



Australian
Human Rights
Commission

Equal before the law

TOWARDS DISABILITY JUSTICE STRATEGIES

FEBRUARY 2014



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Foreword

Equality Before The Law is a basic tenet of human rights. But I have learned, both as an advocate and during my time as Australia's Disability Discrimination Commissioner, that equality is not always available for Australians with disabilities in the criminal justice system.

This report provides a snapshot of where that equality does not exist, highlights services and programs that improve equality before the law for people with disabilities, and sets some directions by which change may occur.

We conducted Australia-wide consultations with people with disabilities, and practitioners throughout the justice system - from Attorneys-General, judges and magistrates; to lawyers, corrections officers and community workers. We heard some tragic stories of where the criminal justice system had failed people with disabilities, and had compounded disadvantage. We saw some positive examples of where best practise was occurring. And we have tried - in this report - to begin the work necessary to develop strategies for change.

I appreciate that criminal justice is primarily the province of States and Territories. For this reason, this report does not take the usual course of making recommendations. Rather, it seeks to point out the barriers, highlight services and programs, and propose possible actions towards the development of Disability Justice Strategies. I trust that this approach will be of benefit to State, Territory and Commonwealth administrations in their ongoing work.

The case for change is strong. Not only should Australians with disabilities - whether victims of crime, offenders, or participants in the criminal justice system - experience equal treatment before the law. But considerable economic savings can be made by preventing violence and providing early diversion and support.

I thank all of the Australians with disabilities, and their families and carers, who met with us and made submissions. I also thank disability advocacy organisations, service providers in the justice sector and government representatives who participated. I thank the Attorneys-General who met with me, and demonstrated their commitment to improvement in this area. I trust that this report provides a solid foundation for change.

Finally, may I thank Commission staff and contractors, the pro bono support of DLA Piper, and our partners at University of NSW and Price Waterhouse Coopers who made this report possible.

The criminal justice system in Australia is complex. Equal treatment by it, irrespective of difference, is fundamental. I trust that this report will begin the work of redressing inequality experienced by Australians with disabilities, particularly those with complex support needs or communication challenges.

Graeme Innes AM
Disability Discrimination Commissioner
February 2014

Summary

Access to justice in the criminal justice system for people with disabilities who need communication supports or who have complex and multiple support needs (people with disabilities) is a significant problem in every jurisdiction in Australia. Whether a person with disability is the victim of a crime, accused of a crime or a witness, they are at increased risk of being disrespected and disbelieved and of not enjoying equality before the law.

In 2013, the Australian Human Rights Commission conducted a wide-ranging consultation process to identify how people with disabilities deal with the barriers they experience to equality before the law. The Commission sought submissions in a range of forms and held public meetings in every State and Territory, including regional locations. Many individual meetings with people with disabilities and their advocates, support services in the community and in government and people in the police, courts and the custody and release system were also conducted. The consultations, submissions and meetings are listed in Appendix C.

The consultation process revealed:

- Inability to access effective justice compounds disadvantages experienced by people with disabilities.
- Many people with disabilities are left without protection and at risk of ongoing violence.
- People with disabilities experience a relatively high risk of being jailed and are then likely to have repeated contact with the criminal justice system.
- Many offenders with disability have themselves been victims of violence and this had not been responded to appropriately, contributing to a cycle of offending.
- There is widespread difficulty identifying disability and responding to it appropriately.
- Necessary supports and adjustments are not provided because the need is not recognised.
- When a person's disability is identified, necessary modifications and supports are frequently not provided.
- People with disabilities are not being heard because of perceptions they are unreliable, not credible or incapable of being witnesses.
- Erroneous assessments are being made about the legal competence of people with disabilities.
- Styles of communication and questioning techniques used by police, lawyers, courts and custodial officers can confuse a person with disability.
- Appropriate diversionary measures are underutilised, not available or not effective due to lack of appropriate supports and services.
- People with disabilities are less likely to get bail and more likely to breach bail because they have not understood the bail conditions.

The case for change is clear.

Not only is there a human rights imperative to ensure equality before the law, but 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. The long-term benefits of reduced contact with the criminal justice system are clear and benefit society as a whole. 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.

The Commission also sought to identify services and programs which are improving equality before the law for people with disabilities. Appendix A highlights some positive initiatives underway in every State and Territory. These initiatives should be expanded. There is an acute need to ensure access to services for people with disabilities living in rural and remote areas.

The Commission has formed the view that in light of the substantial challenges that exist, each jurisdiction in Australia should develop an holistic, over-arching response to these issues through a Disability Justice Strategy.

The Strategy should focus on the following outcomes:

1. Safety of people with disabilities and freedom from violence
2. Effective access to justice for people with disabilities
3. Non-discrimination
4. Respect for inherent dignity and individual autonomy including the freedom to make one's own decisions
5. Full and effective participation and inclusion in the community

These outcomes reflect the understanding that people with disabilities:

- have the right to be heard and informed
- should feel safe and be free from violence so that they can live in safety and with dignity
- should be able to access the support, services and programs they need to prevent disadvantage and address a range of health and social risk factors
- are able to easily identify and access appropriate high quality services if they experience violence, or feel they are unsafe and at risk of experiencing violence
- are treated with dignity when they begin or defend criminal matters, or participate in criminal justice processes, and the legal system provides the modifications, supports and aids needed to participate
- when lawfully deprived of their liberty are treated humanely and provided with supports, adjustments and aids needed to participate in prison life and transition successfully to the community.

Additionally, any Disability Justice Strategy should address a core set of principles and include certain fundamental actions. These principles and actions are set out in Chapter 4 and address:

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

The Commission understands that the Strategies may need to be adapted to suit the circumstances of individual jurisdictions and would need to be given effect in operational plans devised and owned by those ‘on the ground’. We consider, however, that respect for the human rights, dignity and personal autonomy of people with disabilities requires that any Disability Justice Strategy be developed in partnership with people with disabilities.

1 Disability Justice Strategies – an introduction

1.1 Barriers

People with disabilities do not enjoy equality before the law when they come into contact with the criminal justice system in Australia. Whether a person with disability is the victim of a crime, accused of a crime or a witness, they are at increased risk of being disrespected and disbelieved. If a victim, their disability may be seen to mitigate the offender's guilt; if a perpetrator, their disability makes incarceration more likely. Fundamental human rights that we all expect to enjoy are at stake. These rights are set out in treaties Australia has ratified and in our own legislation.¹

In 2013 the Australian Human Rights Commission conducted a wide-ranging consultation to assess how people with disabilities and people who work in the criminal justice system cope with the following five barriers:²

BARRIER 1. Community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disabilities.

BARRIER 2. People with disabilities do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.

BARRIER 3. Negative attitudes and assumptions about people with disabilities often result in people with disabilities being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.

BARRIER 4. Specialist support, accommodation and programs may not be provided to people with disabilities when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead').

BARRIER 5. Support, adjustments and aids may not be provided to prisoners with disabilities so that they can meet basic human needs and participate in prison life.

We asked people to tell us about their experiences, what had worked well and what had not, and what would have been helpful, along with any other ideas that would improve access to justice in the criminal justice system for people with disabilities. We sought submissions in a range of forms and held public meetings in every State and Territory, including regional locations. We also held many individual meetings with people with disabilities, family members, carers, government representatives, politicians, service providers, legal professionals and organisations who hold an interest in access to justice for people with disabilities.

We heard that the inability to access effective justice was compounding the disadvantage experienced by people with disabilities. This results in many people with disabilities being left without protection and at risk of ongoing violence, or more likely to be jailed and destined to have repeated contact with the criminal justice

system. We frequently heard that many offenders had previously been victims of violence and this had not been responded to appropriately.

1.2 A way forward

Through our consultation process it became clear that an overarching Disability Justice Strategy is required which entails:

1. Safety of people with disabilities and freedom from violence
2. Effective access to justice for people with disabilities
3. Non-discrimination
4. Respect for inherent dignity and individual autonomy including the freedom to make one's own decisions
5. Full and effective participation and inclusion in the community

These outcomes reflect the understanding that people with disabilities:

- have the right to be heard and informed
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- are able to easily identify and access appropriate high quality services if they experience violence, or feel they are unsafe and at risk of experiencing violence
- are treated with dignity when they begin or defend criminal matters, or participate in criminal justice processes, and the legal system provides the modifications, supports and aids needed to participate
- when lawfully deprived of their liberty are treated humanely and provided with supports, adjustments and aids needed to participate in prison life and transition successfully to the community.

1.3 Human rights-based approach to improving access to justice

A human-rights-based approach has been adopted in this report to clarify the responsibilities of government and service sectors and the process required to improve access to justice for people with disabilities.

This approach emphasises that content and process are equally important to bring about effective positive change. With this approach, people with disabilities are viewed as rights-holders, afforded dignity and seen as experts in the solutions that are most likely to be successful. Far too often people with disabilities are consulted to identify the barriers that exist but are absent from any genuine process to identify and develop solutions, and only consulted in the final stage, if at all.

The following principles guide the processes necessary for a human rights-based approach.

(a) Participation

Everyone has the right to participate in decisions that directly affect their lives in any way, including through the development of law, policies and projects.

People with disabilities, particularly women, children, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds, must be consulted in the development and implementation of legislation, policies and procedures relating to access to justice in the criminal justice system and participate in decisions that affect their lives.

(b) Accountability

Everyone has a right to know how their human rights are affected and by whom. This requires proper accountability and transparency from Government.

Governments, police, courts, correctional services and disability service providers, amongst others, have a responsibility to uphold the human rights of people with disabilities and are clearly identified. Monitoring, remedies and effective preventative measures must be available to people with disabilities.

(c) Equality

Everyone has the right to be equal. This requires that attention is paid so that laws, policies and projects benefit everyone and will result in substantive equality for everyone.

A human rights approach requires the elimination and prevention of discrimination in the criminal justice system for people with disabilities, including addressing attitudinal barriers and disadvantage when gender and other issues intersect.

(d) Empowerment

Everyone has the right to claim their human rights. Empowerment is the difference between wanting to act and being able to. Education, training and establishing structures that enable decision making to be shared are important.

Meaningful participation and consultation requires people with disabilities to be provided with the support and aids they require, including communication that is accessible and appropriate.

1.4 Provision of necessary modifications and adjustments

The Convention on the Rights of Persons with Disabilities (the Convention) clearly states that people with disabilities must be provided with necessary modifications and adjustments in order to obtain effective access to justice.³ This is often referred to as 'reasonable accommodation'. Reasonable accommodation is the provision of adjustments that aim to level the playing field and remove barriers to full participation.

This may include, but is not limited to: physical access to court buildings, provision of accessible information, adjustments in court proceedings and the use of language which can be understood by a person with disability. Article 13(1) of the Convention requires state parties to ensure the provision of “procedural and age-appropriate accommodations” in the criminal justice system. One of the innovations of the Convention is that denial of reasonable accommodation is a distinct and separate ground upon which to base a claim in discrimination under the Convention.

1.5 Implementation

A Disability Justice Strategy should:

1. be prepared in partnership with people with disabilities
2. be coordinated across the agencies that deliver outcomes in the criminal justice system
3. ensure accountability through our system of parliamentary democracy and public administration
4. involve actions that are embedded in operational plans
5. be monitored for effectiveness and adjusted in light of experience.

Chapters 2 and 3 explain what is happening on the ground. Chapter 4 proposes that through a Disability Justice Strategy, we can make significant improvements. The actions described in Chapter 3 are fundamental and the need for action is urgent.

2 The case for change

2.1 Indicators for change

In Australia, 45 per cent of people with disabilities live in poverty or near poverty. This situation has worsened since the mid-1990s. Employment rates for people with disabilities have been decreasing and so too have educational outcomes.⁴ Women and girls with disability experience violence at significantly higher rates, more frequently, for longer, in more ways and by more perpetrators.⁵ One study indicates 90 per cent of Australian women with an intellectual disability have been subjected to sexual abuse, more than two-thirds of them before they turned 18 years of age.⁶

Among many indicators:

The Australian Institute of Health and Welfare reported⁷ the proportions in 2012 of:

- prison entrants who report that they have ever been told by a doctor, psychiatrist, psychologist or nurse that they have a mental health disorder (including drug and alcohol abuse): 38%
- prison discharges who report that they have ever been told they have a health condition— mental health, including drug and alcohol abuse: 46%

Research by the Australian Institute of Criminology shows:

- across Australia, over the years 1989-1990 to 2010-2011, 42 per cent of the 105 people shot by police, had a mental illness.⁸

In 2013 the Senate Legal and Constitutional Affairs References Committee reported the findings of its inquiry into justice reinvestment approaches to criminal justice. The Committee drew attention to a wide range of studies and submissions indicating that people who interact with the criminal justice system often have:

- high levels of hearing impairment
- cognitive disabilities
- acquired brain injury
- mental illness
- language impairment.

In conducting its Australia wide Profiles of Disability survey for 2009 the Australian Bureau of Statistics (ABS) reported substantial population differences in the incidence of disability.⁹ The ABS found:

- After adjusting for differences in the age structure of the two populations, Aboriginal and Torres Strait Islander people were 1.7 times as likely as non-Indigenous people to be living with disability

- Aboriginal and Torres Strait Islander children aged 0-14 years had much higher rates of disability than non-Indigenous children (14.2% compared with 6.6%). The differences were statistically significant for both boys (19.9% compared with 8.3%) and girls (8.9% compared with 4.8%)
- Aboriginal and Torres Strait Islander adults in the age range of 25-54 years had rates of disability that were between 2.0 and 2.5 times the corresponding rates for non-Indigenous adults
- In the 35–44 years age group, the differences in disability rates for Aboriginal and Torres Strait Islander people and non-Indigenous people were significantly different for both men (35.1% compared with 12.3%) and women (29.0% compared with 12.5%).

The ABS further reports:

- The age standardised imprisonment rate for Aboriginal and Torres Strait Islander prisoners at 30 June 2013 was 1,977 Aboriginal and Torres Strait Islander prisoners per 100,000 adult Aboriginal and Torres Strait Islander population. The equivalent rate for non-Indigenous prisoners was 131 non-Indigenous prisoners per 100,000 adult non-Indigenous population.
- The rate of imprisonment for Aboriginal and Torres Strait Islander prisoners was 15 times higher than the rate for non-Indigenous prisoners at 30 June 2013, which was consistent with 2012.¹⁰

In light of all these indicators the Commission is compelled to conclude that people with disabilities have higher rates of interaction with the criminal justice system than other Australians. We note with grave concern the high rate of disability among Aboriginal and Torres Strait Islander peoples and that they are over-represented in Australian prisons.

2.2 Economic savings through providing early support and diversion

The Australian community spends \$11.7b annually on the criminal justice system and this figure is rising.¹¹ Recent reports highlight the considerable human and economic costs involved when people with disabilities have repeated contact with the criminal justice system or are incarcerated. More importantly, these same studies highlight the significant savings that can be made by the provision of early support and diversion and the improved outcomes for the lives of people with disabilities and the community.

In its Report on Government Services 2012, the Productivity Commission says:

Nationally in 2010-11, the total cost per prisoner per day, comprising net operating expenditure, depreciation, debt servicing fees and user cost of capital, was \$289.

.....

The real net operating expenditure (which excludes capital costs and payroll tax) per prisoner per day was \$216 nationally in 2006-07 compared with \$221 in 2010-11.

.....

Nationally, the real net operating expenditure (which excludes capital costs and payroll tax) per offender per day increased from \$15 in 2006-07 to \$20 in 2010-11.¹²

These figures equate to an annual total cost of \$105,485 per person in a correctional facility and net operating expenditure of \$80,665 per person in a correctional facility or \$7,300 per person subject to community corrections. The expenditure difference between custodial correction and community correction is \$73,365 per person.

A recent cost-benefit analysis of early support and diversion indicates a number of small but successful initiatives appear to improve well-being and other outcomes for people with mental health disorders and cognitive impairment. These initiatives result in diversion from the criminal justice system. The study indicated that for every dollar spent on the early investment, between \$1.40 and \$2.40 in government cost is saved in the longer term.¹³

In a related paper Professor Eileen Baldry and colleagues come to the following conclusion concerning numerous case studies based on a well-controlled dataset from NSW:

The evidence is stark that ... early lack of adequate services is associated with costly criminal justice, health and homelessness interactions and interventions later ... Millions of dollars in crisis and criminal justice interventions continue to be spent on these vulnerable individuals whose needs would have been better addressed in early support or currently in a health, rehabilitation or community space. It is obvious that access to integrated and responsive support services including drug and alcohol support, mental health and disability services or other psycho-social forms of support is needed.¹⁴

The National Indigenous Drug and Alcohol Council cost-benefit analysis has shown that the long-term savings for diversion to community-based rehabilitation for those with substance use problems are as high as \$111,458 per offender.¹⁵

Correctional measures can be a just outcome for a person with a disability. However, allowing for the costs of administering diversion programs, the gap of \$73,365 in favour of community correction over custodial correction suggests at the very least that diversion within the criminal justice system can bring economic benefits. Material presented elsewhere in this report indicates that diversion away from the criminal justice system, or appropriate diversion within it, can significantly improve the lives of people with disabilities by better respecting their human rights.

2.3 Economic savings through preventing violence

Violence is a personal cost to victims and perpetrators, their friends and families. It is an economic burden to the whole community. People with disabilities are exposed to violence at rates that exceed those for many others in the community.

In our consultations the Commission heard many accounts of high levels of violence in the community at large and in institutional settings, including within the criminal justice system. Comprehensive statistics are difficult to obtain and it appears highly likely that violence affecting people with disabilities is under reported.

In December 2013 the ABS released the results of the Personal Safety Survey for 2012.¹⁶ These results show people with disabilities or a long-term health condition experienced higher levels of violence than other people in the preceding 12 months. The ABS cautioned that there are significant issues that could cause the actual levels of violence to be higher than reported in the survey.¹⁷

This year the cost of violence against women and children to the Australian economy reached \$14.7 billion. Almost half of this figure (48 per cent) was attributed to the pain, suffering and premature mortality rates experienced by victims and survivors of violence.¹⁸

As noted above, the rates of violence against women with disability are high. The National Council to Reduce Violence against Women and their Children has estimated that by 2021-2022 the cost of violence perpetrated against women with disability will be nearly \$3.9 billion.¹⁹

These high human and economic costs of violence could be reduced if the social disadvantages of people with disabilities are addressed and their engagement with the criminal justice system lessened.

3 Police, courts and corrections – the issues

3.1 General findings

In our consultations the Commission received information from people with disabilities and their advocates, support services in the community and in government and people in the police, courts and the custody and release system.

The Commission also received many submissions and held a number of meetings with community members and public officials who work in or with the criminal justice system. Our overall sense is that people, whatever their roles, want substantial improvements in the ways criminal justice affects the lives of people with disabilities. We list the consultations, submissions and meetings in Appendix C and in this chapter provide a picture of the issues people deal with every day.

The Commission found:

- Inability to access effective justice compounds disadvantages experienced by people with disabilities.
- Many people with disabilities are left without protection and at risk of ongoing violence.
- People with disabilities experience a relatively high risk of being jailed and are then likely to have repeated contact with the criminal justice system.
- Many offenders with disability have themselves been victims of violence and this had not been responded to appropriately, contributing to a cycle of offending.
- There is widespread difficulty identifying disability and responding to it appropriately.
- Necessary supports and adjustments are not provided because the need is not recognised.
- When a person's disability is identified, necessary modifications and supports are frequently not provided.
- People with disabilities are not being heard because of perceptions they are unreliable, not credible or incapable of being witnesses.
- Erroneous assessments are being made about the legal competence of people with disabilities.
- Styles of communication and questioning techniques used by police, lawyers, courts and custodial officers can confuse a person with disability.
- Appropriate diversionary measures are underutilised, not available or not effective due to lack of appropriate supports and services.
- People with disabilities are less likely to get bail and more likely to breach bail because they have not understood the bail conditions.

The Commission's attention was also drawn to many services and programs that are attempting to overcome barriers and bridge gaps that frustrate access to justice for

people with disabilities. Many of these services and programs specifically provide support to people in dealing with police, courts and custody. Some also address housing, employment and education—factors that profoundly influence standards of living and therefore participation as victims or perpetrators in the criminal justice system. Without attempting to be comprehensive or to assess each one, we have provided a list at Appendix A with links to further information.

The conclusion that clearly emerges from the submissions, public consultations and private meetings is that despite much good work and the best intentions, people with disabilities have far too many unsatisfactory interactions with the criminal justice system. In particular, knowing what support is available and getting it to the right place at the right time seems to be part of the problem.

This and other issues are being addressed in South Australia through development of a Disability Justice Plan. The 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. They are being careful to involve people with disabilities from the outset in formulating the plan.

The Commission urges 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.

3.2 Police

In its Report on Government Services 2012 the Productivity Commission said:

Broadly, the whole community is a 'client' of the police. Some members of the community, who have more direct dealings with the police, can be considered specific client groups, for example:

- victims of crime
- those suspected of, or charged with, committing offences
- those reporting criminal incidents
- those involved in traffic-related incidents
- third parties (such as witnesses to crime and people reporting accidents)
- those requiring police services for non-crime-related matters.

The Productivity Commission also said:

The key objectives for police services are:

- to allow people to undertake their lawful pursuits confidently and safely
- to bring to justice those people responsible for committing an offence
- to promote safer behaviour on roads

- to support the judicial process and achieve efficient and effective court case management and judicial processing, providing safe custody for alleged offenders, and ensuring fair and equitable treatment of both victims and alleged offenders.

These objectives are to be met through the provision of services in an equitable and efficient manner.

First engagement with the criminal justice system often comes through contact with police or other investigators. For most people in the community this is an unusual event involving some difficulty, whether they are a victim of crime, a witness or a perpetrator.

People with disabilities share this general experience but for them it frequently has additional troubling elements. The truth is that for many people with disabilities contact with police is not unusual, it is frequent and alarming. It is marked with the range of societal fears, prejudices and discrimination common in the lives of people with disabilities – but this happens among the heightened tensions of reporting crime, witnessing crime or being accused of crime.

People with disabilities, their families, friends and support services gave disturbing accounts in our consultations describing lack of understanding, abuse, prejudice and violence they have met in their dealings with police and investigative bodies.

From police themselves a troubling picture emerged of good intentions frustrated, resources unavailable when required, and a societal expectation that a police officer is the carer of last resort. Our consultations with police and other research indicates that while under-resourcing is a problem there is a lack of awareness of, and easy access to, existing resources that support people with disabilities in the criminal justice system and this leads to bad outcomes for people with disabilities and for police.

Police are involved more and more frequently as first responders in crisis situations involving people with mental health difficulties. In New South Wales for example, there was a 25 per cent increase in the annual number of police incidents involving people with a mental health problem between 2008-2009 and 2011-2012. This period saw the number grow from about 22,000 incidents in 2007-2008 to around 30,000 in 2011-2012.

Tragically for the person, their family and the officers involved, across Australia over the 11 years 1989-1990 to 2010-2011, 42 per cent of people shot by police had a mental illness. Police do not join the force to shoot people or to be de facto mental health workers.²⁰

Barriers and gaps

As the consultations and submissions demonstrate, the objectives described above are frequently not met.

The necessity for police to be able to broadly identify disability was raised repeatedly especially as it was reported that police have difficulty distinguishing between

intellectual disability, psychosocial disability and acquired brain injury, amongst other cognitive disabilities.

One senior police officer told the Commission “*Police still cart off people with disabilities to psychiatric hospitals.*”²¹

What is common for all people with disabilities is the requirement for ready access to support when involved in criminal investigations. This would ensure people with disabilities are heard and appropriate action by police can then result. This is true for both victims with disabilities and people with disabilities who come into contact with the police.

For example, one person with disability told the Commission “*When I attended the police station, the police officer thought I was dumb at first and he didn’t take it seriously.*”²² The Victorian Coalition of Acquired Brain Injury Service Providers told us in their submission that in community interviews conducted, a person said “*It felt like they were using my disability to discredit me not help me.*”²³ A woman with disability reported:

*As a victim of domestic violence I encountered police who just did not see me as worthy of their time. When I became homeless, they thought this was normal as I was a person with a disability.*²⁴

There is, however, no system to book independent accredited communication support workers.²⁵ There is limited access to legal representation and many people with disabilities do not know their rights and therefore do not ask for appropriate adjustments.²⁶ 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.²⁷

Many people with disabilities, particularly people with intellectual disabilities and psychosocial disabilities also reported that they are being interviewed without appropriate support persons.²⁸

Supports are not being provided, in part because the resource demands exceed perceived value.²⁹

*Such supports are often seen as painstaking, time wasting and ultimately of little utility due to the subjective view that the practicalities of taking the matter further are outweighed by the work required to be done to ensure the process is accessible.*³⁰

The Intellectual Disability Rights Service – Criminal Justice Support Network reported:

*Police are very poor at identifying intellectual disability and calling for a support person when necessary for defendants or victims. This is despite the training we provide to Custody Managers and the police’s own guidelines outlined in the Police Crime Manual. In contrast to the hundreds of court supports we provide each year, we are only given the opportunity to provide very few clients (114 in 2011-12) with support at police stations”*³¹

Submissions to the Commission revealed some evidence of limited understanding of deafness and deaf culture.³² For example, there can be an assumption that Deaf

people can lip-read³³ and nodding means the Deaf person has understood or is agreeing to the statements made.³⁴ The Commission heard of instances where failure by a Deaf person or person with hearing impairment to obey an instruction was misinterpreted by police as aggression.³⁵

Failure to identify disability, provide the necessary supports and adjustments or take disability into account during communications, compounded by negative attitudes, assumptions and stereotypes of people with disabilities, often results in people with disabilities being seen as not credible and their evidence as not reliable.³⁶ For victims with disability this means police do not proceed with charges or the Director of Public Prosecutions (DPP) does not prosecute.³⁷

Professor Martine Powell told the Commission:

*Research indicates that people with an intellectual disability can provide accurate and reliable testimony but that poor interviewing practices negatively influences the quality of evidence elicited. When considering response accuracy, open-ended questions minimise differences in responding between persons with and without an intellectual disability. The decline in accuracy from inappropriate questions is greater for vulnerable witnesses.*³⁸

The necessity for people with disabilities to be provided with appropriate supports and police to be trained in best practice interviewing techniques are therefore seen as critical in order for people with disabilities to be heard and have access to justice.

*We need to get the initial police interview right - If we address this front line barrier of asking the right questions in the right way in the first place, everything will improve right through to prosecution of the case because we would get better evidence.*³⁹

The Commission also repeatedly heard about the limited availability of community supports and services. This significantly reduces police referral and diversion options and is particularly problematic for people with disabilities as they often come into contact with police when they reach a crisis point.⁴⁰ This is especially true for people with psychosocial disability who often are unable to access mental health services and supported accommodation.

Limited access to advocacy and legal services with disability expertise was also reported, especially in remote and regional areas.⁴¹ For Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds with disabilities access to culturally competent services with disability expertise, and Aboriginal legal services, was even harder.⁴²

In relation to bail, people with disabilities, particularly people with psychosocial disabilities and cognitive impairments are less likely to get bail because they have a history of offending, are less likely to have secure accommodation, are less likely to have appropriate supports and services and find it difficult to understand and comply with onerous bail conditions.

Access to supported accommodation is also critical for people with disabilities to be granted bail:

This is a typical case of an Aboriginal man who has been brought into custody. NAAJA couldn't make a bail application on his behalf because he does not have stable and safe accommodation and subsequently there is a presumption against bail. He spent 7 months in custody. Now we have managed to get him into a shared house in a local area. This shows that it can happen: prison to supported accommodation and back into the community. It shows that you don't need millions of dollars but you do need somewhere safe and supported.⁴³

3.3 Courts

The Commission has had the benefit of a report⁴⁴ by DLA Piper responding to some of the issues raised in our Issues Paper, based on their own research and on information they gathered at consultations the Commission held for *Equal before the law*. The following material is a précis of the first chapter of their report, which deals with questions of how people with disabilities fare as witnesses. Full citation of legislation and other sources is given in the original report. We have included this information here because Australia as a nation must ask itself – given the efforts made to reform the law to assist people with disabilities before the courts – why are the outcomes described by community members so often unsatisfactory? Is it still the law? Or is it something else?

(a) Evidence and people with disabilities

Competency

People with disabilities frequently experience prejudicial assessments of their competency to give evidence either as a witness to criminal proceedings or as a defendant to proceedings. This has the potential to preclude people with disabilities from accessing justice.

In the Commonwealth, New South Wales, Victoria, Tasmania and the Australian Capital Territory, *Uniform Evidence Acts* have been enacted. Queensland, South Australia, the Northern Territory and Western Australia have not adopted the uniform evidence laws, and rely on their existing legislation.

Under the *Uniform Evidence Acts*:

1. Every person (regardless of age, race and gender) is competent to give evidence *unless* they do not have the capacity to understand a question about a fact or do not have the capacity to give an answer about a fact that is able to be understood and this incapacity is not able to be overcome.
2. The *Uniform Evidence Acts* expressly state that mental, intellectual or physical disability are examples of reasons that lead to a person having a lack of capacity to understand a question or give an answer.
3. A person incapable of giving evidence about one fact might be competent to give evidence about other facts.

4. A person who is competent to give evidence is not competent to give sworn evidence if they do not have the capacity to understand that they are under an obligation to give truthful evidence.
5. If a person is unable to give sworn evidence they may be competent to give unsworn evidence if the court has told the person that it is important to tell the truth.
6. Evidence given by a witness will not become inadmissible because that witness ceases to be competent of giving evidence.
7. The court is able to inform itself as it sees fit as to questions of competency including obtaining information from persons with specialised knowledge.

Other Evidence Acts

As a rule, the Queensland, Western Australia, South Australia and the Northern Territory presume that everyone is competent to give evidence. Tests of competency vary across the jurisdictions. In general, a person who does not understand the obligation of an oath or affirmation may give informal evidence if the court is satisfied the witness understands the importance of telling the truth.

Facilitating evidence for persons with a disability

The Uniform Evidence Acts

- The Acts give examples of how disabilities might be overcome by use of interpreters and by allowing adjustments to be made for the delivery of evidence by deaf or speech-impaired witnesses. These provisions were included to make it clear that the physical disabilities of a witness give rise only to practical problems of presentation and not to competence.
- Courts have discretion to have questions asked or evidence adduced "in any appropriate way" in circumstances where a witness cannot speak or cannot hear.
- Further examples of how disabilities might be overcome were not included in the *Uniform Evidence Act* on the basis that if the law was more prescriptive of the adjustments that could be made this might prevent alternative adjustments and in turn limit the types of incapacities that might be overcome.
- A judge may direct a witness to answer a question in a particular way such as using simple language or through non-verbal communication. This focuses on the manner and form of the questions to witnesses and their responses.
- Witnesses who cannot hear or speak 'adequately' may be questioned or give evidence by 'appropriate means'.
- Interpreters are allowed (with the exception of Tasmania).

Other legislation

There are varying provisions across jurisdictions that permit special or vulnerable witnesses to be identified and afforded support before a court. That support may take a number of forms, including:

- Having a supportive person present, including a person who can assist with interpreting their evidence
- Using audiovisual evidence, either in real-time or pre-recorded
- Cautions to jurors about not drawing adverse inferences just because a person requires assistance to give evidence.

Perceptions of credibility

- Jurisdictions using the Uniform Evidence Acts abolished the common law rule preventing experts from giving their opinion about the credibility of witnesses.
- An expert can correct mistaken beliefs that juries may have about the credibility of a particular witness.
- This can assist witnesses who need communication supports or who have complex and multiple support needs as such witnesses may be less likely to seek clarification when they are confused, may be prone to anxiety and have difficulties remembering what happened a long time after the event in question.
- Expert testimony can be costly and it is difficult to find trained people in rural Australia who can give expert testimony.
- A judge must disallow an improper question. Under the uniform evidence legislation, an improper question can include a question which is based on a stereotype based on a person's mental or physical disability.
- Witnesses who have communication difficulties may be particularly disadvantaged by the emphasis on oral evidence in court proceedings.
- If reliance is to be placed upon the evidence in chief of a witness with communication difficulties, that witness must usually be made available for cross-examination or otherwise face an adverse inference being drawn.
- The hostility of cross-examination, the use of coercive questioning strategies and the delay between the event and proceedings all contribute to a negative impact on the testimony of witnesses with disabilities.

At the end of this summary of the research by DLA Piper, the question asked at the beginning seems even more pressing. Why are people with disabilities so likely to be denied the basic human right of equality in court and therefore justice under law?

Is it because, as Chief Justice Kourakis of South Australia told us, the rules of evidence are in fact flexible enough to permit interpreters and other supports for people with disabilities but the rules are not used and tested in higher courts? “As judges, we don’t see a lot of these problems because the cases don’t come to court

in the first place and we haven't had to make rulings on evidence", the Chief Justice said.

Are the supports permitted in courts sufficiently known by people with disabilities and their advocates? Does the criminal justice system provide information at the right time, the right place and in the right format?

Or is it because administrative systems are unable to deliver, by reason of lack of knowledge, poor resources or attitudinal barriers, services to people with disabilities? According to the Productivity Commission:

Indicators of quality for court administration have not yet been identified.

The perceptions of court users about the quality of the services delivered by courts may be strongly influenced by the outcomes of judicial decisions ... Isolating perceptions of the quality of court administration may be difficult.⁴⁵

This is a telling statement from the body that produced the *Report on Government Services 2012*. Actions that support the needs of people with disabilities are implemented through administrative actions. If general indicators of administrative service quality are not available then a basic need for transparency and accountability – matters that are fundamental to the exercise of human rights by people with disabilities – are at risk.

People must not be disadvantaged by virtue of being unable to participate in the court process, including by facing longer periods in detention than would otherwise have been imposed as a punishment for the offence. If a victim, they must not be denied justice simply because supporting them is perceived to be difficult.

A victim with disability won't even get their day in court because the DPP won't run the case.⁴⁶

Barriers and gaps

People with disabilities and people who work in the court system expressed considerable frustration to the Commission. The reasons for reasonable adjustments not being provided in court processes included:

- people with disabilities not being aware they were available
- support persons and interpreters were not booked
- lack of availability of support workers
- communication devices banned in court
- there was no help filling out forms or meeting other purely procedural requirements.

In addition to the lack of screening mechanisms, training and inability of lawyers and judges to identify disability, the Commission also heard about the delays and costs

associated with obtaining a formal diagnosis and time constraints on lawyers and Magistrates. The Disability Rights Advocacy Service stated:

It is often the case that people with a mental illness, intellectual disability or acquired brain injury plead guilty (are 'plead out') by duty lawyers who may not identify the disability and thus, be oblivious to whether or not the disability is related to the alleged offending. This lack of identification is further exacerbated by the lack of time available to a duty lawyer to properly and thoroughly investigate a matter prior to entering a plea.

The Commission heard that courts are not adjourned to find out if a person has disabilities and that systematic approaches to identify disability also do not exist, resulting in supports and services not being provided and no accommodations being made.⁴⁷ We heard of statements being taken from Deaf people with no interpreters present, people pleading guilty and not understanding what they were saying or what the consequences would be.⁴⁸

The National Aboriginal and Torres Strait Islander Legal Services told us of how an undetected disability can affect a person's access to justice. In their submission⁴⁹ they quoted from the evidence provided to the Senate Community Affairs References Committee in its Inquiry into Hearing Health in Australia

One audiologist talked to me about dealing with a client who had recently been convicted of first-degree murder and had been through the whole criminal justice process. That had happened and then she was able to diagnose him as clinically deaf. He had been through the whole process saying, 'Good' and 'Yes'—those were his two words—and that process had not picked him up. Given the very high rates of hearing loss, you have to wonder about people's participation in the criminal justice system as being fair and just if in cases like that people simply are not hearing or understanding what is going on.⁵⁰

We also heard instances where the court was made aware of a person's disability but this was never taken into consideration:

Our daughter was always introduced by the duty lawyer to the Magistrate with the remark "my client is, she has an intellectual disability, her parents and guardians are present in the court today"; transcripts from these court hearings indicate that the court was acutely aware of her intellectual disability, yet, her disability was never given due consideration. She was encouraged to enter pleas of guilty when she was overtly unfit to do so.⁵¹

Styles of communication and questioning were also raised as serious concerns for people who need communication supports or who have complex and multiple support needs. We repeatedly heard that people with cognitive and psychiatric disabilities struggle to understand legal advice, court process and court dialogue, which is filled with jargon and complex statements. The NSW Council for Intellectual Disability reported that people with intellectual disability also have high rates of illiteracy and limited language skills.

Some positive stories were also reported about lawyers treating their clients with disability with dignity and respect and efforts by court officials to ensure understanding:

*The current Magistrate grew up around black fellows. He is very understanding. If someone doesn't understand he will sit and talk to them and break the language down. He is very good.*⁵²

The court process, and cross-examination in particular, is stressful and difficult for many people. For people with disabilities who have complex or multiple support needs there is an ever-present risk that in the absence of support they will give inconsistent evidence or plead guilty to get the process over.

*... he elected just to plead guilty rather than contest the charges. There is absolutely no doubt that if he did not have a mental illness and had to be so mindful of just getting through the process while well enough to enter a plea, he would have defended both charges.*⁵³

One woman with disability told us: *I feel that if you commit a crime you get punished twice: you get punished for the crime and you get punished for having a disability.*⁵⁴

Significant concerns were raised about the need for people with disabilities to plead guilty in order to be diverted to alternate courts or lists to secure access to supports and services. The Commission is concerned people may plead guilty or not contest the facts in order to secure needed supports and services. Diversion options are also undermined by a lack of appropriate services, difficulty in coordinating services and limited capacity of services.

However, we also heard of effective outcomes as a result of diversion and access to appropriate supports and services:

*[W]hen he was 3, he was injected with heroin and...removed from his mother and moved in and out of foster homes. He did not receive a stable education and his disability was not diagnosed. He came to the attention of the law when he held up Hungry Jacks with a butter knife because he was hungry. An enlightened magistrate chose not to convict him and instead diverted him into a healing service where he was diagnosed with a mild intellectual disability. For the first time in his life, he had a stable home and received an education. He spent 2 years there and now he is a very talented carver with a means of earning an income.*⁵⁵

The Commission is extremely concerned about arrangements and processes for people with disabilities deemed unfit to plead. Concerns were raised across Australia about inadequate safeguards and access to supports to ensure effective access to justice. Many people deemed unfit to stand trial are being held without appropriate review mechanisms.

*The court found a person unfit to plead and this took 4 months and the person was put in remand. All he did was steal \$50.*⁵⁶

In their report⁵⁷ compiled in parallel with the Commission's consultations, DLA Piper make the following observations:

In each Australian jurisdiction, the legislation dealing with an accused's fitness to plead or fitness to stand trial in criminal proceedings is complex, and in some respects, ambiguous. The disparity between the legislation applicable in the various jurisdictions further complicates matters.

New South Wales, Tasmania, Victoria and Western Australia have separate legislation dedicated to the issue of fitness to plead or fitness to stand trial. Other jurisdictions deal with the issue within their criminal statutes. In Queensland, the issue of fitness to plead or fitness to stand trial is dealt with in more than one statute.

Further, in most jurisdictions, fitness to plead or fitness to stand trial in the context of summary offences is an issue which is neglected or given little attention. Only South Australia, Tasmania, Western Australia and the ACT allow magistrates to deal specifically with the issue of an accused's fitness. Victoria, Queensland and the Northern Territory do not have legislation dealing with this issue in the context of summary offences. The Commonwealth and Northern Territory legislation does not deal specifically with fitness to plead or stand trial for summary offences and only affords magistrates some discretionary powers when dealing with accused persons who are intellectually disabled.

There is certainly a case for a more streamlined and consistent approach to determining an accused's fitness to plead or stand trial in criminal proceedings for both summary and indictable offences. This would improve access to justice for people with disabilities, particularly intellectual disabilities, whose fitness to plead is likely to be an issue in criminal proceedings. The Victorian Law Reform Commission is currently reviewing the Victorian legislation on fitness to plead or fitness to stand trial in order to determine how the process can be improved and the outcome of this review could act as a catalyst for further legislative reform.

In the Commission's opinion DLA Piper expose a situation in which the provision of support for people with disabilities is made so much more difficult by the opacity and inadequacy of the law. We are especially disturbed by the situation for people accused of summary offences as the summary jurisdictions are where the great majority of cases involving people with disabilities are finalised.

3.4 Custodial environments and release to the community

The Productivity Commission has described the purposes of corrective services in this way:⁵⁸

Corrective services contribute to the whole-of-government priority, in all jurisdictions, to create safer communities through the administration of correctional sentences and orders. Objectives common to all jurisdictions are outlined below.

- Provide a safe, secure and humane custodial environment – Corrective services aim to protect the community through the effective management of prisoners commensurate with their needs and the risks they pose to the community.
- Provide an effective community corrections environment – Corrective services aim to protect the community through the effective management

of offenders commensurate with their needs and the risks they pose to the community, and to provide advice services to courts and releasing authorities in the determination of orders and directions for offenders.

- Provide program interventions to reduce the risk of re-offending – Corrective services aim to reduce the risk of re-offending among prisoners and offenders by providing services and program interventions that address the causes of offending, maximise the chances of successful reintegration into the community, and encourage offenders to adopt a law-abiding way of life.

These objectives are to be met through the provision of services in an equitable and efficient manner.

In consultations the Commission heard that these objectives are met in a piecemeal and unsatisfactory manner for people with disabilities.

Barriers and Gaps

... [it is] quite common for Sisters Inside to meet and work with Aboriginal women in the Townsville Correctional Centre who have no idea what they were charged with or convicted for.⁵⁹

After making their way through the difficult processes of investigation and court proceedings, during which their human rights may have been disrespected and denied, in custodial settings new barriers confront people with disabilities:

- Essential aids (for example hearing aids) are often removed and supports withdrawn as a form of punishment.
- Essential medication may be withheld.
- Inability to participate in programs due to disability and lack of supports or adjustments to programs.
- Indefinite detention on the basis of disability, without trial or being convicted of a crime.
- Inhuman and degrading treatment to manage or respond to disability.

The indicators referred to above in Chapter 2 demonstrate proportionately high levels in the criminal justice system of people with disabilities, compounded by the high rates of disability among people with social disadvantage. This has serious consequences for the welfare of prisoners, the capacity of custodial and non-custodial corrections staff to deliver services and the cost to the community of much avoidable incarceration.

While it is known that the level of disability is high in prison populations, many people with disabilities are not identified as having a disability on entry into, or while in, prison. Assessment for disability in prison is patchy and not consistently measured. The Commission heard that even if a person's disability is identified or known, appropriate support, medication and services are frequently not provided in prison or there is limited follow-up.

They did not understand how important my medication was Dilantin – they didn't give it to me and I had lots of seizures and had to be taken to hospital.⁶⁰

Sisters Inside reported that incarcerated women may receive the wrong or unsuitable medication. The women are often subject to punishment if they refuse to take this medication, even if they know they are allergic to it or have other adverse physical or psychological reactions to the medication.⁶¹ These problems are compounded by the lack of communication between corrections and health services and the inability of other health care providers to gain access to certain prisoners to provide treatment and support.

Transition accommodation options from prison to the community were also reported as problematic and concerns were expressed that the transition accommodation resembled prisons, was culturally unsafe for Aboriginal and Torres Strait Islander people, and that insufficient effort had been put in to transition people out.

Limited access to communication support and appropriate adjustments for people with disabilities may also result in the inability to participate in health, education, employment, rehabilitation, and pre-release programs in prison. This can lead to social isolation. For example, the Tasmanian Prison Service Strategic Plan Discussion Paper 2011-2020 stated:

Offenders with intellectual disabilities or acquired brain injuries are not able to participate in programmes with the other offenders due to their reduced cognitive functioning.

The inability of prisoners with disabilities to participate in prison programs, and pre-release programs in particular, also appears to result in delays and difficulties for prisoners with disability to leave prison or exit with successful chances of re-integration:

For example, a male with an IQ of 70 convicted of a sex offence and imprisoned was ineligible to participate in a sexual offender treatment program because corrective services only allowed those with an IQ above 85 to complete the course. However, a sex offender who has not completed such a program may be viewed less favourably by the parole board and therefore not placed onto parole. An anti-discrimination case was made and a program suitable for a person with intellectual disability and tailored to this man's circumstances was created.⁶²

Lack of hearing aids and access to interpreters and independent communication support workers means application for parole may be further compounded. Other factors that make it difficult for people with disabilities to obtain parole are:

- difficulty for people with disabilities to present their case to the Parole Board
- denial of legal representation
- inability to put forward a workable post-release plan.

Negative attitudes and lack of awareness about disability by correctional officers was also identified as a significant barrier. Of more serious concern however were reports of people with disabilities being subjected to a range of harmful practices. For

example: being shackled in hospitals, segregation for long periods of time, medical restraint, violence against women, indefinite detention resulting in deterioration of mental health, seclusion tactics for people with psychiatric disabilities and denying family visits or removal of support person as punishment. NAAJA reported one story as follows:

*There is a man in detention who is stuck in a single cell for 16 hours a day and if he is allowed out, it is out into the mesh yard. This is outrageous.*⁶³

Lack of training for correctional officers contributes to this situation.

The indefinite detention of people with disabilities is a persistent issue and of grave concern. The Commission has previously highlighted the case of Marlon Noble, an Aboriginal man who was in prison for over ten years despite never being tried or convicted of any crime. The United Nations Committee on the Rights of Persons with Disabilities recently recommended that the Australian government:

... as a matter of urgency:

*(a) End the unwarranted use of prisons for the management of unconvicted persons with disabilities, focusing on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention.*⁶⁴

We heard the barriers for successful release from prison and reintegration in the community are hampered by a number of factors:

- People with disabilities are released without long term planning, and in particular no long-term mental health planning
- The lack of culturally relevant supports
- The lack of appropriate housing and employment means that many people with disabilities cycle in and out of the criminal justice system

Concerns were raised about the limited transition planning that occurs prior to release. We heard that prisoners in Western Australia are often released with no long term planning for their mental health, accommodation and financial needs, and as a result they are likely to re-offend. We heard that where juvenile justice agencies provide appropriate services to children when they are in their care, these services are no longer available when the children are released.

The Commission was also encouraged to hear positive stories that indicate appropriate supports lead to positive outcomes that limit the cycle through the criminal justice system and its negative consequences:

*An Aboriginal man with a mild intellectual disability committed violent offences. We helped him to develop an interest in cultural artwork. He has not reoffended since he developed this interest. He is now engaged with the Department of Human Services, is connected to his family, his community and now puts his artwork on display.*⁶⁵

3.5 National Disability Insurance Scheme

The role of the National Disability Insurance Scheme (NDIS) in the criminal justice system was frequently raised during consultations, particularly in relation to early intervention, diversion and post release support. The NDIS commenced on 1 July 2013 and the impact which it may have is difficult to judge based on less than 6 months of 4 trial sites. However, indications suggest that its impact could play an important and positive role.

4 Actions and statements of principle

The Commission considers that each jurisdiction in Australia requires an holistic, coordinated response to the issues raised in this report through a Disability Justice Strategy. The development of a Disability Justice Plan in South Australia provides a good potential model for achieving this.

The Commission considers that any Disability Justice Strategy should address a core set of principles and include certain fundamental actions. These are set out in the following six sections:

- Appropriate communications
- Early intervention and diversion
- Increased service capacity
- Effective training
- Enhanced accountability and monitoring
- Better policies and frameworks

It is not the Commission's intention to prescribe all the details of an ideal Disability Justice Strategy. Strategies may need to be adapted to suit the circumstances of individual jurisdictions and must be given effect in operational plans devised and owned by those 'on the ground'. We consider, however, that respect for the human rights, dignity and personal autonomy of people with disabilities compel the following essential matters to be covered by Disability Justice Strategies developed in partnership with people with disabilities

4.1 *Outcome: Appropriate communications*

PRINCIPLES

Communication is essential to personal autonomy and decision-making. Securing effective and appropriate communication as a right should be the cornerstone of any Disability Justice Strategy.

If the right to appropriate communications support for a person with disability is denied or ignored then courts should take that into account as a mitigating factor.

Legislation, guidelines and procedures should protect the rights of people with disabilities who need communication supports so they can communicate using their preferred method of communication.

ACTIONS

ACTION 4.1.1 Include formal recognition of the requirement to ascertain the need for an interpreter service, communication support worker or hearing assistance when dealing with Aboriginal and Torres Strait Islander people.

Action area: police; courts; custody and release.

ACTION 4.1.2 Provide access to an appropriate independent communication support worker and interpreter regardless of place of residence or geographical location.

Action area: police; courts.

ACTION 4.1.3 Align terms and conditions of bail, bonds and restraining orders to a person's abilities and capacity to comply.

Action area: police; courts.

ACTION 4.1.4 Communicate bail decisions in a format and mode appropriate to the person with disability.

Action area: police; courts.

ACTION 4.1.5 Provide support to remind a person of bail conditions and support compliance.

Action area: police; courts.

4.2 Outcome: Early intervention and diversion

PRINCIPLES

Early intervention and wherever possible diversion into appropriate programs can both enhance the lives of people with disabilities and support the interests of justice.

Detention is a measure of last resort for all children and young people with disabilities and this is reflected in all legislation, policies and programs.

Where detention is the only sentencing option it is for the shortest appropriate period of time and the support needs of people with disabilities are taken into consideration and addressed appropriately.

Viable community-based alternatives to detention should exist for children and young people with disabilities.

ACTIONS

ACTION 4.2.1 Make available via an e-referral program information that assists police and courts with appropriate diversion and early intervention.

Action area: police; courts; custody and release.

ACTION 4.2.2 Make the e-referral program state- or territory-wide and link it to registered local, state and national support service agencies.

Action area: police; courts; custody and release; social.

ACTION 4.2.3 Use e-referral programs to provide timely interventions that stream Aboriginal and Torres Strait Islander children with disability to the support services that they need.

4.3 Outcome: Increased service capacity and support

PRINCIPLES

Increased service capacity and support must be appropriately resourced.

A Disability Justice Strategy should coordinate deployment of resources across government community agencies to achieve effective outcomes for people with disabilities.

ACTIONS

ACTION 4.3.1 Design intervention and support services that are :

- age-, gender- and disability-sensitive
- appropriate for people with disabilities who have communication impairment or complex support needs
- culturally appropriate to the needs of women, children, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds with disabilities.

Action area: police; courts; custody and release; social disadvantage.

ACTION 4.3.2 Expand Community Visitor's schemes to include a broader range of settings and apply to all people with disabilities.

Action area: police; courts; custody and release.

ACTION 4.3.3 Provide access to advocacy and legal services with disability expertise regardless of place of residence or geographical location.

Action area: police; courts; custody and release.

ACTION 4.3.4 Provide during interviews a sexual assault counsellor, disability support advocate or specialist disability lawyer to support adults and children with disabilities who have been sexually assaulted or experienced violence.

Action area: police; courts

ACTION 4.3.5 Provide to people with disabilities who are lawfully deprived of their liberty the support, adjustments and aids they need to meet basic human needs and participate in custodial life.

Action area: police; courts; custody and release.

ACTION 4.3.6 Establish as a matter of urgency a national Aboriginal and Torres Strait Island disability individual advocacy program.

Action area: police; courts; custody and release.

ACTION 4.3.7 Create an assessment protocol that assists police, courts, and correctional institutions in identifying people with disabilities in order to determine:

- the necessity for Independent Communication Support Workers, and Disability Advocate / Support Person
- the appropriate supports and services to exercise their legal capacity and enhance health, social and welfare outcomes
- the requirement for procedural and age-appropriate accommodations to ensure effective access to justice.

Action area: police; courts; custody and release.

ACTION 4.3.8 Provide pre-court conferencing for children and young people with disabilities.

Action area: police; courts.

ACTION 4.3.9 Provide witness support services to people with disabilities,

Action area: police; courts.

ACTION 4.3.10 Aboriginal and Torres Strait Islander people with disabilities are provided with culturally secure assessment, supports and services that promote full and effective participation in society and a life with dignity.

Action area: police; courts; custody and release.

ACTION 4.3.11 Adopt individual case management for prisoners/detainees with disability, including through prison in-reach services provided by community organisations, to provide education and support (pre- and post-release) to assist re-integration into the community and reduce offending behaviour.

Action area: courts; custody and release.

ACTION 4.3.12 Make available quiet rooms for people with disabilities to wait, meet or for break times in court.

Action area: courts.

ACTIN 4.3.13 Sentencing for unpaid fines should involve the exercise of discretion, taking into account the high incidence of poverty among people with disabilities.

Action area: courts.

4.4 Outcome: Effective training

PRINCIPLES

Effective training should address the rights of people with disabilities and prevention of and appropriate responses to violence and abuse, including gender-based violence.

People with disabilities and independent advocacy and legal services with gender and disability expertise should be involved in the development and delivery of education and training to service providers and to people with disabilities

ACTIONS

ACTION 4.4.1 Develop and deliver staff training that:

- improves responses and attitudes of staff
- addresses the impact of intersectional experiences of disability, gender and violence.
- emphasises the rights of people with disabilities to make their own decisions, with support if necessary, and that those decisions deserve respect.

Action area: police; courts; custody and release.

ACTION 4.4.2 Provide to people with a disability, their families and carers appropriate education and information, in a culturally competent manner, so they are confident in using the service system and can acquire the 'inside knowledge' that makes a system work.

Action area: police; courts; custody and release.

4.5 Outcome: Enhanced accountability and monitoring

PRINCIPLES

People with disabilities, including children with disabilities, are consulted and actively involved as equal partners in the development, implementation and monitoring of policies, programs and legislation to:

- a. improve access to justice
- b. raise awareness of the rights of people with disabilities
- c. prevent and respond to violence against people with disabilities
- d. improve access to supports and services in the community, in particular to prevent disadvantage and address health and social risks.

ACTIONS

ACTION 4.5.1 Ensure people with disabilities are represented on relevant governance and advisory boards.

Action area: police; courts; custody and release.

ACTION 4.5.2 Include transparent, effective and culturally appropriate complaints handling procedures.

Action area: police; courts; custody and release.

ACTION 4.5.3 Implement a transparent independent mechanism to monitor the use of restraint and seclusion of people with disabilities in all settings, with a view to recording and minimising the use of these practices. When the circumstances justify the use of restraint and seclusion safeguards must in place and reported.

Action area: police; courts; custody and release.

4.6 Outcome: Better policy and frameworks

PRINCIPLES

Specific measures to address the intersection of disability and gender should be adopted in legislation, policies and programs to achieve appropriate understanding and responses by service providers.

Disability Justice Strategies should be linked to the National Disability Strategy and the National Disability Agreement

ACTIONS

ACTION 4.6.1 At every stage of the criminal justice system, recognise the importance of providing procedural and age-appropriate accommodations to people with disabilities.

Action area: police; courts; custody and release.

ACTION 4.6.2 Recognise that failure to provide necessary accommodations to a person with disabilities can create a legitimate mitigating circumstance that a court should consider.

Action area: police; courts; custody and release.

ACTION 4.6.3 Where a person who has been found unfit to plead is to be held in detention, demonstrate that all reasonable steps have been taken to avoid this outcome.

Action area: courts; custody and release.

ACTION 4.6.4 Require chief executives of relevant agencies to report every 2 years to the Premier and the Premier's Disability Advisory Council in relation to access to justice for people with disabilities in the criminal justice system.

Action area: police; courts; custody and release.

ACTION 4.6.5 All criminal justice agencies monitor and evaluate:

- participation rates by people with disabilities as victims of crime, witnesses, accused, defendants, offenders and jurors in all parts of the justice system
- provision of adjustments and supports on critical indicators including age, sex, gender, disability, race, type of violence.

Action area: police; courts; custody and release.

5. Conclusion

This report has identified a range of problems that exist in the criminal justice system which result in people with disabilities not enjoying equality before the law. Despite much good work and the best intentions, people with disabilities are not treated appropriately in the criminal justice system.

Throughout the consultation process the Commission heard that in order to ensure equality before the law for people with disabilities, sectors must work together effectively. To facilitate this collaborative process, it became clear that each jurisdiction should develop an overarching Disability Justice Strategy. The strategy should entail:

- Safety of people with disabilities and freedom from violence
- Effective access to justice for people with disabilities
- Non-discrimination
- Respect for inherent dignity and individual autonomy including the freedom to make one's own decisions
- Full and effective participation and inclusion in the community

These outcomes reflect an approach that views people with disabilities as rights-holders, who are afforded dignity and are seen as experts in the solutions that are most likely to be successful. Such an approach is fundamental to the Convention on the Rights of Persons with Disabilities and to the National Disability Strategy.

The report includes a set of actions that governments can adopt and incorporate into their Disability Justice Strategy. In partnership with people with disabilities, each jurisdiction can move towards the achievement of the outcomes.

Not only is there a human rights imperative to develop a Disability Justice Strategy, but research incorporated into the report indicates that there is also a strong economic imperative. Significant savings can be made through the provision of early intervention and diversion options from the criminal justice system.

Many services and programs which provide better access to justice for people with disabilities were brought to our attention. While it was beyond the scope of this report to assess these, each is attempting to overcome the barriers to equality before the law experienced by people with disabilities. The services and programs are listed in Appendix A.

Equality before the law for Australians with disabilities will not be easily achieved. The Commission encourages governments around Australia to consult each other, learn from experience, and coordinate, inform and monitor the criminal justice system. Through these processes, barriers to equality before the law will be removed faster and gaps bridged sooner. This report recognises the benefits that such equality will bring, both to people with disabilities and the broader community. It is a goal worth striving for.

Appendix A – Services and Programs

Listed below are examples of services and programs brought to the Commission's attention.

Aboriginal Visitors Scheme (WA)

This is an independent prison visitor scheme where an Aboriginal volunteer is appointed to monitor the treatment of Aboriginal people held in custody and police lock ups. They offer basic counselling and will inform the Officer in Charge of any urgent medical needs (<http://www.correctiveservices.wa.gov.au/rehabilitation-services/aboriginal-visitors-scheme.aspx>). Viewed 3 February 2014.

Advocacy and Support Centre, Toowoomba (QLD)

TASC are a community legal centre that provide legal representation, advice and support to disadvantaged people that have a brain injury, psychiatric or intellectual disability (<http://www.tascinc.org.au/>). Viewed 3 February 2014.

Advocacy Tasmania (Tas)

Advocacy Tasmania provides advocacy services for people with disability in Tasmania (<http://www.advocacytasmania.org.au/>). Viewed 3 February 2014.

After Hours Bail Support Service (ACT)

This service provides advice and assistance to young people at risk of being remanded in custody and to police (http://www.communityservices.act.gov.au/ocyfs/the_blueprint_for_youth_justice_in_the_act/youth-justice/after-hours-bail-support-service). Viewed 3 February 2014

Anne McDonald (VIC)

The Anne McDonald Centre provides assessment and therapy for people with little or no functional speech (<http://www.annemcdonaldcentre.org.au/>). Viewed 3 February 2014.

Assessment and Referral Court List, Melbourne Magistrates' Court (VIC)

The Assessment and Referral Court List (the List) is a specialist court list developed by the Department of Justice and the Magistrates' Court of Victoria to meet the needs of accused persons who have a mental illness and/or a cognitive impairment (<http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/assessment-and-referral-court-list-arc>). Viewed 3 February 2014.

Australian Centre for Disability Law (NSW)

The Australian Centre for Disability Law advises and represents clients on matters concerning disability discrimination and broader human rights matters (<http://disabilitylaw.org.au/>). Viewed 3 February 2014.

Brain Injury Association of Tasmania (TAS)

The Brain Injury Association of Tasmania can provide an identification card to people with an acquired brain injury and/or epilepsy. The ID card includes personal details, a nominated contact number and information about the person's disability for police. The program is run in partnership with Tasmania Police (<http://biat.org.au/index.php/our-services-2/abi-identification-card>). Viewed 29 January 2014)

Centre for Excellence in Positive Behaviour Support, Queensland (QLD)

The Centre was one of the recommendations which arose from the Carter reporter into Challenging Behaviour. The Centre develops best practice research into the use of positive behaviour to improve the lives of people with intellectual disability who exhibit challenging behaviours (<http://centreforexcellenceforbehavioursupport.com.au/>). Viewed 3 February 2014.

Circle Sentencing (NSW)

Circle sentencing tries to avoid gaol time for Aboriginal offenders by bringing them together with elders. The offender must plead guilty, and punishments are not mild. The system has many benefits for all involved (<http://www.creativespirits.info/aboriginalculture/law/circle-sentencing>). Viewed 3 February 2014.

Communication Rights Australia (VIC)

Communication Rights Australia is an advocacy and information service for people with little or no speech (<http://www.caus.com.au/www/home/>). Viewed 3 February 2014.

Community Integration Team, Justice Health (NSW)

The Community Integration team provides pre and post-release care to recently released juveniles, many of whom are Aboriginal and Torres Strait Islander juveniles with serious psychiatric disabilities (<http://www.justicehealth.nsw.gov.au/about-us/health-care-locations/community>). Viewed 3 February 2014.

Community Living Association (QLD)

The Community Living Association oversees a wide range of programs developed to assist people with: an intellectual and/or other cognitive disability and mental illness; young people at risk of early school leaving; and young people at risk of homelessness (<http://www.communityliving.org.au/>). Viewed 3 February 2014.

Court Integrated Services Program (VIC)

The Court Integrated Services Program (CISP) aims to provide the person with disability appearing before court with a variety of services and supports such as social welfare, mental health, housing services and drug treatment. (<http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/court-integrated-services-program-cisp>). Viewed 3 February 2014.

Criminal Justice Support Network, Intellectual Disability Rights Service (NSW)

The Intellectual Disability Rights Service operates the Criminal Justice Support Network which provides trained volunteers to people with intellectual disability when they come into contact with the criminal justice system, particularly at the police station and at court (<http://www.idrs.org.au/home/index.php>). Viewed 3 February 2014.

Disability and Family Violence Crisis Response Initiative – Department of Human Services (VIC)

This initiative provides immediate support for women with disabilities to access crisis accommodation. Short term funds can be provided to a maximum of \$9000 while the woman and her family violence worker develop a longer term plan for housing and supports (<http://www.dhs.vic.gov.au/for-service-providers/children,-youth-and-families/family-violence2/disability-and-family-violence-crisis-response>). Viewed 3 February 2014.

Diversion Programs (NSW)

In some circumstances, people facing criminal charges in court may be referred to a rehabilitation, treatment or intervention program that is intended to address underlying problems (http://www.courts.lawlink.nsw.gov.au/cats/courtguide/during_court/diversion_programs.html). Viewed 3 February 2014.

Equal Treatment Benchbook, Supreme Court of Queensland (QLD)

A number of states, including Queensland have an equal treatment benchbook which provide practical information for judges about trial management, supports and aids and useful contacts to support people with disability in court (http://www.courts.qld.gov.au/data/assets/pdf_file/0004/94054/s-etbb.pdf). Viewed 3 February 2014

Exceptional Needs Unit, South Australia Government (SA)

This unit provides assessment services, accommodation, review of cases and reporting of service gaps for people with complex needs (<http://www.sa.gov.au/government/entity/1856/About+us+-+Disability+SA/Disability+SA+-+what+we+do/Exceptional+Needs+Unit>). Viewed 3 February 2014.

Find a Friend, Keep a Friend (TAS)

Montagu Community Living run a series of workshops for women with disabilities to build their self-confidence, develop social skills and address abuse (http://www.montagucommunityliving.net.au/index.php?option=com_content&view=article&id=82:what-we-offer-v15-82&catid=37:offer-v15-37&Itemid=171). Viewed 3 February 2014.

Homeless Persons' Legal Service (Vic)

The Homeless Persons' Legal Service is specialist *legal service* that provides free legal assistance and advocacy for people who are homeless and charged with minor criminal offences. (<http://www.justiceconnect.org.au/our-programs/homeless-law>)

Integrated Services Program (ISP) for Clients with Challenging Behaviour, Department of Family and Community Services (NSW)

The ISP coordinates cross-agency responses for adults with complex needs and challenging behaviour. The program includes assessment services, behaviour and therapeutic intervention and supported accommodation (http://www.adhc.nsw.gov.au/about_us/our_structure/clinical_innovation_and_governance). Viewed 3 February 2014.

Interagency Guideline for Addressing Violence, Neglect and Abuse (IGUANA), Office of the Public Advocate Victoria (VIC)

The IGUANA guidelines outlines the steps that an organization needs to take if violence or abuse of a person with disability is reported (<http://www.publicadvocate.vic.gov.au/publications/539/>). Viewed 3 February 2014.

Jaanimili, UnitingCare (NSW)

Jaanimili operates a number of Aboriginal-specific programs for people with disabilities including early start programs and in-home support to assist Aboriginal families at risk of relinquishing the care of their child with a disability (<http://www.childrenyoungpeopleandfamilies.org.au/Jaanimili>). Viewed 3 February 2014.

Justice Reinvestment Campaign (NSW)

The Aboriginal Reinvestment Campaign aims to reinvest money spent on custodial services into early intervention programs such as education and early supports that address the underlying causes of crime for young Aboriginal and Torres Strait Islander people (<http://justicereinvestmentnow.net.au/>). Viewed 3 February 2014.

Life on Track (NSW)

Life on Track is a case management service that will tailor personalized plans for people with disability appearing in court and link them to appropriate supports and services in the community (<http://www.lifeontrack.lawlink.nsw.gov.au/lifeontrack/index.html>). Viewed 3 February 2014.

Making Rights Real Project, Federation of Community Legal Centres (Victoria) and SECASA (South Eastern Centre against Sexual Assault) (VIC)

The project is a pilot program in South Eastern Melbourne to improve access to justice for sexual assault victims with a cognitive impairment or communication difficulties. They provide a range of holistic services and legal assistance to victims for compensation appearing before the Victims of Crime Assistance Tribunal (http://www.fclc.org.au/cb_pages/clr_making_rights_reality.php). Viewed 3 February 2014.

Mental Health Intervention Project (QLD)

A collaboration project between Queensland Police, Health and Ambulance services. Coordinators from these 3 agencies regularly meet to identify mental health issues in

the local area, discuss complex cases and develop preventative interventions (<http://www.police.qld.gov.au/programs/cscp/mentalHealth/>). Viewed 3 February 2014.

Mental Health Intervention Team, NSW Police

The Mental Health Intervention Team consists of a clinical team that provide education to police to identify mental health, strategies to communicate with people with psychiatric disabilities, de-escalation and crisis intervention techniques (http://www.police.nsw.gov.au/community_issues/mental_health/).

Mental Health Law Centre (WA) Inc

Specialized community legal centre that provides free mental health law advice to people with psychiatric disabilities in Western Australia (<http://www.mhlcwa.org.au/>). Viewed 3 February 2014.

North Australian Aboriginal Justice Agency (NT)

The North Australian Aboriginal Justice Agency provides culturally proficient Aboriginal legal services to the Top End of the Northern Territory (<http://www.naaaja.org.au/>). Viewed 3 February 2014.

Multiple and Complex Needs Initiative, Department of Human Services (Vic)

The Multiple and Complex Needs Initiative provides case-management and coordination of services such as housing, health and family supports for people with multiple disabilities and complex needs (<http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/projects-and-initiatives/cross-departmental-projects-and-initiatives/multiple-and-complex-needs-initiative>). Viewed 3 February 2014.

Neighbourhood Justice Centre (NSW)

The Neighbourhood Justice Centre is Australia's only community court. A number of different courts sit within the centre along with a "one stop shop" of community services (<http://www.neighbourhoodjustice.vic.gov.au/>). Viewed 3 February 2014.

Nunga Court (SA)

The Nunga Court is Australia's first Indigenous Court. It operates as a treatment court where defendants have access to programs which treat drug use, mental impairment and domestic abuse. Elders are present and there is less formality and the defendant and the family are encouraged to attend and speak directly to the Magistrate (<http://www.courts.sa.gov.au/Community/Pages/Aboriginal-Programs.aspx>). Viewed 3 February 2014.

Office of the Inspector of Custodial Services (WA)

The Office of the Inspector of Custodial Services is an independent statutory body that answers directly to Parliament and provides external scrutiny of custodial services and thematic reviews of systemic issues in Western Australia (<http://www.oics.wa.gov.au/go/home>). Viewed 3 February 2014.

Personal Helpers and Mentors Program

Personal support is provided to people recovering from mental illness to develop skills and confidence as well as access services and participate in their community. This program operates in all states and territories (<http://www.dss.gov.au/our-responsibilities/mental-health/programs-services/personal-helpers-and-mentors/locating-a-personal-helpers-and-mentors-service>). Viewed 3 February 2014.

Prisoner Employment Programs - Sentenced to a job, Department of Correctional Services (NT)

The Sentenced to a Job program is a trial running in the Northern Territory where prisoners are sent to work in real jobs in the local community for award wages. The program is only available for prisoners who have been classified low security. Sex offenders are not eligible (<http://www.correctionalservices.nt.gov.au/AboutUs/BusinessWithUs/Pages/Prisoner-employment-programs.aspx>). Viewed 3 February 2014.

Protocol for Mental Health, Department of Health and Victoria Police (VIC)

Interagency protocol provides guidance to police and clinicians on their respective roles and responsibilities when working together to respond to the needs of people with mental illness (<http://www.health.vic.gov.au/mentalhealth/publications/police-mh-protocol0910.pdf>). Viewed 3 February 2014.

Queensland Criminal Justice Centre (QLD)

The Queensland Criminal Justice Centre is a web based resource for lawyers working with people with disability who come in contact with QLD criminal justice system (<http://www.qcjc.com.au/>). Viewed 3 February 2014.

Red Dirt Driving Academy (WA)

This is an Indigenous driving school in the Pilbara region where police can refer Aboriginal people who have committed driving offences for driver training so that they do not lose their licences (<http://www.bindirri.com/projects/reddirtdrivingacademy/>). Viewed 3 February 2014.

Safe at Home Program (TAS)

This program provides therapeutic support and case management for individuals with a disability affected by domestic violence (<http://www.safeathome.tas.gov.au/>). Viewed 3 February 2014.

Safety House (WA)

Safety House WA provides houses in communities across WA where children can go when it is not safe for them to be at home (<http://www.safetyhousewa.org.au/about.htm>). Viewed 3 February 2014.

Scope Ltd (VIC)

Scope is a not-for-profit organisation providing disability services in Victoria. The organisation provides accessible information services including Easy English resources (<http://www.scopevic.org.au/index.php/site/whatweoffer/communicationresourcecentre/accessibleinformation>). These resources assist other organisations to develop Easy English information. See NSW Police as an example (http://www.police.nsw.gov.au/community_issues/victims_of_crime/easy_english). Viewed 29 January 2014.

Services Connect, Department of Human Services (Vic)

One-stop shop which brings all the human service such as child protection, public housing, disability and family violence services under a single integrated plan (<http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/projects-and-initiatives/cross-departmental-projects-and-initiatives/services-connect>). Viewed 3 February 2013.

Sisters Inside Inc. (QLD)

Sisters Inside Inc. is a community organisation that advocates for the human rights of women in the criminal justice system. The organisation works with women in prison to address gaps in the services available to them (<http://www.sistersinside.com.au/>). Viewed 20 January 2014.

Strongbala (NT)

This is a program which provides Aboriginal and Torres Strait Islander men with culturally appropriate support including clinical services, health education such as domestic violence education advice and employment opportunities (<http://www.wurli.org.au/program-strongbala.htm>). Viewed 3 February 2014.

SupportLink (QLD)

SupportLink is an initiative by Queensland Police which provides an online portal, where police can refer a person with disability to over 200 registered support service agencies for domestic violence, drug and alcohol abuse, crime prevention, elder abuse and neglect, victim support and counselling and trauma support (<http://www.supportlink.com.au/default.aspx>).

Talking Posters (NT)

Talking posters utilize push button technology to provide easily understandable audio explanations on a range of subjects including health, discrimination and human rights in Aboriginal languages (<http://www.adc.nt.gov.au/posters/talkingposters.htm>). Viewed 3 February 2014.

Tell Someone (VIC)

This is a web and DVD resource for people with intellectual disabilities experiencing family violence (<http://www.tellsomeone.org.au/index.html>). Viewed 3 February 2014.

Trial school within Parkville Juvenile Detention Centre – Department of Human Services (VIC)

The Victorian Government is operating a school within a juvenile detention centre, based on a ground-breaking initiative in the United States. The curriculum is designed to ensure that it does not alienate children with language impairments (<http://www.dhs.vic.gov.au/about-the-department/news-and-events/news/general-news/new-school-at-parkville-providing-education-opportunities-for-young-people>). Viewed 3 February 2014.

Victims of Crime Website, Victorian Department of Justice (VIC)

The Victorian Department of Justice provides a website containing easy-English information for people with disability who are victims of crime (<http://www.victimsofcrime.vic.gov.au/utility/for+professionals/easy+english+resources/>). Viewed 3 February 2014.

Visual Audio Recorded Evidence (VARE) - Department of Human Services (VIC)

The Visual Audio Recorded Evidence (VARE) advice outlines the legislative procedures and practice requirements regarding visual and audio recorded evidence. This type of evidence can only be given where the person is aged under 18 years and has suffered physical or sexual harm or is a person with a cognitive impairment (<http://www.dhs.vic.gov.au/cpmanual/investigation-and-assessment/overview-of-investigation-and-assessment-phase/1178-vate-video-audio-taped-evidence>). Viewed 2 February 2014.

Witness Assistance Service (NT)

This service provides support, court preparation assistance, information about the criminal justice system, provision of interpreters, referrals to counselling, legal assistance and assistance with preparing Victim Impact Statements (<http://www.nt.gov.au/justice/dpp/html/victim/index.html>). Viewed 3 February 2014.

Work and Development Order - Office of State Revenue (NSW)

People with a psychiatric or intellectual disability that are homeless can pay their fines through unpaid work with an approved organization as an alternative to jail (<http://www.sdrc.nsw.gov.au/fines/eo/wdo.php>). Viewed 3 February 2014.

Youth Justice Conferencing (NSW)

Juvenile Justice administers youth justice conferences under Part 5 of the Young Offenders Act 1997. Police and courts refer young people for youth justice conferences when they have committed eligible offences that are too serious for warnings or cautions, or they have exceeded the maximum number of cautions available to them (<http://www.djj.nsw.gov.au/conferencing.htm>). Viewed 3 February 2014.

Young People with Exceptionally Complex Needs (YPECN) Program (WA)

The project coordinates service delivery between government and non-government agencies for young people with complex and multiple disabilities

(<http://www.dcp.wa.gov.au/Organisation/Documents/YPECN%20DCP.pdf>). Viewed 3 February 2014.

Youth on track (NSW)

Youth on Track, an early intervention program with an holistic approach identifies and responds young people at risk of criminal offence or who may already be in the criminal justice system (<http://www.youthontrack.lawlink.nsw.gov.au/yot/index.html>). Viewed 3 February 2014.

Appendix B – Australia’s international human rights context

Australia has agreed to be bound by and comply in good faith with international human rights law. It has done this by ratifying international human rights treaties

- International Covenant on Civil and Political Rights (ICCPR).
- Convention on the Rights of Persons with Disabilities (CRPD)
- Convention on the Elimination of Racial Discrimination (CERD), Convention on the Rights of the Child (CRC)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- International Covenant on Economic, Social and Cultural Rights (ICESCR),
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Australia also formally supports the Declaration on the Rights of Indigenous Persons (the Declaration). Throughout this report, the treaties and the Declaration are referenced to indicate that the recommended strategies and actions conform to what Australia has agreed to do. More detailed explanations of the human rights treaty system can be found at <http://www.humanrights.gov.au/education/human-rights-explained-index>

The CRPD is a primary instrument for *Equal before the law* as it focusses on rights of persons with disability. Article 4(5) of the CRPD states “The provisions of the present Convention shall extend to all parts of federal states without any limitations and exceptions.” This is significant because the administration of justice is shared by the Australian government and the governments of all states and territories. The full text of CRPD is at <http://www.un.org/disabilities/convention/conventionfull.shtml>

The key human rights principles in CRPD have guided the report.

Article 3 - General principles

The principles of the present Convention shall be:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;

- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Especially relevant provisions of CRPD for equal access in the criminal justice system include:

Article 4 - General obligations

.....

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

To develop new laws and policies relating to the criminal justice system, governments should seek advice from people with disabilities, including women, children and Aboriginal Torres Strait Islander people with disabilities.

Article 5 - Equality and non-discrimination

1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Everybody has the right to be protected by the law at all stages of the criminal justice system. A person with a disability who engages the justice system must not experience discrimination because of their disability. We must ensure that we remove discriminatory barriers and implement positive measures that foster equality.

Article 13 - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 13 was adopted in response to a long history of denial of access to justice to people with disabilities. People with disabilities have the right to be treated fairly when engaging the criminal justice system. This right extends to “all legal proceedings, including at investigative...stages” from police interviews to courts and custodial situations. People with disabilities must be treated with respect regardless of being a “direct” participant such as a victim, suspect or offender or an “indirect” participant, such as a witness.

Article 14 - Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - a. Enjoy the right to liberty and security of person;
 - b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

People with disabilities cannot be held in custody just because they have a disability, there must be a compelling and lawful reason.

Article 16 - Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.
2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognise and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.
3. In order to prevent the occurrence of all forms of exploitation, violence and

abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

People with disabilities have the right to live free from exploitation, violence and abuse. People with disabilities should be protected from violence and abuse regardless of whether it takes place in a residential setting, psychiatric facility, police station or in prison. People with disabilities have the right to receive help and appropriate supports to stop the violence and recover.

Other important aspects of international human rights law considered in the report, as they relate to access to justice in the criminal justice system, include the right to:

- Adequate standard of living and social protection (art. 28 CRPD, art. 23 CERD, art. 9 CESC, art. 11 CEDAW, art. 26 CRC)
- Habilitation and rehabilitation (art. 26 CRPD)
- Health (art. 25 CRPD, art. 25 CESC, art. 12 CEDAW, art. 24 CRC)
- Education (art. 24 CRPD, art. 5(e)(v) CERD, art. 13(1) CESC, art. 10 CEDAW, art. 28 (1) CRC)
- Work (art. 27 CRPD, art. 6 CESC, art. 11 CEDAW, art. 5 CERD).

Appendix C – Meetings and Submissions

The Australian Human Rights Commission held public meetings in each State and Territory. In addition the Commission conducted 114 individual meetings. These meetings were held with people with disabilities, their families and carers, Attorneys-General, members of the police forces, correctives services and judiciaries, disability advocacy peak-bodies, community groups, and academic, medical and legal experts. The Commission also received 88 submissions.

List of Public Meetings

Hobart (TAS): 20 May 2013
Brisbane (QLD): 18 June 2013
Adelaide (SA): 19 June 2013
Sydney (NSW): 25 June 2013
Canberra (ACT): 26 June 2013
Geelong (VIC): 10 July 2013
Melbourne (VIC): 11 July 2013
Newcastle (NSW): 18 July 2013
Perth (WA): 22 July 2013
Port Hedland (WA): 24 July 2013
Roebourne (WA): 25 July 2013
Katherine (NT): 31 July 2013
Darwin (NT): 1 August 2013

List of Submissions

Aboriginal Legal Service of Western Australia
ACT Children & Young People Commissioner
ADACAS & Fiona May
Advocacy for Inclusion
Australian Community Support Organisation (ASCO)
Autism Aspergers Advocacy Australia (A4)
CASS Care
Central Australian Aboriginal Legal Aid Service Inc.
Children with Disability Australia
Commissioner for Children and Young People Western Australia
Communication Rights Australia
Corrigan, G.
Deaf Services Queensland
Deaf Society of New South Wales
Disability Advocacy Victoria Inc.
Disability Rights Advocacy Service Inc
'Emily'
Flat Out
Galway, J.
Hansen, C.
Intellectual Disability Rights Service - Criminal Justice Support Network
'Jennifer'
'Julie'
Law Council of Australia
Law Institute of Victoria
Legal Aid WA

'Mary'

National Aboriginal and Torres Strait Islander Legal Services (NATSILS)
National Association of Community Legal Centres and Queensland Association of Independent Legal Services

NCID

North Australian Aboriginal Justice Agency

Northern Territory Department of the Attorney-General and Justice

NSW Government

Office of the Public Advocate (Queensland)

People with Disability Australia Incorporated

Physical Disability Council of NSW

Public Interest Advocacy Centre

Queensland Advocacy Incorporated

Queensland Law Society

Sisters Inside

South Eastern Centre Against Sexual Assault

Speech Pathology Australia

TASC

Tasmanian Attorney-General and Minister for Justice

The Information Access Group

UnitingCare Children, Young People and Families

Victorian Coalition of ABI Service Providers Inc.

Women with Disabilities WA Inc

Women's Legal Service Inc. Brisbane

WWILD Sexual Violence Prevention Service

Anonymous X 11

Confidential X 27

¹ See Appendix B to this report.

² See Australian Human Rights Commission, *Access to justice in the criminal justice system for people with disability*, Issues Paper (April 2013) for an extended description of these barriers and the issues they raise. At <http://www.humanrights.gov.au/publications/access-justice-criminal-justice-system-people-disability-issues-paper-april-2013> (viewed 24 January 2014).

³ See Appendix B to this report.

⁴ Pricewaterhouse Coopers, *Disability expectations : Investing in a better life, a stronger Australia* (November 2011) p 11. At <http://www.pwc.com.au/industry/government/publications/disability-in-australia.htm> (viewed 24 January 2014).

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- ²⁶ 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.
- ²⁷ 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.
- ²⁸ Communication Rights Australia, Submission 73; Australian Human Rights Commission Access to Justice Public Meeting, Roebourne (25 July 2013); Name withheld, Submission 3.
- ²⁹ ACT Disability, Aged and Care Advocacy Service, Submission 20; Communication Rights Australia, Submission 73.
- ³⁰ Disability Advocacy Victoria, Submission 68.
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- ³² The Deaf Society of NSW, Submission 66; Sister's Inside, Australian Human Rights Commission Access to Justice Public Meeting, Brisbane (18 June 2013); Deaf Access Victoria, Australian Human Rights Commission Access to Justice Public Meeting, Geelong (10 July 2013); Name withheld, Submission 3.
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- ³⁶ Professor Martine Powell, Deakin University, Melbourne, Australia.
- ³⁷ Meeting with Tasmanian Department of Justice.
- ³⁸ Professor Martine Powell, Deakin University, Melbourne, Australia.
- ³⁹ Meeting with Attorney General's Department, South Australia and Law Faculty, University of South Australia.
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- ⁴¹ Meeting with Katherine Women's Information and Legal Service (KWILS), Australian Human Rights Commission and University of NSW roundtable: Access to Justice in the Criminal Justice System for People with Disability (22 April 2013).
- ⁴² Meeting with South West Aboriginal Medical Service (SWAMS); NT Community Visitors Scheme (Teleconference); Australian Human Rights Commission and University of NSW roundtable: Access to Justice in the Criminal Justice System for People with Disability (22 April 2013); Confidential, Submission 19; Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues Part 1* (2008) pp 12, 41. At <http://www.humanrights.gov.au/publications/preventing-crime-and-promoting->

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