



Royal Commission
into Violence, Abuse, Neglect and Exploitation
of People with Disability

Issues Paper

Criminal justice system

January 2020

Please be aware that the content and associated questions in this issues paper maybe distressing or raise issues of concern for some readers.

There are a range of services available if you require support after reading this paper. Contact details for these services are located at the end of this paper under the heading 'Support to respond to our questions'.

Introduction

The criminal justice system is an important area of inquiry for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission).

People with disability may come into contact with the criminal justice system as a victim of crime, a person accused or suspected of a crime, or as a witness to a crime. People with disability, including young people, are overrepresented across the criminal justice systems in Australia¹ and are at a heightened risk of violence, abuse, neglect and exploitation in criminal justice settings.² People with cognitive and/or psychosocial disability are significantly overrepresented amongst the group who are charged with or accused of criminal offences. They are also disproportionately victims of abusive or violent criminal conduct.³

First Nations people with disability face particular disadvantages in the criminal justice system. Research indicates they often experience multiple discrimination due to the intersection of racism and ableism.⁴ First Nations people with disability are substantially overrepresented across the criminal justice system. There is a lack of precise information as to the number of First Nations people with disability in prisons. The available information suggests that First Nations people with disability are about 14 times more likely to be imprisoned than the general population.⁵

The Royal Commission wants to hear from you about why people with disability, and particularly First Nations people with disability, come into contact with the criminal justice system at disproportionately high rates. We also wish to understand better the problems people with disability face when they are brought into contact with the criminal justice system.

The purpose of this paper is to invite information and discussion about key issues that people with disability face when they come into contact with the criminal justice system.

The experiences of people with disability in relation to other specific issues concerning the justice system will be considered in future Issues papers. These issues include legal capacity, unequal access to justice, and ineffective complaint processes.

This Issues paper sets out a list of questions. The list is designed to assist people and organisations who wish to tell the Royal Commission about the experiences of people with disability and the criminal justice system. The questions are a guide. You do not have to answer every question and your response does not have to address any of the questions. Please send in any information that you think will assist the Royal Commission.

More information about how to respond to this Issues paper is at the end of the paper.

A human rights-based approach

Our terms of reference recognise that Australia has international obligations to take appropriate legislative, administrative and other measures to promote the human rights of people with disability. The right to access to justice for people with disability is well established in the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD).⁶ Article 13 aims to ensure effective access to justice for persons with disabilities on an equal basis with others (among other things) by:

- a. providing for procedural and age-appropriate accommodations to facilitate the role of people with disability as direct and indirect participants, including as witnesses, in all legal proceedings; and
- b. promoting appropriate training for those working in the field of administration of justice, including police and prison staff.

Articles of the CRPD that also relate to the criminal justice system include article 9 (Accessibility), article 12 (Equal recognition before the law), article 14 (Liberty and security of person), article 15 (Freedom from torture or cruel, inhuman or degrading treatment or punishment) and article 16 (Freedom from violence, abuse and exploitation).

The Royal Commission will also have regard to the *United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (UNCAT),⁷ the United Nations Declaration in the Rights of Indigenous Peoples (UNDRIP)⁸ and the *United Nations Convention on the Rights of the Child* (CRC).⁹

The Terms of Reference also require the Royal Commission to consider the multi-layered experiences of people with disability in terms of their age, sex, gender identity, sexual orientation and race. In particular, the Royal Commission will look at the experiences of First Nations people with disability; the experiences of culturally and linguistically diverse people with disability; and the experiences of women and children with disability.

What does Australia's criminal justice system look like?

In Australia, the Australian government and state and territory governments each have their own laws creating criminal offences. They also each have their own agencies responsible for investigating and judging criminal offences and promoting personal and community safety. This means that the Australian criminal justice system is complex. Laws and practices can also vary across jurisdictions which may result in quite different experiences for people with disability, depending on the particular jurisdiction involved.

The principal agencies that make up the criminal justice system are the police, prosecution authorities, criminal courts (including specialist courts), defence lawyers, corrections systems and prisons. Each of these agencies plays a role in the process such as investigating a crime, deciding to prosecute, preparing a prosecution, representing accused people, determining whether guilt has been established according to law, supervising offenders subject to community based orders and detaining offenders sentenced to imprisonment.

The following list outlines the main criminal justice agencies and the roles they play in the criminal justice system:

- **Police** (police officers) – maintain public order; prevent crime; investigate crime; arrest and detain suspects
- **Prosecution** (prosecutors) – determine whether to prosecute; prepare criminal cases to take to court and; conduct the trials on behalf of the prosecuting authority
- **Defence lawyers** (criminal lawyers including legal aid lawyers and Public Defenders) – provide advice and represent people accused of criminal offences
- **Victim support groups** (counsellors and advocates) – provide counselling and other assistance to victims and/or their families
- **Courts** (judicial officers and jurors) – decide bail applications made by people accused of crimes; determine whether the accused person should be diverted from the criminal courts (for example to rehabilitation programs); preside over criminal trials and sentencing hearings; ensure fairness to the accused; decide whether guilt has been established (magistrate, judge or jury); impose sentences on people convicted of offences; and hear appeals against convictions and sentences
- **Community corrections** (community corrections officers) – provide information to the court for bail or probation; prepare pre-sentence reports; work with offenders subject to probationary orders or community service orders (for example, behaviour change programs as a condition of bail or parole); and supervise released prisoners or those on pre-release work
- **Prisons/youth detention** (corrections officers) – hold people on remand; detain people who are sentenced to a term of imprisonment; maintain appropriate conditions for those in custody; provide activities (such as work and rehabilitation programs); and prepare offenders for release.

The media also plays an important role in informing the public of crimes, including through the portrayal of people with disability who are brought into contact with the criminal justice system.

What is meant by violence, abuse, neglect and exploitation within the criminal justice system?

People with disability may be subject to many forms of violence, abuse, neglect and exploitation in the criminal justice system as victims, accused people or witnesses. The Royal Commission will consider the nature and extent of violence, abuse, neglect and exploitation of people with disability in the criminal justice system. We will also inquire into whether particular forms of violence, abuse, neglect and exploitation are prevalent within the criminal justice system.

Attachment A sets out the Royal Commission's working definitions of violence, abuse, neglect and exploitation. Violence and abuse within prisons and forensic mental health facilities can include forced treatment, seclusion (solitary confinement) and other restrictive practices, such as physical, chemical and mechanical restraints. People with disability in such closed environments, are also at risk of bullying and harassment from fellow prisoners or staff.

The United Nations Committee on the Rights of Persons with Disabilities has stated that there is a need to protect the security of people with disability who have been deprived of their liberty, including by eliminating forced treatment, seclusion and the use of restraints.¹⁰

There is a power imbalance between the agencies that make up the criminal justice system and people with disability who are brought into contact with them. This is especially the case for people with cognitive or psychosocial disability, who may have difficulties understanding and navigating the criminal justice system without tailored support. Further, First Nations people with disability and culturally and linguistically diverse people with disability may find it difficult to obtain culturally appropriate support in the criminal justice system.

The Royal Commission has heard that justice agencies may have failed to prevent violence, abuse, neglect and exploitation of people with disability and, in some cases, these agencies may have been perpetrators of violence, abuse, neglect and exploitation. We want to hear from you about such experiences.

People with disability are often victims of crime. The Royal Commission has been told that the authorities, such as the police and prosecutors, often do not consider violence and abuse directed at people with disability to be crimes or to be worthy of investigation or able to be prosecuted successfully. We also want to hear from you about any experiences of this kind.

Why is the Royal Commission looking at the criminal justice system?

Research suggests there is a strong causal link between disability and contact with the criminal justice system.¹¹ People with disability may come into contact with the criminal justice system as victims of crime, being suspected or accused of a crime, or as witnesses to criminal behaviour.

Many people with disability experience multiple forms of hardship, such as unemployment, poverty, homelessness, health problems and social isolation. The compounding effect of these factors increases the marginalisation of people with disability. They are therefore at risk of discrimination and victimisation and, as a consequence, more likely to be charged with offences and enmeshed within the criminal justice system.¹² Disability experts suggest that the criminal justice system is often used to 'manage' people with disability who experience multiple hardships rather than being supported in the community.¹³

First Nations people with disability can also experience additional forms of discrimination and disadvantage. Prejudicial attitudes can make it more difficult for First Nations people with disability to access justice and receive fair treatment in their engagement with the criminal justice system.

Women, children and young people with disability have a heightened risk of violence, abuse, neglect and exploitation. Research shows that women with disability experience aggravated forms of discrimination and that First Nations women are the fastest growing group in the Australian prison system.¹⁴ Although they represent only 2% of the female population nationally, First Nations women represent over one third (34%) of the female prison population.¹⁵

Children and young people with disability enter the juvenile justice system at disproportionately high rates and are more likely as adults to come into contact with the system as victims and/or offenders.¹⁶

There is also evidence of systemic criminalisation of disability which is often related to undiagnosed disability. Undiagnosed disability is when a disability is not recognised by anyone. Criminalisation of disability is when criminal justice agencies treat behaviours which may be related to a person's disability as dangerous and offensive. This can have far reaching consequences for people with behaviours that are seen as challenging by criminal justice agencies. The extent of this problem is difficult to quantify because official statistics do not record the impact of undiagnosed disability on people who are subjected to the criminal justice system.

Research into criminalisation of disability demonstrates that people with disability are more likely to be entangled in the criminal justice system than people without disability.¹⁷ Research also indicates that people with cognitive and/or psychosocial disability are at a particularly high risk of experiencing criminalisation of their behaviour.

Some issues and problems

A range of systemic and structural problems prevent people with disability from accessing justice and fairly participating in the criminal justice system on an equal basis with others. The United Nations Human Rights Council states that access to justice requires the removal of barriers to ensure the right to a fair trial and equality before the courts, the right to effective remedies for violations of rights, and also the right to effective participation in all stages of the criminal justice process.¹⁹

The Royal Commission has heard that people with disability who have experienced or witnessed violence, abuse, neglect, or exploitation face significant barriers in seeking justice. They may be disbelieved by the authorities or be denied information they need to understand and enforce their legal rights. These issues are particularly serious when the alleged perpetrators of crimes are their carers or support people.

Research suggests the following problems arise for people with disability in the criminal justice system:

- Systemic criminalisation of disability that results in their over-representation in the criminal justice system. Discriminatory attitudes of the community and law enforcement officers towards people with disability can influence their response to behaviours of concern. Other factors, such as prejudice, may also inform the response to behaviours of First Nations people or people with disability from culturally and linguistically diverse backgrounds.
- A lack of understanding of the rights of people with disability by those who work in the criminal justice system.
- A lack of cultural awareness and a lack of appropriate support and accommodation, such as accessible court rooms, video link testimony, and decision-making support, which may be needed to realise the right to a fair trial and the right to be treated fairly by the justice system.
- The limited availability of disability-aware legal assistance and services that are tailored to the needs of people with disability.²⁰

A number of recent inquiries and reports have highlighted the need to address inequalities in access to justice for people with disability. These reports have identified that criminal laws, policies and practices often affect people with disability, entrench their disadvantage and in particular, deny them equality before the law.²¹ For example, the rules governing fitness to plead and capacity to understand the proceedings can lead to indefinite detention of people with disability.

The Royal Commission is interested in hearing about the problems outlined above and other issues that people with disability experience in accessing justice or engaging with the criminal justice system.

Questions

Please answer as many of these questions as you wish. You do not need to answer them all and your response does not have to address any of the questions. If you want to tell us about violence, abuse, neglect or exploitation that was experienced by you or another person with cognitive disability when accessing or receiving health care we encourage you to [make a submission](#) via the Royal Commission's website.

Question 1: What experiences related to violence, abuse, neglect or exploitation have you, a family member with disability, or someone with disability you support, had in the criminal justice system?

Question 2:

- a. What do you think causes violence, abuse, neglect and exploitation of people with disability in the criminal justice system? What can be done to stop this from happening?
- b. In particular, what changes would help people with disability avoid the criminal justice system in the first place?

Question 3:

- a. What do you think prevents people with disability who have experienced violence, abuse, neglect, or exploitation from getting protection or justice from the police or the courts?
- b. What problems have you had getting protection or justice from the police or the courts?

Question 4:

- a. What supports do people with disability need to participate in the criminal justice system on an equal footing as others without disability?
- b. When would these supports be needed to assist people with disability who are:
 - (i) victims of crime
 - (ii) witnesses required to give evidence
 - (iii) accused or suspected of criminal offences
 - (iv) convicted of criminal offences or
 - (v) jurors?
- c. What are some examples of good supports? How have these supports worked to keep people with disability out of the criminal justice system or safe within the system?

Question 5: How does violence, abuse, neglect or exploitation in the criminal justice system vary for particular groups of people with disability? For example, how does a person's gender, race, age, cultural or sexual identity, or geographic location (metropolitan, regional, remote) impact on their experiences of violence, abuse, neglect and exploitation?

Question 6:

- a. What are the experiences of First Nations people with disability engaging with the criminal justice system? For example, are the processes and services culturally appropriate and safe?
- b. A high proportion of young people in detention are First Nations people with disability or with an undiagnosed disability. How can they be better supported to access justice when they are in the system? What should be done to help them transition out of the criminal justice system?

Question 7:

- a. What barriers are there to effectively identify, disclose and report instances of violence, abuse, neglect or exploitation in the criminal justice system?
- b. What types of problems have you experienced in identifying, disclosing and reporting violence, abuse, neglect or exploitation in the criminal justice system?

Question 8:

- a. What barriers are there to adequately investigate violence, abuse, neglect or exploitation in the criminal justice system?
- b. What is being done or should be done to encourage effective investigation and reporting of violence, abuse, neglect or exploitation in the criminal justice system when it occurs?

Question 9: What else should we know? Have we missed anything?

Responses to the Issues paper

Responses to this Issues paper can be provided by:

- email to DRCEnquiries@royalcommission.gov.au
- letter to GPO Box 1422, Brisbane, Qld 4001
- phone on 1800 517 199 or +61 7 3734 1900 (between 9:00am to 6:00pm AEDT Monday to Friday). We can make a time with you to take your response over the phone.
- audio recording, or
- video recording.

Responses can be in any language. The Royal Commission will translate the response to English.

If possible, please provide your responses by **20 March 2020**. Responses will also be accepted after this date.

Support to respond to our questions

Blue Knot Foundation offers specialist counselling support and a referral service for anyone affected by the Disability Royal Commission.

For support please call their national hotline on **1800 421 468** (9am to 6pm AEST Monday to Friday, 9am to 5pm AEST Saturday, Sunday and public holidays).

In addition to the Blue Knot Foundation, the Australian Government provides support to assist people to engage with the Royal Commission. This support includes:

- free legal advisory services provided by National Legal Aid and the National Aboriginal and Torres Strait Islander Legal Services through the Your Story Disability Legal Service
- advocacy support services provided under the National Disability Advocacy Program.

Further information about these supports, including how to access them, is available on the [counselling and support](#) section of our website.

Consenting to publication of your responses

Please indicate if you consent to your response to this Issues paper being made public on the Royal Commission website and, if so, whether you would like it to be published in a de-identified form.

If you want to tell us about violence, abuse, neglect or exploitation and the criminal justice system that was experienced by you or another person we encourage you to make a submission via the Royal Commission's website.

We also recognise criminal justice is one of many issues for consideration by the Royal Commission and we invite your ideas on other matters we should be examining related to justice. Based on your feedback and our research, other justice-related issues will be addressed in forthcoming Issues papers in 2020.

Attachment A – Definitions

The Royal Commission has provisionally defined key terms as follows:

Violence and abuse – include assault, sexual assault, constraints, restrictive practices (physical and chemical), forced treatments, forced interventions, humiliation and harassment, financial and economic abuse and significant violations of privacy and dignity on a systemic or individual basis.

Neglect – includes physical and emotional neglect, passive neglect and wilful deprivation. Neglect can be a single significant incident or a systemic issue that involves depriving a person with disability of the basic necessities of life such as food, drink, shelter, access, mobility, clothing, education, medical care and treatment.

Exploitation – means the improper use of another person or the improper use of or withholding of another person's assets, labour, employment or resources including taking physical, sexual, financial or economic advantage.

Cognitive disability – arises from the interaction between a person with cognitive impairment and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. Cognitive impairment encompass an actual or perceived difference in cognition, including concentrating on, processing, remembering, or communicating information, learning, awareness and/or decision-making.

Disability – is an evolving concept and results from the interaction between people with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

Psychosocial disability – a disability arising from a perceived or actual impairment(s) relating to mental health condition.

Endnotes

- 1 In Australia, there are nine separate sources of criminal law: Commonwealth legislation and the legislation of eight States and Territories. Each jurisdiction has its own courts although most prosecutions for Commonwealth offences are heard in State or Territory Courts. For ease of reference in this paper, the Royal Commission will use 'the criminal justice system' to refer to the criminal justice systems of the Commonwealth, the States and the Territories.
- 2 See Eileen Baldry, 'Disability at the margins: limits of the law' (2014) 23(3) *Griffith Law Review* 370.
- 3 Ruth McCausland and Eileen Baldry, "'I feel like I failed him by ringing the police': Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290, 293.
- 4 Eileen Baldry et al, "'It's just a big vicious cycle that swallows them up': Indigenous people with mental and cognitive disabilities in the criminal justice system' (2016) 8(22) *Indigenous Law Bulletin* 10, 11.
- 5 Australian Civil Society CRPD Shadow Report Working Group, 'Disability Rights Now 2019', Submission to the UN CRPD Committee in response to the List of issues prior to the submission of the combined second and third periodic reports of Australia, 26 July 2019, 24.
- 6 *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
- 7 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
- 8 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).
- 9 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- 10 Committee on the Rights of Persons with Disabilities, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities*, 14th sess (4 September 2015) para 12.
- 11 Law Council of Australia, 'People with Disability, The Justice Project Final Report – Part 1' (2018) 18.
- 12 Eileen Baldry, 'Disability at the margins: limits of the law' (2014) 23(3) *Griffith Law Review* 370, 377.
- 13 Eileen Baldry, 'Disability at the margins: limits of the law' (2014) 23(3) *Griffith Law Review* 370, 383.
- 14 Mandy Wilson et al, 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia' (2017) 7 *SAGE Open* 1, 2.
- 15 Australian Bureau of Statistics, *Corrective Services, Australia September Quarter 2019* (Catalogue No 4512.0, 18 November 2019); See also June Oscar, 'The collective power and potential of Aboriginal and Torres Strait Islander women and girls: Recognising their human rights in achieving equality' (Grace Vaughan Memorial Lecture, University of Western Australia, 2 May 2018).
- 16 Chris Cunneen et al, 'Juvenile Justice, Young People and Human Rights in Australia', *Current Issues in Criminal Justice* (2016) 28(2) 173, 175–6.
- 17 Ruth McCausland and Eileen Baldry, "'I feel like I failed him by ringing the police": Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290, 290–2.
- 18 Law Council of Australia, 'People with Disability, The Justice Project Final Report – Part 1' (2018) 4.
- 19 Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities*, 37th sess, Agenda Items 2 and 3, UN Doc A/HRC/37/25 (27 December 2017) paras 3–5 and 12.
- 20 Adapted from the Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, Report (2014) 8.
- 21 See for example, Law Council of Australia, 'People with Disability, The Justice Project Final Report – Part 1' (2018); Melbourne Social Equity Institute, 'Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities' (2017); and Australian Human Rights Commission, 'Equal Before the Law – Disability Justice Strategies' (2014).



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