

Equal before the Law: Towards Disability Justice Strategies

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The release in February of 2014 of the Human Rights Commission report 'Equal Before the Law: Towards Disability Justice Strategies', is a crucial and timely document. This report draws a significant line in the sand. It is both critical of the current inequalities affecting those with disabilities when engaging with the justice system and simultaneously optimistic that a strategic response can create change, while providing a realistic measure of how far there is to go before equal justice before the law is achieved.

Built on wide consultation and submissions from key stakeholders gathered in 2013, it provides a clear picture of the inequities that interaction with the justice system currently present for those with a disability, whether victims of or perpetrators of crime.

These inequities include the lack of access to effective justice as a further layer of disadvantage. It notes the exposure of those with a disability to further risk due to a lack of protection, and acknowledges that some victims, can become caught in a cycle of offending. The relatively high risk of being imprisoned can lead to repeated involvement with the justice system, compounding the already existing inequities.

“The lack of access to effective justice is a further layer of disadvantage...”

The report highlights the difficulties of identifying disabilities and responding with the appropriate supports which are often lacking. The report mentions the unknown impact of NDIS on disability support services and its potential effect on access to justice.

The issue of communication and misunderstanding about the legal competence of those with disabilities is highlighted along with barriers created by the perceptions that they will be unreliable, not credible or incapable of being a witness. This can be compounded by a questioning style by police, lawyers, courts and custodial officer that can confuse those with disabilities. The Commission heard that those with disabilities often experience prejudicial assess-



ments of their competence to give evidence. Professor Martine Powell spoke to the Commission about research that shows people with an intellectual disability can provide accurate and reliable testimony but “poor interviewing practices negatively influences the quality of evidence elicited” noting the decline in accuracy from inappropriate questions is greater for vulnerable witnesses.

The variation in relevant legislation between states is noted as an issue. The Uniform Evidence Act has been enacted in NSW, Victoria, Tasmania and ACT but not in Queensland, South Australia, Northern Territory or Western Australia. The Act provides a clear legal framework for consideration of disability in Court proceedings. The testing of such legislation, as explained by South Australia Chief Justice Kourakis, is however reliant on the issues coming before the High Court but in the current situation this rarely happens. The report noted this as an indication that people with disabilities and their advocates are not aware of the potential legal pathways.

The Commission heard that diversion measures were not well utilised, not available or were ineffective without appropriate supports and services. People with disabilities were less likely to get bail and then have difficulty understanding and complying with the conditions.

The report places considerable emphasis on safety, freedom from violence and the importance of access to services that can provide the necessary level of support. This is linked to the 2013 ABS Personal Safety Survey which found that those with a disability or long term health conditions experienced higher levels of violence than the wider community, with higher rates for women with disability. There is also a higher risk of violence for those with disability within the criminal justice system.

The issues and challenges are evident in the profiles of disability for Aboriginal and Torres Strait Islander people. The 2009 Australian Bureau of Statistics found this population were 1.7 times more likely than non-indigenous people to be living with disability. For indigenous children aged below 14 yrs, the rate was 14.2% compared with 6.6% for their non-indigenous peers. Coupled with a rate of imprisonment 15 times higher than average, there is a high risk trajectory for this population to be involved with the justice system .

This picture of disadvantage in so many aspects for those with disabilities and the need for change is clearly stated in the foreword to the report by the Disability Discrimination Commissioner Graeme Innes. It acknowledges the Australian criminal justice system is complex but that equal treatment irrespective of difference is fundamental and that the report will “begin the work of redressing inequality experienced by Australians with disabilities, particularly those with complex support needs and communication challenges”.

The report does not make specific recommendations but has focused on barriers, services, programmes and proposing actionable steps towards a Disability Justice Strategy.

“It emphasises the importance of partnership with people with disabilities in the development of a justice strategy...”

The report proposes that each jurisdiction develop an holistic overarching response to the challenges presented with a strategy that focuses on the safety of people with disabilities. The strategy should describe effective justice that is non-discriminatory and reflects a respect for the “inherent dignity and individual autonomy including the freedom to make one’s own decisions with full and effective participation and inclusion in the community”.

The report emphasises the importance of partnership with people with disabilities in the development of a justice strategy alongside the coordination of services, with actions embedded in operational practice that is monitored and adjusted as experience progresses. Crucial to this process is accountability via the parliamentary democratic process and public administration.

Summary

In its conclusions, the Commissions report notes that equality before the law for those with disabilities will not be easily achieved. It encourages governments around Australia to consult, work and learn together to remove barriers to accessing justice.

The report includes the economic consequences of inequality in access to justice in considerable detail. This may be of importance to policy makers, politicians and economists but these are a sideline to the ethical and human rights questions of equity in access to justice highlighted by the Commission.

Link to paper and reference https://www.humanrights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf

(Access to justice in the criminal justice system for people with disability. Issues Paper 2013)

<https://www.humanrights.gov.au/publications/access-justice-criminal-justice-system-people-disability-issues-paper-april-2013>