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People with Disability Australia (PWDA)

Strengthening child sexual abuse laws in NSW

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Disabled
People's
Organisations
Australia

Our vision is of a socially just, accessible and inclusive community, in which the human rights, citizenship, contribution and potential of people with disability are respected and celebrated.

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About People with Disability Australia

1. **People with Disability Australia (PWDA)** is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.
2. PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.
3. We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.
4. PWDA is also a founding member of Disabled People's Organisations Australia ([DPO Australia](#)) along with Women With Disabilities Australia, First Peoples Disability Network Australia, and National Ethnic Disability Alliance. DPO's are organisations that are led by, and constituted of, people with disability.
5. The key purpose of DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability In Australia by working collaboratively on areas of shared interests, purposes, strategic priorities and opportunities. DPO Australia is made up of four national peak DPOs that have been funded by the Australian Government to represent the views of people with disability and provide advice to Government/s and other stakeholders.

Introduction

6. PWDA welcomes the commitment of the NSW Government to implement recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). We are pleased to provide a response to the 'Strengthening child sexual abuse laws in NSW' Discussion Paper, and would like to thank the NSW Department of Justice for this opportunity.

7. PWDA's following response draws upon our long history of advocacy around the structural practices that lead to violence, abuse, neglect and exploitation of people with disability.
8. PWDA firmly believes that this topic, and broader considerations of access to justice in response to violence against children and adults with disability, requires a human rights based approach. Australia is a party to the Convention on the Rights of Persons with Disabilities (CRPD), alongside many other international human rights instruments.¹ All of these human rights instruments must be considered in relation to any changes to the current child sexual abuse laws in NSW.
9. Indeed, Article 7 of the CRPD outlines that States Parties must ensure that children with disability enjoy their human rights on an equal basis with other children. This is particularly important to remember when proposing changes to the justice system. It is vital that any justice system amendments adequately address the needs of children both with and without disability, and protect and enhance the rights of all children equally.
10. In addition, Article 5 of the CRPD focuses on equality before the law and non-discrimination, Article 12 outlines equal recognition before the law and the right to enjoy legal capacity on an equal basis with others, and Article 13 refers to the need for procedural and age-appropriate accommodations to facilitate access to justice. To ensure any changes to child sexual abuse laws in NSW are responsive to the varied experiences and needs of people with disability, PWDA recommends that the following submission be read in conjunction with our recent submission to the NSW Disability Justice Strategy,² as well as our collaborative response to the 2014 ALRC *Equality, Capacity and Disability in Commonwealth Laws* inquiry.³
11. Furthermore, as explained in our recent letter to the NSW Department of Justice in response to the NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission, PWDA has been funded by the Department of Social Services (DSS) to provide support to people with disability who may be impacted by the Royal Commission. This project, *Disability Support for the Royal Commission*, has provided a

¹ Australia is a party to the seven key international human rights treaties: The *International Covenant on Civil and Political Rights* (ICCPR); the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); the *Convention on the Rights of the Child* (CRC); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD); the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); and the *Convention on the Rights of Persons with Disabilities* (CRPD).

² Provided as an attachment to this submission.

³ People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre). 2014 'Submission to Australian Law Reform Commission (ALRC): Equality, Capacity and Disability in Commonwealth Laws Discussion Paper,' Available: <http://www.pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-ACDL-AHRCentre.doc>

multifaceted approach to ensure people with disability are represented in the work of the Royal Commission.

12. The *Disability Support for the Royal Commission* project has seen PWDA provide individual advocacy support to people with disability regarding the Royal Commission, including providing these individuals with information, advice and support. This individual advocacy support is ongoing, with advocates assisting clients to tell their story to the Royal Commission, pursue compensation and legal matters and seek therapeutic supports. In addition, as part of this project we have been delivering a range of training packages nationwide, to people with disability, disability service providers and mainstream services. We have also performed a research project, in which we spoke to people with disability across Australia, asking about their experiences, insights and beliefs about 'what makes organisations safe for children with disability?' The final element of this project has been systemic advocacy, whereby over the course of the Royal Commission's work, PWDA has provided disability specific violence prevention policy advice.
13. The following submission is therefore based upon information attained through all elements of our *Disability Support for the Royal Commission* project. It provides information that has been drawn from conversations with our Royal Commission individual advocacy clients, as well as participants in research project. The below information is also heavily informed by previous PWDA submissions to the Royal Commission.⁴
14. As PWDA's expertise and work is predominantly non-legal, we do not have the necessary knowledge to provide comprehensive responses to each of the discussion questions. However, we nonetheless believe the insights offered in our submission will be useful for the NSW Government to consider in relation to the implementation of the Royal Commission's recommendations. Indeed, as discussed below, the prevalence of sexual violence against children and adults with disability requires that any changes to or simplifications of child sexual abuse laws and frameworks in NSW take into consideration the experiences of this cohort.

⁴ In particular, this submission makes reference to PWDA's 2016 response to the Royal Commission's Consultation Paper on Criminal Justice: PWDA, 2016a. *Submission to Consultation Paper: Criminal Justice, People with Disability Australia*. Available: [http://www.childabuseroyalcommission.gov.au/getattachment/e7f22c43-46d2-4dbf-8e32-6fd70792549a/People-with-Disability-Australia-\(PWDA\)](http://www.childabuseroyalcommission.gov.au/getattachment/e7f22c43-46d2-4dbf-8e32-6fd70792549a/People-with-Disability-Australia-(PWDA))

Recommendations

PWDA makes a number of recommendations that respond to the issues we raise in this submission. We recommend that:

1. the NSW Government embed recommendations 13 and 37f of the Royal Commission's Criminal Justice Report in any changes to current child sexual abuse laws. This would help to ensure that policing and prosecutorial responses recognise the increased risk of child sexual abuse experienced by children with disability, and are made more responsive to and inclusive of all people with disability.
2. the offence of 'persistent child sexual abuse' be replaced by the model provision recommended by the Royal Commission, alongside the creation of a course of conduct charge. Both offences should have retrospective operation.
3. a broader grooming offence be created in NSW, aligning with the Royal Commission's recommendations. For this grooming offence, the prosecution must prove the accused had an unlawful state of mind.
4. the creation of grooming offences for those other than the child who has experienced sexual abuse (such as their family members or friends, for instance).
5. additional relationships be included in NSW legislation relating to 'special care', to include disability-specific workers in particular.
6. the failure to report offence be created, in conjunction with specific and robust whistle-blower protections. We further recommend that this offence be partially retrospective.
7. the failure to protect offence be established, in line with the recommendations of the Royal Commission.
8. the pre-recording of evidence and the use of registered witness intermediaries in NSW be made more widely available to children with and without disability, adults with disability and those who have experienced sexual violence more broadly.
9. communication supports, including having a support person present in police interviews and trial processes, be provided in addition to the involvement of registered witness intermediaries (in line with the Royal Commission's recommendations).
10. legislation be amended to facilitate additional tendency and coincidence evidence and joint trials. PWDA further recommends that the Royal Commission's model provisions and recommendations be adopted in relation to proceedings for adult sexual offences in addition to child sexual offences.
11. judicial directions and information be improved, in line with the Royal Commission's recommendations, including the development of set standard directions in each state and territory in consultation with those with relevant expertise.

Prevalence of violence against children and adults with disability⁵

15. Despite there currently being no comprehensive, national mechanism to capture data on the prevalence, causes and impacts of violence against people with disability, available data does show that children and adults with disability experience violence at much higher rates than people without disability.⁶ This is true for both sexual and non-sexual violence. For instance, children with disability are reported to be 3.4 times more likely than children without disability to experience some form of violence.⁷ In addition, children with disability are 2.88 times more likely to experience sexual abuse than their peers without disability.⁸
16. There are many factors that contribute to the increased risk of violence, including sexual violence, experienced by children with disability. These include, for instance, that people with disability are often exposed to a range of institutions, as children, young people and adults, to which people without disability are not.⁹ These facilities include residential institutions, respite care services, special schools, disability services and disability justice facilities. In addition, children with disability are disproportionately represented in out-of-home care settings.¹⁰
17. Children, young people and adults with disability who live in institutional and/or residential settings are more vulnerable to all forms of violence, including sexual violence.¹¹ Such violence is often perpetrated by multiple offenders, and can occur over extended periods of time.
18. Justice responses to violence against these individuals must not only recognise the increased rates of violence against people with disability in

⁵ This section has been extracted from PWDA's recent letter to the NSW Department of Justice in response to the Civil Litigation Consultation process.

⁶ Frohmader, C., and Sands, T. 2015. *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings*. Australian Cross Disability Alliance (ACDA); Sydney, Australia. p35. Available: http://pwd.org.au/documents/Submissions/ACDA_Sub_Sen_Inquiry_Violence_Institutions.pdf

⁷ Robinson, S. 2011. *Enabling and protecting: Proactive approaches to addressing the abuse and neglect of children and young people with disability*, Children with Disability Australia, p. 9.

⁸ Llewellyn, G., Wayland, S., Hindmarsh, G. 2016. *Disability and Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney.

⁹ PWDA, 2013. *Royal Commission into Institutional Responses to Child Sexual Abuse: Submission Issues Paper 3, Child Safe Institutions*, p6. Available: <http://www.childabuseroyalcommission.gov.au/getattachment/a4579ac4-6e23-4c60-a7c7-eceab841158e/42-People-with-Disability-Australia-Incorporated>

¹⁰ For more information, see PWDA, 2016b. *Submission to Consultation Paper: Institutional Responses to Child Sexual Abuse In Out of Home Care*, People with Disability Australia. Available: <http://www.childabuseroyalcommission.gov.au/getattachment/02170c97-5bc7-4b34-8252-cb0fe822186f/40-People-With-Disability-Australia>

¹¹ Frohmader and Sands, 2015 op cit., p35. See also: Attard, M., & Price-Kelly, S. 2010. *Accommodating Violence: The experience of domestic violence of people with disability living in licensed boarding houses*, PWDA, NSW.

institutional settings, but must also acknowledge the multiple barriers to reporting they experience.¹²

Disability specific recommendations in the Royal Commission's Criminal Justice Report

19. Throughout its Criminal Justice Report, the Royal Commission acknowledged that children and adults with disability can face significant challenges as complainants in child sexual abuse cases.¹³ In this report, the Royal Commission outlines some of the barriers experienced by people with disability, including issues with police and prosecution responses, a lack of support programs and the effect of negative assumptions about the reliability or credibility of people with disability in criminal justice processes.¹⁴

20. PWDA was pleased that the Royal Commission made an explicit recommendation (recommendation 13) in response to these barriers to justice system responses commonly experienced by children and adults with disability. We recommend that the NSW Government follow the Royal Commission's lead by implementing principles for police that mirror those provided below.

21. The Royal Commission's recommendation¹⁵ reads as follows:

- 13. Each Australian government should ensure that its policing agency responds to victims and survivors with disability, or their representatives, who report or seek to report child sexual abuse, including institutional child sexual abuse, to police in accordance with the following principles:*
- a. Police who have initial contact with the victim or survivor should be non-judgmental and should not make any adverse assessment of the victim or survivor's credibility, reliability or ability to make a report or participate in a police investigation or prosecution because of their disability.*
 - b. Police who assess or provide an investigative response to allegations made by victims and survivors with disability*

¹² For further discussion of the barriers to justice, see: *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*, August 2012, p82. Available: <http://www.afdo.org.au/media/1210/crpd-civilsocietyreport2012-1.pdf>; French, P. 2007. *Disabled Justice: The barriers to justice for persons with disability in Queensland*, Queensland Advocacy Incorporated; and Victorian Equal Opportunity and Human Rights Commission, 2014. 'Beyond Doubt: the experiences of people with disabilities reporting crime', Available: <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/894-beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime>

¹³ Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Executive Summary and Parts I-II, page 30.

¹⁴ Ibid.

¹⁵ Ibid. p119.

should focus on the credibility of the complaint or allegation rather than focusing only on the credibility of the complainant, and they should not make any adverse assessment of the victim or survivor's credibility or reliability because of their disability.

c. Police who conduct investigative interviewing should make all appropriate use of any available intermediary scheme, and communication supports, to ensure that the victim or survivor is able to give their best evidence in the investigative interview.

d. Decisions in relation to whether to lay charges for child sexual abuse offences should take full account of the ability of any available intermediary scheme, and communication supports, to assist the victim or survivor to give their best evidence when required in the prosecution process.

22. Such principles would help to ensure that NSW police responses are responsive to and inclusive of all people with disability. Unfortunately, the stories and experiences of our clients and participants in our Royal Commission-related research indicate that some people with disability have been disbelieved when making reports to the police, or denied the support they may need to provide their statement.

23. Such police responses may be attributable to their narrow perceptions of what constitutes a 'reliable' or 'credible' witness with disability.¹⁶ People with disability may have their reports dismissed by police due to these notions about witness credibility, and discriminatory stereotypes about disability. Indeed, police officers may not even take a report, due to their belief that such cases will unlikely lead to conviction.¹⁷ These stereotypes and views about credibility, reliability and legal capacity must be urgently disrupted to improve responses to people with disability reporting crimes, including child sexual abuse and other forms of violence.

24. As outlined in the recommendation, it is therefore vital that all police be non-judgemental and focus on the credibility of the complaint or allegation, rather than focusing on the credibility (or perceived credibility or reliability, based on the aforementioned stereotypes and inaccurate views) of the complainant. By explicitly recognising and remedying the additional barriers to reporting, and thus to justice, commonly experienced by children and adults with disability, some of the systemic factors leading to inequity in criminal justice responses may be addressed.

¹⁶ Disability Rights Now, 2012 op. cit., p78; see also French, 2007 op cit.; Victorian Equal Opportunity and Human Rights Commission, 2014 op cit., Chapter 7.

¹⁷ PWDA, 2016b op cit., p5.

25. In addition, in its Criminal Justice Report, the Royal Commission proposes some principles to guide prosecution responses to child sexual abuse. Acknowledging the increased risks of violence, including child sexual abuse, experienced by children with disability, the Royal Commission included a disability-specific principle. This principle proposes that:

“Prosecution agencies should recognise that children with disability are at a significantly increased risk of abuse, including child sexual abuse. Prosecutors should take this increased risk into account in any decisions they make in relation to prosecuting child sexual abuse offences” (Recommendation 37f).

26. PWDA again recommends that the NSW Government embed the above recommendation into changes to the current child sexual abuse laws in NSW. Recognising the increased risks of child sexual abuse experienced by children with disability, and taking this into consideration in relation to decisions regarding prosecuting such cases, could lead to improved responses and outcomes for this cohort.

Response to discussion paper questions

27. As outlined above, PWDA does not have the necessary legal expertise to provide comprehensive responses to each of the discussion questions. We therefore only provide responses to some questions and topic areas.

Chapter 7 – Improving the offence of persistent child sexual abuse

28. PWDA supports the Royal Commission’s recommendations of a strengthened persistent child sexual abuse offence, as well as the creation of a course of conduct charge. The existence of both of these offences would allow the prosecution to determine the best possible approach depending on the needs of the victim/survivor, the particulars of each case, and the evidence available.¹⁸

29. PWDA recommends that the offence of ‘persistent child sexual abuse’ be replaced by the model provision recommended by the Royal Commission to enable the inclusion of instances of criminal conduct without requiring the victim/survivor to recall precise dates and times.¹⁹ We believe these

¹⁸ Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI.

¹⁹ PWDA, 2016a op cit.

provisions will ensure that children who have experienced sexual abuse will not be unfairly disadvantaged if it is difficult for them to provide the particulars of abuse they have endured.

30. In addition, PWDA recommends the retrospective operation of the offence of persistent child sexual abuse.²⁰

31. In many cases, people with disability are delayed in disclosing child sexual abuse or other types of violence. This may be for a range of reasons, such as being physically or socially isolated in an institutional setting with limited (if any) external oversight and therefore offered no opportunities to disclose; having limited access to appropriate communication or decision-making supports, including access to Auslan interpreters or augmentative or alternative communication devices; having limited (if any) education about sex, respectful relationships or their rights; or being reliant on the perpetrator of abuse (or other staff who may act as gatekeepers) to report their abuse.²¹

32. Moreover, in some instances additional factors may also affect the understanding that a child with disability has in relation to time and memory.²² Without a retrospective formulation of the offence, children and adults with disability risk being unable to access justice.

33. Particular attention should be paid to the findings of the research commissioned by the Royal Commission on the effects of child sexual abuse on memory.²³ Furthermore, it is vital that attention is given to the:

*'particularities of children's development in relation to memory, and the differential experience and recollection of time by some people with disability and some Aboriginal and Torres Strait Islander people.'*²⁴

34. PWDA recommends that the offence of persistent child sexual abuse receive a higher penalty than isolated offences. The offence of persistent sexual abuse has been determined as being 'more serious'²⁵ and in the 'worst category'²⁶ of abuse compared with the offence of individual acts of abuse, and thus requires a higher penalty.

²⁰ Ibid.

²¹ For more information see: PWDA, 2013 op cit.; Paine, M., Hansen, D. (2002). 'Factors influencing children to self-disclose sexual abuse'. *Clinical Psychology Review*. 271-295.

²² PWDA, 2016a op cit.

²³ Goodman-Delahunty J, Nolan M A & Van Gijn-Grosvenor E L, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complaints' Evidence*, Report for the Royal Commission into Institutional Response to Child Sexual Abuse, July 2017.

²⁴ PWDA, 2016a op cit., p7.

²⁵ *R v Langbein* (2008) 181 A Crim R 378, McClellan CJ at [115].

²⁶ *Hitchen v R* [2010] NSWCCA 77 at [24].

35. This is particularly pertinent as children with disability, as previously mentioned, experience child sexual abuse and other forms of violence at much higher rates than their peers, face additional barriers to reporting these crimes and subsequently accessing justice. Consequently, violence against people with disability is often more severe and typically lasts longer than violence against people without disability.²⁷
36. PWDA also supports the introduction of a course of conduct charge, as this charge is more likely to be established in instances where it is more difficult for victim/survivors to provide particulars and specifics of each occurrence of abuse.²⁸ This is important for people with disability who, as discussed above, may experience difficulty in remembering particulars or specifics of incidents. In particular, where people with disability do not have a conventional understanding of time they may be unable to provide a distinct timeline of abuses.²⁹
37. PWDA recommends the course of conduct charge be available for historic offences. As the Royal Commission has seen in the course of its work, children and adults both with and without disability can be substantially delayed in disclosing experiences of child sexual abuse.³⁰
38. People with disability may only be able to access the course of conduct charge for a variety of reasons. It is therefore imperative that the course of conduct charge is available whenever they choose to disclose. To avoid prejudice against the accused, PWDA recommends the course of conduct charge only be used where there is a reasonable explanation as to why the victim/survivor is unable to provide details as to dates and circumstances.³¹ The assessment of whether such explanation is reasonable could be performed by a legal professional or court.

Chapter 8 – Improving the offence of grooming

39. PWDA supports the Royal Commission's recommendation for a broader grooming offence and agrees that the narrow approach currently in place in NSW legislation does not meet the policy objectives of prevention and deterrence of grooming in its entirety.³²

²⁷ Frohmader and Sands, 2015 op cit., p35.

²⁸ The Royal Commission, 2017 op cit.

²⁹ PWDA, 2016a op cit.

³⁰ Ibid.

³¹ NSW Government Department of Justice, 2017. *Discussion Paper: Strengthening child sexual abuse laws in NSW*. Available: <http://www.justice.nsw.gov.au/justicepolicy/Documents/strengthening-child-sexual-abuse-laws.pdf>.

³² Ibid.

40. As outlined in the Discussion Paper, the current NSW offence (defined in section 66EB of the *Crimes Act 1900*) is rarely charged despite a high prevalence of grooming.³³ These low conviction rates are of particular concern when considering children with disability, as this cohort can be uniquely vulnerable to grooming. The higher risk of grooming for children with disability can be attributed to a number of factors, including that:

- a. children with disability may rely on a disability service provider or a special school for their social and support networks, thus limiting their external supports;
- b. children with disability often experience systemic barriers that increase their isolation, providing an easier pathway for perpetrators to access victims; and
- c. grooming can be harder to recognise because of the societal perception that people who work with children with disability are inherently moral, upstanding members of the community.³⁴

41. PWDA supports the Royal Commission's recommendation that the prosecution must prove the accused had an unlawful state of mind. This would narrow the offence to ensure an offence is not charged in a circumstance that involves innocent conduct, while still enabling the broad offence to have an educative function by emphasising the wrongfulness of grooming behaviour. Indeed:

*'Some adults with disability may have had limited education regarding social mores, community expectations and so on. They may also be treated with more suspicion by a community, and it is important that they do not get criminalised for innocent behaviour.'*³⁵

42. As such, PWDA recommends that prosecutorial direction must be clear in grooming cases, in order to ensure that grooming charges only apply where child sexual abuse was the intent of the behaviour.³⁶

43. Furthermore, in line with the Royal Commission's recommendations, PWDA strongly recommends the creation of grooming offences for those other than the child who has experienced sexual abuse.³⁷ Implementing this recommendation would provide a community-based, prevention focused

³³ Ibid. p50.

³⁴ PWDA, 2016a op cit., p7.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

response that recognises the impacts that a wide range of grooming behaviours can have on families and communities, while also increasing awareness of what constitutes criminal behaviour.³⁸ In institutional settings, such as disability services, the grooming of children is not the only aspect of a perpetrator's manipulation.³⁹ Others who are involved in the child's life, including their family, friends, or others who are providing services and supports, may also be groomed by the perpetrator.

44. If NSW were to implement a grooming offence based on another jurisdiction's current provisions, PWDA would support an offence based on the Victorian model. These provisions explicitly apply to 'a person under whose care, supervision or authority the child is' in section 49B(2) of their *Crimes Act 1958* (Vic). It is important to ensure this is explicitly stated in the legislation to ensure that the unique experiences of children with disability are covered, and that all children – both with and without disability – are adequately protected.

Chapter 9 – Strengthening offences against young people under care

45. PWDA is supportive of the protections offered to 16 and 17 year olds by Section 73 of the *Crimes Act 1900*. It is important that 16 and 17 year olds are protected against the misuse/abuse of authority in the 'special care' relationships involving power imbalances as outlined in legislation.
46. We are aware that Section 66F of the *Crimes Act 1900* provides legislation around sexual offences against people with cognitive impairment committed by a 'person responsible for the care' of the individual with cognitive impairment. However, we are concerned that young people with disability aged between 16 and 17 may not be offered protection under this section. For instance, these 16 and 17 year olds may not have 'cognitive impairment' as defined by the Act, but may nonetheless be in relationships of 'special care' with disability support staff.
47. As such, while we broadly agree with the current relationships outlined in NSW legislation, we also recommend that additional relationships be included under the definition of 'special care.' Specifically, staff providing services and support to young people with disability aged 16 and 17 years (including, for instance, in residential out of home care facilities, group homes and other mainstream and disability-specific settings) should be recognised as holding a position of care, authority and/or dominance over these individuals.

³⁸ Ibid.

³⁹ Ibid.

48. Throughout our *Disability Support for the Royal Commission* project, we have heard from many people with disability who experienced child sexual abuse in institutional settings. Many of these stories had a common theme: that of people in authority responding inadequately (if at all) to allegations of child sexual abuse.⁴⁰ While 16 and 17 year olds may seek consensual relationships with people who are older than them, we believe that relationships characterised by power imbalances pose additional risks to young people.

49. In relation to expanding the types of sexual conduct covered by the offence, PWDA agrees with the recommendation of the Model Criminal Code Officers Committee of the Standing Committee of Attorney-General that this offence also apply to acts of indecency and indecent assault.

Chapter 10 – Introducing specific offences of failing to protect and failing to report

50. PWDA is broadly supportive of the adoption of the targeted failure to report offence. Failure to report is a common feature in child sexual abuse amongst clients of PWDA, and we believe the current broad offence in the NSW Act (s316(1)) is not adequate.

51. Many people with disability who have experienced child sexual abuse in institutional settings have shared information about their experiences with PWDA. Common to many of these stories is the repeated failure of people in authority to report child sexual abuse, particularly by employees of service providers. People in authority may refuse to respond, they may provide an inadequate response, or they may respond in a way that breaches their own policies and procedures.⁴¹ In other cases, staff may assume that other staff members were providing a response, or that it was not their duty to respond.⁴²

52. However, PWDA is mindful that some victim/survivors may not wish to have the crimes they have experienced reported.⁴³ Indeed, if people are aware that crimes committed against them will be reported without their consent, this can severely impede disclosures.⁴⁴ Disclosure can be a traumatic process and it is important to place the safety and needs of the victim/survivor at the centre of any considerations. As such, people must be provided with appropriate supports around their decision to disclose, including decision-making support where necessary.

53. Furthermore, PWDA supports the partially retrospective formulation of the failure to report offence. We agree with what has been submitted to the Royal

⁴⁰ Ibid. pp7-8.

⁴¹ Ibid. p7.

⁴² Ibid. pp7-8.

⁴³ Ibid. p8.

⁴⁴ Ibid.

Commission, that the retrospective application is imperative for child sexual abuse offences because they are typically not reported for years.⁴⁵ This is particularly pertinent to the disability context where, as previously outlined, people with disability may experience significant delays in reporting such crimes against them.

54. Nonetheless, PWDA is concerned to ensure that protection is afforded to people who make disclosures of child sexual abuse from detrimental action on the part of the institution.⁴⁶ Indeed, it is vital that appropriate and adequate supports and/or protections are put in place for whistle-blowers. PWDA has repeatedly found that in instances where staff failed to report child sexual abuse it was because they feared retribution from their employer and in most instances, this fear was not misplaced.⁴⁷

55. Additionally, we believe that appropriate whistle-blower protections will make the pathway for reporting clearer. PWDA has knowledge of some circumstances in which disclosures have been made to junior members of staff, as they have had the closest relationship with the children under their care. However, pathways of reporting for these members of staff are often closed.⁴⁸ Segregated institutional settings, characterised by problematic internal cultures of obedience and silence, strict staff hierarchies, and practices designed to manage or constrain children⁴⁹ can contribute to this failure to report allegations of child sexual abuse.

56. Finally, PWDA supports the recommendation for a failure to protect offence.⁵⁰ As outlined in our submission to the Royal Commission, PWDA believes that criminalising the failure to protect is vital as it meaningfully shifts accountability to individuals providing services to children.⁵¹ This offence also recognises the significance of failing to protect and contributes to a greater community awareness of the importance of protecting children from sexual abuse, both in institutions and within the broader community.⁵² This is particularly important for children with disability who, as previously mentioned, are more likely to access services and/or institutional settings during childhood.

Chapter 13 – Limiting circumstances where complainants give evidence on multiple occasions

⁴⁵ The Royal Commission, 2017 op cit.

⁴⁶ PWDA, 2016a op cit.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ PWDA, 2013 op cit., p8.

⁵⁰ PWDA, 2016a op cit.

⁵¹ Ibid.

⁵² Ibid.

57. All possible efforts must be made to prevent complainants of child sexual abuse from giving evidence on multiple occasions. As outlined in the Discussion Paper, such processes can lead to delays and duplication, and can add to the trauma experienced by the complainant.
58. Delays and long wait times for legal proceedings can cause additional difficulties for children, young people and adults with disability. This can be due to people fearing (or knowing) that their memory of the event will become less clear over time.⁵³ In addition, the impact of long wait times can also be distressing for people with psychosocial disability, particularly for those also experiencing the effects of trauma.⁵⁴
59. While the current Child Sexual Offence Evidence Pilot allows the pre-recording of evidence by child complainants, this must happen earlier (rather than in the higher court as presently occurs). Complainants should be allowed to pre-record evidence on one occasion, which could be used in legal proceedings at different courts and at different times. This opportunity should be afforded to children with and without disability and adults with disability, as well as to people without disability who have experienced sexual violence and those who may be re-traumatised by being forced to repeat their experiences.
60. Earlier pre-recording could prevent complainants from experiencing further distress, trauma and/or delays, which should be a key consideration when deciding possible options for reforms. The effect of earlier pre-recording should be thoroughly explored in relation to other proposed reforms (such as the planned reforms to early guilty pleas⁵⁵ for instance), assessing how these different changes might improve processes for all complainants.

Broader discussion regarding special supports for child witnesses in child sexual assault proceedings:

61. PWDA applauds the current work of the Child Sexual Offence Evidence Pilot in providing special supports to reduce trauma to child witnesses in child sexual assault proceedings. While the Pilot goes some way to addressing recommendations 52-55, and 59-60⁵⁶ of the Royal Commission, it is vital that the special supports offered to children in these pilot areas are extended to all children in NSW. In addition, PWDA believes that early pre-recording of evidence, and the use of registered witness intermediaries be extended to adults with disability, as well as people without disability who have

⁵³ As discussed in PWDA, 2016a op cit. and PWDA's submission to the NSW Disability Justice Strategy.

⁵⁴ PWDA, 2016a op cit., p10.

⁵⁵ We note that the discussion paper clearly outlines that the proposed early plea reforms would change criminal procedures in the Local Court but not in the Children's Court – however we believe that the impact of such reforms could free up additional resources for the completion of early pre-recording of evidence processes.

⁵⁶ As mentioned on p10 of the Discussion Paper.

experienced sexual violence, as we feel these provisions would likely support people with and without disability to provide their best possible evidence.⁵⁷

62. Indeed, as provided in Article 13.1 of the CRPD:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

63. In addition to this, Article 5 of the CRPD speaks to equality before the law and non-discrimination, outlining the right of people with disability to equal protection and benefit of the law. PWDA find it concerning that ‘the current justice system response to child sexual abuse does not provide this equality of protection or benefit.’⁵⁸

64. As such, PWDA urges the NSW Government to extend the use of witness intermediaries. PWDA agrees with the Royal Commission’s recommendations (59 and 60) that all witness intermediaries be appropriately qualified in communication with children and adults with disability, and that they must be able to provide recommendations on how to best communicate with the witness. This must include cultural competency, ensuring that children and people with disability are assigned witness intermediaries with appropriate cultural and communication skills. We are pleased that the Royal Commission has recommended that intermediaries be available at both the police interview stage and at the trial stage, and believe that if implemented in NSW, this would contribute to better evidence from child witnesses and children and adults with disability.

65. PWDA also concurs with the Royal Commission’s assertion (in recommendation 13) that communication supports may help people with disability to give their best evidence in investigative interviews. These supports could include, for instance, assistive technology or Auslan interpreters. In their report, the Royal Commission outlines that these communication supports can be provided in addition to or instead of witness intermediaries. PWDA agrees that communication supports, including having a support person present in police interviews and trial processes, should be provided in addition to the involvement of witness intermediaries.

⁵⁷ As outlined in PWDA’s response to the NSW Disability Justice Strategy.

⁵⁸ PWDA, 2016a op cit., p3.

66. PWDA supports the assertion of the Royal Commission that the current NSW approach unjustly favours the accused in child sexual abuse proceedings.⁵⁹ As noted by the Royal Commission and others, it is quite common that a single offender involved in child sexual offence proceedings has committed offences against more than one, if not multiple individuals.⁶⁰ It is important that any reforms in this area seek to improve the experience of the criminal justice system for complainants of child sexual abuse. The increased use of tendency and coincidence evidence and joint trials would ensure juries are provided with sufficient context and/or circumstances regarding the case before them. The use of joint trials in particular may be especially beneficial to complainants, as the complainants could offer each other support throughout the legal proceedings.⁶¹

67. PWDA is supportive of the Royal Commission's recommendations that legislation be amended to facilitate additional tendency and coincidence evidence and joint trials. These reforms may help to address some of the barriers to justice often experienced by people with disability.

68. As outlined in our submissions to the Royal Commission and participation in case study public hearings, tendency and coincidence evidence and joint trials would be of particular benefit to children and adults with disability.

69. Some of our Royal Commission clients told us about living in Children's Homes and Orphanages, in which children with and without disability were housed together.⁶² As these clients explained to us, children with disability and children without disability alike often experienced child sexual abuse in these facilities. However, the outcomes for children without disability who experienced sexual abuse in these facilities were often quite different than those experienced by children with disability who had also been abused.⁶³ This includes, for example, having access to compensation as adults without disability, while adults with disability were unable to pursue this avenue.⁶⁴

70. In addition:

'In another case, differential outcomes depending on the kind of impairment have clearly impacted on the access to justice of

⁵⁹ Women's Legal Services NSW, 2016. *Criminal Justice Consultation Paper response*, p3. Available: <https://www.childabuseroyalcommission.gov.au/getattachment/95b7a5c8-cc08-44a1-ad0c-fdff1657f4e7/Women-s-Legal-Service-NSW>

⁶⁰ The Royal Commission, 2017 op cit., p411.; Women's Legal Services NSW, 2016 op cit., p4.

⁶¹ Women's Legal Services NSW, 2016 op cit., p4.

⁶² PWDA, 2016a op cit., p13.

⁶³ Ibid.

⁶⁴ Transcript of J Cadwallader, Case Study 46, 29 November 2016, T23952:5-19.

*particular individuals. Adults with lesser cognitive impairments who are living in the community have accessed civil remedy; those with higher support needs continue to reside within housing provided by the same service provider in which their abuse occurred, and have not been provided with access to counselling or other supports. Again, the availability of tendency and coincidence evidence and joint trials may help to address the extensive barriers to justice faced by particular cohorts of people with disability.*⁶⁵

71. In relation to the model provisions of the Royal Commission, and the options available in regards to the admissibility of tendency and coincidence evidence, PWDA believes that the Royal Commission's model provisions and recommendations should be adopted in relation to proceedings for adult sexual offences in addition to child sexual offences.⁶⁶

Chapter 15 – Improving and codifying jury directions

72. PWDA agrees with the Royal Commission's recommendations in relation to reforming judicial directions and improving information for jurors. As outlined by the Discussion Paper, expert witnesses are rarely called, and this can leave some jurors with misconceptions based on their expectations in regards to the child complainant's behaviour or response to their abuse.

73. In cases of child sexual abuse, it is vital that jurors have an adequate understanding of the behaviour and responses of children who have been sexually abused. This would require providing information not only about children's behaviour, but also general information about trauma, the impact of child sexual abuse and how that can affect a child's reaction or attitude towards the abuse.

74. Information could also be provided in relation to the legal capacity of all individuals (including those with disability). Such information could bolster judges to be more robust in disallowing inappropriate questioning of people with disability or children, for instance. Currently, judges may be aware of the bias that jurors might hold towards children or complainants with disability.⁶⁷ As a result, judges may be less likely to intervene during inappropriate questioning due to concerns that the jury might perceive such intervention as an indication of the lack of credibility or reliability of the witness.⁶⁸

⁶⁵ Ibid.

⁶⁶ As laid out in option 2 of the discussion paper (p94).

⁶⁷ PWDA, 2016a op cit., p11.

⁶⁸ Ibid.

75. In addition, information should be made available to jurors about the use of any special measures within the legal process, to ensure they understand why and how such special supports are being used (including but not limited to the use of pre-recorded evidence and witness intermediaries). This could further address the myths and stereotypes that jurors might hold in relation to the reliability of children or people with disability.

76. PWDA also supports the recommendations of the Royal Commission to set standard directions in each state and territory, in consultation with those with relevant expertise. We concur that the mandatory directions recommended by the National Child Sexual Assault Reform Committee and the directions proposed by the Victorian Government should provide a starting point for this consultation. We further recommend that consultation on these proposed directions pay particular attention to the diverse experiences and needs of children with disability, Aboriginal and Torres Strait Islander children, children from culturally and linguistically diverse backgrounds, and children identifying as LGBTQAI.

PWDA would like to thank the NSW Department of Justice for the opportunity to provide feedback on this discussion paper, and welcomes any further consultation on this topic.



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NGO in Special Consultative Status with the
Economic and Social Council of the United Nations

People with Disability Australia (PWDA)

Submission to the NSW Department of Justice Disability Justice Strategy

**Submission
May 2017**

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Disabled
People's
Organisations
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About People with Disability Australia

1. **People with Disability Australia (PWDA)** is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.
2. PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.
3. We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.
4. PWDA is also a founding member of Disabled People's Organisations Australia ([DPO Australia](#)) along with Women With Disabilities Australia, First Peoples Disability Network Australia, and National Ethnic Disability Alliance. DPO's are organisations that are led by, and constituted of, people with disability.
5. The key purpose of DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interests, purposes, strategic priorities and opportunities. DPO Australia has been funded by the Australian Government to be the recognised coordinating point between Government/s and other stakeholders, for consultation and engagement with people with disability in Australia.

Introduction

6. PWDA welcomes the opportunity to be involved in consultations regarding NSW's Disability Justice Strategy. The following submission builds on our long history of advocacy on access to justice issues, and our extensive expertise in the area of violence, including domestic and family violence, against people with disability. PWDA provides individual advocacy support to many people with disability who have experienced various forms of violence, including those affected by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).
7. In addition, we have also provided disability specific policy advice to the Royal Commission¹ and a number of other inquiries, such as the Senate Inquiry into

¹ PWDA submissions to the Royal Commission which may be of particular interest include: PWDA, 2015a. 'Royal Commission into Institutional Responses to Child Sexual Abuse: Issues Paper 8 – Experiences of Police and Prosecution Responses'. Available: <http://www.childabuseroyalcommission.gov.au/getattachment/5d0dcca4-9166-442f-a8ac-e6f76821e005/17-People-With-Disability-Australia-Inc> and PWDA, 2016a. 'Royal Commission into Institutional Responses to Child Sexual Abuse: Submission regarding Criminal Justice' April 2016. Available:

Violence, Abuse and Neglect of People with Disability in Institutional and Residential Settings² and the 2014-15 Senate Inquiry into Domestic Violence.³ We have also made submissions to the Australian Law Reform Commission's 2014 *Equality, Capacity and Disability in Commonwealth Laws* investigation,⁴ as well as to the 2014 Disability Discrimination Commissioner's *Equality Before the Law: Towards Disability Justice Strategies*⁵ report.

8. Equality before the law is a non-derogable human right.⁶ All people are entitled to, and should receive, equal protection and benefit of the law, whether they are perpetrator, witness, or victim. NSW legislation and policy must recognise that all people, equally, have legal capacity, have the right to exercise this capacity (legal agency) and to have their acts respected and upheld in legislation and practice.⁷
9. This universal presumption of capacity must be an overarching principle in the development and implementation of the NSW Disability Justice Strategy. From this premise of legal capacity as an inherent human right, the emphasis shifts to ensuring that all people have the support they require to navigate and benefit from all aspects of the justice system. This could range from support required for a person with hearing impairment to participate in jury duty, to decision making support for an individual with cognitive disability who may come into contact with police, to the provision of witness intermediary support for a person with disability who may be a victim of crime. The priority is whether or not the person is adequately supported through these processes.⁸
10. It is widely recognised that people with disability are not treated equally across the full spectrum of the justice system in Australia. In 2013, the Committee on the Rights of Persons with Disabilities expressed its concern that people with disability are overrepresented in the Australian justice system.⁹ Available research indicates that adults with intellectual disability are overrepresented in prisons, with between 12-30% of the prison population having some form of

[http://www.childabuseroyalcommission.gov.au/getattachment/e7f22c43-46d2-4dbf-8e32-6fd70792549a/People-with-Disability-Australia-\(PWDA\)](http://www.childabuseroyalcommission.gov.au/getattachment/e7f22c43-46d2-4dbf-8e32-6fd70792549a/People-with-Disability-Australia-(PWDA))

² Frohmader, C. and Sands, T. 2015 *Submission to the Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings*. Australian Cross Disability Alliance (ACDA) Sydney, Australia. Available: <http://pwd.org.au/documents/Submissions/ACDASubSenInquiryViolenceInstitutions.doc>

³ DPO Australia, 2014. *Senate Standing Committee on Finance and Public Administration: Inquiry into Domestic Violence in Australia. Joint Submission from National Cross-Disability Disabled People's Organisations (DPO's)*, p23. Available: <http://www.pwd.org.au/documents/Submissions/SubDVSenate2014.doc>

⁴ People with Disability Australia (PWDA), the Australian Centre for Disability Law (ACDL) and the Australian Human Rights Centre (AHRCentre). 2014 'Submission to Australian Law Reform Commission (ALRC): Equality, Capacity and Disability in Commonwealth Laws Discussion Paper,' Available:

<http://www.pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-ACDL-AHRCentre.doc>

⁵ PWDA, 2013. 'Access to Justice and YOU'. Available: <http://pwd.org.au/documents/pubs/SB13-AccessToJusticeSubmission.doc>

⁶ The NSW Disability Justice Strategy must therefore be based upon all of the rights outlined in the Convention on the Rights of Persons with Disabilities (CRPD), in addition to all other human rights instruments to which Australia is a party.

⁷ Article 12 of the CRPD.

⁸ Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) clearly outlines the need for 'the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.'

⁹ Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its Tenth Session (2-13 September 2013)', UN Doc CRPD/C/AUS/CO/1 (4 October 2013), [31]

intellectual disability (despite comprising 2-3% of the general population).¹⁰ In addition, 46-78% of prisoners experience a 'psychiatric disorder', compared to 11% of the general population.¹¹ However, these estimates are approximate, as disability is often under-recognised in the correctional system, and also by police.¹² Data from New South Wales shows that 50% of all young people in juvenile detention centres have intellectual disability,¹³ and that 39% of these are young Aboriginal and Torres Strait Islander people.¹⁴ Further data illustrates that 85% of young people in juvenile detention centres in NSW have a 'psychological condition', with 73% reporting two or more 'psychological conditions'.¹⁵

11. The over-representation of people with disability in the criminal justice system is, in large part, a consequence of the prevailing legal capacity framework in NSW. Not only are people with disability routinely denied the support to which they are entitled to navigate the criminal justice system, they are also excluded from prevention interventions and court proceedings because of perceptions of individual 'capacity'. For example, people with disability can not participate as jurors despite their rights as community members, and the benefit that may come from this alternative perspective in court; and school children with disability are excluded from classes focussed on healthy and respectful relationships, despite the preventative nature of these classes in skilling all children to recognise abuse.
12. The NSW Disability Justice Strategy must therefore investigate the extent to which people with disability are currently excluded from mainstream services, including crime prevention and diversionary programs, as well as education and other supports, and put in place mechanisms and pathways to enhance this access.
13. Furthermore, the NSW Disability Justice Strategy needs to recognise the intersectional issues, including multiple forms of discrimination and marginalisation that face many people with disability, subsequently making them more vulnerable to the criminal justice system. Crime prevention and response initiatives under the Strategy need to be grounded in an understanding of the intersectional challenges faced by Aboriginal and Torres Strait islander people with disability, women with disability, people with disability from culturally and linguistically diverse backgrounds and people with multiple disabilities (including psychosocial disability arising from mental illness).

¹⁰ Baldry E., Clarence M., Dowse L. & Trollor J., 2013. 'Reducing vulnerability to harm in adults with cognitive disabilities in the Australian criminal justice system.' *Journal of Policy and Practice in Intellectual Disability* 10:222-9; NSW Law Reform Commission, 2010. 'People with Cognitive and Mental Health Impairments in the Criminal Justice System: An Overview' (Consultation Paper No 5, January 2010), pp13-15.

¹¹ Ibid.

¹² PWDA, 2015b. 'Royal Commission into Institutional Responses to Child Sexual Abuse Issues Paper 10: Advocacy and Support and Therapeutic Treatment Services', p12. Available: <http://www.childabuseroyalcommission.gov.au/getattachment/ac1328d3-fe86-485c-9d9b-511e030d6b1e/99-People-with-Disability-Australia>

¹³ Horin, A. 2010. 'Report Finds Disability and Disadvantage Common in Young Offenders', *Sydney Morning Herald* (Sydney) 27 February 2010. www.smh.com.au/nsw/report-finds-disability-and-disadvantage-common-in-young-offenders-20100226-p95r.html

¹⁴ Devon Indig et al. 2011. '2009 NSW Young People in Custody Health Survey: Full Report' (Report, Justice Health, NSW Health and Human Services Juvenile Justice, NSW Government, 2011) 15.

¹⁵ Ibid.

14. To understand and address these issues, a comprehensive, holistic Strategy is required that reaches across Government, recognising the multiple factors that lead to greater risk, including poverty, homelessness, ill-health, poor education and so on. We acknowledge that these areas fall outside the remit and responsibility of the justice system, but ultimately the Strategy will in large part depend on a concerted effort across government to overcome the current risks and barriers facing people with disability in NSW. The economic rationale for investment across Government is clear. The cost of ensuring that people with disability can access appropriate disability supports, social supports, inclusive prevention and diversionary programs and inclusive education and training that diverts them from the justice system (both as victims and as offenders) is far less than the cost of these individuals engaging with justice proceedings.
15. The NSW Government has obligations to fulfil the rights of people with disability as defined in the Convention on the Rights of Persons with Disabilities (CRPD) and other human rights instruments to which Australia is a party. The National Disability Strategy (NDS) is the mechanism through which the Australian Government is implementing the CRPD, and in NSW the Inclusion Plan lays out priority areas of focus. Unfortunately, the NSW Inclusion Plan has a notable lack of focus on rights and justice initiatives. It is therefore essential that this NSW Disability Justice Strategy fill the policy gaps in the Inclusion Plan, with direct and transparent accountability and monitoring to the NDS.
16. There are a number of national protective initiatives that are closely related with the NSW Disability Justice Strategy, and it is important that the Strategy is integrated with these initiatives. In particular, the National Plan to Reduce Violence Against Women and their Children, the National Framework for Protecting Australia's Children and the National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework.

Recommendations

In relation to the NSW Disability Justice Strategy, PWDA recommends:

1. That the NSW Disability Justice Strategy be informed by the recommendations of the following reports: The Australian Law Reform Commission's *Equality, Capacity and Disability in Commonwealth Laws*;¹⁶ the Australian Human Rights Commission's *Equal Before the Law*;¹⁷ and the Productivity Commission's *Access to Justice Arrangements*.¹⁸
 - a. In particular, the core principles of *Equal Before the Law* must be taken into consideration: appropriate communications; early intervention and diversion; increased service capacity; effective training; enhanced accountability and monitoring; and better policies and frameworks.
 - b. Furthermore, people with disability must be included in all aspects of policy development, implementation and monitoring.
2. That the NSW Government work alongside other jurisdictions to develop a nationally consistent framework to guide the processes and principles relevant to the full spectrum of ways to exercise legal agency, including the different ways a person may be provided with, or utilise support.¹⁹
3. That the Department of Justice take a holistic, cross-government approach, to the NSW Disability Justice Strategy, with direct accountability and monitoring of the Strategy linked to outcomes under the NSW Inclusion Plan and the National Disability Strategy
4. That the Disability Justice Strategy be aligned with initiatives under the NDIS Quality and Safeguarding Framework
5. That primary prevention and early intervention programs regarding violence be provided to all children and adults with disability in NSW.
6. That NSW police training in relation to domestic and family violence be upgraded to fully reflect the definition of this crime offered by the *Crimes (Domestic and Personal Violence) Act 2007*.
7. That all definitions of domestic and family violence across NSW services and government agencies be amended to reflect the legal definition in the *Crimes (Domestic and Personal Violence) Act 2007*, or to otherwise ensure the

¹⁶ Available: <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>

¹⁷ Available: <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>

¹⁸ Available: <http://www.pc.gov.au/inquiries/completed/access-justice/report>

¹⁹ As discussed in Bevan, N. 2016. *NSW Law Reform Commission Review of the Guardianship Act 1987*, People with Disability Australia, March 2016, p4. Available:

http://pwd.org.au/documents/Submissions/SUB_180316_Law_Reform_Commission_Guardianship_Act_1987.pdf ; Finch, K. 2016. *NSW Law Reform Commission Review of the Guardianship Act 1987, Question Paper 1: Preconditions for Alternative Decision Making Arrangements*, People with Disability Australia, October 2016, p10;

and Lea, M. and Sands, T. 2017. 'Disabled People's Organisations Australia (DPO Australia) Submission to the Australian Law Reform Commission Discussion Paper: Protecting the Rights of Older Australians from Abuse', DPO Australia, Sydney, Australia. For more information, see: NGO Coalition, 2015, *Australia's UPR 2015: Fact Sheet Legal Capacity*, available:

<http://www.pwd.org.au/documents/Word/AusUPRFactSheetSupportedDecisionMaking.docx>;

inclusion of people with disability and the settings and relationships in which they experience domestic and family violence.

8. That the NSW government provide additional funding for the provision of attendant care for people with disability who are escaping domestic and family violence. The current Victorian *Disability and Family Violence Crisis Response Initiative*,²⁰ which provides short term funds of up to \$9,000 for disability related supports, should inform the creation of a NSW equivalent.
9. That the current NSW 'Children's Champion' pilot be broadened to a 'Witness Intermediary Scheme' that includes the provision of support for people with disability, in both police and court proceedings.
10. That the NSW government provide sufficient funding for independent individual advocacy, representation, information and advice for people with disability.
11. That mainstream advocacy, legal and support services be trained in disability awareness and delivering trauma-informed support, to enable these services to recognise disability, increase their accessibility and provide adequate service responses.
12. That disability awareness training, including information about working with people with disability and people experiencing trauma, be made mandatory for police, lawyers, judicial officers, court staff and prison staff in NSW.²¹
13. That the Department of Justice promote the inclusion of people with disability in jury service and dedicate resources to ensure support is made available for this participation.
14. That the Department of Justice work alongside other government agencies and the NDIA to develop a strategy to identify prisoners requiring disability and other social supports, and to develop a plan to provide these supports prior to their release into the community.
15. That 'good character' be excluded as a mitigating factor in sentencing for violent offences against people with disability.

²⁰ See <http://www.dhs.vic.gov.au/for-service-providers/children,-youth-and-families/family-violence2/disability-and-family-violence-crisis-response> for more information.

²¹ As outlined in additional detail in *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*, August 2012, p82. Available: <http://www.afdo.org.au/media/1210/crpd-civilsocietyreport2012-1.pdf>

Crime Prevention and Early Intervention

17. Across Australia, people with disability who are at risk of coming into contact with the criminal justice system have historically been overlooked, or denied access to early intervention or prevention services, largely due to ill-informed and discriminatory beliefs about their needs and rights. This includes access to appropriate disability, health and other therapeutic services and supports, including those that are gender specific and culturally appropriate.²²
18. In addition, the provision of disability support remains embedded in the medical model of disability, where people are found eligible for support based on a formal diagnosis, and where people with disability are treated in certain ways due to misunderstandings about disability and how it impacts people across different aspects of their lives. This can result in a failure to recognise disability, or to identify and address support needs. As such, people with disability may not have access to appropriate services, including a range of social support that respond to their personal circumstances.²³
19. Furthermore, there remains limited understanding and consideration of the intersectional factors that lead to some people with disability being at higher risk of coming into contact with the criminal justice system, either as victim or perpetrator. These factors include, for example, intersectional discrimination and marginalisation, (such as for Aboriginal and Torres Strait Islander people with disability), poverty, homelessness, poor health, trauma, and dependence on social support.
20. The lack of understanding of disability, and the intersectional factors that impact communities and individuals, lead to inadequate policy and programmatic responses that result in people with disability having frequent and often multiple contacts with the criminal justice system.²⁴
21. The National Disability Insurance Scheme (NDIS), with its focus on choice and control, will ensure increased access to tailored disability services and supports for some people with disability.²⁵ However, the NDIS, with its client, demand driven model is currently poorly equipped to respond to the needs of many people with disability who are marginalised, including those who are at increased risk of contact with the justice system.
22. Provision of adequate, timely and appropriate support for people with disability at risk is critical. The Department of Justice must develop a holistic and coherent strategy that works across Government, including integrating with the NDIS, to deliver community based early intervention and outreach

²² DPO Australia, 2017. 'Re: Resolution 30/7 "Human Rights in the administration of justice, including juvenile justice."'

²³ Ibid.

²⁴ Ibid. An example of this situation is the story of Dylan Voller, an Aboriginal teenager with disability whose treatment in the Don Dale Juvenile Detention Centre in the Northern Territory triggered the Royal Commission into the Protection and Detention of Children in the Northern Territory, see ABC 7:30, Dylan Voller's troubled past, <http://www.abc.net.au/7.30/content/2016/s4514995.htm>; see also *Disability Rights Now*, op cit. p77.

²⁵ Ibid.

strategies to prevent people with disability being at high risk of coming into contact with the criminal justice system.

Justice diversionary provisions

23. People with disability who are accused of committing a crime can be diverted from criminal proceedings through legislative provisions that can find a person 'unfit' to stand trial or not guilty by reason of 'mental impairment'. These diversionary provisions lead to people with disability being detained indefinitely in forensic services without conviction, often for periods longer than the maximum custodial sentence for the offence.²⁶
24. There is an immediate need for all Australian Governments to end indefinite detention of people with disability without conviction. DPO Australia has provided specific recommendations around the required legislative and policy reform required in this area in their submission to the Senate Community Affairs References Committee Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia.²⁷ We provide this submission as an appendix and strongly endorse and commend the recommendations in this regard to the NSW Department of Justice to inform the development of this Disability Justice Strategy.

Primary prevention

25. In NSW, as is the case in many other states and territories, there are currently very limited primary prevention efforts targeted at people with disability.²⁸ This can contribute to people with disability being unaware that what they've experienced is a crime, or that there is a way to report these incidents.
26. Prevention education regarding violence, in particular, should be made accessible to all people with disability in NSW, including children and young people with disability in all school settings (including those in segregated units of mainstream schools). Such education should include information about sex and relationships, domestic and family violence, human rights, and how to make complaints or reports.
27. Prevention education, targeting both adults and children, should be delivered by independent organisations, preferably in partnership with a disability rights organisation, to ensure a level of independence from the services that participants receiving the training may attend or rely on for support.²⁹ This neutrality allows participants the opportunity to speak openly, and possibly disclose violence they've experienced in these settings. In PWDA's experience delivering sex and respectful relationships training to people with disability, numerous disclosures happen in these training sessions, as

²⁶ Ibid.

²⁷ Available: http://dpoa.org.au/wp-content/uploads/2016/04/ACDA_IndefiniteDetention_Submission_April2016.pdf

²⁸ PWDA, 2016b. 'Re. A Blueprint for Family and Domestic Violence Response in NSW', pp4-5. Available: http://pwd.org.au/documents/Submissions/SB_NSW_Blueprint_PWDA_050216.doc

²⁹ Ibid.

participants come to realise that their previous experiences actually constitute violence. This new recognition of their experiences provides them with the opportunity to pursue justice, or to access a range of support services, if they so choose.

28. Finally, another key element of crime prevention for people with disability is ensuring that perpetrators are held to account. In PWDA's recent work in relation to the Royal Commission, it has become clear that perpetrators frequently move from workplace to workplace, and sector to sector, as often allegations do not result in formal convictions.³⁰ This ability to maintain employment with children, people with disability, and older people is often facilitated by the barriers to reporting experienced by these cohorts, and the barriers to justice experienced by people with disability in particular.³¹ The barriers are elaborated on further below.
29. The failure to adequately investigate or prosecute allegations of violence against people with disability puts this cohort at greater risk.³² While the NDIS Quality and Safeguarding Framework outlines that the development of a nationally consistent screening process will help to strengthen protections offered to people with disability, it is important to note that these screening processes will only apply to individuals engaged by NDIS providers and the National Disability Insurance Agency (NDIA).³³ As such, people with disability receiving support services from unregistered providers, those who are ineligible for the NDIS, or those receiving supports from mainstream services, will not benefit from the protections offered by this tool.
30. Protections must be available for all people with disability, regardless of where they receive supports. People with disability must therefore be provided with adequate and accessible supports to engage with criminal justice processes to prevent perpetrators from moving onto another sector or institution and continuing to perpetrate. The Department of Justice Disability Strategy must be fully and actively integrated with the NDIS Quality and Safeguarding Framework to ensure consistent safeguards are in place for all people with disability.

Barriers to Justice

31. People with disability experience numerous barriers to justice, many of which have been clearly articulated in previous reports and inquiries.³⁴ These

³⁰ PWDA, 2016c. 'Royal Commission into Institutional Responses to Child Sexual Abuse Submission to Consultation Paper: Institutional Responses to Child Sexual Abuse in Out of Home Care', p18. Available: <http://www.childabuseroyalcommission.gov.au/getattachment/02170c97-5bc7-4b34-8252-cb0fe822186f/40-People-With-Disability-Australia>

³¹ Ibid.

³² See also PWDA, 2016a, op cit.

³³ With regards to the NDIA, the risk-based screening will only apply to individuals who will have significant contact with people with disability as part of their work. In addition, those who have already been checked through equivalent systems will be exempted from screening through this national process.

³⁴ For further discussion of these barriers, see: *Disability Rights Now*, op cit.; French, P. 2007. 'Disabled Justice: The barriers to justice for persons with disability in Queensland', Queensland Advocacy Incorporated; and Victorian Equal Opportunity and Human Rights Commission, 2014. 'Beyond Doubt: the experiences of people with disabilities reporting crime', Available: <http://www.humanrightscommission.vic.gov.au/index.php/our->

include, for instance, people with disability not being believed, being unaware that what they've experienced is a crime, feeling like their experiences haven't been taken seriously, being made to feel like they brought the crime on themselves, being reliant on the perpetrator of the crime (or the service or institution for which they work) to contact police or complaint bodies or being unable to physically attend a police station (or unable to access support to allow them to do so).

32. Reporting or complaints mechanisms may also be inaccessible, with automated telephone systems, centralised intake systems and form based complaints posing particular accessibility concerns. All complaint systems should be flexible, accessible and provide support for people to use the service if required. In addition, all justice system processes and complaints mechanisms should readily provide information in Easy English, Pictorial, Braille or audio formats.
33. The inaccessibility of justice processes can lead people with disability to believe that no one cares about them or their experiences, or understands the personal impacts and/or trauma that their experience of crime may have caused. This can compound trauma impacts, and can lead them to distrust the justice system, making them less likely to report future crimes.³⁵
34. Another key barrier to reporting crime experienced by people with disability is a fear of having their children removed from their care. Children of parents with disability are removed at 10 times the rate of other children.³⁶ In particular, women with disability who have experienced domestic and family violence may have their children removed, despite not being the perpetrator, as they are deemed 'inadequately protective' of their children's welfare.³⁷ This not only places blame on the victim for the violence they are experiencing, but understandably increases the hesitance of people with disability to contact the police or access support services in these cases.³⁸ As previously mentioned, the NSW Disability Justice Strategy must be integrated across Government, with an emphasis on the provision of support required by people with disability. Through a holistic approach, women in these circumstances should be supported to pursue justice whilst receiving appropriate parenting and family support to ensure their children are not removed unnecessarily.

Recognising Crimes³⁹

35. An essential element of receiving an adequate response to a crime is having that crime recognised as such. Statistics from the NSW Bureau of Crime Statistics and Research (BOCSAR), for instance, indicate that violence occurring in residential institutional settings, such as psychiatric facilities and aged care facilities, is frequently not identified as domestic and family violence

[resources-and-publications/reports/item/894-beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime](#)

³⁵ PWDA, 2015b, op cit.

³⁶ DPO Australia, 2014, op cit.

³⁷ PWDA, 2015a, op cit., p7.

³⁸ Ibid.

³⁹ The following information has been drawn from PWDA, 2016b, op cit.

(despite being included within the definition provided in the *Crimes (Domestic and Personal Violence) Act 2007*).⁴⁰

36. This therefore means that the rate of domestic and family violence in NSW is higher than is currently reported, based on this exclusion of people in residential institutions. In addition, it also means that people with disability and other people experiencing domestic and family violence in these settings are not provided with the same types of support, or appropriate justice response, as other people who experience domestic and family violence.
37. Indeed, violence against people with disability in residential institutions and other such settings are often dealt with as service incidents that require an internal response.⁴¹ These internal processes can hamper the future gathering of evidence, and can undermine police investigations. This is despite the fact that many, if not all, of these cases should in fact be referred to the police in the first instance.
38. The failure to appropriately recognise domestic and family violence in all settings in which it occurs can result in people with disability, and others experiencing domestic and family violence in these settings being denied access to processes specific to this crime, such as the video collection of evidence in Domestic Violence Evidence in Chief, or the Domestic Violence Forensic Unit collection of physical evidence.⁴² These processes of physical evidence collection are all the more relevant for people with disability, who are often excluded from participation in court proceeding, due to inadequate or inappropriate support provision or because of the inadmissibility of certain kinds of evidence provided by them (in some cases including evidence given through Auslan interpreters).⁴³ This leads to a double standard in accessing justice, with reduced likelihood that domestic and family violence perpetrated against people with disability will be prosecuted.
39. It is therefore vital that the definition of domestic and family violence used by police, services and government agencies be amended, to ensure that the needs of people with disability experiencing domestic and family violence at the hands of a carer, or in an institutional setting, are covered by all services, approaches and responses.
40. This includes amendments to the NSW *It Stops Here* reform definition of domestic and family violence. Changes are also required to the Domestic Violence Safety Assessment Tool (DVSAT) to broaden its understanding of domestic and family violence, and to include a consideration of the experiences of people with disability. This would help prompt police to consider how the relationship between the perpetrator and the person experiencing violence may be characterised by atypical forms of dependence that exacerbate risk. Indeed, situations in which a person with disability is dependent on a perpetrator of violence for disability support places them at

⁴⁰ PWDA, 2016b, op cit., p5.

⁴¹ Frohmader and Sands, 2015, op cit.

⁴² Ibid

⁴³ PWDA, 2016b, op cit., p5.

higher risk, as they may be denied food, water or medication, may have their mobility aids removed or may be denied access to the community by the perpetrator.⁴⁴

41. All forms of violence, abuse, neglect and exploitation of people with disability must be appropriately defined, recognised and addressed. For instance, the role of the Department of Justice must be analysed, with respect to recognising and responding to financial abuse. This would involve, for instance, liaising with state and national government agencies, such as the Department of Social Services, as well as guardianship and trustee bodies and the private sector (including banks and superannuation funds), to identify financial abuse against people with disability.

Victims Support⁴⁵

42. Victim Services funding is strictly limited and does not reflect the cost of disability support provision. Additionally, these funds are supposed to cover all of a victim's immediate needs, including items such as clothing and/or furniture for those who have had to leave their home. That people with disability are forced to choose between these immediate needs and disability support needs is inappropriate and discriminatory. It also forces people with disability to remain in violent homes to access the support they need, putting them at far greater risk of violence and death.
43. There are sometimes assumptions made about the NDIS, particularly the belief that it will provide all services to all people with disability. This is not the case. The processes involved in amending a plan for an existing participant, or for a new participant to enter the scheme, are lengthy, and are likely to remain so. For this reason, the NDIA has outlined that it is not a crisis response service, and should not be understood as a violence response for people with disability.
44. Discrete additional funding must therefore be allocated to provide disability support for people with disability who need it upon leaving domestic and family violence.⁴⁶ The current Victorian *Disability and Family Violence Crisis Response Initiative*⁴⁷ should be used as a model for the NSW equivalent.
45. This Victorian initiative provides short term funds of up to \$9,000 for women with disability experiencing domestic and family violence, to use towards immediate disability related supports. These women can use those funds for attendant care support for disability related needs, such as personal care or shopping assistance, as well as the hire of equipment, Auslan interpreting where required, and transport costs related to their disability. This process

⁴⁴ Ibid

⁴⁵ This section has been drawn from PWDA, 2016b, op cit.

⁴⁶ For more information about the additional costs associated with disability supports, see: Saunders, P. 2006. 'The Costs of Disability and the Incidence of Poverty', Social Policy Research Centre Discussion Paper No. 147, August 2006. Available: <https://www.sprc.unsw.edu.au/media/SPRCFile/DP147.pdf>

⁴⁷ See <http://www.dhs.vic.gov.au/for-service-providers/children,-youth-and-families/family-violence2/disability-and-family-violence-crisis-response> for more information.

could prompt an NDIS application, beyond the crisis response, where a woman with disability is identified to have ongoing unmet disability needs.

46. Importantly, the *Disability and Family Violence Crisis Response Initiative* is based upon strong collaborations between the domestic and family violence sector and the disability sector, based on the mutual recognition of these sectors of their shared responsibility to support women with disability.
47. In the Victorian scheme, however, the woman must be identified as requiring immediate protection under the Victorian safety assessment tool (the CRAF). In addition, the woman must be supported or referred to the initiative by a domestic and family violence specialist service. There are obvious barriers to this occurring, such as those discussed above, in addition to cases in which police don't recognise that a woman has disability, or a woman is unable to access a domestic and family violence service (due to a lack of physical accessibility, or perhaps a lack of accessible information about the supports offered).

Witness Intermediaries⁴⁸

48. Witness intermediaries are currently being used across the UK to assist children and people with disability to participate in criminal processes. They are usually highly skilled and experienced professionals in the area of communication, and are typically available from the beginning of the investigative process. Ideally, the intermediary would be called in before a first interview to conduct an assessment of any communication needs, including the person's differentiation between truth and untruth.
49. The intermediary then provides advice to the police, and helps them plan the interview, from the set-up of the room, to rapport building and how to pose questions. The intermediary is then present for the police interview to assist if communication breaks down. Prior to the case reaching court, the intermediary produces an extensive report outlining their findings, assessment and any recommendations. The judge, on the basis of that report, develops a sense of what is required in the courtroom to enable a witness to give their best possible evidence. In most circumstances, the intermediary is present at the ground rules hearing, in which the judge decides which of the intermediary's recommendations are to be followed. Counsel will be given direction in regard to their questioning. Intermediaries are also allowed, during the trial, to alert the judge to potential communication breakdowns if they feel a certain question is beyond the comprehension of the witness.⁴⁹
50. The use of witness intermediaries in the UK has been highly effective in facilitating access for children and people with disability in the justice system

⁴⁸ This section has been drawn from PWDA, 2016d. 'Australian Law Reform Commission Issues Paper: Protecting the Rights of Older Australians from Abuse', available:

https://www.alrc.gov.au/sites/default/files/subs/167_people_with_disability_australia.docx

⁴⁹ For more information, see evidence provided to the Royal Commission into Institutional Responses to Child Sexual Abuse on 23rd and 24th March 2016, Case Study 38. Transcript (days 177 and 179) available: <http://www.childabuseroyalcommission.gov.au/case-study/1c1a2449-93cd-4268-86da-7dd7e3272797/case-study-38,-march-2016,-sydney>

and processes. The introduction of witness intermediaries in all Australian jurisdictions would significantly improve the support that is available for people with disability throughout court processes, and would ultimately improve justice outcomes.

51. While the current NSW 'Children's Champion (Witness Intermediary)' pilot is a positive step, this trial currently only applies to child complainants and child prosecution witnesses in cases of child sexual assault.⁵⁰ This pilot must be extended to include the provision of support by witness intermediaries for people with disability across the board. Other elements of the trial, including the pre-recording of a child's evidence in chief, cross-examination and re-examination,⁵¹ must also be afforded to people with disability where required, as these provisions would likely support people with disability to provide the best possible evidence.⁵²

52. In the UK, witness intermediary schemes have seen similar numbers of children and adults with disability accessing the assistance of witness intermediaries. This illustrates the need for this support to be extended to all children, people with disability and other vulnerable witnesses in NSW, as well as in all other states and territories.⁵³

Independent Individual Advocacy

53. Independent individual advocates play a key role in supporting people with disability in a range of areas, including in accessing justice. People with disability may have experienced multiple crimes against them throughout their lifetime, may struggle to advocate for themselves and may be unaware of the supports and services available to them.⁵⁴

54. With respect to access to justice, individual advocates can assist people with disability to access the services to which they are entitled (including legal representation), negotiate with these services, and facilitate communication. Individual advocates can also help people with disability attend police stations, make statements, make complaints, attend court, apply for services (such as housing) and apply for victim supports payments.⁵⁵

55. Independent individual advocacy is crucial for many people with disability avoiding the criminal justice system, in terms of identifying gaps in disability and social support and linking these individuals in with other services. In addition, independent individual advocacy is also critical for people with disability coming into contact with the criminal justice system. These

⁵⁰ Victims Services, NSW Department of Justice, 2016. 'Children's Champion (Witness Intermediary): Procedural Guidance Manual (2016)', available: http://www.victimsservices.justice.nsw.gov.au/Documents/child-champ_manual.pdf

⁵¹ Ibid, pp8-9.

⁵² PWDA, 2016a, op cit., p11.

⁵³ PWDA, 2016a, op cit., p12.

⁵⁴ PWDA, 2015b, op cit., pp4-5

⁵⁵ Ibid.

individuals should be offered and/or provided in all instances whereby a person with disability is seeking to report violence they have experienced.⁵⁶

56. However, due to the transition to the NDIS, individual advocacy funding is currently at risk in NSW. It is worthwhile noting that the advocacy undertaken by independent, individual advocates is primarily not in relation to disability support, but is rather about accessing mainstream services, including justice.

57. Individual advocacy and information organisations will play a role in preventative and support initiatives across the Disability Justice Strategy. This needs to be recognised, with adequate funding across NSW, to ensure equitable access to advocacy and supports for all people with disability.

Disability Awareness and Trauma-Informed Support

58. In some cases, mainstream and disability-specific advocacy, legal and support services do not have the internal capacity or knowledge to respond appropriately to a disclosure of violence by a person with disability, or the associated impacts of trauma experienced by these individuals.

59. Inadequate service system responses can mean that people with disability have never been supported to access psychological or other support services they need as a result of their experience of crime.⁵⁷ Some people with disability may avoid accessing support services because their initial contact was so poor.⁵⁸

60. It is therefore vital that these services be trained not only in disability awareness, but also in delivering trauma-informed support to all clients. This would contribute to the ability of these services to provide appropriate and supportive responses to disclosure of violence, and to provide suitable referrals where required.

Police and Court Responses

61. People with disability are often denied support when seeking to report or in interviews, both as perpetrators and as victims.⁵⁹ In addition, police may decline to take reports from people with disability due to difficulties in understanding them, or because they are inadequately equipped or trained to take statements from people with disability, particularly those who use alternative or augmentative communication.⁶⁰

62. Failing to provide appropriate supports may be attributable to the fact that the NSW Police Force doesn't screen for disability, with police officers instead

⁵⁶ PWDA, 2015a, op cit., p9.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Disability Rights Now, op cit., p79.

⁶⁰ See Australian Human Rights Commission (2014), op. cit. for more information.

being guided by ‘indicators’ of intellectual disability.⁶¹ For instance, when the ‘impaired intellectual functioning’ of a person is suggested by these ‘indicators’, or the person’s disability is otherwise disclosed to the police, the police are required to contact a support person for that individual.⁶²

63. Police officers may not even take a report or be as committed to the investigation of cases involving people with disability, due to a belief that these cases are unlikely to reach trial or conviction.⁶³ Indeed, in some cases, police perceptions of witness reliability may lead them to place greater weight on other sources of evidence. The police may therefore believe that the time and effort required to obtain this other evidence may be disproportionate.⁶⁴

64. This clearly limits the reporting, prosecution and conviction of crimes against people with disability. Indeed, if the police choose not to investigate or refer the case for prosecution, this may completely shut down future disclosures by that individual, not only increasing their vulnerability to future or additional harm, but also allowing perpetrators to avoid any consequences for their crimes.⁶⁵

65. Police in NSW must receive additional training (and regular refreshers), on how to recognise disability, how to appropriately engage with people with disability and how to access adequate and appropriate (disability and emotional) supports, including prior to interviews.⁶⁶ This must include information about witness intermediaries, and appropriate arrangements for communication aides (for instance, not requesting a family member to act as an Auslan interpreter for a witness/victim).

66. Although it is positive that the NSW Police Force Handbook outlines some suggestions for interviewing or speaking to someone with intellectual disability, this must be reinforced by practice. This could include involving people with disability in practical disability awareness training or role play exercises. This type of real-world disability awareness training would not only up-skill police officers, but may help increase the confidence of people with disability in accessing police support when required.

67. Prejudicial attitudes exist throughout the legal system, from the police, through to legal professionals, court staff, judges and juries. Therefore, lawyers, judicial officers, court staff and prison staff in NSW must also receive mandatory disability awareness training, including the recurrent provision of information about how to work with people with disability and people

⁶¹ New South Wales Police Force, 2016. ‘NSW Police Force Handbook’, p163. Available:

http://www.police.nsw.gov.au/_data/assets/pdf_file/0009/197469/NSW_Police_Handbook.pdf

⁶² In addition, not recognising someone’s disability also affects the supports available to someone in court. For example, if police do not recognise someone as having disability, they would not notify the Witness Assistance Service (as discussed in pp485-486 of the NSW Police Force Handbook) when the matter is to be prosecuted by the Office of the Director of Public Prosecutions, thus meaning the witness/victim wouldn’t receive specialist support from this service.

⁶³ Victorian Equal Opportunity and Human Rights Commission, 2014, op cit.

⁶⁴ Ibid; PWDA, 2015a, op cit., p10.

⁶⁵ Anti-Discrimination Commissioner (Tasmania), Submission 71 to the Australian Law Reform Commission’s Inquiry into Equality, Capacity and Disability Issues Paper.

⁶⁶ PWDA, 2016b, op cit.

experiencing trauma.⁶⁷ In addition, training must be provided on the supports available (as outlined in legislation) to people with disability when providing evidence, and how to access these.⁶⁸

68. In March 2016, the Royal Commission heard evidence by Crown Prosecutors and Directors of Public Prosecutions that suggested an unwillingness to make use of certain parts of evidence legislation that would enable people with disability to access to supports they may require in court.⁶⁹ Further direction must therefore be provided to all legal professionals, including prosecutors, regarding how to make use of the available evidence legislation.⁷⁰

69. The current iteration of the Equality before the Law Bench Book⁷¹ outlines that people with disability have capacity to give evidence as long as they've been provided with appropriate adjustments and supports. This Bench Book therefore requires amendments to ensure it reflects a CRPD compliant view of legal capacity: that is, that all people have legal capacity, and it is rather the supports available to that person that may not be adequate or appropriate for them to exercise legal capacity.

70. While some examples of the adjustments available to people with disability are outlined in the Bench Book,⁷² it is crucial that these written suggestions are reinforced by practical advice and training (such as that outlined in the NSW Disability Inclusion Action Plan⁷³), to ensure that all court personnel across NSW are fully aware of the available supports, and their obligations to pursue such support. This would help alleviate the concern expressed by some people with disability that courts and tribunals may be inaccessible, and that supports will not be readily available to them in regional and remote areas.⁷⁴

71. The NSW Disability Justice Strategy must be integrated with a host of other NSW and national policies and plans, including strong links to the NSW Disability Inclusion Action Plan. To enhance monitoring and accountability, these strategies and plans must be as interconnected, responsive and transparent as possible.

Legal proceedings

72. Equal access to justice relies on access to legal representation. People with disability may be unable to pay for such legal services, due to their increased cost of living and rates of unemployment and other associated costs of

⁶⁷ Committee on the Rights of Persons with Disabilities op cit. [27].

⁶⁸ Ibid, p5.

⁶⁹ PWDA, 2016a, op cit., p6; see also evidence provided to the Royal Commission into Institutional Responses to Child Sexual Abuse on 23rd March 2016, Case Study 38. Transcript (day 177) available:

<http://www.childabuseroyalcommission.gov.au/case-study/1c1a2449-93cd-4268-86da-7dd7e3272797/case-study-38-march-2016-sydney>

⁷⁰ PWDA, 2016a, op cit., p9.

⁷¹ Judicial Commission of NSW, 2016. 'Equality before the Law Bench Book', available:

https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Equality_before_the_Law_Bench_Book.pdf

⁷² Ibid, section 5.4.1.

⁷³ NSW Department of Justice, 2015. 'Disability Inclusion Action Plan, 2015-18.'

⁷⁴ PWDA, 2013, op cit.

disability.⁷⁵ In addition, people with disability may be reliant on their partners, family members, carers or formal Guardians to access funds to pursue legal proceedings. These actors may refuse to pay legal fees, and may financially control or abuse people with disability in other ways.

73. In addition, long wait times for legal proceedings can cause further difficulties for some people with disability. This may be due to people fearing (or knowing) that their memory of the event will become less clear as time goes on. The impact of long wait times can also be distressing for people with psychosocial disability, particularly for those also experiencing the effects of trauma.⁷⁶ Appropriate support for people with disability in this process, including independent advocacy and decision-making support where required, is critical, particularly providing opportunities for people with disability to provide evidence in alternative formats, and for this evidence not to be required to be given on multiple occasions over the course of a trial.

Prison Experience

74. If a person with disability is convicted of a crime and imprisoned, it is important that they have access to appropriate therapeutic and disability supports while in these settings. These supports should include, for instance, access to the right kinds of supports for their impairment/s (including relevant communication devices, sign language and community language interpreters), access to mental health services and supports, access to therapy and access to education and/or vocational training.⁷⁷ These services and supports should be offered to prisoners during incarceration and reassessed well in advance of their release.

75. As with early intervention strategies, the Department of Justice should work with other cross-government agencies such as the Department of Health, the Department of Housing, and the NDIA to develop a strategy for correctional facilities to identify prisoners who require support, including disability support, and a holistic reintegration plan be developed prior to their release into the community.⁷⁸ This will help to ensure that recently released prisoners with disability don't fall through the gaps in service provision, which may help to minimise their risk of further contact with the criminal justice system.

Sentencing of crimes against people with disability

76. Sentences for individuals who have perpetrated crimes against people with disability are often influenced by enduring discriminatory attitudes and ableism within the community. This results in people working with or caring for people with disability being viewed as inherently moral and virtuous, with these

⁷⁵ Disability Rights Now, op cit., p75

⁷⁶ PWDA, 2016a, op cit., p10.

⁷⁷ PWDA, 2015b, op cit., p12.

⁷⁸ Bevan, N. and Sands, T. 2016. *Submission to the Senate Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, Australian Cross Disability Alliance; Sydney, Australia.

Available: http://dpoa.org.au/wp-content/uploads/2016/04/ACDA_IndefiniteDetention_Submission_April2016.pdf

beliefs often resulting in leniency for perpetrators who have committed crimes against people with disability.

77. For instance, in cases (including homicides) involving people with disability, the provision of care is often understood as a mitigating factor to the perpetration of violence. This can result in lower sentences for relatives or support workers who have killed people with disability under their care.⁷⁹

78. There must therefore be no provision in NSW legislation or policy for mitigating factors, including a perception of 'good character' that undermines the pursuit of justice for people with disability.

PWDA would like to thank the NSW Department of Justice for the opportunity to contribute to the development of the NSW Disability Justice Strategy, and welcomes any further consultation on this topic.

⁷⁹ Young, Stella. 2013. 'Disability is no justification for murder', The Drum, 3 September 2013. Available at: <http://www.abc.net.au/news/2013-09-03/young-kyla-puhle-death/4930742> .