



Australian Human Rights Commission Issues Paper – ‘Access to justice in the criminal justice system for people with a disability’

Submission by ACT Children & Young People Commissioner
August 2013

Background

Thank you for the opportunity to provide information in response to the Australian Human Rights Commission (AHRC) Issues Paper ‘Access to justice in the criminal justice system for people with a disability’.

The ACT Children & Young People Commissioner (CYPC) is established by the *Human Rights Commission Act 2005* (ACT). Alasdair Roy was appointed Commissioner in 2009.

Put simply, the role of the CYPC is to help make the ACT a better place for the children and young people who live here. More formally, the roles and functions of the CYPC include:

- Investigate complaints about the provision of services for children and young people;
- Consult with and listen to children and young people, and encourage government and non-government agencies to do the same;
- Promote the rights of children and young people;
- Make recommendations to government and non-government organisations on legislation, policies, practices and services that affect children and young people;
- Encourage and assist providers of services for children and young people to contribute to review and improve service delivery;
- Promote community discussion about the CYPC and services for children and young people; and
- Conduct enquiries and reviews.

The Commissioner is based within the ACT Human Rights Commission, and is assisted by two part-time advisers.

We communicate regularly with Bimberi Youth Justice Centre and the Community Services Directorate of ACT Government (CSD), with the aim of assisting them to improve services for children and young people in the youth justice system, including children and young people with a disability.

General comments on the intersection of disability and youth justice

The AHRC Issues Paper was addressed primarily to the adult criminal justice systems across Australia, however the comments in this submission relate to the youth justice system in the ACT.

Unfortunately in the ACT we lack a policy framework for responding to the intersection between disability and youth justice.

In 2011 I conducted an *Inquiry into the Youth Justice System in the ACT* (‘Bimberi Review’) in conjunction with the ACT Human Rights Commissioner, who conducted a *Human Rights Audit of Bimberi Youth Justice Centre*. We recommended that the ACT Government create a policy framework to guide the provision of services for children and young people with disability in the youth justice system. The ACT Government

agreed with this recommendation, and said it would be implemented as part of a policy document titled the 'Blueprint for Youth Justice in the ACT'. Unfortunately disability issues were not addressed in the Blueprint when it was released in 2012. We understand that CSD is in the process of developing a policy document to address disability issues in the youth justice system.

Despite the lack of a policy framework, on visits to Bimberi Youth Justice Centre it is clear that staff and management at the centre deal with disability issues on a daily basis. A significant proportion of young people in detention are living with a mental health disorder, cognitive impairment, or intellectual disability.

There are significant challenges for youth detention centres in managing cognitive, mental health or intellectual disabilities, particularly in the areas of:

- providing effective rehabilitation program and services,
- providing education, training or employment programs which will assist young people's reintegration into the community on release from detention,
- operating constructive behaviour management processes (ie. recognising young people's varied capacity to process information or manage their emotions or interact with other people),
- integrating personalised therapeutic advice into individual case plans, and
- effective transition planning (eg. promoting living skills, identifying suitable housing, establishing adequate follow up services).

One of the fundamental conclusions of the Bimberi Review in 2011 was that the youth justice system must incorporate support services and rehabilitation programs that are responsive to each young person's individual needs. (A copy of the Bimberi Review is provided at Attachment A, and the report is discussed further below.)

In other words, policies and procedures within the youth justice system must take account of young people's capacity. Therefore I particularly welcomed hearing one senior manager speak in 2012 of his intention to adopt a 'trauma based approach' to responding to young people's needs. This attitude recognises that many young people in detention have experienced challenges in their lives which negatively affect their ability to process information, regulate their emotions, make healthy decisions, and interact with other people.

Bimberi Review 2011

In 2011 the ACT Legislative Assembly asked the CYPC to undertake an *Inquiry into the Youth Justice System in the ACT* and the ACT Human Rights Commissioner to conduct a *Human Rights Audit of Bimberi Youth Justice Centre*. A copy of our combined report is enclosed at Attachment A.

Chapter 10.8 of the report was focused on disability issues. In this chapter we:

- Noted the lack of intersection between disability and youth justice systems at either policy or program level in the ACT. This situation compared unfavourably with the Victorian *Protocol between Disability Services and Youth Justice and guidelines for workers 2009*.
- Recommended government 'develop a protocol to articulate the ACT Government's approach to working with young people with a disability in the youth justice system'. The government agreed to this recommendation in 2011, however it is yet to be implemented.
- Recommended improved training on 'Issues that influence young people's behaviours (such as trauma and abuse, mental health issues, intellectual disability, autism and Asperger's syndrome, cognitive incapacity)'.
- Recommended govt 'develop data collection practices to allow greater understanding of the number of young people detained in Bimberi who experience cognitive or intellectual disability'.

- Recommended government establish an independent advisory panel to assist Bimberi management, including a disability expert.

However, while the Bimberi Review devoted a chapter to the topic of disability, we found that disability issues presented at all stages of the system, and could not be quarantined to a discrete policy arena. For example, workers and managers were grappling with complex questions relating to disability when considering:

- early intervention (eg. disengagement from school, child protection intervention, engagement with police),
- bail and remand (eg. understanding bail conditions, capacity to change bail conditions when they are unworkable),
- provision of education in detention,
- behaviour management in detention,
- design and delivery of rehabilitation programs in detention and the community, and
- transition planning for release from detention.

Bail and remand roundtables 2012 and 2013

Following the Bimberi Review of 2011, CYPC committed to host an annual Youth Justice Forum. We bring together in one room the organisations which constitute the youth justice system, and provide them space and time to consider issues from a systemic rather than a procedural perspective. Participants include government agencies, statutory authorities, the legal sector and the community sector.

In 2012 and 2013 CYPC conducted two roundtables to identify ways the ACT youth justice system might improve outcomes for young people in contact with the youth justice system, particularly with respect to bail and remand. Objectives of the roundtables were for participants to:

- see more fully young people's experiences of the youth justice system, particularly in relation to bail and remand,
- learn more about the perspectives and roles of other stakeholders in the system, and
- identify areas for further learning, potential improvement and/or reform.

It is rare that the organisations involved in the youth justice system have opportunity to come together in one place to discuss issues from a systemic perspective. Such an activity is very useful to gain a more informed perspective on why particular outcomes occur. When everyone is in the room together, speaking about hypothetical situations, we each gain greater understanding of the constraints under which other organisations operate, and potential areas for change.

Following both roundtables an outcome report was produced for participants, to facilitate ongoing discussions about reform to law and procedure in these areas:

- greater use of community and family based supports to assist behaviour control and modification for young people in contact with the criminal justice (rather than court imposed bail),
- reducing the number of young people arrested for breach of bail,
- minimising the time children and young people are held in custody on weekends,
- facilitating access to support services at police stations and the court,
- improving capacity for different parts of the youth justice system to share information about young people in contact with the system in a timely and effective manner, and
- improving data collection across the system, and improving analysis of collected data.

Interviews with young people in Bimberi 2013

Earlier this year, in partnership with the Official Visitor and the Public Advocate of the ACT, CYPC conducted an inaugural survey of the views of young people in Bimberi Youth Justice Centre.

The survey was originally designed and used by the Queensland Commission for Children and Young People and Child Guardian's in their regular *Views of Young People in Detention Centres* survey, with a small number of questions being edited to suit the local context.

While the survey did not ask young people to identify if they have a disability, the questions did invite them to discuss a wide range of experiences in detention, and identify ways in which the centre did, or did not, meet their needs in each area (including admission, contact with family, interaction with staff, education and other programs, health care, behaviour management, getting help and making complaints, legal matters, and leaving Bimberi).

Young people's perceptions of their experiences can provide us with useful information about design of law, policies and programs. Their views do not constitute an objective assessment of the system, but they can provide meaningful insights which can inform the way we design the legal system or the services system.

AHRC Issues Paper

The AHRC Issues Paper was addressed primarily to the adult criminal justice systems across Australia. However some aspects of the paper were relevant to our observations of the ACT youth justice system, and these are highlighted below.

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 a disability. This means that people with disability are left without protection and face ongoing violence, or have repeated contact with the criminal justice system because appropriate programs and community support are not available.

Issue 3: *Costly criminal justice responses are often applied to people with disability when their needs are better addressed by health, disability, rehabilitation and community responses.*

- Early intervention was a significant theme in the Bimberi Review of 2011.
- For the last two years, CYPC's annual Youth Justice Forum has focused on bail and remand. These fruitful discussions between organisations in the youth justice system allowed us all to reflect in detail on the potential for diversionary responses to better meet the needs of young people.
- CYPC has seen information which verifies that some young people have been detained on remand, not because of the nature of their alleged offence or their criminal history, but solely because of lack of suitable accommodation options in the ACT.

Issue 4: *Many people with disability are not identified as having a disability. This occurs outside and inside the criminal justice system, including education and health. This means people with disability are unable to access early intervention and a range of other supports and services when necessary. It also means people with a disability are not able to identify that they have a disability or state the supports they need if asked.*

- In our discussions with police, solicitors and magistrates, they recognise the systemic barriers which make it difficult for the legal system to access holistic information about a child or young person when making decisions. These barriers include pressured timeframes, limited resources, and restricted communication channels between legal authorities and community based support services. Through our annual Youth Justice Forum, CYPC hopes to assist agencies in the youth justice system to find solutions to address these problems.

Barrier 2: People with disability 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.

Issue 8: Modifications to the legal process that would help a person with disability to participate may not be provided or permitted by police, lawyers or the courts...

- In our discussion forums with organisations in the youth justice system there was recognition that:
 - many young people do not have capacity to understand bail conditions, or to negotiate a change to unworkable bail conditions, which leaves them vulnerable to breach and detention, and
 - police may make decisions about breach of bail without being made aware of community supports that may be in place for a young person, and that access to such information would be desirable to inform their decision.
- We have heard no claims of police or lawyers or courts refusing to allow particular modifications to the legal process. Rather, the challenge lies in identifying areas for systemic improvement of the legal system, to allow it to meet the needs of both victims and offenders. Potential lies in:
 - strengthening communication, support and follow up with young people during and after the court process, and
 - opening channels for communication between organisations who work with young people in the youth justice system.

Issue 10: Bail and parole conditions and court orders may not be conveyed to people with disability in a way that they can understand, making it more likely that they will fail to comply with these conditions and orders.

- As mentioned above, many young people do not have capacity to understand bail conditions, or to negotiate a change to unworkable bail conditions, leaving them vulnerable to breach and detention.

Barrier 5: Support, adjustments and aids may not be provided to prisoners with disability so they can meet basic human needs and participate in prison life. They often face inhuman and degrading treatment, torture and harmful prison management practices.

Issue 21: Many people with disability are not being identified as having a disability on entry into prison or while in prison. As a result no supports or special services are provided...

- Given the complex presentations of mental health, cognitive or intellectual disability amongst young people in detention, there is a risk that particular young people may not be identified as having a disability. For this reason we are encouraged that senior managers in CSD speak of adopting a trauma based approach to working with young people in detention; it is preferable for a system to be responsive to young people's diverse needs, regardless of whether the young person is willing or able to identify as having a disability.

Issue 23: Inappropriate and harmful practices may be used on prisoners with disability by prison staff, including seclusion and medical and physical restraint...

- During the Bimberi Review, CYPC was attentive to the risks and potential harm presented by segregation, physical restraint and prescription medication. Such strategies may be necessary in some circumstances, but procedures must be closely regulated and monitored. CYPC encouraged adequate resourcing of rehabilitation and therapeutic services to try to prevent the need for behaviour management strategies such as restraint, 'time out' and segregation.
- CYPC continues to encourage Bimberi to integrate individualised therapeutic advice and support into young people's case plans, to assist in ensuring that segregation and restraint is only used as last resort.

Issue 24: *Lack of appropriate treatment and support services while in prison. Release from detention without health plans or referrals to services. Lack of culturally relevant services.*

- We are concerned that some of the young people in detention in the ACT have high and complex needs. We have encouraged Bimberi to access expert therapeutic advice, to assist them to identify the best way to work with individual young people. Individualised advice should be incorporated into case plans and behaviour management plans, to provide guidance and support both for the young person and the workers.
- Effective transition planning remains an ongoing challenge for all youth justice systems.
- During the Bimberi Review, CYPC was concerned about what was at that time a longstanding vacancy in the Aboriginal and Torres Strait Islander support worker position. Such a role is essential to assist a detention centre to be aware and attentive to the diverse needs of residents.