



8 August 2013

Cristina Ricci
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear Ms Ricci

CONSULTATION ON ACCESSING JUSTICE FOR PEOPLE WITH DISABILITY

Disability Rights Advocacy Service Inc ('DRAS') safeguards and promotes the rights and interests of people with disability, their families and their carers. We would be pleased if you accept this submission to the current Australian Human Rights Commission inquiry.

We note the Australian Human Rights Commission's Access to Justice in the Criminal Justice System for People with a Disability Issues Paper April 2013. We also note the United Nations Convention on the Rights of Persons with Disabilities to which Australia is a signatory party, but in particular Articles 13, 14 and 15.

We also note the SA Ombudsman's opinions and recommendations in his Final Report on the Department for Correctional Services May 2013 regarding physical restraint and the care of a prisoner with psychiatric disability.

DRAS's service areas lie within South Australia. We have metropolitan and regional offices. We are regularly called upon to assist people with disability in criminal justice matters, in either their capacity as defendants or complainants. We have drawn from clients' lived experiences and reported them anonymously with the greatest care and candour possible. We trust they will assist the Commission.

We thank you for the opportunity to make a submission.

Yours sincerely

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DISABILITY (SYSTEMIC) ADVOCATE

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

1.1 *Inadequate legal representation for defendants*

People with disability often face disadvantage in the criminal justice system relating to their typically poorer financial resources. The Second Edition of the Australian Social Inclusion Board's *Social Inclusion in Australia: How Australia is Faring* report notes that almost half of all recipients of Centrelink payments are Disability Support Pension recipients. Centrelink recipients are typical applicants for publicly funded legal assistance (commonly referred to as 'legal aid'). However, our clients are often denied legal aid following an assessment which concludes that they have little prospect of successfully defending a charge or because there is a remote chance of imprisonment.

Being denied legal representation despite poor financial resources produces yet another area of disadvantage for people with disability. DRAS believes the competition for scarce legal resources reflects inadequate funding of the Legal Services Commission of South Australia and community legal centres. In turn this denies people with disability the opportunity to put meritorious defences before the courts. It also denies opportunities to make informed decisions and submissions about criminal law and sentencing.

1.2 *Inappropriate responses by South Australia Police*

Clients' lived experiences include police arriving to take a statement by the traditional notebook method when it has been previously articulated to police by a disability advocate that the complainant has no verbal capacity due to the nature of their disability.

Sometimes clients have physical disability such that evading assault is highly compromised, making them more vulnerable to being attacked and harassed by others. Over several years a client with physical disability alleged being assaulted and stalked by a person with intellectual disability. The client with physical disability wished to make a formal complaint to police and have a restraining order issued against the person.

However, our client has been frustrated by what they see as the police 'fobbing-off' attempts to make a formal complaint. Police say the alleged perpetrator has limited cognitive ability such that they would not possess the mental capacity to understand legal processes and therefore there is no point in pursuing charges or a restraining order. This in turn, however, denies the client's right to effectively turn to the criminal justice system for protection.

Another client has a longstanding diagnosis of schizophrenia. During a period of illness he was charged with theft but also accused of making 'bizarre' statements to a teenage girl. People with schizophrenia often make bizarre and irrational statements when unwell. During the criminal justice process the client was accused by police of having predatory sexual tendencies even though the client's documented mental health history did not attribute any such behaviour to him.

The criminal justice process stigmatised the client with accusations of paedophilia notwithstanding that he was never charged with a sexual offence. Due to his inability to arrange timely legal representation he was unable to effectively respond to very damaging allegations which despite being dubious undoubtedly exacerbated his psychiatric disability.

1.3 Exercising legal rights of accused with disability

In a recent matter that received some public notoriety a client with a moderate degree of intellectual disability was involved in a collision with a car. The car driver alleged the client was riding his bicycle on the footpath and that when the client entered the road the car driver had no time to avoid the collision.

When police arrived they interviewed both parties. Upon presentation it is difficult to comprehend that police believed our client possessed a proper appreciation of his right to remain silent or that police could predict anything other than our client being keen to provide a statement.

When it became obvious to police that the client has intellectual impairment they should have ceased taking the statement until such time as our client either had the opportunity to obtain legal representation, or until such time that it could be confidently ascertained that our client properly understood the consequences of providing a statement to police. In the end our client was issued with an expiation notice for an offence under the Australian Road Rules.

The client's statement undoubtedly provided ample inculpatory evidence for successful prosecution if the matter went to court. In these circumstances the client's right to remain silent is highly problematised and rendered virtually meaningless.

1.4 Inappropriate institutional (non-police) responses

Another client has a high degree of intellectual disability and therefore little understanding of right and wrong. The client's care service alleged the client assaulted one of their staff and pursued a formal police complaint, notwithstanding that third parties suggested the client's violence was a result of frustration and other negative emotions brought on by recent experiences in the client's life.

The client entered the criminal justice system with no understanding of its processes. They were eventually referred to a court intervention program but even within that forum, the client was not provided with an opportunity to address the issues likely to have motivated the assault.

1.5 Lack of accommodations for people with disability

A client with cerebral palsy who has significant speech impairment such that they are non-verbal, alleged being assaulted by a care worker in a supported accommodation setting. The first challenge our client faced was reporting the allegation of assault to police.

The local police station was contacted by a disability advocate to negotiate alternative arrangements for taking a statement, such as using a video camera to record the client's particular communication method and responses, with assistance from a trained professional that we would arrange. It was also explained to police that the usual enquiring-type of statement would not be suitable as the client's communication method is primarily limited to 'yes'- and 'no'-type responses. The traditional form of taking a statement along the lines of 'Tell me what happened ...' would be of no value here.

Notwithstanding this advice police attended the client's accommodation without a video camera and ready to take a verbal statement in a notepad. The police were

particularly challenged by our client's inability to verbally communicate. It wasn't until some time later that police could again attend upon the client with a video camera to take a statement through a series of questions.

A different client has paraplegia and therefore severely impaired mobility. He lives in disability-modified housing. His partner accused him of domestic violence and he was subsequently charged and arrested. The client was later bailed on conditions including that he was not to return to the disability-modified home he shared with his partner. Instead he had to stay with a friend who did not have modified housing.

The client's mobility within the friend's house was severely impaired because it did not have handrails for support, wide doorways and passageways to accommodate mobility aids, a walk-in shower to provide easier access to it, or modified doors to provide easier access in and out of the house. The criminal charge took in excess of 3 months to progress its way through the criminal justice system, during which time our client laboured in accommodation that was totally inappropriate for him and made his daily living undignifying and inhumane.

Perhaps surprisingly DRAS does not take the view that our client should have been permitted to return to his disability-modified housing and that the alleged victim - who did not require the disability modifications - should have found alternative accommodation. We instead take the view that the State must provide resources to ensure that people with disability on bail conditions requiring them to reside at alternative accommodation must be provided with alternative suitably modified housing.

A policy that forces a person who requires disability-modified housing to reside at a residence that is not appropriately modified is to unlawfully discriminate against them on the grounds of disability. It is also breaches Article 9 of the United Nations Convention on the Rights of Persons with Disabilities.

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

Government policies and institutional reforms that provide inclusion for people with disability must be implemented and properly funded. To this end DRAS looks forward to timely outcomes from the recent South Australian Attorney-General's Department's Disability Justice Action Plan consultations.

South Australia Police must undertake disability awareness training and be provided with the appropriate resources and additional training to assist and accommodate complainants and accused with disability.

Appropriate information should be provided by South Australia Police and the courts in Plain English and Braille and with text enlargement facilities and downloadable audio files on their respective websites to accommodate people with disability seeking information on criminal justice processes and where to seek assistance.

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

South Australia is fortunate to historically have had specialist courts for defendants with mental impairments, the Magistrates Court Diversion Program¹ and the Youth Court Diversion Program.² These programs were recently merged into the one 'Treatment Intervention Program'³ with separate pathways for adults and youth.⁴ The Treatment Intervention Program 'provides a single point of entry for assessment for both mental impairment and substance dependence and develops and implements an individualised treatment plan which integrates a mental health care plan ...'⁵

DRAS assists to refer clients to these programs. With one or two exceptions our clients generally achieve more positive outcomes than if they had not accessed the programs. DRAS's interaction with the programs can also lead to referrals for advocacy in other areas of defendants' lives that are not immediately related to criminal offending but which nevertheless play a part in satisfaction of the person's rights and overall quality of life.

Disability advocates play an important role in assisting clients navigate the criminal justice system, providing them with high quality information and making referrals to legal advice and representation, undertaking negotiations with police, accessing fines payment schemes for clients, providing advice and assistance in obtaining medical evidence, and so on.

4. Please tell us about any time that [people] with disability experienced barriers to justice.

Where otherwise not mentioned in this submission and in particular, clients who experience mental illness relating to their psychiatric disability, barriers to justice exist:

- in navigating the criminal justice system due primarily to its complexity and its financial implications for legal representation
- trying to access a fine payment scheme because its existence is not known or it is not known how to apply for the scheme
- in electing to be prosecuted for a minor criminal matter because they believe they experienced a mental impairment at the time of the offending but they don't have enough information about presenting relevant evidence to court
- during the administration of criminal justice because they were detained in hospital for treatment under a mental health order
- when their potent medication regime leaves them too fatigued and confused to take charge of their legal affairs at the time
- when, due to recent psychosis, they are not in a position to satisfactorily respond to criminal charges or their adverse outcomes but do not have legal representation.

¹ Courts Administration Authority, Annual Report 2011-2012, 39.

² Courts Administration Authority, Annual Report 2011-2012, 57.

³ Courts Administration Authority, Annual Report 2011-2012, 40-1, 57-8.

⁴ Courts Administration Authority, Annual Report 2011-2012, 58.

⁵ Courts Administration Authority, Annual Report 2011-2012, 40.

In addition, criminal justice experiences can trigger and exacerbate the illness aspect of psychiatric disability. Coupled with the lack of equitable access to legal representation noted above, clients with psychiatric disability are distinctly disadvantaged within the criminal justice system.

[Question 5 omitted by the author]