

Access to Justice

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Our daughter (let's call her Julie) loves pretty calendars and greeting cards. In her thirties, she has an intellectual disability. She lives independently. During a four year period she was convicted of shoplifting such cards seven times, and was at risk of going to gaol. The duty lawyer always told the Magistrate 'my client ... has an intellectual disability, her parents and guardians are present in the court today'.

Transcripts indicate that the Queensland courts were acutely aware of her intellectual disability, yet it was never given due consideration. Nor was it ever suggested that her hearings be adjourned so that her disabilities could be further investigated. Julie's parents report that she doesn't comprehend any part of the court process, and that she acquiesces just to get it over and done with.

In Queensland, if charges are 'indictable' they can be referred to the Mental Health Court, but for summary offenses, there is no alternative procedure. This encourages pleas of guilty.

Unfortunately, things escalated. Julie began to refuse to attend court, became traumatised, and had panic attacks requiring medical intervention. Her refusal to attend left her at risk of arrest.

The story of Rosie Fulton, of which I am sure you are all acutely aware, is similar. A Northern Territory resident, she was found unfit to plead by a WA Court after being charged for offenses relating to a motor car. She has spent the last 18 months in Kalgoorlie prison, hardly

appropriate accommodation for a woman in need of support due to her cognitive disability.

Thank you to the Northern Territory Law Society for asking me to speak today. Julie's and Rosie's experiences are typical of the experiences of people with disabilities across Australia. Australians who need communications supports, or who have complex and multiple support needs, are not having their rights protected, and are not being treated equally, in the criminal justice system. This must change. Hence the work of the Australian Human Rights Commission in this area, and our report 'Equal Before the Law: Towards Disability Justice Strategies'¹ launched in February.

Last year the Commission identified five key barriers which limit or prevent access to justice for people with disabilities. We heard from victims, witnesses, those accused of crime and offenders.

The first barrier concerns programmes, assistance and other community supports addressing violence, prevention and disadvantage, which may not be readily accessible to those with disabilities.

One submission told of Sarah, an Aboriginal woman with cognitive impairment, psychosocial disability and health conditions. Sarah began a long pattern of contact with criminal justice and human service agencies at age 12. What became obvious was that there is a lack of appropriate support outside the criminal justice system, and responsibility for addressing her needs was often left to the police and the juvenile justice system. At the



age of 18, she was provided with 24 hour supported accommodation through a Community Justice Program.² If Sarah had had access to community assistance from an earlier age, would she have had such continual interaction with the criminal justice system?

It is often police services which are the fall back position in times of crisis, rather than appropriate community and health services. As was reported in one submission: 'The police have become the emergency mental health response ... for many individuals and families, and they are ill-equipped for the job.'³

The second barrier dealt with the supports people may need to participate in the criminal justice process. Maria, for example, has cerebral palsy and little speech. She wanted to tell police about a sexual assault, but there was no communication support worker to help with the statement. The police relied on Maria's parents to provide communication support. Maria was uncomfortable giving personal details of the assault to police in front of her parents, so her evidence was incomplete. This caused problems for the investigation, and during the court process. Clearly it is inappropriate for family members to act in the place of communication support workers.

Barrier three concerns negative attitudes and assumptions about people with disabilities, which often result in us being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings. For example, we were

told at our Geelong public meeting that 'when I attended the police station, the police officer thought I was dumb at first and he didn't take it seriously.'⁴ Similarly, a disability advocate in Tasmania told us that 'a victim won't even get their day in court as the DPP won't run the case.'

The fourth barrier deals with accommodation and programmes for people deemed 'unfit to plead'. These people are often detained indefinitely in prisons or psychiatric facilities, without being convicted of a crime. The well-known case of West Australian man Marlon Noble demonstrates this; I invite you to look at one of the Commission's 20 Years: 20 Stories films entitled 'Presumed Guilty'.⁴

The last barrier we identified concerns prisoners. Supports and adjustments may not be provided to prisoners with disabilities so that they can meet basic human needs, and participate in prison life. This can result in delays and difficulties exiting prison, or exiting with successful chances of re-integration. Henry has an acquired brain injury. He wanted to apply for support from Legal Aid to appeal his conviction, and needed help to fill in forms. He found the language complex and difficult to understand. He did not receive assistance in prison to fill out the forms, and filled them out incorrectly. This delayed his application. By the time Henry filled out the forms correctly, his application was outside the time limit.

To get a better handle on the impact of these barriers to justice, the Commission undertook a consultation, with public meetings in capital cities and regional areas. From Newcastle in NSW to Roebourne WA, and from Adelaide to Katherine in the NT, we spoke with people with disabilities, their families, carers and advocates, practitioners from police, the courts and corrections services, and Attorneys General. We also received 88 written submissions from individuals, advocacy groups and experts, many of which may be accessed on the Commission's web site.

And the statistics back up what we were hearing. One report found that 90 per cent of Australian women with an intellectual disability have been subjected to sexual abuse at some time during their lives.⁵ There are currently at least 20–30 people in our prison systems who have not been convicted of an offence, but have been found unfit to plead, and gaols are the only accommodation option. From 1989 to 2011, 105 people were shot by police, and 42 per cent had a mental illness.⁶

Our evidence also suggests that it is women, children, Aboriginal and Torres Strait Islander people, and people from a culturally and linguistically diverse background

with disabilities, who are even less likely to have equitable access to justice.

The case for change is clear. Not only is there a human rights imperative to ensure equality before the law, there is also a strong economic imperative. Cost-benefit analyses indicate significant savings for governments when support is provided early, and diversion options from the criminal justice system are available. For every dollar spent on diversion, between \$1.40 and \$2.40 in government costs is saved⁷ – big money when the Australian community spends \$11.7 billion annually on the criminal justice system.⁸

The costs of violence, both personal and economic, are significant. Violence prevention efforts will have positive impacts on both people with disabilities and society as a whole.

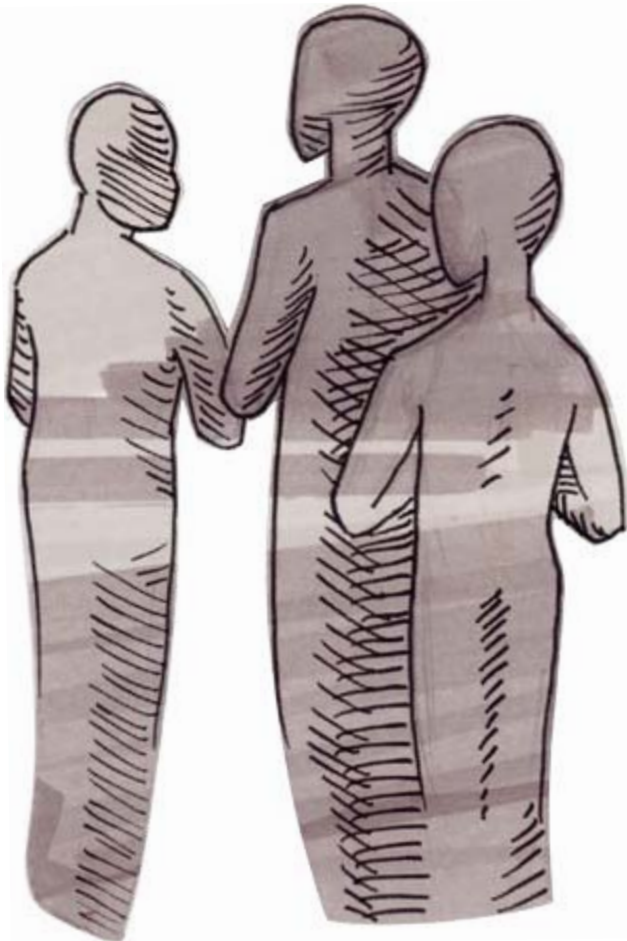
Our report considers each step of engagement with the criminal justice process – prevention, police, courts and prisons. The report makes 12 general findings. These include that the inability to access effective justice compounds disadvantage experienced by people with disabilities, and leaves them at risk of ongoing violence. It was reported to us that: '[a]s a victim of sexual assault I did not have access to sexual assault services ... and experienced 'blame and shame' from disabil[ity] workers and services'.⁹

We also found that there is widespread difficulty identifying disability, recognising the need for adjustments and support, and providing that support. A justice from the Queensland Mental Health Court told us: '[t]he reality of the Magistrates Court is that it is fast and furious. They have limited resources to detect and identify disability.'⁷

People with disabilities are not being heard because of perceptions we are unreliable, not credible, or incapable of being witnesses. On top of that, erroneous assessments are being made about the legal competence of people with disabilities.

A further finding concerned styles of communication and questioning techniques used by police, lawyers, courts and custodial officers which can confuse a person with disabilities. A person with ABI said 'It's really scary, they ask you so many questions, pumping too much information into you – it would be great to have an advocate; someone to explain things to take the time.'¹⁰

Diversionary measures, too, are underutilised, not



available, or not effective due to lack of appropriate supports and services. The NSW Law Reform Commission reported that the formal court process does not provide adequate scope to explore diversionary options due to time constraints and multiple parties required.¹¹

So what does *Equal Before The Law* conclude? The Commission has formed the view that, in light of the substantial challenges which exist, each jurisdiction in Australia should develop a holistic, over-arching Disability Justice Strategy; these strategies must be developed with the participation of people with disabilities. It is not enough that people with disabilities identify the barriers, it is critical that they are involved in the development and implementation of solutions. Adopting a human rights based approach, those strategies should focus on 5 key outcomes:

- I. Safety of people with disabilities and freedom from violence;
- II. Effective access to justice for people with disabilities;
- III. Non-discrimination;
- IV. Respect for inherent dignity and individual autonomy, including the right to make one's own decisions; and
- V. Full and effective participation in the community.

The principles and actions in any such strategy should address:

- I. *Appropriate communication;*
- II. *Early intervention and diversion;*
- III. *Increased service capacity;*
- IV. *Effective training;*
- V. *Enhanced accountability and monitoring; and*
- VI. *Better policies and frameworks.*

Of course, criminal justice is primarily the province of the states and territories. For this reason, the report does not take the usual course of making recommendations. Rather, it seeks to point out the barriers to justice, highlight existing services and programs, and propose possible actions towards the development of disability justice strategies.

There is great work being done in South Australia with the development of its Disability Justice Plan. The

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South Australian Government intends to use this plan to safeguard the rights of all people with disabilities in their interactions with the criminal justice system, and they have been careful to involve people with disabilities from the outset. I urge governments around Australia to consult with South Australia, and to learn from experiences there. If we coordinate, inform and monitor in a planned manner, barriers will be removed faster, and gaps bridged sooner. The services we have will be improved and new and better ones developed. The human rights of people with disabilities will be better respected, their standard of living will improve, and the criminal justice system will become less of a presence in their lives.

Following on from the Report, the Commission has uploaded to its website a database of existing services and programs which provide a more positive pathway through the criminal justice system for people with disabilities. This database will be a useful resource for all practitioners. It will showcase solutions that have been tried in one jurisdiction, and that might work to provide better access to justice for people with disabilities in other settings.

The database lists such programs as the Northern Territories' 'Sentenced to a Job' trial program. Low security prisoners are sent to work in real jobs in the local community for award wages. They learn vocational

and life skills, and earn money which is available for them upon release. New South Wales' Life on Track is a case management service that tailors personalised plans for people with disabilities appearing in courts, and links them to appropriate supports and services in the community. And in Queensland the Mental Health Intervention Project is a collaboration between Queensland Police, Health, and Ambulance services. The three agencies regularly meet to identify mental health issues in the local area, discuss complex cases, and develop preventative interventions.

Please feel free to access this database via our website. We plan soon to migrate the database to a relevant university or centre of research so that it can continue to be updated and maintained.

There is one further matter which I want to raise. It relates more to the civil than the criminal justice system, but is still very relevant to Australians with disabilities. It is the Australian Law Reform Commission's current inquiry on equality capacity and disability, for which I am a part-time commissioner. It deals with legal barriers for people with disability in decision-making, in various aspects of our lives. Whilst again a federal inquiry in an area where jurisdiction sits primarily with the states and territories, it will propose a set of new decision-making principles, and consider how they might be applied in areas of federal law such as social security law, the national disability insurance scheme, electoral law and federal criminal proceedings to name a few. The same decision-making principles could be applied in state and territory areas of law such as guardianship and administration.

Let me return to *Equal before the Law*. This report does not provide the simple solution for Australians with disabilities of which we may dream. However, the development of disability justice strategies by all jurisdictions, in partnership with people with disabilities, will recognise the impact of disability within the criminal justice system, and provide for better co-ordination of services to address that impact. Systematic change in this area is vital, and it is the responsibility of all of us to work to bring about that change. Australians with disabilities must get an equal chance in our criminal justice system.

As Julie's parents told the Commission, '[n]o one should be punished because they have a disability, no one should go to gaol because they have a disability, and their disability certainly should not be criminalised.'

REFERENCES:

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1. Australian Human Rights Commission, *Equal Before The Law: Towards Disability Justice Strategies*, Report (2014).
2. Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with Disability*, Issues Paper (2013) 6.
3. Submission No 35 to Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with Disability*.
4. Marlon Noble: *Presumed Guilty* (Directed by Paul Bell, Feral Films, 2013) <www.youtube.com/watch?v=Jn8BEyBNdTY>.
5. Victorian Health Promotion Foundation (VicHealth), *Preventing Violence Against Women in Australia* (Research Summary, Victorian Health Promotion Foundation, October 2011) <<http://www.vichealth.vic.gov.au/Publications/Freedom-from-violence/Violence-against-women-in-Australia-research-summary.aspx>>.
6. Australian Institute of Criminology, *Police Shootings of People with a Mental Illness* (Research in Practice No 34, Australian Institute of Criminology, May 2013) <<http://www.aic.gov.au/publications/current%20series/rip/21-40/rip34.html>>.
7. Ruth McCausland et al, *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-Benefit Analysis of Early Support and Diversion*, (Report, University of New South Wales and Price Waterhouse Coopers, August 2013) 12 <<http://www.humanrights.gov.au/sites/default/files/document/publication/Cost%20benefit%20analysis.pdf>>.
8. Australian Institute of Criminology, *Australian Crime: Facts and figures: 2011*, Chapter 7: Criminal justice resources (2012). At <http://www.aic.gov.au/publications/current%20series/facts/1-20/2011/7_resources.html>.
9. Submission No 15 to Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with Disability*, 3.
10. Victorian Coalition of ABI Service Providers, Submission No 57 to Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with Disability*.
11. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Report No 135 (2012).