

advocacy for inclusion

Addressing the barriers

- making equal participation in the ACT justice system a reality for people with disabilities

Submission to ACT Budget Consultation 2016 - 17

Advocacy for Inclusion
October 2015

About Advocacy for Inclusion
Home of the Disability Rights Law Centre

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

Advocacy for Inclusion provides individual, self and systemic advocacy services for people with disabilities. We provide information, education, and representation to effectively advocate for positive and inclusive outcomes for people with disabilities.

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

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Recommendation 5: People with disabilities must be supported to participate in legal processes concerning them, and supported to retain control over their own decision making.

Recommendation 6: Specialist disability communication support must be provided at the outset for any person whose legal capacity is in question.

Recommendation 7: Cease expecting existing justice system professionals to universally develop high level specialist disability expertise.

Recommendation 8: Justice system professionals must be trained in identifying when specialist expertise is required.

Recommendation 9: Support the systemic introduction of specialist disability expertise to overcome the barriers to equality of access to justice for people with disabilities.

Recommendation 10: Provide ongoing funding of \$150,000 per year to commence responding to demand for the DRLC.

Recommendation 11: The forthcoming Disability Justice Strategy must contain a research strategy so that the true disability justice picture is better understood and responded to.

Introduction

People with disabilities¹ are significantly over represented in the criminal justice system as both offenders and victims.² In several other areas of the justice system people with disabilities represent large groups of affected people including in child protection, guardianship, and tenancy matters. Yet there are very few specialist disability response legal services anywhere in Australia, and few that have a capacity to respond to the variety of matters that the disability population faces.³

Australia and the ACT have been relying on generic justice solutions to respond to people with disabilities, many of whom have cognitive impairments⁴ or significant communication barriers and complex support needs. While many of these existing solutions are high quality for general purposes, they also face substantial demand, and so they struggle to respond appropriately to many people with disabilities.

The outcomes of this generic approach are stark:

- Over half the Australian prison population is people with disabilities.⁵
- Parents with disabilities have high exposure to the child protection system.⁶
- People with disabilities can be indefinitely incarcerated in Australia.⁷
- People with disabilities face a low incidence of their legal problems reaching successful resolution.⁸
- People with disabilities experience higher rates of violence.⁹
- Women with disabilities experience very high rates of physical and sexual violence.¹⁰
- People with disabilities are not seen as credible witnesses.¹¹
- There are low rates of prosecution of assaults perpetrated against people with disabilities.¹²
- People with disabilities feel substantially less safe out in their local area and at home alone at night.¹³

¹ The *Convention on the Rights of Persons with Disabilities* includes people with psychosocial disability. As such whenever Advocacy for Inclusion uses the term disability it includes ALL people with disabilities including those with psychosocial disability.

² Australian Human Rights Commission. (2014). *Equal before the law: Towards disability justice strategies*.
<https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>

³ In the ACT, the only disability specialist response is the Disability Discrimination Legal Centre which focusses on responding to matters covered by the *Disability Discrimination Act 1991*.

⁴ The term cognitive impairment covers a broad range of disabilities including intellectual disability, brain injury and psychosocial disability.

⁵ Human Rights Law Centre (2015) *Australia's Human Rights Score cards – NGO Coalition Fact Sheet 10 – People with Disability and Mental Illness*; Australian Institute of Health and Welfare (2013) *The health of Australia's prisoners 2012*.

⁶ See Advocacy for Inclusion. (2013). Counting them in: Parents with disabilities and the ACT Child Protection System.
http://www.advocacyforinclusion.org/images/Publications/housing/Advocacy_for_Inclusion_Response_to_CSD_Out_of_Home_Care_Strategy_2015-2020_Dec2013_FINAL.docx ; Lamont, A., & Bromfield, L. (2009). *Parental intellectual disability and child protection: Key issues*. National Child Protection Clearing House, (31), 1-18. www.aifs.gov.au/nch/pubs/issues/issues31/issues31.html ; Hamilton, S. & Braithwaite, V. (2014). *Complex lives, complex needs, complex service systems*. Australian National University.

⁷ Justice diversion provisions for people with cognitive, psychosocial disability or mental illness within the criminal justice system deemed 'unfit to stand trial' have resulted in indefinite detention of people in prisons or psychiatric facilities without conviction. See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (2014). *KA, KB, KC and KD v Commonwealth (Department of Prime Minister and Cabinet, Department of Social Services, Attorney-General's Department)* [2014] AusHRC 80.

⁸ Coumarelos, C., Macourt, D., People, J., McDonald, H. M., Wei, Z., Iriana, R., & Ramsey, S. (2012). *Legal Australia-wide survey: Legal need in the Australian Capital Territory* (Vol. 8). Law and Justice Foundation of New South Wales, xv, xix.

⁹ Australian Bureau of Statistics. (2012). *Personal Safety, Australia, 2012 - 44906.0*. Table 11 – Experience of violence during the last 12 months, Disability Status. People with disability were found to be more likely to experience violence (a physical or sexual assault or threat) in the preceding 12 months. It was noted that those with severe communication disabilities would be under represented by the survey and people residing in non-private dwellings, such as institutions, were excluded – therefore, the populations of people with disabilities most likely to experience violence were not captured by this survey.

¹⁰ Dowse, L., Soldatic, K., Didi, A., Frohmader, C. and van Toorn, G. (2013) *Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia. Background Paper*. Hobart: Women with Disabilities Australia; Frohmader, C Dowse, L., and Didi, A. (2015) *Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective*. Hobart: Women with Disabilities Australia.

¹¹ See for example *Director of Public Prosecutions v Vinod Johnny Kumar* [20 November 2013] VCC. See also Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings* (2014).

¹² Australian Human Rights Commission. (2014). *Equal before the law: Towards disability justice strategies*.p20. Camilleri, M. (2010) *Disabled Justice: Why reports of sexual assault made by adults with cognitive impairment fail to proceed through the justice system*.

¹³ Australian Bureau of Statistics (2011) *Social Participation of People with Disability – 4439.0* , Feelings of Safety.

The assumption that generic solutions will manage, or be able to provide specialist expertise as required, is clearly erroneous. If generic solutions were going to work they would be doing so already, and they are not. The lack of a specialist disability response means people with disabilities simply don't have equal access to justice.

The key contributing factor to the current situation is a long term failure by the community to recognise the considerable disadvantage faced by people with disabilities in accessing justice on equal terms to the broader population. There is no specific blame to attach to this failure; rather it is a cultural phenomenon that has arisen over many centuries of poor responses to the needs of people with disabilities.

Additionally, the lack of specialist responses to people with disabilities in the justice system must be held up alongside longstanding specialist responses for other groups in the community who are over represented and disadvantaged in justice processes, for example Aboriginal and Torres Strait Islander peoples, LGBTIQ people, and women. A system that recognises that some groups in our community are disadvantaged, and provides specialist responses for them, is simultaneously expecting that the most disadvantaged group will be well served by generic responses.

Recommendation 1: Recognise the specific disadvantage faced by people with disabilities in accessing justice and support holistic policy and program responses to address it.

1. Recognising Disadvantage

People with disabilities are placed at extreme disadvantage when interacting with justice systems in the ACT – whether as victims, offenders or other litigants, they are victimised, wronged or discriminated against, caught up in inadvertent processes of criminalisation, or simply excluded from accessing mechanisms and supports necessary to achieve just legal outcomes.

Systemic problems manifest in the differential treatment of people with disabilities, in negative and discriminatory ways, and in repeated failures to recognise, accommodate or otherwise respond to a person's disability in appropriate ways that would facilitate their effective participation in criminal or civil law processes, and which might also lead to swifter resolution of legal problems.

In 2011 all Australian governments recognised law and justice issues as crucial to disability reforms, with “Rights protection, justice and legislation” forming one of the six outcome areas of the *National Disability Strategy 2010-2020*, which includes commitments to more effective criminal justice responses and access to justice for people with disability.¹⁴

In 2014, the *Equal before the law*¹⁵ report by the Australian Human Rights Commission brought into focus the urgent need for action on disability justice reforms across all jurisdictions. South Australia has been ahead of the curve with its *Disability Justice Plan 2014-2017*. However, South Australia's Plan is concerned only with the criminal justice system.

As the ACT develops its own strategic plan for disability justice reforms it must be recognised that the disadvantage experienced by people with disabilities is not exclusive to matters of criminal law, but is inextricably bound up with issues of legal capacity and the full range of civil law matters to which people with disabilities are commonly exposed.¹⁶

Current moves by the ACT Government to expand restorative justice practices and to build a restorative community align well with supporting people with disabilities to better engagement. People with disabilities will require forums where they are heard, supported to be listened to, and are respected contributors to outcomes. Restorative practices provide an opportunity to take this approach and, as such, provide a strong way forward for building a more equitable justice experience for people with disabilities.

ACT reforms must be coordinated with the expansion of restorative programs, the development of a Justice Reinvestment Strategy, and other broader reforms in justice and disability policy.¹⁷

Recommendation 2: Ensure the ACT disability justice response covers the entirety of the justice system and is not confined to criminal justice areas.

Recommendation 3: Disability justice reforms in the ACT must be coordinated across a range of existing initiatives.

¹⁴2010-2020 *National Disability Strategy* at p36-41, Outcome area 2, Policy Directions 3 and 5. Indeed, this is part of our international human rights obligations under of the United Nations *Convention on the Rights of Persons with Disabilities*. Article 13 requires States Parties to “ensure effective access to justice for persons with disabilities on an equal basis with others”. United Nations General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106*.

¹⁵ Advocacy for Inclusion was part of the early roundtable which framed the human rights structure of the *Equal before the law* report. We then partnered with the AHRC to undertake the consultation process in the ACT and assisted in finalising the report.

¹⁶ ACT Law Reform Advisory Council (2015) *Tell us what you think – Adults making decisions in the ACT: Reform of guardianship arrangements for adult people with disabilities in our community - Response Booklet*. Although the current review is focused on the *Guardianship and Management of Property Act 1991*, reforms that bring decision making laws (and practice) into compliance with Article 12 of the UN CRPD would have significant implications in how the broader legal system is accessed by, and responds to, people with disabilities. We explore some of the ways that outdated understandings of legal capacity impede the participation of people with disabilities in legal processes.

¹⁷ Simon Corbell MLA (2015) *Media Release: Improved outcomes in restorative communities*.

http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/corbell/2015/improved-outcomes-in-restorative-communities ACT Justice and Community Safety Directorate (2015) *Justice Reinvestment Strategy*.
<https://justice.act.gov.au/page/view/3829/title/justice-reinvestment-strategy> .

Recommendation 4: The ACT disability justice response must be in keeping with a justice reinvestment and restorative practice approach.

Over-representation and exclusion

The barriers to justice experienced by people with disabilities extend across a range of areas.¹⁸ In 2012, the Legal Australia-Wide Survey conducted by the Law and Justice Foundation of New South Wales examined access to justice and legal need and found people with disabilities stood out as a disadvantaged group across all jurisdictions.¹⁹ Not only are people with disabilities:

*“more likely to experience legal problems, but the wide range of legal problems they face may impact negatively on their lives and further entrench their social exclusion”.*²⁰

In the ACT, people with disabilities have significantly higher prevalence of legal problems overall and substantial, multiple and diverse legal problems.²¹ People with disabilities are the only disadvantaged group with significantly lower levels of finalisation of legal problems.²²

There is a great deal of research documenting and analysing the over-representation of people with disabilities specifically in criminal justice systems.²³ During arrest and interrogation, some suspects with disabilities will struggle to understand their legal rights, including the right to silence, especially where no specific communications support is provided.²⁴ These barriers are, in turn, likely to influence the sentencing stage, contributing to the high number of detention orders imposed on people with disabilities.²⁵ In the first instance, disability may not be readily evident and police, and other first responders, often fail to identify its presence.²⁶

Throughout various points in justice processes, inflexible systems or procedures often fail to respond to a person’s disability and their associated needs, or the identification of their disability leads to discrimination against them. For instance, being assessed as having cognitive impairment, and subsequently being found unfit to plead, directly contributes to the indefinite detention of people with disabilities.²⁷

Inaccessibility and barriers to justice

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

- communication and cognitive barriers associated with giving instruction to legal representatives;
- costs associated with legal representation;

¹⁸ Productivity Commission (2004) *Review of the Disability Discrimination Act 1992- Inquiry Report*, 3 April 2004, p 248-253.

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

¹⁸ Ibid, 19.

¹⁹ Coumarelos, C. et al. (2012), *Legal Australia-wide survey: Legal need in the Australian Capital Territory* (Vol. 8). Law and Justice Foundation of New South Wales, xv.

²⁰ Ibid, 19.

²¹ Ibid. xv.

²² Ibid. xix.

²³ Australian Human Rights Commission. (2014). *Equal before the law: Towards disability justice strategies*.

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

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

Law Reform Commission (2013) *People with cognitive and mental health impairments in the criminal justice system*. Intellectual Disability Rights Service, (2008) *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System*. Brown, S. and Kelly, G. (2012) *Issues and inequities facing people with acquired brain injury in the criminal justice system: Report prepared for Victorian Coalition of ABI Service Providers Inc. (VCASP)*. Cockram J, (2005), *Equal justice? The experiences and needs of repeat offenders with intellectual disability in Western Australia*. Activ Foundation Inc.

²⁴ Bartels, L. (2011). *Police Interviews with Vulnerable Adult Suspects*. Research in Practice Report No. 21. Australian Institute of Criminology, Canberra, ACT. 13p.

²⁵ Cockram, J. ‘People with an Intellectual Disability in Prisons’ (2005) 12 *Psychiatry, Psychology and Law* 163, 170.

²⁶ Susan Hayes, ‘A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities’ (2005) 17 *Current Issues in Criminal Justice* 69, 71. M Henshaw and S Thomas, ‘Police Encounters with People with Intellectual Disability: Prevalence, characteristics and challenges’ (2011) *Journal of Intellectual Disability Research* 1.

²⁷ Aboriginal Disability Justice Campaign, ‘Position Statement on the Inappropriate Incarceration of Aboriginal People with Cognitive Impairment’, (Position Paper, People With Disability Australia, October 2008) <www.pwd.org.au/systemic/adjc.html>. Sotiri, M, McGee, P, & Baldry, E (2012) *No End in Sight. The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*. Sydney: University of NSW.

- difficulties accessing necessary support, adjustment or aids;²⁸ (a shortage of funding to legal assistance services severely undermines their capacity to meet the legal needs of specific and vulnerable groups, particularly people with disabilities);²⁹
- highly formalised and ritualised procedures and complicated legal language that people with cognitive disabilities find confusing, incomprehensible, alienating or intimidating;³⁰ and,
- cognitive and/or sensory impairments require extra time and specialist assistance to address.

When people with disabilities do access legal representation, lawyers are ill-equipped to respond to their particular individual needs; for example, allowing the client time to process information, or communicating in ways that support their comprehension and involvement. People with disabilities may need

“more time to understand and answer questions or... a support person to explain things to them and ensure that they are not overwhelmed by the stress of a new and confronting situation (like a court or police station)”³¹

Through our direct advocacy work Advocacy for Inclusion finds that police officers, lawyers, and court staff do not have specific skills for working with people with disabilities, despite the best of intentions. Their focus is on applying their specialist area of expertise, and this is as it should be. Just like many other members of the community assumptions are made that people with disabilities are unable to be engaged, to make a credible statement, or give evidence, even with supports.

Usually, they also lack the time that is required to ensure full participation by a person with significant cognitive or communication barriers. The need for support is not considered - instead legal presumptions and processes are applied to remove or downgrade the client’s legal personhood, such as through substitute decision-making (guardianship).³²

Case study

Daniel has a cognitive disability and was recently charged with a serious criminal offence. Daniel didn’t know what was going on. His lawyer, Paula, didn’t explain much to him and instead insisted that she talk to his uncle, who is his primary support person.

Daniel does not have a guardian.

When Daniel asked about the details of the court proceeding Paula refused to disclose the information. She said that she would only talk to Daniel’s uncle. Daniel asked Paula to communicate directly with him to explain what is going on.

Paula replied “this offense could result in jail time and his case has to be treated very carefully. She felt that Daniel didn’t really understand what is going on because of his disability. There was not really any point in explaining it all to him. I’ve been talking to your uncle about it. He is your main carer and is responsible for you.”

Daniel was devastated. He knew things were serious but nobody would take the time to tell him exactly what was happening. Paula finally disclosed some the details of what she was planning to do, including applying for Daniel to have his fitness to plead assessed. She also advised Daniel’s uncle to apply for a guardianship

²⁸ Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws – Final Report*, ALRC Report 124, p192.

²⁹ The Law Council of Australia (2014) *Submission to Inquiry into Equality, Capacity and Disability in Commonwealth Laws*. Office of the Public Advocate Victoria (2011) *Submission to the Inquiry into Access to and Interaction with the Justice System by People with Intellectual Disability and their Families and Carers*, 20-21.

³⁰ Parliament of Victoria Law Reform Committee (2013) *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers- Final Report*. quoting the Submissions of the Legal Services Commissioner, Villamanta Disability Rights Legal Service, Victorian Advocacy League for Individuals with Disability Inc xxiv, 103, 178, 205.

³¹ Fogarty, B. (2010) ‘Improving legal representation for people with intellectual disability’, *Precedent* 96.

³² The current review of the *Guardianship and Management of Property Act 1991* has illustrated the vital need to overhaul ACT laws around adults making decisions. ACT Law Reform Advisory Council (2015) *Tell us what you think – Adults making decisions in the ACT: Reform of guardianship arrangements for adult people with disabilities in our community - Response Booklet*.

order. “He needs somebody to make decisions on his behalf. A guardianship order would have stopped him from getting into this mess in the first place.”³³

Daniel’s uncle was convinced that a guardianship order would improve the situation, even though Daniel has always made his own decisions with informal support as needed.

Daniel’s family was pressured to apply for a guardianship order, seemingly because it would support the case that Daniel was “unfit to plead”. It was assumed that a guardianship order would be the solution to Daniel’s problems.

The ramifications for Daniel were serious: he would lose recognition of his authority to make decisions about his own life, and there would be no solution to his criminal matters. Even without the guardianship order, the lawyer treated Daniel as though he already had no such authority simply because of his disability.

Paula stopped taking Daniel’s phone calls and now only discusses the matter with Daniel’s uncle. It’s easier for her that way.

Daniel has been effectively excluded from participating in his own legal defence.

Lawyers often prefer to speak with family members instead of directly to the person with disability about their case. This saves time, but it results in people with disabilities not being directly represented or heard, and as such their rights are being discarded.

The idea that guardianship can fix people’s problems reflects the paternalistic responses that have historically been used toward people with disabilities. As Advocacy for Inclusion argued in our recent submission:

“guardianship orders necessitate an imbalance of power, unequal access to legal assistance and uneven valuing of knowledge in both procedure and outcome. The perception that guardianship protects and cares for people with disabilities is unrealistic and must be challenged.”³⁴

People with disabilities are often left in the dark about how their case is progressing and are not provided the support they need to understand and engage in the process. Unfortunately Daniel’s case illustrates several existing systemic barriers to justice.

Lawyers, police officers and other relevant personnel are not, and cannot reasonably be expected to become, experts in disability or proficient in responding to the various needs of this group. Rather, access to specialist support to assist communication and comprehension in justice settings would enable people with disabilities to meaningfully participate in legal processes. People working in the justice system must be trained in identifying when specialist expertise and support is required, and have access to supports to call in for assistance.

The need for specialists to work alongside justice professionals is well entrenched across a range of other specific areas of disadvantage, yet there is no current recognition that this would improve justice processes for all concerned when working with people with disabilities.

A very small number of people with disabilities³⁵ are able to access an advocate through the National Disability Advocacy Program.³⁶ In the ACT each year independent advocacy services turn away more than double the number of people that they are able to support.³⁷ Most people with disabilities are not supported to participate as equals in their own justice process; instead it further marginalises them from the community.

³³ There is strong evidence to suggest that guardianship provides no safeguard against people ending up in difficult situations. See Advocacy for Inclusion (2015) *The Right to Equality: Review of Guardianship Arrangements for Adults with Disabilities in the ACT - Submission to the Law Reform Advisory Council*, 22-27. <http://advocacyforinclusion.org/index.php/2014-09-22-05-11-32/publications-home/decision-making>

³⁴ Ibid.

³⁵ The current resource available in the ACT equates to less than 20 people per year supported with justice processes.

³⁶ Department of Social Services (2015) *National Disability Advocacy Programme (NDAP)*. <https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/national-disability-advocacy-program-ndap>

³⁷ Advocacy for Inclusion (2015) *Submission to the Senate Inquiry into community sector funding*. <http://advocacyforinclusion.org/index.php/2014-09-22-05-11-32/publications-home/funding>

The inaccessibility of legal advice and appropriate supports affects the participation of people with disabilities across numerous areas, for example:

- outdated understandings of legal capacity commonly prevent people with disabilities from being informed about or involved in legal decision-making directly concerning their lives;³⁸
- people with disabilities regularly don't attend Tribunal processes which impose or review Guardianship and Administration Orders;³⁹
- parents with disabilities are poorly resourced to respond to the removal of their children by Care and Protection, or to access the parenting supports and/or legal advocacy needed to have their children returned from Out of Home Care;⁴⁰
- people with disabilities are stranded in situations of abuse or violence, unaware of their rights and feeling isolated and powerless to speak up, or without access to recourse against the perpetrator(s).⁴¹

The current levels of disadvantage will not be addressed by mere legislative reform, but will require coordinated investment in changing culture and attitudes and in supporting people with disabilities to exercise their decision-making rights.⁴²

The current system works somewhat retrospectively. Once a legal process has reached a certain point a great deal of effort is then put into assessing a person's legal capacity. Capacity assessment processes can take many months to work through and many people who require assistance find themselves ineligible for services that arise from capacity impairment. Once capacity is called into question a case will progress differently.

Shifting the support emphasis to the beginning of any justice process and assuming that appropriate communication supports must be provided at the outset for any person whose legal capacity is in question, will provide a more holistic response to all people including people with disabilities. It will also align more readily with Australia's obligations under the *Convention on the Rights of Persons with Disabilities* articles 12 and 13, which insist that all people with disabilities have a right to equality of access to justice, and to be supported to make their own decisions.⁴³

There may occasionally be someone who subsequently doesn't need the support that is provided (for example someone whose capacity is impaired by a cocktail of substances rather than a disability), but the numbers of people with disabilities currently in the system illustrates the need to operate differently and err on the side of assuming support is required rather than waiting until disability becomes a hindrance to proceeding with a case, then assessing for capacity, and then responding according to the outcomes of that assessment.

A person with disability who is supported to participate in their justice process from the outset will be in a better position to instruct their lawyer, respond to police or prosecution staff, and ultimately better understand any outcome. A person who is more engaged and understanding of any process and outcome will also be a person who is better able to accept that outcome, whatever it is.⁴⁴ This is a rarity in the current system as the

³⁸ The Australian Law Reform Commission has recommended in its 2014 Report, *Equality, Capacity and Disability in Commonwealth Laws*, that the existing tests relating to a person's capacity to exercise legal rights or participate in legal process must be reformulated to focus on whether and to what extent a person can be supported to play their role in the justice system. Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws – Final Report*, ALRC Report 124, p192.

³⁹ Advocacy for Inclusion (2015) *The Right to Equality: Review of Guardianship Arrangements for Adults with Disabilities in the ACT - Submission to the Law Reform Advisory Council*, 22-27.

⁴⁰ See Advocacy for Inclusion. (2013). Counting them in: Parents with disabilities and the ACT Child Protection System.

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

⁴¹ Advocacy for Inclusion (2015) *Submission to the Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings*, 8. <http://advocacyforinclusion.org/index.php/2014-09-22-05-11-32/publications-home/restraint>

⁴² For more detailed recommendations see Advocacy for Inclusion (2015) *The Right to Equality: Review of Guardianship Arrangements for Adults with Disabilities in the ACT -Submission to the Law Reform Advisory Council*, 22-27.

<http://advocacyforinclusion.org/index.php/2014-09-22-05-11-32/publications-home/decision-making>

⁴³ United Nations *Convention on the Rights of Persons with Disabilities* articles 12 and 13,

http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf

⁴⁴ For an examination of how being supported to participate in legal processes affects perceptions of fairness and consequently wellbeing, see: Beaupert, F. (2009) 'Mental Health Tribunal Processes and Advocacy Arrangements: "Little Wins" are No Small Feat' 16 *Psychiatry, Psychology and the Law* 90, 93. Winick, B.J. (1999) 'Therapeutic Jurisprudence and the Civil Commitment Hearing' 10 *Journal of Contemporary Legal Issues* 37, 54. Tyler, T. R. (1992) 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' 46 *Southern Methodist University Law Review* 433.

assumption is made that the person cannot participate, rather than on supporting them to participate as an equal.

Recommendation 5: People with disabilities must be supported to participate in legal processes concerning them, and supported to retain control over their own decision making.

Recommendation 6: Specialist disability communication support must be provided at the outset for any person whose legal capacity is in question.

Recommendation 7: Cease expecting existing justice system professionals to universally develop high level specialist disability expertise.

Recommendation 8: Justice system professionals must be trained in identifying when specialist expertise is required.

2. Identifying a model to address disadvantage

In 2013 Advocacy for Inclusion recognised the significant disadvantage faced by people with disabilities in the justice system by building a new service to address this large area of unmet need. The Disability Rights Law Centre (DRLC) will build legal services that more effectively respond to people with disabilities by providing specialist disability supports to work alongside law partners, provide and sponsor research to clarify causes and options behind the levels of over representation, and train justice professionals in disability awareness and confidence. Additionally, it is clear that the boundaries of the law, and how they impact on people with disabilities, are poorly understood so developing legal precedent by undertaking test cases will contribute to a better understanding of the parameters of the law and how it relates to people with disabilities.

The DRLC provides the Canberra disability community, for the first time, with a specialist response to an area that has previously been approached through ad hoc or generic services. With the inclusion of research, test case and training capacity it will also provide a more holistic approach to progressing the right to equal access to justice for people with disabilities.

Advocacy for Inclusion was approached in late 2013 by consulting firm 180 Degrees,⁴⁵ a respected international collaboration with a unit housed at the Australian National University, to undertake a pro bono project. This offer provided the potential to develop an implementation plan for the nascent DRLC for the forthcoming decade. The consulting report, including implementation plan, was delivered in late 2014 and contains a highly developed rollout plan for the DRLC over a 10 year period.

The Disability Rights Law Centre was quietly launched in June 2015 and was immediately embraced by the local law community, including the community legal centres, Legal Aid ACT, the Human Rights Commission, and various corporate law firms. The intention at this early stage was to provide connections between people with disabilities and law practitioners, to assist with developing justice practitioner disability confidence, and to coordinate a cohort of law student volunteers to assist with research.

The disability community, however, including individual people with disabilities and other disability organisations, immediately began to contact Advocacy for Inclusion to gain assistance with legal matters. This demand has continued unabated despite no phone listing or advertisement. Additionally the media became interested despite not being directly contacted, and suddenly demand exploded.

Within four months the DRLC has already progressed to phase 2 of its 10 year implementation plan - the 2 to 5 year period for the medium term. This was highly unexpected, but indicates the dearth of services and supports for people with disabilities accessing the justice system and the disability community's desire to access appropriate services. While the original 180 Degrees report provides continuing strong guidance as to the elements of the implementation plan, it is clear that the timeframes envisaged must now become flexible to harness the unexpected levels of enthusiasm and demand.

Advocacy for Inclusion has been working to ensure the current enthusiasm is not lost, and that we maintain the current momentum for developing the DRLC. This is the culmination of 2 years of planning and development to address a significant area of disadvantage for one of the most disadvantaged and marginalised groups within our community.

Taking the Disability Rights Law Centre forward

While several of the elements of the DRLC will be self-funded, pro bono, or captured within existing Advocacy for Inclusion capacity,⁴⁶ it has become clear that there are other specific elements that can only be realised through the provision of government assistance.

The DRLC is now a member of the ACT Legal Assistance Forum and the Pro Bono Human Rights Stakeholder Group.⁴⁷ Already invitations to speak to Law Society workshops and to deliver training to various law firms

⁴⁵ 180 Degrees is the world's largest social impact consultancy <http://180dc.org/>

⁴⁶ While existing NDAP funding remains. Disability advocacy funding through the NDAP faces significant uncertainty and is awaiting COAG processes to be resolved and DSS funding systems to be finalised.

⁴⁷ ACT Legal Assistance Forum <http://www.actlaf.org.au/about-us/>

have been received, illustrating the level of specialist expertise sought by the local law and justice community.⁴⁸ Additionally, the DRLC is participating in Disability Justice Plan developments, and is rapidly developing a cohort of senior law students to support research.

Current work underway by the ACT Government in building a restorative community aligns well with the vision and intention of the Disability Rights Law Centre. People with disabilities are rarely involved as experts in developing policies and programs, particularly about matters which concern them. Additionally, current justice outcomes for people with disabilities point to a distinct lack of equal participation in justice matters. The use of restorative mechanisms such as being in the room, actively contributing to outcomes, being valued as a participant in building or designing outcomes, and being equal owners and implementers of those outcomes, will make a substantial contribution to equality of justice outcomes for people with disabilities.

The DRLC is examining how restorative practices can be used to build better outcomes for people with disabilities. A key aspect of a disability rights approach (CRPD article 12) is to ensure a space is created for people with disabilities to be heard, to be supported to be heard, and to be valued for what they say. This rights based approach aligns well with restorative practices and paves the way for the forthcoming Disability Justice Plan to commit to strong outcomes which will have meaning for the disability community.

What is needed today?

Advocacy for Inclusion undertook a design workshop to identify the immediate needs for the unexpected accelerated rollout of the Disability Rights Law Centre. We examined several key questions:

- What is it that is needed to provide a disability approach that is missing from existing legal services?
- What is needed now to harness the current level of enthusiasm and demand for the DRLC?
- How do we ensure people with disabilities have more involvement / control over their justice processes?

- How do we address the barriers to equal participation in the justice system?

Some elements of the DRLC implementation plan cannot be accelerated regardless of what level of resources are contributed immediately. These include:

- a. Disability confident legal practitioners – training and understanding will take 3 to 5 years to embed, probably much longer depending on the model.
- b. Corporate and philanthropic relationships – these require slow building and good resources to maintain. The DRLC will build these over time as anticipated in the original implementation plan.
- c. Establishing a legal practice – this can be done immediately with substantial resources, including office accommodation, but will still require the growth of disability confident legal practitioners.

How do we embed the principle that specialist support is systemically provided at the outset to those who need it?

Rather than waiting for someone's disability to become so apparent that it cannot be ignored, or to wait upon the outcome of lengthy diagnostic or other testing processes, how do we build a "no wrong doors" approach which targets someone as soon as they encounter the system? How do we avoid multi repetitions of justice exposure (recidivism) before providing any specialist disability response?

It became clear during our recent design workshop that the immediate need is for specialist disability expertise. It is the one element of the current justice system for which there are no available resources, and no systemic response. Occasionally disability specialists might be unnecessary, or someone might even decline the assistance, but it is better to assume that the assistance is needed and to have it available, than to seek ad hoc solutions further into the process or fail to provide them at all.

⁴⁸ The DRLC currently has collaborations in place with the Australian Government Solicitor, Legal Aid ACT, ACT community legal centres, the ACT Human Rights Commission, and the Australian Federal Police, and is in discussions with the ANU Law School. It also has offers from several corporate law firms for pro bono assistance, and has been undertaking regular conversations with officers of the Justice and Community Safety Directorate.

Specialist disability expertise will provide the right conditions to harness the current level of enthusiasm from law sector collaborators. Legal expertise is currently being offered, but it comes from existing legal services who are also seeking disability confidence training. A workable bridge between the disability community and legal practitioners will require specialist disability advocates⁴⁹ with law practice skills. Specialist disability expertise is what the DRLC brings to the legal community, which doesn't currently exist, and which will contribute substantially to the long term desired outcomes for disability justice equality.

If a person requires a language interpreter to participate in any legal process it is automatically recognised and measures are taken to provide it.

When a disability interpreter / communication support is required there is no response unless an ad hoc arrangement is made, a guardian is appointed, or the person goes without assistance of any kind.

During specific collaboration discussions with community legal centres it has become clear that several are being stretched to cover the lack of specialist disability legal services for their clients (despite this being outside their remit, capacity or professional skill base). At the same time Advocacy for Inclusion's disability advocacy is severely over stretched and regularly being drawn into quasi legal responses to achieve outcomes for our consumers. Clearly everyone is stepping outside their specialist area trying to make do in an attempt to fill the long standing gap in specialist disability response.

The DRLC design workshop developed a solution centred on an increase in specialist disability advocates so that both legal and disability specialist practitioners can work alongside each other to more effectively achieve outcomes for the person with disability – the lawyer focusses on the legal outcomes, while the advocate ensures two way disability communication and the fullest possible engagement by the person with disability. This was not the expected outcome, but once it was developed it became clear that it would be the most effective option.

Advocacy for Inclusion is unable to refer clients to legal services. Rather we must accompany them and remain engaged in the matter through to its conclusion. The key feature of this new model is that it is assumed that the lawyer and the advocate work alongside each other from the outset right throughout the process. It ensures that even the most disadvantaged person with disability is supported to engage in their own process.

The outcome is a full two way process for the client: they will understand what their justice process involves, and they will have an ability to ask questions and direct their lawyer regardless of their cognitive or communication barrier. The lawyer will be in a position to focus on their legal responsibilities while being confident that they have been fully instructed by their client. The advocate supports the client to follow up lawyer instructions as required without being drawn into quasi legal activities.

This model provides a systemic response that will substantially reduce the current ad hoc responses which take both lawyers and advocates away from their intended work into areas outside their remit in order to cover each other's responsibilities. It will also increase the capacity of both legal services and advocacy organisations to do their intended work and better meet current unmet demand. Greater efficiencies should become apparent within a short timeframe.

Advocacy for Inclusion is seeking the ACT government's support to provide specialist legal disability advocates, and experienced administrative staff to liaise with clients for a better justice outcome. Our experience in working with the most marginalised and isolated people with disabilities, in addition to extensive experience working alongside law practitioners, will be augmented and the Disability Rights Law Centre will meet the demand that is becoming increasingly evident.

The immediate needs for the DRLC are:

- a. **One full time disability advocate** (specialist communication / interpreter support) experienced in working alongside legal and justice practitioners – this advocate will provide complementary

⁴⁹ Independent disability advocates are guided by the National Disability Advocacy Code of Conduct, and the principles underpinning the NDAP.

support for legal service clients so that lawyers can focus on legal work without the various extra elements that many clients with disabilities require including lengthy explanations, briefings and preparation for meetings, sourcing alternative format documents, providing support to develop questions and consider options, ensuring the client is making their own decisions about progress for the case.

- b. **specialist administrative support** – to ensure lawyers and advocates can focus on their high demand work administrative assistance is required to coordinate appointments, track documents, follow up phone calls from clients, and meet accessibility requirements. From our experience this must be done by someone who is disability confident and who is able to speak to people with significant communication barriers on the phone and in person. This position will also take responsibility for supporting volunteers, and scheduling and supporting clinics.
- c. existing volunteer and pro bono lawyers – we are not seeking funding for a lawyer at this stage as this is available through existing mechanisms and partnerships, but there will need to be coordination support for the volunteer and pro bono lawyers who are offering their services – this will be undertaken by the admin support.

DRLC proposal as outlined, including on costs, is \$150,000 for each year.

Further considerations

The DRLC model outlined is a first step in building a new disability specialist community legal service. Over time the DRLC will grow to offer other services including:

- a. police watch house response / liaison
- b. first response victim support
- c. in house lawyers with disability confidence
- d. specialist research focussing on longitudinal outcomes
- e. training and consultancy in disability confidence for all justice practitioners
- f. development of specialist justice resources to support the ACT disability community for both victims and offenders
- g. further responses as identified by research.

Recommendation 9: Support the systemic introduction of specialist disability expertise to overcome the barriers to equality of access to justice for people with disabilities.

Recommendation 10: Provide ongoing funding of \$150,000 per year to commence responding to demand for the DRLC.

3. Clarifying the unknown

Improving justice outcomes for people with disabilities in the ACT will require a clearer picture of how, and to what extent, justice processes and systems are intersecting with their lives. Existing research indicates a strong over-representation of people with disabilities in the criminal justice system – for instance, in 2012, the Legal Australia-wide survey found a high prevalence of “crime legal problems” among people with disabilities in the ACT, with 20.8% of respondents reporting such problems.⁵⁰ The ACT Criminal Justice Statistical Profile presents extensive data on the interactions Aboriginal and Torres Strait Islander people with policing, courts, the Restorative Justice Unit and Corrective Services. Considerable data is also provided on the age and gender of offenders, detainees and victims. However, disability status is not indicated.

Similarly, no data is systematically collected on the prevalence of parents with disabilities in the ACT child protection system. While we know that there is a significant issue facing parents with disabilities as a result of advocacy experience and a recent ANU study⁵¹, they are invisible in government data and planning. Without data, appropriate policies and programs cannot be developed to address child protection issues for parents with disabilities, or to meet the needs of children and families involved in the out of home care system. Provision must be made to routinely collect demographic data from child protection service users in the ACT, including whether or not the parent/s and/or child/ren have disabilities.

In guardianship matters there is no tracking about the kind of support that was provided to a person for whom an order application has been made, nor is there any data about whether or not they attend and participate in their hearing.

These are just some of the many blank areas in knowledge about how people with disabilities intersect with the justice system and highlight how little research, particularly longitudinal, has been undertaken. The collection and publication of key information would allow the tracking and measurement of trends over time, and guide future priorities in disability justice reforms across both criminal and civil systems.

Recommendation 11: The forthcoming Disability Justice Strategy must contain a research strategy so that the true disability justice picture is better understood and responded to.

⁵⁰ Coumarelos, C. et al. (2012), *Legal Australia-wide survey: Legal need in the Australian Capital Territory* (Vol. 8). Law and Justice Foundation of New South Wales, 325.

⁵¹ Hamilton, S. & Braithwaite, V. (2014). *Complex lives, complex needs, complex service systems*. Australian National University. 10

4. Conclusion

People with disabilities experience severe and complex disadvantage when interacting with the ACT justice system. Existing statistics and research indicate a highly disproportionate involvement of people with disabilities across criminal and civil jurisdictions, though the true extent and nature of this over-representation is unknown. As a disability justice response is developed, the ACT government must implement a research strategy to shine a light on current disadvantage and, over time, track progress in removing it.

An effective policy response will not isolate criminal justice issues but comprehensively address the inaccessibility and prejudice of the legal system. Disability justice initiatives must also be integrated with broader reforms in disability and justice policy and coordinated with the emerging approaches of restorative practice and justice reinvestment.

It is time for the ACT Government to recognise that the lack of specialist disability support in justice settings is a major roadblock to the effective and equitable participation of people with disabilities in the ACT in their own justice processes. Generic responses have not, and will not, succeed in making justice accessible to this disadvantaged group.

Justice system practitioners are rightly focused on application of the law and developments in their area of expertise. It is unreasonable to expect professionals working in the often pressured and evolving justice sector to possess, or acquire, the considerable skills and knowledge needed to effectively assist the participation of people with disabilities in legal processes. Instead reforms must focus on ensuring the need for specialist disability expertise is systemically identified and addressed through the swift provision of appropriate communication and other supports from the first point of contact between the justice system and a person with disability.

The solution is a model that harnesses existing legal sector resources and capacity while systemically augmenting them with a specialist disability response.

The Disability Rights Law Centre has commenced this work and is now seeking ACT Government support to harness the significant levels of enthusiasm and demand that have become evident so that we may continue to build an effective systemic response.