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Subject: **Access to justice for people with disability**

Thank you for the opportunity to comment on “Access to justice in the criminal justice system for people with disability”.

*Autism Aspergers Advocacy Australia* (A4) is a national grassroots organisation advocating for people affected by autism spectrum disorder (ASD). People with ASD are a subgroup of people with disability (PwD).

ASD is a disability or mental disorder described in the recently released DSM-5 to involve:

- A. Persistent deficits in social communication and social interaction
- B. Restricted, repetitive patterns of behaviour, interests or activities
- C. Presence of symptoms from a young age
- D. Clinically significant impairment in social, occupational or other important areas of current functioning.
- E. Symptoms are not better explained by intellectual disability or global developmental delay.

Up until the late 1990s, ASD (sometimes referred to as “autism”) was considered a relatively rare disorder affecting up to 1 per 1,000 children. At this time, most people with ASD also had *intellectual disability* (sometimes called *mental retardation*).

In the past, particular concerns were raised about the experiences of people with intellectual disability in Australia’s legal system (see below).

Since the late 2000s, diagnosis rates for ASD have risen to at least 1 in 88, a point where the prevalence of ASD diagnoses is similar to the prevalence of intellectual disability in the community. The Australian Bureau of Statistics reports that most people with ASD (87% in 2003, 74% in 2009) have severe or profound disability. Others report that fewer than half the people with ASD also have intellectual disability. Most people with ASD have needs that are different from people with intellectual disability; they need essential services and support that are often unrecognised and unmet<sup>1</sup>.

As yet, little concern has been shown by anyone other than specific ASD advocates about the experiences of people with ASD in Australia’s legal

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<sup>1</sup> <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4428.0>

system. Reports from overseas<sup>2</sup> show people with ASD have major problems in their encounters with the legal system. We anticipate that if and when information about the experiences of people with ASD in Australia's legal system becomes available, it will show people with ASD generally, not just those who have an intellectual disability, have abysmal encounters with Australia's legal system.

The Introduction section to the Issues Paper<sup>3</sup> says ...

“The Australian Human Rights Commission is concerned that many people with disability ...”

- are not having their rights protected and
- are not being treated equally,

in the criminal justice system.

In relation to PwD, Australia does not have a “justice system” – Australia has a legal system. Using the term “justice system” is the “Yes Minister” tactic of “dealing with the difficult bit in the title”, hoping to fool people into believing something exist, when it doesn't exist.

Unfortunately, there are very few examples of Australia's legal system delivering justice for people with a disability like ASD, developmental delay or intellectual disability. Injustice is the usual outcome when people with such a disability come into contact with Australia's legal system.

A4 is disappointed that the Australian Human Rights Commission is merely “concerned” that the rights of PwD are not protected, and that PwD are not treated equally. The AHRC's website says

- its mission is “leading the promotion and protection of human rights in Australia”, and
- its “statutory responsibilities include ... human rights compliance [and] policy and legislative development”.

A4 notes that recommendation on the treatment of people with intellectual disability were made previously in the Burdekin Report<sup>4</sup>, especially in relation to people with “dual diagnosis” ... but the AHRC and Governments made little progress since then; that the AHRC apparently feels it needs to collect more data through processes like this and has not acted to ensure the rights of PwD are protected.

With its mission, responsibilities and its past findings, surely the AHRC should be *active*, not just “concerned”.

The AHRC's latest Issues Paper has two sections on “the rights of people with a disability in the criminal justice system”. Both sections say

“... people with disability:

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<sup>2</sup> in particular the *Adults with Autism and the criminal justice system* (Dec 2012) ... see the Annex below.

<sup>3</sup> [https://www.humanrights.gov.au/sites/default/files/document/publication/Access%20to%20Justice%20in%20the%20Criminal%20Justice%20System%20for%20People%20With%20Disability%20-%20Issues%20Paper%20April%202013\\_o.doc](https://www.humanrights.gov.au/sites/default/files/document/publication/Access%20to%20Justice%20in%20the%20Criminal%20Justice%20System%20for%20People%20With%20Disability%20-%20Issues%20Paper%20April%202013_o.doc)

<sup>4</sup> Human Rights and Equal Opportunity Commission (1993), *Human Rights & Mental Illness: Report of the National Inquiry into Human Rights of People with Mental Illness*.

- are entitled to equal protection and equal benefit of the law
- have the same legal rights and obligations as people without disability
- have an equal right to use the law to protect and pursue their interests
- should enjoy equal and effective access to justice
- ...

These claims are misleading or simply false. They have been known to be false for some considerable time.

It is impossible that all levels of Australia's legal system are completely unaware that "people with a disability are entitled to equal protection and benefit of the law"; the reality is that people with disability are not entitled to equal protection and benefit. The media has reported numerous cases where people with a disability have not been entitled to, and definitely nor received, "equal protection and benefit of the law". Nor do people with disability have "the same legal rights ... as people without disability". If this were true, there would be no need for the AHRC to collect any more information. Why would it be asking questions?

The right to life is one of the most fundamental of human rights. People with a disability need to be safe, but they are not – the law does not protect their right to life. Even when a person with disability dies due to the actions (or inaction) of others, those responsible are rarely prosecuted. The law and the legal system fail to provide anything like "equal protect and benefit" for people with disability.

A4 is most familiar with cases involving people with autism in the ACT; for example ...

- the criminal legal system failed Stephen Moon who died from the use of chemical restraint. The Coroner's inquiry fails to mention any more appropriate behaviour management approaches even being considered: this safer option is not even mentioned in the coronial report, a report that took almost 9 years to emerge (see <http://a4.org.au/a4/node/557#comment-1899> and <http://a4.org.au/a4/node/445>). The Coroner conducting the inquiry initially refused to recognise or even notify interested parties of hearing dates.
- Jack Sullivan, who was known to have seizures, died after being left unsupervised in a bath: no one was held accountable (see <http://a4.org.au/a4/node/547> and <http://www.autismaspergeract.com.au/node/151>). The DPP walked away after the appearance of a suitable delay.
- The 4 deaths that were the subject of the Gallop Inquiry were excluded from (never considered by) the criminal legal system. Eventually, there was an Inquiry but the Act Government turned the Inquiry aftermath into a legal and policy circus ... and the ACT's Government delayed then dropped its promised responses to recommendations.

When someone dies as a result of someone else's action, inaction, negligence, etc. the criminal legal system usually swings into vigorous action ... unless the person who died has a disability. Inaction is especially likely when the person with a disability who died was in state-funded care.

So PwD do not get equal protection or benefit from the law. A4 is disappointed that the AHRC makes this claim and promotes this myth. Promoting such myths is contrary to the AHRC's espoused purpose.

People have a right to a timely legal system, yet matters relating to people with disability seem to drag out excessively; for example,

- Stephen Moon's coroner's inquest took nearly 9 years,
- Jack Sullivan's discrimination complaint took 10 years; and
- It took a decade to achieve the decision in the Business Services Wage Assessment Tool (BSWAT) matter<sup>5</sup>.

In its section headed "What are the rights of people with disability in the criminal justice system?" the Issues Paper says:

The human rights of people with disability are outlined in the *United Nations [Convention on the Rights of Persons with Disabilities](#) (Disability Convention)*.

This description of the rights of PwD is incomplete. The CRPD describes the rights of PwD that are **different** for PwD from people who do not have a disability.

The Issues Paper is wrong to say PwD "have the same legal rights and obligations as people without disability". PwD need, and theoretically have through the CPRD, more rights than people without a disability. It would be more accurate to say *the rights of PwD include all the rights of people who do not have a disability*.

A4 is wary of statements that PwD "have the same ... obligations as people without disability". Such a claim needs much more explanation than is given. And the practicality of such an expectation is deeply questionable: for example, are temporally advantaged (older) drivers really obliged to react as quickly as the rest of the community? How could that possibly work?

PwD should have the same rights as other through the most basic of international human rights provisions under numerous international treaties<sup>6</sup> ... but Australia is one of the few place where citizens do not have legal protection of their basic human rights. Perhaps the legal system in Australia manages to meet most people's expectations relating to human rights... but it fails PwD badly. PwD are the people who need real human rights, and the legal system does not meet their need.

The reality is that Australian legal systems provide nothing like "equal protection and equal benefit of the law" for PwD. In Australia, PwD cannot "use the law to protect and pursue their interests" or "enjoy equal and effective access to justice".

According to international law, PwD have more rights others ... not the same rights as others; the CRPD gives PwD additional rights.

The legal system in Australia fails to provide "the adjustments and support [PwD] need to enjoy their other human rights" in any circumstance ... including "if they have had their personal freedom taken away".

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<sup>5</sup> <http://www.ncid.org.au/index.php/employment-first/108-commonwealth-discriminates-against-people-with-intellectual-disability-high-court-rules>

<sup>6</sup> see <http://www.info.dfat.gov.au/Info/Treaties/Treaties.nsf/WebView?OpenForm&Seq=2>

The Issues Paper asks:

Are there barriers to justice for people with disability in the criminal justice system in Australia?

A4 certainly agrees that there is plenty of evidence showing “that people with disability who need communication supports or who have complex and multiple support needs are not having their rights protected, and are not being treated equally, in the [legal] system. Additionally, people with disability who face multiple disadvantage and barriers are even more unlikely to have their rights protected or be treated equally in the [legal] system. This includes children, women, Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse backgrounds, and people with disability living in institutional, residential and other segregated settings.”

However, we believe the key barrier to justice for PwD is the legal system’s refusal to recognise and address its well-documented ignorance, prejudice, discrimination and incompetence relating to PwD.

While the 5 barriers that the AHRC identified in its issues paper certainly contribute, these barriers are outside the legal system. Progress on those barriers will be limited while the key barriers to justice within the legal system persist.

1. *What are the biggest barriers for you or other people with disability in the criminal justice system?*

The biggest barriers include:

- The lack of law to protect rights and insurmountable resistance from politicians and the Attorney-General’s Department in Australia to implementing laws required of nations who ratify international human rights treaties.
- The legal profession’s and workforce’s lack of training, skills, etc. in any disability-related matters
- Given that Australia has the worst disability related poverty in the OECD, so PwD have some of the worst access to legal representation of the entire community (even if legal professional knew what they were doing).
- The failure of the United Nations to hold Australia to account on its refusal to meet its obligation to enact effective human rights laws (largely because the United Nations wants to believe the political spin that the HREOC/AHRC gives it).

Then there are all the barriers described in a plethora of previous inquiries, reports, etc. such as in Chapter 21 of the Burdekin Report (and the Reconvened Inquiry into Victoria published Dec 1995) ... or Discussion Papers #29<sup>7</sup> & #35<sup>8</sup> and particularly Report #80<sup>9</sup> of the NSW Law Reform Commission.

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<sup>7</sup> New South Wales Law Reform Commission (1993), *People with an Intellectual Disability and the Criminal Justice System: Policing Issues. Discussion Paper 29.*

<sup>8</sup> New South Wales Law Reform Commission (1994), *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues. Discussion Paper 35.*

<sup>9</sup> New South Wales Law Reform Commission (1996), *People with an Intellectual Disability and the Criminal Justice System. Report 80.*

These reports describe massive failure of the legal system for people with intellectual disability, and especially for people with both intellectual disability and mental illness. According to these reports, people with intellectual disabilities are:

- Seriously over-represented as offenders
- Seriously over-represented as victims of crime
- Denied participation in the legal system as witnesses

2. *What could be done to remove these barriers and help people with disability in the criminal justice system?*

Having identified some of the biggest barriers, it is pretty obvious what can be done to remove the barriers. These have been documented in numerous previous reports. The best thing would be to start with implementation of all the previous recommendations.

Once some progress on these matters is underway, come back and talk to us about people with ASD. The basic diagnostic criteria for ASD (severe and pervasive impairment in social communication & interaction and behaviour) indicate that people on the autism spectrum will experience enormous barriers to justice in the legal system as it currently operates. The number of people with ASD has massively increased since the Burdekin Report and other reviews of the 1990s.

3. *Can you provide information about support that has helped you or other people with disability to participate in the criminal justice system?*

We have hardly any examples where people with ASD participated successfully in the legal system. Universally, the few successful examples we know of involved the legal professionals working closely with people with ASD, and understanding what they communicate. Positive outcomes are unusual since most legal professionals believe they know it all; generally, legal professionals have poor listening skills.

4. *Please tell us about any time that you or another person with disability experienced barriers to justice.*

A4 does not have direct involvement in legal processes however, some of our members have personally experienced barriers to justice or are close to others with experience.

Our experience is consistent with previous reports (as discussed above). With few exceptions, the legal system fails people with ASD just as it fails people with intellectual disability, especially when these people also have comorbid mental illness.

5. *Do you have any other thoughts, ideas or comments you would like to make about people with disability and the criminal justice system?*

A4 suggests that the Government starts by:

- enacting laws that ensure PwD have the rights described in the international human rights treaties, and
- implementing the recommendations of the numerous previous reports (e.g. the Burdekin Report dating back to 1993) relating to people with intellectual disability in the legal system.

In the event that these steps eventuate, next would be:

- educating people working in the legal system about disability, including intellectual disability, ASD and the full range of mental disorders and differences.
- enacting law that prevents disability vilification so that PwD have the same protections as people with a religion or people with a race.

The Issues Paper concludes:

Since 1993, people with disability in Australia have been able to make complaints of disability discrimination using the Disability Discrimination Act.

This certainly puts the most positive possible spin on the last 20 years. Yes, people have been able to make individual complaints to the AHRC. Some complaints, mostly complaints with non-government agencies, are resolved through conciliation. Some discrimination complaints progress to court and some of the complaints that do not involve a government agency as respondent were decided in favour of the applicant.

But international law says the state (being the Governments of Australia) is responsible for ensuring the needs of PwD are met. Yet to our knowledge, over the 20 years the only successful disability discrimination complaint against a government policy or a government agency is the BSWAT case (that took around 10 years).

The AHRC does not report information like this. It does not report on how long legal/criminal matters involving PwD take compared to other disadvantaged or vulnerable groups, or even compared to the average time taken for legal matters in the criminal legal system.

Notice that the *Purvis vs NSW* decision in the High Court denies children with behavioural disability (for example, children with ASD) their rights to education. This decision is not specific to education so it could also relate to other service types such as treatment, rehabilitation or any service that is a responsibility of the state ... even if Australia says it ratified various international human rights treaties.

The Australian Government ignores complaints about disability discrimination within the legal system ... see <http://a4.org.au/a4/node/619>, <http://a4.org.au/a4/node/637> and <http://a4.org.au/a4/node/628>.

There is no prospect that a complaint against disability discrimination in Australia's legal system would succeed.

A4 is not sure how disability discrimination relates to criminal law compared to other law. Please remember that A4 is completely unfunded<sup>10</sup>, so it does not have the resources needed to research thoroughly or collect comprehensive relevant data for responses like this.

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<sup>10</sup> The Commonwealth Government chooses (has an ongoing commitment) to discriminate (albeit legally) against people with ASD in refusing to fund a peak body to represent most people with ASD. The Commonwealth Government funds numerous peak bodies for other types of disability and peak bodies for some collections of disability types that none-the-less exclude effective representation (participation in the group) for the majority of people most affected by ASD.

A4 hopes these comments and information are useful and that you find our criticism constructive. Please feel free to contact us if you want additional information or clarification.

Yours sincerely



Bob Buckley  
Convenor

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## Annex: Some background on Autism Spectrum Disorders and legal systems

*Adults with Autism and the criminal justice system* (Dec 2012)

[https://www.birminghambeheard.org.uk/adults-communities/www-birminghamcitycouncil/supporting\\_documents/Adults%20with%20autism%20and%20the%20criminal%20justice%20system%20final%20report.pdf](https://www.birminghambeheard.org.uk/adults-communities/www-birminghamcitycouncil/supporting_documents/Adults%20with%20autism%20and%20the%20criminal%20justice%20system%20final%20report.pdf)

This is a comprehensive report from Birmingham in the UK.

### Quotes:

4.1.2 Most autistic people cannot understand or imagine the effects of their actions on others. Thus it should be very rare to prove *mens rea* for an autistic offender. The percentage of the general population that is autistic is thought to be 1-2%. So it might be expected that the proportion of autistic convicted prisoners would be lower than that. Unfortunately the reverse is true: overall the figures in the Prison Data section of the report suggest that compared with an average person in the general population an autistic person is about three times more likely to be imprisoned.

4.1.4 Autistic adults are much more likely to be victims of crimes rather than to be criminals.

### 4.3 Autistic defendants have problems in court

*... well, just read the whole document.*

Presentations from:

<http://www.conferenceworks.net.au/archive/acso/page/Downloads.html>

- L. Gook (2011) *Autism spectrum disorders in the criminal justice system: Identification and personnel knowledge*, <http://dl.dropbox.com/u/128401/live/acso2011/Tuesday/Ballroom/Lauren%20Gook.pdf> see also
- J. Chesterman (2011) *Restrictions on the liberty of people with disabilities: The situation in Victoria*, <http://dl.dropbox.com/u/128401/live/acso2011/Tuesday/Breakout/1b/John%20Chesterman.pdf>

*Autism spectrum disorders in institutionalized subjects* (2008)

<http://www.ncbi.nlm.nih.gov/pubmed/18569781>