
Access to Justice in the Criminal Justice System for People with Disability

Australian Human Rights Commission

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Introduction

1. The Law Council is pleased to provide this submission to the Australian Human Rights Commission (the AHRC) in response to the Issues Paper on *Access to Justice in the Criminal Justice System for People With Disability* (the Issues Paper).
2. As outlined in Attachment A, the Law Council represents the 16 Australian state and territory law societies and bar associations and the Large Law Firm Group (collectively referred to as the “Constituent Bodies” of the Law Council). In this way, the Law Council effectively acts on behalf of some 59,000 lawyers across Australia.
3. The Law Council notes that the purpose of the Issues Paper is to obtain information about the experiences of people with disability, their families and carers in the criminal justice system, which will assist the AHRC in examining options to promote access to justice for people with disability.¹
4. The comments outlined in this submission reflect the views of members from the Law Council’s Access to Justice Committee, as well as a number of the Law Council’s constituent bodies, some of which have made separate submissions to the AHRC.

General comments

5. The Law Council welcomes the AHRC’s Inquiry and notes there are a number of factors underlining its importance and timeliness.
6. As a signatory to the United Nations Convention on the Rights of Persons with Disabilities (the UN Convention), Australia has undertaken to ensure certain minimum standards for protection of the rights of people with disability.
7. The UN Convention provides an important framework in which to consider the rights of people with disability in the criminal justice system. The Law Council considers that Articles 12, 13 and 15 of the UN Convention are of particular relevance to the matters raised in the Issues Paper, which include provisions for equal recognition before the law, access to justice and the freedom from exploitation, violence and abuse.
8. Notwithstanding Australia’s commitments under the UN Convention, most Australian jurisdictions have inadequate procedures, processes and infrastructure to ensure disabled people have equal access to justice and due process under law.

¹ Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with Disability*, Issues Paper (April 2013), p3.

9. In 2011, the NSW Law and Justice Foundation released a report² into the most comprehensive survey of unmet legal need anywhere in the world. The Legal Australia-Wide Survey examined unmet legal need nationally.
10. Its most critical findings were that:
 - (a) around 22 per cent of Australians aged over 15 years experience a legal problem each year; and
 - (b) people with a disability had high prevalence of legal problems overall, substantial legal problems, multiple legal problems and problems from all 12 problem groups.
11. Recent reports into hearing loss have also demonstrated the prevalence of hearing impairment among the general prison population and the lack of any programs or services in place to either identify or support those with hearing impairment at any stage of contact with the criminal justice system. There is a very real risk that this has led, and may again in the future lead, to miscarriages of justice.
12. Failure to address the incapacity of the criminal justice system to appropriately assess and divert disabled people into necessary treatment and support programs may result in a range of consequences, including wrongful imprisonment or detention, poor treatment within the criminal justice system, deteriorating health, injustice for disabled people and their families or carers and an overall failure to address the root-causes of offending, which significantly increases the likelihood of re-offending. This has a significant and quantifiable cost for the community which could be diminished significantly through investment in support programs and initiatives designed to improve access to and interaction with the criminal justice system.

Barriers to justice

13. The Issues Paper outlines five key barriers to justice experienced by people with disability who need communication supports or who have complex and multiple support needs. These are:
 - (a) Lack of availability of community support, programs and assistance to prevent violence and disadvantage and address health and social risk factors.
 - (b) People with disability do not receive support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.

² Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, August 2012, 'Legal Australia-Wide Survey', *Access to Justice and Legal Needs*, Vol.7, NSW Law and Justice Foundation
<http://www.lawfoundation.net.au/ljf/app/EDD640771EA15390CA257A9A001F7D08.html>

- (c) Negative attitudes and assumptions about people with disability often result in people with disability being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.
- (d) Specialist support, accommodation and programs may not be provided to people with disability when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead'). Instead, they are often indefinitely detained in prisons or psychiatric facilities without being convicted of a crime. This situation mainly happens to people with intellectual disability, cognitive impairment and people with psychosocial disability.
- (e) Support, adjustments and aids may not be provided to prisoners with disability so that they can meet basic human needs and participate in prison life. They often face inhuman and degrading treatment, torture and harmful prison management practices.

14. The Law Council considers that the barriers identified are appropriate. A further 'barrier' which could be acknowledged is *lack of awareness* about disability (or undiagnosed or unreported disability), which contributes to the failure of the criminal justice system to provide appropriate support and may lead to more adverse outcomes both at the stage of police contact and at every other stage, including trial, sentencing and during incarceration.

15. For example, in July 2011 a report into an investigation into hearing impairment among Indigenous prisoners within the Northern Territory Correctional Services found that:

"...more than 90% of Indigenous inmates had a significant hearing loss. Comments by inmates indicate that hearing impairment is often a significant disability in a custodial environment that contributes to the breakdown in communication with prison officers."³

16. This followed a finding by a Senate Inquiry in 2010 into hearing loss in Australia⁴ that hearing loss affects the vast majority of Indigenous prison inmates in all jurisdictions. Evidence presented to the Inquiry led the Committee to conclude that:

"The case has been made to the Committee's satisfaction that there is likely to be a link between hearing impairment and higher levels of engagement with the criminal justice system..."

"Poor communication at a person's first point of contact with the criminal justice system can have enormous implications for that person, and indeed for the integrity of the system as a whole. As has been noted above, the High Court has set a precedent that a conviction where the accused was not able to hear or understand the proceedings is not safe"⁵

³ Troy Vanderpole, Dr Damian Howard, *Investigation into hearing impairment among indigenous prisoners in the Northern Territory*, July 2011, page 3.

⁴ Senate Legal and Constitutional Affairs References Committee, May 2010, *Hear us: Inquiry into hearing health in Australia*, Australian Parliament.

⁵ Ibid, paragraph 8.103-8.104.

17. This is clearly an endemic and destructive issue. Indigenous Australians are incarcerated at over 14 times the rate of non-Indigenous people and make up 26 per cent of the overall prison population, yet only 2.5 per cent of the Australian population.
18. As demonstrated by the case examples in the Issues Paper, the justice system is sorely ill-equipped to provide humane and appropriate treatment for those deemed unfit to plead or stand-trial.
19. In this regard, the Law Council refers the AHRC to the *preliminary matters* raised by the Law Society of South Australia in its submission to the South Australian Attorney-General, in response to a discussion paper on *Improving the Criminal Justice System for People with a Disability*,⁶ which identifies:
 - (a) the different capacities in which disabled people must engage with the criminal justice system;
 - (b) the extent to which the criminal justice system is able to accommodate for diminished understanding or capacity to take part in a legal process on an equal basis with others; and
 - (c) the extent to which disability is or should be a relevant factor in automatic fines (such as traffic offences) or other strict or absolute liability offences.

Options for addressing barriers to justice

20. It is noted there are a number of measures which might be implemented to ensure better access to justice for disabled people under the criminal justice system, including:
 - (a) Specific training for police officers, legal practitioners, court registry staff, judicial officers and corrections officers in identifying and assisting or communicating with people with a disability;
 - (b) Development of protocols for adoption by corrections centres/prisons for management of inmates with disability, with specific provision for cultural and linguistic differences, and for Indigenous prisoners/detainees;
 - (c) Establishment , where they do not already exist, of specialist courts for defendants with a reported or suspected disability impacting on their culpability or capacity to engage with or understand ordinary court proceedings (noting the examples below);
 - (d) Having regard to the likely link between poor educational outcomes for those with a disability (including hearing impairment) and engagement in criminal behaviour, implementation of significant programs addressed at early

⁶ See

http://www.lawsocietysa.asn.au/submissions/130729_Improving_the_Criminal_Justice_System_for_People_with_Disability.pdf

intervention, assessment and support for students with disability, particularly in regional areas and Indigenous communities (and other areas where a high prevalence of sensory and other impairment has been recorded);⁷

- (e) Establishment of secure facilities to accommodate and treat those with mental or intellectual disability which may have contributed to their offence, or which may have made them unfit to stand trial (having regard to the examples given in the AHRC's Issues Paper in relation to Barrier 4);
- (f) Consider adopting a justice reinvestment approach to criminal justice in all jurisdictions, through the Council of Australian Governments and Standing Council of Law and Justice – with a specific focus on at-risk groups, including disabled people;⁸
- (g) Substantially increased funding for legal assistance services in order to enable those bodies to provide appropriate support, advice and representation for those with disabilities; and
- (h) Appointment of a national disability advocate's office perhaps linked or reporting to the Disability Commissioner, one of the functions of which could be to receive complaints or requests for assistance from disabled persons, their families or their carers, concerning adverse contact with the criminal justice system, and to make appropriate recommendations to the relevant authorities. That office might also have the function of coordinating with relevant public advocate or public guardian's office in each jurisdiction.

Different approaches and lack of coordinated service delivery

- 21. The Law Council notes there are a significant array of programs in various jurisdictions, directed at either diverting those with a disability or health concerns or providing appropriate rehabilitation in an effort to diminish the likelihood of re-offending.
- 22. The Law Council identifies below some court intervention programs in Victoria, Western Australia and Queensland, by way of example, which aim to address underlying causes of offending behaviour and encourage rehabilitation, in order to highlight the different approaches taken in these jurisdictions.
- 23. The Law Council suggests that the AHRC should consider how to promote better communication and integration between various existing programs, to enable the provision of individualised treatment and support plans for people with disability, particularly those who present with complex and multiple support needs.

⁷ Ibid, paragraph 8.102.

⁸ In this regard, consider the recent inquiry and report by the Senate Legal and Constitutional Affairs References Committee into the value of a justice reinvestment approach in Australia.
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2010-13/justice_reinvestment/report/index.htm

Victoria

Court Integrated Services Program

24. In Victoria, the Assessment and Referral Court List established by the Department of Justice and the Magistrates' Court of Victoria, divert accused persons with mental illness and/or cognitive impairment (and who meet the relevant criteria for eligibility) to the 'Court Integrated Services Program' (the Program).⁹
25. The Program provides case management to participants and may include psychological assessment, referral to welfare, health, mental health, disability, housing services and/or drug and alcohol treatment.¹⁰
26. To become eligible for the Program an accused person must meet the following criteria:
- the accused is charged with a criminal offence listed at Melbourne Magistrates Court (proper venue rules apply);
 - the accused person has not been charged with an excluded criminal offence that involves serious violence or serious sexual assault (see clauses 1, 2 or 3 of Schedule 1 of the *Sentencing Act 1991* (Vic));
 - the accused person has (or is likely to have) a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder and/or a neurological impairment, including dementia;
 - the disorder/s cause/s substantially reduced capacity in at least one of the areas of self-care, self management, social interaction or communication;
 - the accused person would derive benefit from receiving co-ordinated services in accordance with an individual support plan. These may include psychological assessment, welfare, health, mental health, and/or disability services, drug and alcohol treatment, or housing and support services, and/or would benefit from participation in a problem solving court process;¹¹ and
 - the accused person consents to participate in the List, including attending court regularly and meeting with the Assessment and Referral Court List Staff.
27. Referrals to the Program are accepted from the accused, significant others, community service organisations, magistrates, police, prosecutors, legal representatives and other court based support services.

⁹ See <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/assessment-and-referral-court-list-arc>

¹⁰ Ibid.

¹¹ Ibid.

Other Relevant Services

28. The Mental Health Court Liaison Service also provides court-based assessment and advice service and complements the other court support services provided by the Magistrates Court of Victoria.¹²
29. The Law Council agrees with the Law Institute of Victoria's (LIV) submission to the Victorian Parliamentary inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers, in which the LIV endorsed the principles of the Assessment and Referral Court List.¹³

Western Australia

30. The Intellectual Disability Diversion Program in the Perth Magistrates Court is a joint initiative by the Department of Corrective Services and the Disability Services Commission.¹⁴
31. Whilst a separate specialist program, one for intellectual disability and the other for mental illness, enables a targeted approach to disability, it is noted that many people with disability have multiple support needs which cut across different programs. By way of example, a person with intellectual disability may also have a significant drug dependency. In these situations, it may not always be easy to ascertain whether that person should be in the Intellectual Disability Diversion Program or the Mental Illness Diversion Program.
32. The Law Council suggests that the AHRC consider how to promote better communication and integration between various existing programs, to enable the provision of individualised treatment and support plans for people with disability, particularly those who present with complex and multiple support needs, including for alcohol and drug dependency, intellectual disability, mental illness, homelessness etc.
33. It is further noted that the Western Australian Government recently announced that it would develop Disability Justice Centres to provide secure accommodation for people charged with an offence, but who are not able to understand the court process because of their disability and are ruled unfit to enter a plea.¹⁵
34. The Law Council suggests that the experience of Disability Justice Centres, once established in Western Australia, could be examined with a view to considering implementation in other jurisdictions.

¹² See <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/mental-health-court-liaison-service>.

¹³ See <http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Administrative-Law-Human-Rights/Submissions/Parliamentary-Inquiry-into-Access-to-and-Interacti.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0>

¹⁴ See http://www.magistratescourt.wa.gov.au/l/intellectual_disability_diversion_program_iddp.aspx?uid=7942-2328-8603-7948

¹⁵ See media release by the WA Government at <http://www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=7466>.

Queensland

35. The Queensland Courts Referral Program enables defendants to engage with Government agencies and non-Government organisations to address the causes of offending behaviour by assisting defendants who come into contact with the criminal justice system as a result of:

- Drug and/or alcohol dependency
- Mental illness
- Intellectual disability
- Cognitive impairment
- Homeless people or those at risk of homelessness.

36. In 2012, the Queensland Government closed the Special Circumstances Court, the Murri Court and the Drug Court, which provided important diversion and intervention programs for disadvantaged Queenslanders, including Aboriginal and Torres Strait Islanders, disabled and homeless people and those whose drug addiction may have contributed to their offence. The Law Council supports the Queensland Law Society's comments that

“Diversionary courts like the Murri, Special Circumstances and the Drug courts play an important role in rehabilitating offenders, reducing the rate of crime and creating considerable long-term cost savings for the community.

“Dollars aside, this move by the government also raises serious justice issues. It is more just, and more effective, for vulnerable people with specific needs to be treated with sensitivity and given appropriate help to address the causes of their offending behaviour, thereby reducing recidivism.

“This includes the homeless, people with mental health issues and those with drug problems.”¹⁶

37. The Queensland Courts Referral Program replaced the Special Circumstances Court. The Queensland Law Society's submission to the AHRC's Issues Paper noted that its members reported that compared to the previous Special Circumstances Court, the new QCR program is not performing as well for those at risk, is more difficult for defendants to access, and is unable to offer the same benefits as the previous program.

38. The Law Council supports reinstatement of the Murri, Special Circumstances and Drug Courts in Queensland.

¹⁶ See Queensland Law Society's Media Release at http://www.qls.com.au/About_QLS/News_media/Media_releases/The_vulnerable_vetoed_in_court_cuts.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.