SUBMISSION: Inquiry into the value of a justice reinvestment approach to criminal justice in Australia.

DATE: 4 March 2013

1. Introduction: The Civil Society Report on the Convention on the Rights of Persons with Disabilities (CRPD)

The following submission is based on the The Civil Society Report on the Convention on the Rights of Persons with Disabilities (CRPD) with the aim of addressing the following terms of reference that relate to persons living with disability:

- The over-representation of disadvantaged groups within Australian prisons, including Aboriginal and Torres Straight Islander peoples, and people experiencing mental ill-health, cognative disability and hearing loss
- The cost, availability and effectiveness of alternatives to imprisonment, including prevention, early intervention, diversionary and rehabilitation measures.

The CRPD Shadow Report

The CRPD Shadow report was drafted by a Project Group comprised of representatives from seven leading disability and human rights organisations in Australia, with the aim of assessing Australia's compliance with the CRPD from a Civil Society perspective. The overall focus of the Shadow Report was to make recommendations to the United Nations Committee on the Rights of Persons with Disabilities. The Shadow Report details the extent to which Australia has implemented its obligations under the CRPD and provides recommendations for future action by the Australian Government.

The process of drafting the Shadow report has been a long one. From November to December 2009, community consultations were undertaken in the form of a listening tour. Project Group representatives travelled to capital cities in Australia and consulted with people with disability and their representative and advocacy organisations to discuss the CRPD and the lived experience of people with disability.

In December 2009 a website was created to provide information on the CRPD Civil Society Report for both the disability sector and the general public, with the further intention being that it would encourage submissions, of which over 200 responses

were made. The website was regularly updated throughout the project.

During 2010 the project group invited disability representative, advocacy, and legal organizations to provide information about the lived experience of their members, clients and constituents with disability.

In April 2010, Project Group representatives met with First Peoples Disability Network (Australia) to discuss the CRPD and the lived experience of Aboriginal and Torres Strait Islander peoples with disability.

The Shadow Report was launched in August 2012 and subsequently sent to the UN Committee in Geneva. It contains over 130 recommendations. To date 73 organisations have endorsed the report which is still open for endorsement. In 2013 the UN Committee on the Rights of Persons with Disabilities will begin dialogue with Australia in regard to its compliance with CRPD obligations.

The Project Group on the Shadow Report on the CRPD has led its development and has involved the following individuals and organisations:

- Joanna Shulman, Australian Disability Rights Network, Redfern Legal Centre
- Therese Sands, People with Disability Australia
- Ken Wade and Rebekah Horvath, Queensland Advocacy Incorporated
- Lesley Hall, Australian Federation of Disability Organisations
- Fiona Given, Disability Discrimination Legal Centre
- Andrea Simmons, Disability Advocacy Network Australia
- Rosemary Kayess, Australian Human Rights Centre

For a full copy of the Shadow Report and further information about the reporting process see: http://www.disabilityrightsnow.org.au/node/15

About the CRPD

The CPRD is a human rights instrument that reaffirms that all people with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to people with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively

exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.

Of primary importance to this submission on the Criminal Justice system are Australia's obligations under international law to respect, protect and fulfill our commitments under the CRPD. Particularly Article 14 relating to the Liberty and Security of the Person and the Article 13 requirements of Access to Justice.

2. The Project Groups Views in Summary

People with disability are over-represented in the justice system whether as complainants, litigants, defendants, victims or other witnesses. They also encounter significant barriers in undertaking roles as officers of the courts, such as jurors, lawyers, administrators and adjudicators.[1]

The failure to acknowledge the credibility of people with cognitive or psychosocial disability before the law, whether as witnesses or victims, enables perpetrators of abuse and criminal assault, to avoid the normal consequences for such acts.

Disproportionately high numbers of people with disability in the justice system highlight major failures in the justice system to divert and prevent custodial sentences and provide appropriate post custody supports and rehabilitation.

Major reforms are required with regard to how people with disability are treated in the justice system.

Some of these issues are acknowledged as areas for action in the National Disability Strategy (NDS)[2] and Australia's National Human Rights Action Plan Exposure Draft (NHRAP Exposure Draft).[3] However, the NDS contains no specific measures to address these issues and the NHRAP Exposure Draft has not at March 2013 been endorsed by Australian governments.

Australian governments fund some legal services specifically for people with disability

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[1] Phillip French, 'Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland' (Report, Queensland Advocacy Incorporated, 22 May 2007); Disability Council of NSW, 'A Question of Justice: Access and Participation for People with Disabilities in Contact with the Justice System' (Report, 2003); Intellectual Disability Rights Service in conjunction with the Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, 'Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System' (Report, May 2008).

[2] Council of Australian Governments, *National Disability Strategy*, 36-40

[3] Attorney-General's Department, 'Australia's National Human Rights Action Plan Exposure Draft' (Draft Report, Australian Government, 2012) 3.

and Australian courts are introducing disability access schemes.[4] However, people with disability participating in the legal system often experience significant barriers,[5] with many finding access to justice too difficult, hostile or ineffectual.[6] As a result, people with disability are often left without legal redress.[7]

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[4] See, for example, NSW Attorney General's Department, 'Disability Strategic Plan 2006–2008: Summary' (Report, undated) <www.lawlink.nsw.gov.au/Lawlink/DiversityServices/ll_DiversitySrvces.nsf/vwFiles/Summary%20DSP.pdf/$file/Summary%20DSP.pdf> and Victorian Department of Justice, 'Disability Action Plan 2009–2011' (Report, undated) <www.justice.vic.gov.au/wps/wcm/connect/1fa77b80404a83bf91bdfbf5f2791d4a/DAP2009–2011_word_large_print.doc?MOD=AJPERES>.

[5] Submission by attendee at the CRPD Shadow Report consultation in Adelaide, SA (25 November 2009).

[6] Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

[7] Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

3. Recommendations

Recommendation 1: That legislative, administrative and policy frameworks that deprive people with disability of their liberty and impact on their security are reviewed to ensure they are fully consistent with the CRPD.

Recommendation 2: That adequate funding is provided to Community Legal Centres to ensure access to justice to people with disability.

Recommendation 3: That standard and compulsory modules on working with people with disability are incorporated into training programs for police, prison officers, lawyers, judicial officers and court staff.

Recommendation 3: That all people with disability be made eligible for jury service.

Recommendation 4: The development of a comprehensive, gender and culture specific social support programs and systems to identify and prevent the circumstances that contribute to children and young people with disability coming into contact or entering the juvenile justice system.

Recommendation 5: The implementation of a range of gender and culture specific diversionary programs and mechanisms and community based sentencing options that are integrated with flexible disability support packages and social support programs to prevent adults with disability coming into contact or entering the criminal justice system.

Recommendation 6: That as a matter of urgency, the unwarranted use of prisons for the management of unconvicted people with disability be ended, with a focus on Aboriginal and Torres Strait Islander people with disability, by establishing legislative, administrative and support frameworks that comply with the CRPD.

Recommendation 7: The establishment of mandatory guidelines and practice to ensure that people with disability who are deprived of their liberty in the criminal justice system are provided with appropriate supports and accommodation.

Recommendation 8: That legislation should be amended in relation to crime to include the specific (statutory) offence of deprivation of liberty.

Addressing Article 13 of the CRPD — Access to justice

Article 13 of the CRPD - Access to Justice

1. 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.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Obligations

This article is an important new development, or application, of the right of equality before the law to persons with disability. The article requires State Parties to ensure effective access to justice for persons with disability. This is a new positive dimension to the obligation that will require State Parties to undertake measures that will ensure substantial equality of treatment, rather than mere formal equality treatment, of persons with disability in the justice system. In this respect, it highlights the need for procedural accommodations to the legal process to facilitate the effective participation of all persons with disability in the justice system in whatever role they encounter it, for example, whether as litigants, defendants, victims or other witnesses, or as officers of the justice system, such as jurors, lawyers, administrators and adjudicators. The article also requires State Parties to ensure that specific age-appropriate accommodation are made to the legal process that will ensure effective access to justice for children and young persons with disability. Paragraph 2 requires State Parties to ensure effective access to justice for persons with disability by promoting appropriate disability related training of justice agency personnel.

STATUS IN AUSTRALIA

People with disability are over-represented in the justice system whether as complainants, litigants, defendants, victims or other witnesses. They also encounter significant barriers in undertaking roles as officers of the courts, such as jurors (See also Articles 12 and 29), lawyers, administrators and adjudicators.[8]

Australian governments fund some legal services specifically for people with disability and Australian courts are introducing disability access schemes.[9] However, people with disability participating in the legal system often experience significant barriers,[10] with many finding access to justice too difficult, hostile or ineffectual.[11] As a result, people with disability are often left without legal redress.[12]
Australian governments fund disability advocacy services to provide support to people with disability to safeguard and exercise their rights.[13] However, there are some gaps in advocacy funding, such as the lack of funding from the South Australian Government for the provision of advocacy, and the lack of funding for a specific Aboriginal and Torres Strait Islander self-governing disability advocacy program.

Over-Representation in the Prison System

While data is not uniform or consistent across jurisdictions, available data suggests that almost half to 78 percent of prisoners have experienced a 'psychiatric disorder'

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[8] Phillip French, 'Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland' (Report, Queensland Advocacy Incorporated, 22 May 2007); Disability Council of NSW, 'A Question of Justice: Access and Participation for People with Disabilities in Contact with the Justice System' (Report, 2003); Intellectual Disability Rights Service in conjunction with the Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, 'Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System' (Report, May 2008).

[9] See, for example, NSW Attorney General's Department, 'Disability Strategic Plan 2006–2008: Summary' (Report, undated) <www.lawlink.nsw.gov.au/Lawlink/DiversityServices/ll_DiversitySrvces.nsf/vwFiles/Summary%20DSP.pdf/$file/Summary%20DSP.pdf> and Victorian Department of Justice, 'Disability Action Plan 2009–2011' (Report, undated) <www.justice.vic.gov.au/wps/wcm/connect/1fa77b80404a83bf91bdfbf5f2791d4a/DAP2009–2011_word_large_print.doc?MOD=AJPERES>.

[10] Submission by attendee at the CRPD Shadow Report consultation in Adelaide, SA (25 November 2009).

[11] Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

[12] Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

[13] Council of Australian Governments, *National Disability Strategy*, 40.

compared with 11 percent of the general population; and 20 percent of prisoners have an intellectual disability compared with 2–3 percent of the general population.[14] As research and data tends to focus on people with intellectual and psychosocial disability, it is suggested that there is a tendency to overlook the significant over-representation of people with acquired brain injury in the criminal justice system, as well as ignore specific issues, and perhaps over-representation of Deaf people.[15]
Women with disability consist of between 30 to 50 percent of the prison population. Research also indicates that the percentage of women with disability in prisons is greater than men with disability and that rates for women with disability from Aboriginal and Torres Strait Islander background is also higher than equivalent figures for men.[16]
Aboriginal and Torres Strait Islander people with disability are almost 14 times more likely to be imprisoned than the rest of the population.[17] Given that it is estimated that the incidence of disability in Aboriginal and Torres Strait Islander communities is twice that of the general community, it can be assumed that there is significant over-representation of Aboriginal and Torres Strait Islander people with disability in Australian prisons.

Over-Representation in the Juvenile Justice System

In 2005 the UN Committee on the Rights of the Child expressed concern about the over-representation of children with disability in the juvenile justice system in Australia. It recommended that Australia address issues for children and young people in conflict with the law "without resorting to judicial proceedings".[18] Despite this recognition there has been no coordinated approach to research and implement measures to address this issue.
Available evidence from 2010 suggests that nearly "half the young people in New South Wales juvenile detention centres have an intellectual or 'borderline' intellectual

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[14] NSW Law Reform Commission, 'People with Cognitive and Mental Health Impairments in the Criminal Justice System: An Overview' (Consultation Paper No 5, January 2010) 13–15.

[15] Phillip French, 'Disabled Justice', above n 1, 25

[16] See <www.sistersinside.com.au>.

[17] Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System* (March 2010) 5.

[18] Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268, (20 October 2005) page 15.

disability".[19] A higher proportion of Aboriginal and Torres Strait Islander young people were represented in this group — 39 percent compared to 26 percent.[20] The majority of young people were found to have a 'psychological condition' (85 percent), with two thirds (73 percent) reporting two or more 'psychological conditions'. There were a significantly higher proportion of young women and Aboriginal and Torres Strait islander young people in this group.[21] The study also found that 32 percent of young people in New South Wales juvenile detention centres had a traumatic brain injury or a head injury, and that this incidence had increased significantly for young women since the previous survey in 2003 (from 6 to 33 percent).[22]

The increased risk of young people with disability entering the juvenile justice system is linked to failures that breach rights contained in Article 13, as well as Articles 14, 15, 16, 23 and 26. These failures include:[23]

- lack of support services, appropriate treatment and behaviour intervention programs, family based out of home care services and accommodation options;
- the use of inappropriate and harmful service practices, such as physical restraint and medication;
- the risk or actual occurrence of physical and sexual assault; and
- the reliance on the police to resolve 'challenging' behaviour.[24]

Case Study

Jack has an intellectual disability and attention deficit disorder, has been a victim of abuse and is homeless. Much of Jack's contact and interaction with police has resulted in additional charges, including resisting, assaulting or intimidating police. When being fined for riding a bike without a helmet, Jack was cooperative until the

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[19] Adele Horin, '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>.

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

[21] Ibid 15.

[22] Ibid 77.

[23] People With Disability Australia, Submission to the Senate Community Affairs References Committee, *Protecting Vulnerable Children: A National Challenge — Second Report on the Inquiry into Children in Institutional or Out-of-Home Care*' (March 2005) 173.

[24] Ibid.

police also searched him for drugs. He became verbally abusive, and continued to swear when walking away. The Police followed and grabbed him and told him he was under arrest for offensive language. The actions of the police escalated the situation and Jack was charged with intimidating police and resisting arrest. Things would have turned out differently if the Police had been less confrontational and more experienced in working with young people with disability.[25]

Systemic Barriers

Only some Australian governments have established court diversion programs that provide interventions and supports to people with disability to prevent unnecessary contact with the criminal justice system. Inappropriate and unnecessary contact with the criminal justice system often leads to multiple offences, fines and incarceration.[26] A key factor contributing to the higher than average arrest rates for people with disability is insufficient police training. Currently, police training primarily deals with discrete disability issues instead of taking into account the ongoing social supports and needs of people with disability.[27] Experience and statistics also indicate that Australia has failed to train prison system personnel and police to facilitate access to justice.

Training in providing accommodations and supports to people with disability is neither compulsory nor consistent across different jurisdictions for judicial officers, legal practitioners and court staff.[28] A lack of awareness about disability issues leads to discrimination and negative attitudes which create barriers to accessing justice.[29] (See also Article 8)

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[25] Intellectual Disability Rights Service, 'Enabling Justice', above n 1.

[26] Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

[27] Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

[28] For different examples of training programs for Court staff see NSW Attorney General's Department, 'Disability Strategic Plan', above n 4 and Victorian Department of Justice, 'Disability Action Plan', above n 4. Disability issues or discrimination law is currently not compulsory for Australian law graduates.

[29] Louis Schetzer and Judith Henderson, 'Access to Justice and Legal Needs, Stage 1 Public Consultations' (Report, Law and Justice Foundation of NSW, 2003) 216, 225 <www.lawfoundation.net.au/report/consultations>.

People with disability can face barriers to establishing credibility when interacting with the justice system. Assumptions about the credibility of people with disability, in particular people with cognitive disability are constantly made by police and court officers, such as prosecutors, judges and magistrates.[30]

Case Study

In a case recently profiled on a national ABC TV investigative report, a bus driver employed by a church operated special school for children with disability was not charged with a series of sexual assault charges against a number of young boys with disability over a period of time as police did not believe that these charges would be upheld in a court due to questions about the competence of witnesses on the grounds of their intellectual disability. Despite action taken to pursue a number of serial rapists and paedophiles who preyed on children without disability in church run schools in recent times, cases involving children with disability, such as this one have not been pursued by authorities.[31]

Reasonable Accommodation

People with disability are often not provided with the supports they require to engage effectively in all processes of the justice system.[32] Many people are unable to access police and court premises or communicate with, police, lawyers or court staff[33] in the method of their choice.

Case Study

Helen has multiple chemical sensitivity and was retired from her job. During a worker's compensation hearing, the judge said that Helen would be held in contempt

[30] Phillip French, 'Disabled Justice', above n 1.

[31] ABC, 'Four Corners Reveals Story of Abuse at St Ann's Special School', *ABC Four Corners*, 26 September 2011 (Bronwyn Herbert) <www.abc.net.au/pm/content/2011/s3326103.htm>.

[32] Legal Aid Queensland, 'Developing a National Disability Strategy', 2008, 4 <www.legalaid.qld.gov.au/about/policy/Policy%20submissions%20and%20research/national–disability–strategy–submission.pdf>.

[33] Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

if she did not attend court. Unable to obtain information about pesticides used on the premises, Helen became sick upon entering the foyer.

Initiatives to improve access to courts do not include preliminary and investigative stages of proceedings, while access to such initiatives often involves an element of luck.[34]

Furthermore, training for judicial officers, legal practitioners and court staff about how to accommodate people with disability is not compulsory or consistent across Australian jurisdictions.[35] (See also Article 8)

People with cognitive impairment also face significant barriers at all stages of the justice system, often not receiving adequate or appropriate support to:

- communicate instructions to legal representatives;
- understand the substance and significance of legal issues and documents; or
- understand formal court processes.[36]

Trial by Jury

People with disability are often ineligible for jury service on the basis of their disability.[37] (See also Articles 12 and 29) The exclusion of people with disability from jury service means that juries are not composed of the full diversity of the Australian

[34] Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

[35] For different examples of training programs for Court staff see NSW Attorney General's Department, 'Disability Strategic Plan', above n 4 and Victorian Department of Justice, 'Disability Action Plan', above n 4. Disability issues or discrimination law is not compulsory for Australian law graduates.

[36] Legal Aid Queensland, 'Developing a National Disability Strategy', above n 32, 2.

[37] *Federal Court of Australia Act 1976* (Cth) ss 23DQ, 23DR (sheriff may excuse juror who is unable to perform duties of a juror, considering the *Disability Discrimination Act 1992* (Cth)); *Juries Act 1967* (ACT) s 10 (mental or physical disability), sch 2 (person who is totally or partially blind or deaf may claim exemption); *Juries Act 1980* (NT) sch 7 (person who is blind, deaf or dumb or otherwise incapacitated by disease or infirmity); *Juries Act 1977* (NSW) sch 2 (a person who is unable because of 'disability'); *Juries Act 1995* (Qld) s 4(l) (person with a physical or mental disability); *Juries Act 1927* (SA) s 13 (mentally or physically unfit); *Juries Act 2003* (TAS) sch 2 (physical, intellectual or mental disability); *Juries Act 2000* (Vic) sch 2 (persons with a 'physical disability' or 'intellectual disability'); *Juries Act 1957* (WA) s 5 (incapacitated by any disease or infirmity of mind or body, including defective hearing); sch 4 (potential juror to disclose to the summoning officer any incapacity by reason of disease or infirmity of mind or body, including defective hearing).

community. This means that the experience of disability is not available to the jury for consideration during trials, and defendants with disability cannot face a trial by peers.[38]

Legal Representation

Access to justice often relies on access to legal representation. Increased living costs and difficulties securing employment often result in people with disability being unable to pay for legal services or bear cost risks of not succeeding.[39] Underfunding of public legal services has resulted in a significant tightening of eligibility criteria. As a result, legal representation is primarily available only to the very poor and generally only in criminal matters.

Case Study

AG was placed on a Compulsory Treatment Order (CTO) which required involuntary treatment with the anti-psychotic drug Risperdal, and oversight by a psychiatrist appointed by the Mental Health Review Tribunal. AG was not represented at the tribunal hearing when he was placed on a CTO. After some time on the medication, AG formed the view that his mental state was worse and the drug was having substantial detrimental effects. AG sought assistance from Legal Aid New South Wales to appeal the CTO. Legal Aid applied a merit test to his request for assistance and declined to represent him because he had no medical evidence to support his assertion the dosage was incorrect. AG then approached a pro bono legal service that sought to obtain a report from a psychiatrist. The only income received by AG was a disability support payment, and as such AG could not afford to fund the cost of a psychiatrist's report, and there was no funding available to pay for one. Ultimately, a law firm agreed to provide free legal representation and pay for the cost of the medical report. The medical report confirmed that the dosage could be reduced. AG

[38] Submission by attendee at the CRPD Shadow Report consultation in Brisbane, Queensland (12 November 2009).

[39] Submission by attendee at the CRPD Shadow Report consultation in Sydney, NSW (10 November 2009).

was represented at a further hearing by the pro bono provider, and his CTO was varied.[40]

Civil and administrative claims for people with disability receive minimal support, even when such claims involve important human rights issues. Funding for community legal centres fell 18 percent between 1998 and 2008.[41] As a result of this decline, the burden on community legal centres, pro bono services and other community organisations has increased.

Consequently, many people with disability are continually referred from one service to another whenever services have inadequate resources or expertise to deal with disability legal issues.

Gaps in the provision of legal services are further magnified in regional and remote parts of Australia.[42] Such shortages particularly affect Aboriginal and Torres Strait Islander people with disability, who also experience gaps in health and education. For example, a lack of funding means the Aboriginal Legal Service in New South Wales and the Australian Capital Territory no longer provides civil and family law services.[43]

Recommendation 1: That legislative, administrative and policy frameworks that deprive people with disability of their liberty and impact on their security are reviewed to ensure that they are fully consistent with the CRPD.

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[40] Case study provided by Nicolas Patrick, Pro Bono Partner, DLA Piper.

[41] National Association of Community Legal Centres, 'An Investment Worth Protecting': Funding Submission to the Commonwealth Government 2007–2010, 1 January 2008, Executive Summary, 2 <http://www.naclc.org.au/resources/NACLC_fund08_CMYK.pdf>.

[42] Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Access to Justice* (2009) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/access_to_justice/report/index.htm>.

[43] Nicolas Patrick, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into Access to Justice*, 2009 <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=fae67931–c2a4–448a–9dc8–0ab803c08780>.

Recommendation 2: That adequate funding is provided to Community Legal Centres to ensure access to justice to people with disability.

Recommendation 3: That standard and compulsory modules on working with people with disability are incorporated into training programs for police, prison officers, lawyers, judicial officers and court staff.

Recommendation 4: That all people with disability be made eligible for jury service.

Recommendation 5: The development of a comprehensive, gender and culture specific social support programs and systems to identify and prevent the circumstances that contribute to children and young people with disability coming into contact or entering the juvenile justice system.

Recommendation 6: The implementation of a range of gender and culture specific diversionary programs and mechanisms and community based sentencing options that are integrated with flexible disability support packages and social support programs to prevent adults with disability coming into contact or entering the criminal justice system.

Addressing Article 14 of the CRPD- Liberty and security of the person

Article 14

Article 14 of the CRPD – Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

a. Enjoy the right to liberty and security of person;

b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

This article affirms that persons with disability are to enjoy the right to liberty (personal freedom) and security (non-interference with the person) on an equal basis with others. It provides that persons with disability cannot be deprived of their liberty unlawfully or without proper reason, and that the mere existence of a disability can never justify deprivation of liberty. This means that a person with disability may only be denied liberty for a reason other than their impairment or disability: for example, a person cannot be involuntarily institutionalised just because they have intellectual or psychosocial impairment.

The article also requires State Parties to ensure that persons with disability who are deprived of their liberty are guaranteed their remaining human rights, including those provided under the CRPD. This includes an obligation on State Parties to ensure that reasonable accommodations are made to ensure persons with disability are able to enjoy their other human rights in fact (rather than just in form). This might include, for example,

ensuring that a person who is Deaf who is incarcerated in a criminal justice facility has regular access to an Auslan interpreter so that he or she cannot communicate with prison authorities and other prisoners. The article applies to all processes and circumstances in which persons with disability are deprived of their liberty, not only to denial of liberty under the criminal law and in criminal justice facilities. For example, it applies equally to involuntary detention in a mental health facility and to immigration detention.

STATUS IN AUSTRALIA

In Australia, legislation does not permit people with disability to be deprived of their liberty without lawful and proper reason. However, people with disability face higher rates of deprivation of their liberty than the general population.

Arbitrary Detention in Prisons

People with disability, predominantly those with cognitive impairment, may be found not guilty of a criminal charge or found 'unfit' to be tried due to their impairment. However, people with disability in this situation can still be detained for the duration of the maximum period they would have spent in prison if they were found guilty; or they can be held in prison for an indeterminate sentence that can significantly exceed the maximum period of a custodial sentence for the same offence.[44] A key reason for this situation is the lack of alternative and appropriate accommodation and support options.[45] The practice of indefinite incarceration in prison (or sometimes in psychiatric facilities) occurs across Australia but is most prevalent in Queensland, Western Australia and the Northern Territory, and is particularly experienced by Aboriginal people with disability.[46] Case studies and initial research indicates that significant numbers of Aboriginal people with

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[44] NSW Bar Association, 'Does Australia Need A Bill of Rights?' (Lecture, undated) 34 <www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf>.

[45] Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

[46] Aboriginal Disability Justice Campaign, 'Position Statement on the Inappropriate Incarceration of Aboriginal People with Cognitive Impairment', (Position Paper, People With Disability Australia, October 2008) <www.pwd.org.au/systemic/adjc.html>.

cognitive impairment are currently being indefinitely incarcerated in maximum security prisons.[47]

Case Study

Mr N. is an Aboriginal man with intellectual disability. He spent ten years in a Western Australian prison without ever being found guilty of a crime. Mr N. was charged with sexually assaulting two girls in 2001, but has never faced trial after he was deemed 'unfit to plead'. His lawyer estimates that if he had been convicted he would have only served about five years in prison. There appears to be no evidence that the crimes he was charged with ever actually occurred. He was released in January 2012 under stringent conditions that limit his ability to lead a normal life in the community, despite never being convicted of the crime he was charged with.[48]

Arbitrary Arrest and Detention

Reports indicate that people with disability, particularly those with cognitive impairment are more likely to be questioned, arrested and detained by police for minor public order matters. Police are more likely to inappropriately respond to people with cognitive impairment if they are viewed as having 'challenging behaviour'.[49] Arbitrary arrest and detention often arise in these circumstances.

Case Study

Sarah is in her 50s and has a psychosocial disability. Sarah was unlawfully arrested and falsely imprisoned by the New South Wales Police who had mistaken her identity. The arrest proceeded despite Sarah's repeated attempts to identify herself and despite the fact that she was well known to local police and there was no warrant or provision of a reason for arrest. Sarah was forced to change in front of the arresting officer and placed in the police wagon despite pleas that she had a broken arm and was recovering from facial reconstruction (due to abuse by her former partner). All this was done in front of Sarah's seven year old son and no alternative care was arranged for his protection. Once in a holding cell Sarah had a panic attack and requested her asthma puffer and other

[47] Ibid.

[48] Michael Brull, 'The sad story of Marlon Noble' on ABC Ramp Up, *Ramp Up* (9 December 2011) <www.abc.net.au/rampup/articles/2011/12/09/3387845.htm>.

[49] Phillip French, 'Disabled Justice', above n 1.

prescribed medication that was initially refused. Sarah was told she would have to remain in the cell until the next court date in four days time. Sarah was not offered or provided with access to legal counsel and was denied bail. Finally it became apparent to the police that Sarah blatantly didn't fit the description of the wanted individual and was released. She is now terrified of the police.[50] *(Sarah's experiences also have ramifications under Articles 13, 15 and 25)*

Rights in the Prison System

Prisoners with disability are often not provided with the necessary supports and safeguards they require to maintain their security and enjoyment of other human rights. Key issues include:[51]

- lack of protective supports to address the greater risks of people with disability, particularly people with intellectual disability to sexual assault, abuse and victimisation, and coercion into breaking rules and conducting illegal activities, such as drug dealing;
- inadequate complaints processes and mechanisms for recording and responding to incidents, to support prisoners to make complaints and to ensure adequate protections against retribution for making complaints, including being placed in protective custody;
- lack of information about prisoner rights and access to support to exercise their rights;
- lack of identification of people with disability in prison, and consequent measures to provide necessary supports;[52]
- inadequate services to provide support to prisoners leading up to their release, or provide assistance from community and forensic mental health workers;[53]
- lack of planning with disability, mental health and other social supports to facilitate successful return to the community;[54]

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[50] Redfern Legal Centre, Submission: 'PWD and the Violation of their Procedural and Substantive Rights — Case Studies', *CRPD Shadow Report*, 2010, 2.

[51] Kathy Ellem, 'The Impact of Imprisonment for People Labelled as Having an Intellectual Disability: A Qualitative Life Story Approach in the Queensland Context' (PhD Research Proposal, School of Social Work and Applied Human Sciences, The Unviersity of Queensland, undated) <www.sistersinside.com.au/media/ResearchProposal15KathyEllem.pdf>.

[52] Forensicare (Victorian Institute of Forensic Mental Health), Submission to the Senate Select Committee on Mental Health, 'Forensic Mental Health — Working with Offenders with a Serious Mental Illness', 2005, 20 <www.aph.gov.au/senate/committee/mentalhealth_ctte/submissions/sub306.pdf>.

[53] Ibid 20–1.

[54] Ibid 19.

- lack of physical access to prison facilities and services;
- lack of access to relevant aids and communication devices, sign language and community language interpreters and lack of personal care and hygiene supports; and
- lack of necessary services and supports, such as mental health and medical services and supports.

Case Study

A man with a mobility disability was sentenced to a maximum security prison in 2009 for up to 10 years, being the first quadriplegic in New South Wales to receive a full-time custodial sentence.[55] *The man is unable to eat, drink, go to the toilet or wash without assistance, and requires a hoist to lift him from his motorised wheelchair to his bed. The man was being held in the aged care and frail section of the prison complex on a transitional basis as there was no capacity for people to stay permanently in this section. The man was subsequently transferred to a complex where inmates with intellectual disability, developmental issues and acquired brain injury are accommodated. However, these facilities are inappropriately equipped to deal with his complex physical needs. There were a limited number of staff available to assist the man to the extent he requires care each day, resulting in the man receiving insufficient assistance for eating, showering, being assisted into common prisoner areas within the correctional centre. Due to the man's disability and diabetes he must have a special diet, however this was also not being serviced by the correctional centre, resulting in the man being undernourished and having problems with indigestion.*

Due to his disability, he was at risk of autonomic dysreflexia due to suffering from common urinary tract infections which may cause his catheter to block and rapidly increase his blood pressure, placing the man at risk of a brain haemorrhage or seizures. Further, no provision had been made for the man to participate in any exercise, resulting in muscle wasting, and he had not been given the opportunity to become involved in educational programs.[56]

[55] Marnie O'Neill, 'Quadraplegic Drug Lord Paul Baker Jailed for 10 years' *The Sunday Telegraph* (online) 31 May 2009 <www.news.com.au/national/quadraplegic-drug-lord-paul-baker-jailed-for-10-years/story-e6frfkvr-1225718692294>.

[56] Case study provided by Nicolas Patrick, Pro Bono Partner, DLA Piper.

Recommendation 7: That as a matter of urgency, the unwarranted use of prisons for the management of unconvicted people with disability be ended, with a focus on Aboriginal and Torres Strait Islander people with disability, by establishing legislative, administrative and support frameworks that comply with the CRPD.

Recommendation 8: The establishment of mandatory guidelines and practice to ensure that people with disability who are deprived of their liberty in the criminal justice system are provided with appropriate supports and accommodation.

Recommendation 9: That legislation should be amended in relation to crime to include the specific (statutory) offence of deprivation of liberty.