



SUBMISSION | NEW SOUTH WALES  
**BAR ASSOCIATION**

The Criminal Justice System Issues Paper: Royal  
Commission into Violence, Abuse, Neglect and  
Exploitation of People with Disability

5 June 2020

### **Promoting the administration of justice**

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the Courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

### **The New South Wales Bar Association**

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practice in NSW. We also include amongst our members Judges, academics, and retired practitioners and Judges. Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Accessibility Panel and Criminal Law Committees, and our members' experiences practising in NSW registries of State and Commonwealth Courts.

If you would like any further information regarding this submission, our contact is the Association's Director of Policy and Public Affairs, Elizabeth Pearson, on 02 9232 4055 or at [epearson@nswbar.asn.au](mailto:epearson@nswbar.asn.au) at first instance.

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## 1. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**the Disability Royal Commission**) for the opportunity to make a submission concerning the *Criminal Justice System: Issues Paper* (**the Paper**).
2. The Rule of Law provides that every person is equal before the law. Unfortunately, Australians with disability face significant barriers in accessing and engaging with the legal system, whether as clients, solicitors, barristers or judges. The challenges people with disability face in accessing justice vary substantially, from physical environments and infrastructure to systemic barriers, inflexible procedures and significant under-resourcing of courts and legal assistance to support those in need.
3. The Association supports greater scrutiny of and focused reflection on the experience of people with disability in the Australian legal system and considers that the Disability Royal Commission has a unique opportunity to lead meaningful reform in these areas. The Association looks forward to providing a more fulsome submission to the Disability Royal Commission in due course regarding broader issues for people with disability in accessing the legal system more generally. To best assist the Disability Royal Commission in its important work at this time, this submission focuses predominantly on Question 4 of the Paper.
4. This submission is informed by the expertise of the Association's Criminal Law Committee and Accessibility Panel. In recognition of the magnitude of the challenges faced by people with disability in accessing and engaging with all facets of our justice system, the Association established its Accessibility Panel in October 2019 to consider, address and respond to matters involving disability, access and inclusion, and assist in the delivery of the aims and objectives of barristers with disability. The Accessibility Panel's work includes advising on policy matters and addressing access issues in built environments, such as Chambers and court buildings, that affect people working at or visiting those locations. The Panel comprises twelve members, including ten practising barristers with personal and/or professional experience with and knowledge of accessibility matters.
5. The Association represents barristers whose direct professional experiences of people with disability in the criminal justice system are primarily at the trial, sentencing and appeal stages of proceedings. In most cases the person with disability with whom barristers interact directly is the accused. At a lesser and more indirect level, counsel will also have contact with people with disability who are victims, complainants, witnesses or jurors or who work as lawyers or in other formal roles in the criminal justice system.
6. It is the common experience of the Association's members that a significant proportion of accused persons in the criminal justice system suffer either from a cognitive disability or a psychosocial disability. First Nations Peoples are substantially overrepresented in these groups.

7. It is also the experience of the Association's members that the greatest challenges for the criminal justice system are:
  - a. first, to ensure that people with disability are able properly and effectively to engage in the proceedings; and
  - b. second, to ensure that they are not placed at greater risk of violence, abuse, neglect and exploitation.
8. People living in regional and remote areas are less likely to have access to the level of support currently available to persons with disability in the criminal justice system in capital cities and large regional centres. Even in cities and larger centres, often that support is inadequate.
9. The Association considers it is best able to assist the Disability Royal Commission with the issues raised by Question 4 and accordingly makes the following recommendations.

## 2. Recommendations

### 10. The Association recommends:

- a. increasing the funding and resources of the Intellectual Disability Rights Service (IDRS) so it is better able to meet the demand for assistance and advice from police and other agencies early in the criminal justice process;
- b. providing a designated court-based representative (such as a member of the IDRS) to support people with cognitive disabilities at large regional and urban court precincts, similar to the forensic mental health service;
- c. increasing the availability of court-based forensic mental health nurses;
- d. undertaking a review of funding and resourcing of NSW state courts, including those in regional and remote areas, with the aim of identifying the capacity of each court to meet priorities including:
  - i. sufficient accessible and proximate parking or other transport hubs, with appropriate and accessible ramps and/or lifts to enable easy access to the Court building;
  - ii. ramps into and within courtrooms to enable ease of access;
  - iii. sufficient mobility within the courtroom, including from and between the bar table and witness box;
  - iv. the availability of “roaming” microphones within the courtroom;
  - v. sufficient accessible toilet and hygiene facilities, fitted with braille signage;
  - vi. hearing loops; and
  - vii. the ability to have transcripts made available in braille and/or audio format;
- e. appointing a dedicated courts disability liaison officer with ready access to the court registrars and administrators;
- f. increasing funding and resourcing to ensure the availability of timely, appropriate mental health care for inmates in correctional and mental health facilities, including access to culturally appropriate care for Aboriginal and Torres Strait Islander Peoples;
- g. specialised education and training for judicial officers and senior court administrators, including as regards:
  - i. the role and use of the court disability liaison officer and forensic mental health nurse;
  - ii. the specialist witness intermediary process (outlined below); and
  - iii. the importance of adapting court practices and procedures to ensure defendants or offenders, particularly those with cognitive and psychosocial disabilities, are better able to participate in the court process.

### 3. Response to Qn 4 of the Discussion Paper

#### A. What supports do people with disability need to participate in the criminal justice system on an equal footing as others without disability?

11. Before consideration can be given to what supports are needed by persons with disability in order for them to participate in the criminal justice system, these persons must first be recognised as such by key stakeholders of that system. While many physical disabilities may be easily recognised (at least in a rudimentary sense) by lay persons, cognitive and psychosocial disabilities are not as easily identified without specific training or expertise.
12. Consequently, it is recommended that consideration should be given to developing and strengthening existing support mechanisms to ensure that people with disability are identified as such when they enter and engage with the criminal justice system.
13. This identification, however, must be informed by the potential discrimination that could arise from having a person's disability identified to others. Consideration must be given to this issue. Even if identifying someone with disability is well-intentioned and aimed at ensuring equal treatment, if that individual is inadvertently disadvantaged by someone having knowledge of their disability and using it to discriminate against them, then the benefits of identifying their disability would be called in to question.
14. Understandably, recognising and identifying someone as having cognitive impairment while also ensuring that this knowledge does not impact upon how they are treated by the court and other people involved in the criminal justice system is crucial.
15. The following measures would assist in the identification of persons with disability at an early a stage as possible in the criminal justice system:
  - a. increasing the funding and resources of the Intellectual Disability Rights Service (IDRS) so it is better able to meet the demand for requests for assistance and advice from police and other agencies early in the criminal justice process;
  - b. providing a designated court-based representative (such as a member of the IDRS) to support people with cognitive disabilities at large regional and urban court precincts, similar to the forensic mental health service; and
  - c. increasing the availability of court-based forensic mental health nurses.
16. To participate effectively and constructively in the criminal justice system, people with disability need to be able to access and physically participate in court proceedings, regardless of their role in those proceedings or the location or jurisdiction of the relevant court. This submission outlines below examples of supports available for people with disability who are interacting with the criminal justice system.
17. As the ability of courts around NSW to meet the needs of persons with a physical disability varies depending on the particular court and particulate region, it is recommended that a



review be undertaken of NSW state courts, including those in regional and remote areas, with the aim of identifying the capacity of each court to meet the following priorities:

- a. sufficient accessible and proximate parking or other transport hubs, with appropriate and accessible ramps and/or lifts to enable easy access to the Court building;
  - b. ramps into and within courtrooms to enable ease of access;
  - c. sufficient mobility within the courtroom, including from and between the bar table and witness box;
  - d. the availability of “roaming” microphones within the courtroom;
  - e. sufficient accessible toilet and hygiene facilities, fitted with braille signage;
  - f. hearing loops; and
  - g. the ability to have transcripts made available in either braille and/or audio format.
18. Further, it is suggested that the new initiatives listed below be considered across key court precincts in metropolitan and regional NSW:
- a. A dedicated courts disability liaison officer with ready access to the court registrars and administrators. This would assist participants (or their supports) to make arrangements so that the court proceeding can progress as smoothly and with as few impediments to the participant as possible;
  - b. Specialised education and training for judicial officers and senior court administrators regarding:
    - i. the role and use of the court disability liaison officer and forensic mental health nurse,
    - ii. the specialist witness intermediary process (as outlined below), and
    - iii. the importance of adapting court practices and procedures to ensure defendants or offenders, particularly those with cognitive and psychosocial disabilities, are better able to participate in the court process, for instance by:
      1. allowing a friend or support person to sit alongside them during the proceedings;
      2. not compelling the accused/defendant to sit in the dock;
      3. adapting the court routine and timetable to provide adequate breaks; and,
      4. using effective and sensitive communication methods, including the simplification of legal language and concepts.
19. The Association notes that the use of specialist intermediaries for child witnesses and complainants in child sexual assault proceedings have been successfully utilised to ensure that those children who are particularly vulnerable, including those with disabilities, are able to



give effective evidence. Specialist intermediaries have provided significant guidance to the Court and practitioners about how most appropriately to question children and how the court proceeding should be modified to accommodate their particular needs, for instance by the use of simple language, modifying the way questions are asked, having frequent breaks, using first names, removing wigs and utilising visual guides and cues.

20. It is suggested that as part of the case management procedures in advance of District Court and Supreme Court trials, where a victim or witness has been diagnosed as having a cognitive and/or psychosocial disability, or where it may be reasonably apparent to either the practitioners or a judicial officer that the witness may suffer such disability, that a specially trained witness intermediary be appointed to assess the needs of the witness and to provide a report to the court with suggestions as to how procedures could be modified to support them during the proceedings. If the individual is a prosecution witness, it may also be of assistance to the court for experts who are engaged by the Director of Public Prosecutions (DPP) at an early stage to assess and explain what, if any, impact the psychosocial disability has on the victim or witness in giving evidence. Where the person with cognitive and/or psychosocial disability is the defendant, and they are represented by Legal Aid or the Aboriginal Legal Service, funding should be made available upon application for a specific report to be prepared which addresses the same issues for use by the defendant's legal representatives.

## **B. When would these supports be needed to assist people with disability who are:**

### **(i) victims of crime**

21. Victims of crime will generally interact with the criminal justice system by engaging first with police, and then with solicitors employed by the State and Commonwealth DPP and Crown prosecutors. They are also supported by various government and not-for-profit agencies such as VOCAL, NSW Witness Support Service and community legal centres. Those agencies are best placed to respond to this question.

### **(ii) witnesses required to give evidence**

22. As with victims, witnesses required to give evidence are generally (but not always) witnesses for the prosecution. The supports that are currently provided to those witnesses, and necessary improvements to those systems, are, as such matters best addressed by NSW Police Force and both the Commonwealth DPP and NSW DPP.
23. The Association, however, observes that where a critical witness in a District Court or Supreme Court trial has, or appears to have, a cognitive or psychosocial disability but is not a complainant in a child sexual assault trial, orders should be made as soon as practicable, preferably before committal, for the appointment of a specialised witness intermediary as referred to above. Intermediary reports should be made available to the parties by no later than the case management or readiness hearing to ensure preparations can be made in sufficient time before trial.

### **(iii) accused suspected of criminal offences**

24. An accused may be self-representing or have either publicly funded or privately funded legal representation. Aside from the physical needs of accused persons with disability, such as ready access to nearby parking or transport, the court, courtroom and accessible toilet facilities, disabled defendants may also require more frequent breaks in the usual court routine or may need documents to be read out or sign-language translators to be provided.
25. Where an accused with disability has been refused bail, greater flexibility in the court process may be required to enable such an accused to have easier access to and from the courtroom and to have the ability to conference with their lawyers with a support person present.
26. Where the accused is a person with cognitive or psychosocial disability, then additional funding should be provided as referred to above.

### **(iv) convicted of criminal offences**

27. A person with disability entering custody may require additional physical support when being transported to the correctional facility. Upon arrival at the gaol, that person may also need an appropriately modified cell and toileting/showering facilities to accommodate her/his specific needs.
28. Correctional facilities need to be able to accommodate all inmates with disability to ensure they are not further disadvantaged or exploited, abused, neglected or become the victims of violence in prison. The protection of inmates with disabilities could be achieved by, amongst other measures, the employment of dedicated staff (including nurses, occupational therapists and other specialists) who regularly consult with the inmate and independently review the services, programs and facilities made available to that inmate.
29. Frequent specialist liaison services should also be available to ensure that replacement aids or devices are made available when needed, and that the participant's external support person is updated as to any ongoing or new needs of the inmate.
30. Convicted persons with psychosocial disabilities are over-represented in the prisons yet many do not receive any appropriate psychological or psychiatric care in custody. Visits by psycho-medical professionals are limited and, as such, inmates with disabilities in most immediate need have to be prioritised. This means that those inmates with less pressing or urgent diagnoses may miss out entirely. The Association's members report many instances of clients who have ongoing and chronic psychosocial disabilities in custody but who either receive no treatment at all or treatment at a far lower standard than they would receive in the community.

### **(v) jurors**

31. The experience of jurors varies depending on the quality, size, modernity and age of the courtroom. Many "jury boxes", particularly those in the older courts, are cramped seating areas with little flexibility. In those courtrooms, there is little opportunity for a wheelchair to

be easily positioned into the jury box. Juror boxes also often have audio-visual facilities which are located in positions that would make viewing by jurors with a physical disability difficult, with, for instance, the closest screen for the viewing of pre-recorded evidence on the opposite wall.

32. Accordingly, consideration should be given to:
  - a. prioritising courtrooms, particular for long trials, with the best jury box and audio-visual facilities for jury trials; and
  - b. where practicable, modifying existing courtrooms to ensure the jury box can accommodate wheelchairs and mobility aids by, for instance, providing more space between seats in the jury box.

**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?**

33. Many courts are now meeting the physical requirements for persons with physical disability, such as providing ramp access, internal elevators, hearing and sight impaired aids in court and modifying toilet facilities. Some have not, particularly in regional and remote areas, and this should be addressed uniformly.
34. The DPP and police employ victim support staff and liaison personnel who have training in dealing with vulnerable people and children.
35. Court-based forensic mental health liaison staff are an excellent resource. They are generally trained forensic mental health nurses, and are accessible to accused persons while they are in custody at court. They provide Magistrates with short form reports and assessments, and assist with facilitating the transfer of those in need to immediate treatment facilities.
36. The IDRS is a service designed specifically to assist persons with a cognitive disability in the criminal justice system. The services of the IDRS are available to various stakeholders including police, solicitors and barristers. The IDRS utilises experienced and well-trained case-workers who can be connected to clients from an early stage in proceedings. When working with accused persons with a cognitive disability, the role of an IDRS caseworker includes: providing support on arrest in police custody; making referrals to support services; liaising with the NDIS; attending court; participating in conferences; facilitating communication with family; and providing guidance to the client's legal practitioners. As with the forensic mental health liaison staff, however, IDRS caseworkers are limited in number and availability relative to the demand for their services. This is particularly so in regional and remote courts.
37. The Justice Advocacy Service (JAS) is another important example. From 1 July 2019, JAS has provided support to people with cognitive impairments who are interacting with the criminal justice system. A branch of the IDRS, JAS is funded by the NSW Government and uses "an individual advocacy approach by arranging a support person to be with victims,

witnesses and suspects/defendants when they are in contact with police, courts and legal representatives."<sup>1</sup>

38. JAS is a useful and progressive resource that has been developed to bridge the gap that exists between individuals with cognitive disabilities and their equal and successful interaction with the criminal justice system.
39. A Support Person is assigned to an individual with a cognitive impairment to help them with going to court, understanding the court process and potential outcomes, completing paperwork, and obtaining legal advice.<sup>2</sup> JAS also provides free legal advice to a person with a cognitive impairment when they are at the police station. This service is free and importantly, does not require proof that an individual has a cognitive impairment.
40. For an individual to obtain JAS support, there is no formal application process; instead, an individual is referred to the service by police, court or legal representatives. The service is available across NSW in remote, regional and rural areas.
41. This is an important service as it attempts to ensure that access to justice is available to vulnerable members of the community who are at risk of falling through the gaps in the legal system. This service is particularly important as it relates to the criminal justice process in the court system, as it attempts to ensure a greater understanding for people with cognitive impairments of what is happening as it relates to them, and therefore, facilitates a greater outcome of justice.

### *Conclusion*

42. In conclusion, the Association would be pleased to assist the Disability Royal Commission with any questions it may have, through oral or further written submissions. Please contact the Association's Director of Policy and Public Affairs, Ms Elizabeth Pearson, at [epearson@nswbar.asn.au](mailto:epearson@nswbar.asn.au) if you would like any further information or to discuss this submission.

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<sup>1</sup> 'Justice Advocacy Service (JAS)', *Intellectual Disability Rights Service* (Web Page) <<https://idrs.org.au/jas/>>.

<sup>2</sup> 'Justice Support', *Intellectual Disability Rights Service* (Web Pages) <<https://idrs.org.au/what-we-do/justice-support/>>.