began decades ago, because it provides support attached to people with disabilities as they go about their lives in the general community under the justice framework. However, true deinstitutionalisation requires a significant amount of work outside of the National Disability Strategy to enable real inclusion. This includes broader structural change such as better access to the justice system. Without opportunities equal to that of the general population, people with disabilities will continue to find themselves forced into living, support, and work arrangements, with no choice and control and very limited access to justice. They will continue to face powerlessness and therefore remain at heightened risk of violence, abuse and neglect.

Importantly, a thorough national investigation into violence against people with disabilities in institutional settings is a priority concern, which due to the complexity of the issue could only be achieved by a Royal Commission. The Australian Government has recently rejected this option.⁴³ The Senate Committee undertaking the inquiry into violence and abuse of people with disabilities faced a number of hurdles in creating an accessible and adequate Inquiry due to the nature of the matter at hand, and we fear the vast majority of people with disabilities in institutional settings continue to be ignored. A Royal Commission would enable a desperately needed deep analysis; a structured capacity to reach out to the people it seeks to hear from, better measures for accountability of services and individual perpetrators, and robust scrutiny into this widespread yet mostly hidden problem.

Recommendation 13: Creation of oversight and accountability mechanisms, such as a statutory complaints body, and community based disability advocacy remain vital in helping to balance out power inequalities, and to support people with disabilities to have their voices heard in a context that is currently extremely inequitable and challenging in the justice process.

Recommendation 14: Establish a Royal Commission into the abuse, violence and neglect of people with disabilities.

3. Being a parent

Australia is a signatory to the CRPD, which places obligations on Governments to fulfil the right of parents with disabilities to care for their children - with appropriate supports. Parents with disabilities are currently an incredibly marginalised group in the ACT. Parents with disabilities have high exposure to the child protection system.⁴⁴ In 2014-2015 the annual real expenditure in the ACT *Out of Home Care* system amounted to \$51,165.42 per child⁴⁵ for 671 children in care.⁴⁶

This is the most costly solution available, yet it remains the most common response to parents with disabilities. Accessible resources that meet the needs of this group are non-existent. In several Advocacy for Inclusion cases, children have been removed from parents because no appropriate support was available to help them to care for their children. In all these cases no supports were tried or offered before removal was undertaken.

The number of parents with disabilities that face child removal by child protective services is very high, yet data remains uncollected. For parents in the family court responding to child protection intervention, disability is simply not considered, and they face removal of their children as a result of being unable to participate as equals in a very complex legal process. For almost a decade, Advocacy for Inclusion has been highlighting

⁴³ ABC News (2017) 'Royal commission into alleged abuse, neglect of people with disabilities off the table, Government says', <http://www.abc.net.au/news/2017-03-03/royal-commission-into-abuse-of-disabled-people-ditched/8320364>; DPO Australia (2017), 'Media Release: Disability Groups Slam Government Decision Not to Hold Royal Commission Into Violence and Abuse', <http://dpoa.org.au/news/disability-groups-slam-government-decision-not-to-hold-royal-commission-into-violence-and-abuse/>

⁴⁴ See Advocacy for Inclusion. (2013). Counting them in: Parents with disabilities and the ACT Child Protection System. http://www.advocacyforinclusion.org/images/Publications/housing/Advocacy_for_Inclusion_Response_to_CSD_Out_of_Home_Care_Strategy_2015-2020_Dec2013_FINAL.docx

⁴⁵ Productivity Commission (2016) Report on Government Services, Chapter 15 Child Protection Services, table 15.13 <http://www.pc.gov.au/research/ongoing/report-on-government-services/2016/community-services/child-protection/rogs-2016-volume-f-chapter15.pdf>

⁴⁶ Child protection Australia 2014–15, table 15A.18 p.150

concerns regarding the disproportionate removal of children from the care of their parents where one or both parents have disability, in particular, cognitive disability.

In our experience, there have been no outcomes from the *National Framework for Protecting Australia's Children 2009-2020* in the enhancement of protecting parents with disabilities and their rights to be recognised as a parent. Despite best intentions of national strategies, the outcomes and recommendations are yet to be met and implemented in full. This means that Outcome 2 of the National Disability Strategy is also not being implemented. It is suggested that children and families who come in contact with the child protection system often share common marginalisation and demographic characteristics^{47 48 49 50 51 52}. Parents with cognitive disabilities are over-represented in the child protection system and face significant barriers to equitable participation in legal processes arising from it.⁵³ In our experience, children have been removed from parents because no appropriate disability support was available to help them to care for their children. In all these cases no supports were tried or offered before removal was undertaken, despite the NDIS now being available.

Advocacy for Inclusion has observed a number of concerning transparency and accountability issues, particularly between agencies and parents with disabilities, and their children being removed from their care. Parents with disabilities facing child protection orders are often left in the dark about how their case is progressing and are not provided the support they need to understand and engage in the process. Child protective services do not provide materials in plain or easy English. A high proportion of our advocacy consumers have children removed and placed into a Final Care and Protection Order of 18 years (under ACT legislation) removing all parental responsibility or care from the parent, without ever truly understanding what it is that they have done wrong and how they could have changed it. Most simply understand that it is about their disability and they are simply “wrong”.

Given the lack of awareness of the needs of parents with disabilities in the child protection system, parents' ongoing disability support needs at the end of a maximum 12 month order will likely be misunderstood as a lack of progress or an inability to address the issues that brought their child into care. This misunderstanding then results in children being permanently removed from the care of parents, and placed into permanent arrangements (adoption), simply because appropriate disability supports were not provided. This is unfair and discriminatory to parents that do not have support made available to enable them to perform their parenting role as a first response to their child being born.⁵⁴

Rather than working with parents with disabilities to provide early intervention supports, via the fully available (in the ACT) National Disability Insurance Scheme (NDIS), and to identify what long term support will result in maintaining family cohesion, current systems use costly court processes and lengthy orders for out of home care, and subsequently adoption, as their first response.

The provision of advocacy support represents a much less costly response and also removes the marginalisation and discrimination inherent in the current system. Under the National Disability Strategy and needed justice reform, Australian jurisdictions, including the ACT, could be saving substantial funds were they to recognise their obligation to support the right of parents with disabilities (Article 23) and turn existing resources towards early intervention and ongoing supports.

⁴⁷ Lamont, A., & Bromfield, L. (2009). *Parental intellectual disability and child protection: Key issues*. National Child Protection Clearing House, (31), 1-18. www.aifs.gov.au/nch/pubs/issues/issues31/issues31.html

⁴⁸ McConnell, D., Llewellyn, G., & Ferronato, L. (2000). *Parents with a disability and the NSW Children's Court*. Sydney: University of Sydney.

⁴⁹ Booth, T., & Booth, W. (2005). Parents with learning difficulties in the child protection system: Experiences and perspectives. *Journal of intellectual disabilities*, 9(2), 109-129

⁵⁰ Mildon, R., Matthews, J., & Gavidia-Payne, S. (2003). *Understanding and supporting parents with learning difficulties*. Melbourne: Victorian Parenting Centre

⁵¹ Llewellyn, G., McConnell, D. & Ferronato, L. (2003). Prevalence and outcomes for parents with disabilities and their children in an Australian court sample, *Child Abuse & Neglect*, 27(3), 235-251. doi: 10.1016/S0145-2134(03)00004-8

⁵² McConnell, D., Llewellyn, G., & Ferronato, L. (2002). Disability and decision-making in Australian care proceedings. *International Journal of Law Policy and the Family*, 16(2), 270-299. doi: 10.1093/lawfam/16.2.270

⁵³ AIHW (2016) Child Protection in Australia 2014-2015, p.

⁵⁴ Counting them in: Parents with disabilities and the ACT Child Protection System.

http://www.advocacyforinclusion.org/images/Publications/housing/Advocacy_for_Inclusion_Response_to_CSD_Out_of_Home_Care_Strategy_2015-2020_Dec2013_FINAL.docx

Case study 2

Advocacy for Inclusion has been working with Mandy, a mother with a cognitive disability who has had two children removed from her care.

Mandy used an advocate to assist her in liaising with Child Youth Protection Services (CYPS) and the NDIS for support services to be established for herself, and her children. Both CYPS and NDIS had refused to collaborate with each other, and there had been a number of changes in caseworkers in CYPS, fracturing communication further.

Over six months the advocate worked with Mandy to ensure that she was supported to be an equal participant in proceedings with both CYPS and NDIS. The advocate assisted in communication, navigating available services and processes, ensuring support for attendance at case meetings, and providing referral to appropriate services. The advocate worked alongside Mandy, was guided by her expressed wishes, and assisted in achieving her desired outcomes. With the assistance of an advocate, Mandy is now confident in liaising with both organisations to gain support mechanisms.

Mandy is currently working through a plan for the restoration of one of her children now that she can rely on support services covered by the NDIS. One year ago she was facing 18 year final orders.

The NDIS has been available in the ACT for over two years. During that time Advocacy for Inclusion has pushed for protocols to be developed to ensure Child Protection Services engages directly with the NDIS whenever supports are required for a parent with disability to maintain custody of their children. This support is rarely called on by either agency, and both regularly fail to engage. We have intervened in numerous cases to bring the two agencies together so that custody can be retained, or in some cases restoration can be worked towards.

Recommendation 15: The *National Disability Strategy 2010-2020* must further advocate a provision to routinely collect demographical data from child protection service users nationally, including whether or not the parent/s and/or child have disability. This should be done along with the collection of other pertinent data such as cultural background to identify and address intersecting areas of disadvantage.

Recommendation 16: The Australian Government must acknowledge that parents with disabilities have disability specific support needs, to which Care and Protection Services of each State and Territory must be sensitive and responsive in order to prevent out of home care placements and promote successful restoration with these families.

4. Guardianship

Guardianship orders necessitate an imbalance of power, unequal access to legal assistance and uneven valuing of knowledge in both procedure and outcome.⁵⁵ The perception that guardianship only protects and cares for people with disabilities is unrealistic and must be challenged; there are numerous and harrowing examples where this is not the case.⁵⁶ Certainly in related issues of forced sterilisation and medical treatment, the concept of 'best interests' has been used to serve the interests of the carer, to the appalling detriment of a person with disability.⁵⁷ Guardianship can be the very tool used against people with disabilities, who are all the more vulnerable when their voice is not legitimised.

We have commended the ACT Government's recent Guardianship Act Review, and look forward to structures to implement flexible decision-making processes for people with cognitive disabilities in justice processes. The ACT does not systematically provide independent representation for people for whom a Guardianship Review

⁵⁵ Victorian Office of the Public Advocate, 2009, *Supported Decision Making Background Discussion Paper*, Melbourne

⁵⁶ Chartres, Op. Cit.

⁵⁷ Dowse, L. and Frohmader, C. 2001, *Moving Forward: Sterilisation and Reproductive Health of Women and Girls with Disabilities*, Women with Disabilities Australia (WWDA), Tasmania, Australia.

process is underway. In our experience, guardians for people with cognitive disabilities have also refused to appoint advocates or legal representatives even when people under guardianship orders request representation.

If a person under a guardianship order is not supported to understand the nature of the process and its legal implications, or properly notified of an upcoming review of an order, they have no real opportunity to put forward relevant evidence about changes in their lives or in their decision making skills; nor is there a chance for the person to receive independent legal advice, seek to be legally represented, or indeed to meaningfully engage in a legal process in which their fundamental legal rights are at stake.⁵⁸ This situation is not consistent with:

- “The right to equality before courts and tribunals and to a fair hearing” in Article 14 of the ICCPR⁵⁹
- the natural justice principles of civil and administrative law;
- “providing access by people with disabilities to the support they may require in exercising their legal capacity”, as expected in CRPD Article 12(3);
- the “access to justice” described by CRPD Article 13, which includes an expectation of procedural accommodations for people with disabilities “in order to facilitate their effective role as direct and indirect participants... in all legal proceedings, including at investigative and other preliminary stages.”

This lack of natural justice has been a major issue experienced by consumers at Advocacy for Inclusion. Once orders are made, the person with disability is placed in a position of extreme powerlessness. Until full implementation of the recommendations arising from the ACT Guardianship Act Review, we remain concerned about the rights of people with disabilities who are subject to guardianship proceedings and have not been offered legal representation, nor have any meaningful access to independent legal information or advice. In some cases, our individual advocates have organised to have this put in place for a consumer or we have been able to source pro bono legal representation to ensure that the person is able to be fairly and effectively engaged in the process. Unfortunately, such supports are difficult to source and are only available for the most difficult cases.

In its General Comment 32 on Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), the United Nations Human Rights Committee observes that:

*“The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way... States are encouraged to provide free legal aid in [civil/non-criminal] cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.”*⁶⁰

Guardianship matters do not currently attract the same “guarantee of legal assistance” as criminal proceedings, yet the rights and freedoms at stake for the individual are fundamental. Indeed, the potential restrictions on autonomy that a Tribunal may authorise in guardianship matters are analogous to those faced by a defendant in criminal proceedings. Therefore, we contend that whenever a person’s legal capacity is called into question before a tribunal (or court) there is a positive obligation on governments to not only allow the person to seek and access legal representation, but also to provide legal assistance to individuals who cannot afford it (or whose right to make financial decisions has been removed or limited in some way, whether in law or practice).

Although the ACT Government has voiced a commitment to a Guardianship Act Review process, it is vital that implementation work is undertaken in this area under Outcome 2 of the National Disability Strategy with only three years remaining of the Strategy. It is evident that ensuring support decision-making safeguards for all

⁵⁸ In this way, guardianship hearings are highly analogous to Tribunal hearings for mental health orders and reviews.

⁵⁹ *International Covenant on Civil and Political Rights* article 14

⁶⁰ United Nations Human Rights Committee (2007) *General Comment on Article 14 of the International Covenant on Civil and Political Rights*, Para 10. <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>

people who need them in place, including the accountability of guardianship and substitute decision makers, is necessary and needed to ensure that their equal participation to justice is acknowledged.

Recommendation 17: Legal representation needs to be standard, not rare. The Australian Government use the Outcome 2 of the NDS as a model to move away from substitute decision-making towards a nationally consistent supported decision-making model to ensure people with guardianship orders are provided their full right to equal participation in the justice process.

Recommendation 18: Increase collaboration between government and advocacy organisations, to develop a formal system that ensures all people subject to guardianship applications can readily access advocacy support, independently of the guardian, before, throughout and after a guardianship order is in place.

Recommendation 19: Ensure compliance with Article 12 of the CRPD by removing guardianship as an option to ensure that people with disabilities are given the right to make their own choices without coherence.

Conclusion

The National Disability Strategy 2010-2020 is in year seven of a ten year strategy and three years remaining. The section of Outcome 2 'Rights protection, justice and legislation' has seen no real action at either the ACT or national level. The number of people with disabilities in the prison system Australia-wide, including the ACT, is significant and acknowledged, yet there is no consistent national data collected on people with disabilities in the criminal justice system. Collecting national data will enable policy development in eliminating overrepresentation of people with disabilities entering and exiting the justice system.

Parents with cognitive disabilities continue to be over-represented in the child protection system and face significant barriers to reasonable participation in our justice system in child protection. The number of parents with disabilities that face child removal by child protective services is very high, yet data about disability remains uncollected.

Despite the impact on self-determination and civil rights of guardianship orders, there is no presumption of legal representation for those facing the imposition of substitute decision making orders. The rights of people with disabilities who are subject to guardianship proceedings and have not been offered legal representation are not engaging in a fair and equitable justice process.

There are no current comprehensive policies in place to address Outcome 2 of the National Disability Strategy. While this continues the over representation of people with disabilities across all areas of the criminal and civil justice system will continue. Without systematic data collection, Australia will struggle to understand the scale and nature of what it is facing and continue to disadvantage and marginalise people with disabilities in the justice process.