Australian Human Rights Commission

Disability Discrimination Commissioner

Access to Justice Inquiry

Submission by the ACT Disability, Aged and Carer Advocacy Service

ACT Disability, Aged and Carer Advocacy Service (ADACAS) asserts, promotes and protects the rights and responsibilities of people with disabilities, people who are older and people who are caregivers. We vigorously advocate for and with vulnerable people who have a disability, are older, or their caregivers so that they may exercise their rights as citizens, live valued and dignified lives in the community and pursue their dreams. ADACAS acknowledges the Ngunnawal people as the traditional owners of the land on which we work.

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Introduction

ADACAS welcomes the opportunity to provide input to the Australian Human Rights Commission inquiry, "Access to justice in the criminal justice system for people with disability". ADACAS provides independent, individual advocacy to people with disability, frail older people and their carers. As advocates and representatives of some of the most marginalised people in the community, we are fully aware of the many barriers to justice faced by people who need communication supports, or who have complex and multiple support needs.

We have reviewed our recent cases and included those that best illustrate the barriers that exist for those who interact with the criminal justice system. While our focus has been criminal justice matters, we have taken the opportunity to bring some civil cases to your attention. We have done that for two reasons. Firstly, we feel that many of the barriers to justice in the civil court system largely mirror those that apply to criminal matters. Secondly, we feel these stories need to be heard.

The paper is organised around the cases rather than addressing the five barriers used in your paper. Where possible we have identified possible recommendations for change. We recognise that our cases typify endemic and entrenched barriers to justice for people with disabilities and that a concerted effort, significant funding and state based issues will all impact on effective resolution and change. Nevertheless, we do hope that your work will yield positive outcomes, and we fully support your endeavours.

Competence to Give Evidence

Recommendation: Disability support teams should be established to advise local police on disability issues and assist police to assess witness competence. It should be mandatory for front line police to refer cases involving people with disabilities to that unit.

The question of whether a person with a disability is competent to give evidence is a key issue in any discussion of access to the justice system. It is also potentially difficult to make a determination. If a person's competence to give evidence is called into question in a court of law, a judge may ask the witness a range of questions designed to assess their competence, or seek expert advice to determine whether a person can take an oath and give evidence.

The question of competence can be a complex one, and the Australian Law Reform Commission (ALRC) has raised a number of issues that require consideration. In essence, it is argued that traditional tests are inadequate and a range of new tests have been proposed. The ALRC also makes the point that application of the competence tests in s 13 (of the uniform evidence acts) "requires skilled questioning[1]".

It is arguable that, by refusing to investigate a complaint made by or on behalf of a person with a disability, police are putting themselves in the position of a skilled questioner and possibly making an erroneous assessment about the legal competence of the complainant.

[1] Uniform Evidence Law (ALRC Report 102)/4. Competence and Compellability Para 4.41

That raises three issues:

- Police receive legal training and are presumably provided with guidelines to help them assess the merits of a complaint and the likely reliability of witnesses. It is questionable whether junior front line officers have the level of skill or experience to apply these tests fairly when dealing with people who have disabilities.

- A person's legal competence may be masked by communication difficulties. Police may not always have the patience, training and motivation needed to understand what a person with a disability is saying. It is well known that police resources are stretched, and it seems likely that they will often not have the time or inclination to make the effort required to understand the complainant and properly assess their reliability as a witness.

- Community resources can be provided to assist police, but they may not be readily available to front line officers attempting to prioritise work in a busy station environment. If these resources were more readily available, and were positioned in an easily accessible way, the hurdles preventing people with disabilities from receiving justice might at least be reduced.

ADACAS is aware of several instances where police have failed to act, notwithstanding the availability of evidence. The following case is typical.

> *Case Number One involves a fairly articulate young person with a mild intellectual disability who substantially manages their own affairs. The person was the victim of fraudster who took a computer and other items to the value of about $15,000. The young person, accompanied by their father, reported the matter to police who declined to investigate. The Advocate was subsequently able to persuade police to pursue the case. Despite the existence of independent witnesses and the fact that the fraudster was well known to police, they declined to act. The police decision not to prosecute was apparently made by balancing the effort required, and the competence of the witness, against the likelihood of securing a conviction.*

It might be that police were correct in concluding that the young man's competence as a witness would have been successfully challenged in court. The injustice, of course is that their failure to act robbed the complainant of the opportunity to be properly assessed by a competent expert. It also denied the young person the just outcome that would otherwise be available to victims of fraud.

Ideally front line police would be fully supported to enable people with disability to be heard when they are victims of crimes, and to ensure that police have the capacity to act on all crimes against people with disability. ADACAS believes that viable supports must be developed.

Police Attendance Where Sexual Assault or Violence is Alleged

Recommendation: All cases of sexual assault should be investigated by police, regardless of whether they expect to secure a conviction. Deterring recurrence of sexual assaults should be regarded as a valid use of police resources.

Recommendation: It should be mandatory for schools and disability service providers to report sexual assaults on people with disabilities and/or minors to the police.

Sexual assaults against people with disabilities are distressingly common in our society, and victims have a right to expect that police will investigate such cases. Unfortunately, as the following case demonstrates, police are not always willing to attend.

> *Case Number Two involves a female who was sexually assaulted while at a teen respite facility. The person has physical and intellectual disabilities and is non-verbal. When the person returned home from respite, she exhibited behaviours of concern, and her mother found blood stains on her daughter's underwear. The person could not discuss what had happened, and her distraught mother would not allow the collection of physical evidence as her daughter was already upset. It was possible to conclusively establish that the bleeding was not associated with a physical injury, menstruation or any other natural cause. The matter was reported to Disability ACT whose staff conducted an internal investigation. That investigation concluded that it was not possible to determine whether the assault was committed by a staff member or another client, let alone identifying an individual. The police would not investigate the matter because of a lack of evidence.*

From a resource perspective, the reluctance of police to involve themselves in this case is possibly understandable given the reported facts and the lack of available evidence. The problem lies in the message being sent by the failure of police to attend. The offender will have noted the lack of police interest and would now have some degree of confidence that repeat offences might be committed without fear of adverse consequences. Indeed, it is possible that this is a repeat offence and, had police attended in other instances, the deterrent effect might have been sufficient to prevent this deplorable event from ever happening.

One positive from this case is that police were at least notified. As Case Three demonstrates, that does not always happen.

> *Case Three involves a young person with multiple disabilities who was sexually assaulted by another student while on an interstate school excursion. A complaint was made to the school and the other student was expelled. Police were not called in. The victim now wishes to lodge a complaint with police. Police advice is that the complaint must be lodged at the police station nearest to where the offence took place. This is impractical for a person with multiple disabilities and seems unnecessarily unhelpful on behalf of the police. Because of cross border issues, police will not visit the complainant in Canberra.*

The reasons why the school chose to deal internally with what is patently a criminal matter and not involve police are not known. Perhaps the principal assessed that the victim would not be a competent witness, or there may have been a desire to protect the reputation of the perpetrator, their family or the school. Regardless, the failure to report the matter is inexcusable, and the victim is now caught in a Catch 22 situation involving what are probably intractable cross border jurisdictional issues.

Another variation on the theme of police refusal to attend concerns complaints that emanate from inside secure mental health settings; Case Four illustrates the problem.

> *Case Four involves a person in their early to mid-30s who has an intellectual disability, limited verbal skills and is deaf. The person has been unwell for two years and is confined in a secure facility. The person was physically assaulted by a staff member at the facility. Some physical signs of the assault existed. Two other staff members witnessed the assault, and both submitted internal incident reports. Family members were advised of the incident and elected to involve the police. Police were given copies of witness statements and incident reports. Police subsequently refused to take action. The staff member has been moved to another location.*

Police did not explain why two witness statements and physical evidence did not constitute a prima-facie case. It is interesting to note that, had this incident occurred in Victoria, police would have been obliged to investigate. The Victoria Police have established a protocol with the Mental Health Branch of the Victorian Department of Human Services. It states in part that,

> "*Police will investigate all alleged assaults reported to them. In some cases, particularly where there is a lack of physical evidence, there will be insufficient evidence to take the matter to court. Under these circumstances, it is important that the individual is made aware of the possibility for them to undertake civil action if they so desire*[2]*."*

The same document also states that:

"*In most circumstances, mental health professionals will deal with persons requiring psychiatric assessment or treatment through their own established internal clinical guidelines.*"[3]

Finally, the preamble to the protocol states,

"*In general the protocol rests on the assumptions that:*

- *mental health services are responsible for providing treatment and care of people with a mental illness and providing consultation and advice about matters relating to mental illness, and*
- *police are responsible for the protection of the community and have responsibility for managing situations which involve a threat to public safety."*

[2] Protocol between Victoria Police and the Department of Human Services, Mental Health Branch, pp.44 at http://www.health.vic.gov.au/mentalhealth/archive/police/protocol-police.pdf
[3] Ibid, pp. 27

A similar protocol does not seem to exist in the ACT. The Victorian model allows that, unless called in by the service running the institution, police will not generally involve themselves in the internal affairs of a mental health facility. Police will probably also accept as given that there will sometimes be a requirement to forcibly restrain clients in those facilities. The use of restraint however is a different matter from assault and it should not be possible to confuse the two.

More generally the approach of police towards people with disability or mental health issues in the community is sometimes of concern. Media stories of poor police handling of incidents involving people experiencing mental illness, sometimes resulting in extreme injury (as is the case for one of our clients) highlight a lack of confidence and the need for appropriate response training for the police force so that they are more skilled when dealing with mental illness.

Enduring Power of Attorney

Recommendation: When an enduring power of attorney (EPA) is activated, there should be a mechanism for the actions of an attorney to be regularly monitored by an independent third party.

> *Case Five involves an elderly lady who is in a nursing home. About seven years ago, she signed an enduring power of attorney (EPA) authorising a person to act on her behalf. The Lady has dementia and is now incapable of managing her own affairs. The person acting on her behalf had complete access to her property and money. A relative was alerted by the nursing home that there may be irregularities associated with the use of the EPA. It was alleged that the attorney has been misappropriating funds. There was also evidence that the lady had dementia when she signed the EPA. Both allegations were fully substantiated at the tribunal hearings. Over 7 years the Attorney had accessed her account on numerous occasions to fund things that were not for the elderly lady. The Advocate has assisted the relative to have the EPA removed and guardianship granted to her. It will now be a matter for the new guardian to decide whether to press for criminal charges to be laid.*

The problem here is the lack of an oversight of the actions of attorneys and the opportunity for criminal behaviour that therefore exists. An EPA confers powers that can be very like those granted to a guardian, but none of the guardianship safeguards exist. In this case, the EPA was privately executed between the lady and her attorney. There was no external scrutiny to ensure that she was competent to execute it, and now that she is incapable of managing her own affairs, there is no scrutiny of the actions of the attorney.

We have been advised by the ACT Public Advocate that the question of external scrutiny was considered when the law governing EPA's was reviewed in 2008. Apparently, a public consultation process revealed that the majority did not want external scrutiny. While we can understand that people in full possession of their faculties might not want external scrutiny, the risks that crystallise once they lose capacity are self-evident. As was the situation in this case.

Problems Understanding Legal Proceedings

Recommendation: Judges, lawyers and court staff should receive training to better skill them in communicating with people who have a disability.

We have included Case Number Six because it illustrates the difficulties faced by people with disabilities who actually make it into court, either as witnesses or defendants.

> *Case Number Six involves a young man who is accused of committing acts of indecency. His parents are paying for legal representation and sought an Advocate to support and explain what his lawyer is saying/doing in a way he understands. The issue is that his is lawyer seems to address the parents and not attempt to involve his client. Without an independent Advocate, the accused would not have the right support to understand what is happening as the parents can become quite upset and/or stressed during proceedings. An Advocate is also able to explore with the accused ways to be calm during proceedings and try to focus to understand the proceedings.*

This case typifies the difficulty many people with disabilities encounter when interacting with the justice system. Legal matters are inherently complex and arcane, and many of those involved including judges, lawyers and court staffs are not willing and/or able to adequately explain the issues or their decisions to those affected by the outcomes. In some cases those people are left bewildered and not feeling that justice has been done.

Child Protection Matters

Recommendation: Magistrates should not issue 18 year orders until they are satisfied that parents with disability have been provided with adequate supports, training and time to demonstrate that they cannot adequately care for their child.

ADACAS involvement in child protection matters has been growing steadily over the past two years. These cases are difficult for all concerned both because of the intrinsic issues and because the legal barriers are significant.

Case Seven has been selected as it typifies this type of matter and because it illustrates the points we would like to make.

> *Case Seven involves a young man and his partner who both have mild intellectual disabilities. They recently had a baby. The young man's partner was reported to Care and Protection Services (CPS) prior to the birth, and she was not allowed to take the baby home. Instead, she was required to take part in two residential assessment programs at different locations. Subsequently, CPS placed the baby with the young man's foster parents. The young man and his partner are allowed supervised access visits. Each parent has a mild intellectual disability that sometimes manifests in a lack of attention. CPS staff members believe these issues make them unable to safely care for the baby, and CPS is now seeking 18 year orders to permanently remove the child.*

The first barrier to justice lies in the way the residential parenting services are funded and conducted. CPS arranges the assessments and funds the respective services to conduct them. The young woman's first experiences of parenting occurred in environments that were both foreign to her and highly stressful. While the programs are described as supports for new parents, their focus is actually on assessment, time frames are short and parents with disability are not given full and appropriate support to develop in their parenting role. There is an inherent conflict of interest between supporting a new parent to develop skills, and assessment with a view to recommending removal of the child. Likewise the young man was allowed only a few short hours of contact each week and was not given the support and education that he needs in order to be able to parent effectively.

The second barrier is that these assessment reports are presented in court as evidence of the parenting capacity of those involved. One problem in Case Seven is that the mother was taken straight from hospital to the assessment. The assessment report was then used as the basis for a decision to place the child in expensive foster care arrangements. A better outcome for the parents, the child and the public purse might have been achieved if the mother was provided with funded specialist in-home support and given time to develop the skills needed. The formal assessment to determine the child's future should not be conducted until that parenting skills development process is complete. Given the very high costs of out of home care, more specialised effort should be made to enable and support individuals with cognitive disability to be parents.

Mental Illness

Recommendation: That guidance be developed for use in jurisdictions that establishes fair and reasonable responses to people who cannot stand trial due to mental impairment.

> *Case Eight involves a man with Paranoid Schizophrenia. He committed a violent crime and other offences during a psychotic episode. He was found not guilty by reason of mental impairment. He was ordered to be held in custody until the Mental Health Tribunal determined otherwise. A judge later changed this to 10 years. He was initially placed in a mental health rehabilitation centre and after some years was allowed into the community for specific purposes and under supervision.*
>
> *His release was subject to psychiatric treatment order (PTO) and at least 17 Conditions of Release Orders (CRO). Some conditions contravened the Human Rights Act, for example freedom of movement; he was not allowed to catch particular buses or enter a particular suburb. Other conditions were excessive, for example, he had to submit to random drug testing for over 5 years although in all that time no positive tests were found. ADACAS intervened on his behalf and eventually the drug testing ended. In the meantime, the Tribunal responsible for the CRO's tried to add new conditions from time to time. For instance on hearing that the man had holidayed outside the ACT they then expected him to seek prior permission before travelling outside the ACT again.*
>
> *The man was told by the treating specialist seven years ago that his medication could be changed from depot injection to oral, but the mental health staff members did not follow that advice, apparently because of the CROs. In addition, the PTO lapsed some time ago because*

> *the man is now well. However, the CRO's have continued in force, only because of the initial judicial order not because of the man's current mental state.*

The positive aspect is that the man has been successfully treated and is allowed into the community. Nevertheless, the CRO continue in force because a judge so ordered. After reading this and considering the cases in your paper, we wondered whether there is a belief in some quarters that, even after people in this situation are well, they must still be watched and punished. That seems to be an inevitable result of mixing the mental health and criminal justice systems without any guidance to ensure procedural fairness for the accused persons.

Cost of Legal Representation

Recommendation: Increase funding to enable people with disability to access legal and specialist services when they have legal matters to pursue.

> *Case 9 is a client who felt she had a case for medical negligence. She could not afford to pay for legal representation and legal aid advised they did not support such matters. She then went to law firms which advertised "no win, no fee" and also put in an application with the law society for a pro bono lawyer. She was advised that she needed a medical specialist's report which demonstrated that if the work had been done differently there would have been a better outcome. However the report costs thousands of dollars. Being on the Disability Support Pension (DSP) this is not something she can afford. Therefore she has no legal representation, no support and no justice.*

In some respects, this case is not disability specific because anyone on a low income could be caught in the same situation. The real problem is that a person with a disability does not have the capacity to work extra hours or take out a loan to cover their legal and associated costs.

Centrelink Case

Recommendation: Centrelink establish improved procedures for communication with people with cognitive disability.

> *Case Ten involves a young man who has a mild intellectual disability that manifests as a difficulty in dealing with complex processes. He receives a lot of support from his mother, but she does not live in Canberra. He worked* at *Kentucky Fried Chicken while also collecting a Disability Support Pension from Centrelink. Luke failed to declare his other income to Centrelink, and over a two year period, he accrued a debt of $15,000. He ignored letters of demand from Centrelink and did not feel able to discuss the matter with Centrelink staff. Luke was eventually prosecuted and the outcome was an order to repay the money. Although no conviction was recorded, Luke was placed under the supervision of a parole officer. He made an arrangement to repay the debt at $20 per fortnight.*

Ideally processes within Centrelink would recognise that a person with cognitive disability is not as able to respond to usual communication modes (letters and phone calls) and the case would be referred to a social worker or other specialist to attempt resolution before resorting to prosecution. This case also raises questions as to why a parole officer was appointed when no conviction was recorded. It would be more useful for the Courts to recommend alternative

preventative interventions, such as decision support, so that the person can learn from their mistakes and develop skills that will avoid repeat offenses.

Conclusion

ADACAS cases demonstrate that people with disability face barriers to justice in a wide range of settings, from criminal to civil and across many domains of life. Our justice systems are not currently enabled to serve people with disability well. Much needs to be done to ensure procedural fairness, access to justice, and a change in culture around the rights of people with disability within the justice system.

To discuss any aspect of this report or ADACAS work with people with disability please contact Fiona May via email manager@adacas.org.au or phone (02) 62425060