



**Australian Federation of
Disability Organisations**

ISSUES PAPERS RESPONSE

Rights and Attitudes

Promoting Inclusion

Quality and Safeguards

Criminal Justice

June 2021

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About AFDO

Since 2003, the Australian Federation of Disability Organisations (AFDO), a Disabled Peoples Organisation (DPO) and Disability Representative Organisation (DRO), has been the recognised national peak organisation in the disability sector, along with its disability specific members, representing people with disability. AFDO's mission is to champion the rights of people with disability in Australia and support them to participate fully in Australian life.

Our member organisations represent disability specific communities with a total reach of over 3.8 million Australians.

AFDO continues to provide a strong, trusted, independent voice for the disability sector on national policy, inquiries, submissions, systemic advocacy and advisory on government initiatives with the Federal and State/Territory governments.

We work to develop a community where people with disability can participate in all aspects of social, economic, political and cultural life. This includes genuine participation in mainstream community life, the development of respectful and valued relationships, social and economic participation, and the opportunity to contribute as valued citizens.

Our vision

That all people with disabilities must be involved equally in all aspects of social, economic, political and cultural life.

Our mission

Using the strength of our membership-based organisations to harness the collective power of uniting people with disability to change society into a community where everyone is equal.

Our strategic objectives

To represent the united voice of our members and people with disability in national initiatives and policy debate.

To enhance the profile, respect and reputation for AFDO through our members.

To build the capacity and sustainability of AFDO and our members.

To foster strong collaboration and engagement between our members and stakeholders.

To enhance AFDO's connection and influence in international disability initiatives, particularly in the Asia Pacific region, through policy, advocacy and engagement.

Our members

Full members:

- Autism Aspergers Advocacy Australia
- Blind Citizens Australia
- Brain Injury Australia
- Deaf Australia
- Deafblind Australia
- Deafness Forum of Australia
- Down Syndrome Australia
- Disability Advocacy Network Australia
- Disability Justice Australia
- Disability Resources Centre
- Enhanced Lifestyles
- National Mental Health Consumer and Carer Forum (NMHCCF)
- People with Disability WA
- People with Disabilities ACT
- Polio Australia
- Physical Disability Australia
- Women with Disabilities Victoria
- Women with Disabilities ACT

Associate members:

- AED Legal Centre
- All Means All
- Aspergers Victoria
- Disability Advocacy and Complaints Service of South Australia (DACSSA)
- Disability Law Queensland
- Leadership Plus
- National Organisation for Fetal Alcohol Spectrum Disorder (NOFASD)
- YDAS – Youth Disability Advocacy Service



Framing the Issue - Intersectionality

We have elected to submit our response to these multiple Issues Papers as a single, combined document in order to demonstrate the necessity of an intersectional approach in any consideration of disability. Just as there is no single experience of sex, race, or class, there is equally no single experience of disability. Rather, there are a vast multitude of experiences, varying from person to person depending on how disability intersects with other aspects of their identity.

The term ‘intersectionality’ was originally coined by professor Kimberlé Crenshaw in her seminal 1989 paper,¹ where she grappled with the tendency of feminism and other critical theories to use a single-axis framework when considering forms of oppression. From this single-axis perspective, the various demographic categories into which individuals may fall are treated as “mutually exclusive categories of experience and analysis”.² A similar approach is also seen in anti-discrimination law, where Crenshaw notes how Black women in particular have been unable to claim discrimination on the basis of *both* sex and race. Crenshaw problematised this single-axis framework by centring Black women in her analysis, revealing both the multidimensionality of their vast and varied experiences and the ways in which they had been distorted by the single-axis lens. In her own words:

*Intersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects. It's not simply that there's a race problem here, a gender problem here, and a class or LBGTQ problem there. Many times that framework erases what happens to people who are subject to all of these things.*³

In sum, intersectionality is an analytical lens that enables us to see and describe the overlapping systems of oppression to which individuals or groups with multiple marginalised identities may be subject. To return to the topic of disability, it is clear that *how* an individual experiences disability will differ greatly depending on where they are situated within these multiple axes of oppression. As an example, the DRC themselves have acknowledged the increased risk that comes with living at the intersection of indigeneity and disability, with First Nations people with disability being at greater risk of both being involved with the criminal justice system and experiencing violence, abuse, neglect, and exploitation.⁴ While this minor nod to an intersectional approach is welcomed, it is not sufficient, and we submit that both the DRC and the NDIA must work to systemically entrench intersectionality at all levels.

Further demonstrating the necessity of taking an intersectional approach, recent research provides strong evidence that people with disability are more likely to be subject to “multilayered hierarchies of disadvantage”.⁵ Given the multitude of barriers they are faced

¹ Crenshaw 1989

² Ibid. p. 139

³ Crenshaw 2017, quoted in Columbia Law School 2017

⁴ DRC 2020a

⁵ Maroto et al. 2019, p.23

with – including, but not limited to, social and economic exclusion; disproportionate rates of poverty and homelessness; a recent history of de-institutionalisation; lower rates of education and employment; and reduced access healthcare – this revelation should not be terribly surprising.

We submit that, in its failure to utilise an intersectional approach that recognises and accounts for additional axes of oppression beyond disability, the NDIA is simply and fundamentally unable to recognise people with disability as they actually exist in the world. This failure leaves those most vulnerable at risk of falling through the cracks, as has been demonstrated in the research literature and statistical evidence time and again. This blindness of the NDIA is particularly evident in regards to the justice system, where people with disability are assumed to simply not exist, and offending behaviour can be easily separated out from behaviours related to disability. This has created a situation in which disability itself is criminalised, leaving people with disability even more vulnerable to violence, abuse, neglect, and exploitation.

Having established an understanding of intersectionality and its relevance to disability, we will now address each of the four nominated Issues Papers in turn.

Rights and Attitudes

Where and when in life do people learn about the rights of people with disability? How could this be reinforced and/or improved?

In Australia, where and when people with and without disability learn about disability rights has changed over time. It is important to recognise that the rights of people with disability have not been fully acknowledged or recognised in Australian law or practice to date, and so the education on whether disability rights exist and what that messaging looks like has evolved with our general recognition of the rights of people with disability to date.

In recent decades, it is our view that there have been minimal teachings of disability rights in Australia for people with disabilities, their families, and the broader community. Until the ratification of the CRPD in 2008, Australian law, policy, and practice heavily subscribed to the medical model of disability. In doing so, the conversation around disability focused on there being something “wrong” with the person, curing conditions, and creating charity initiatives to “save” or “fix” people with disability. In this paradigm, there was little education provided on the rights of people with disability. As a result, people with disability and their families by and large did not know what their rights were. The impact of this was that people with disability were not able to access basic human rights including healthcare, housing, disability services, employment, and education. Importantly, it is our submission that this lack of knowledge of their rights left people with disability vulnerable to violence, abuse, neglect, and exploitation. As the Commission is aware, those vulnerabilities have often been a reality for the Australian disability community, with disproportionate rates of violence, abuse, neglect, and exploitation reported over decades, capturing the experiences of generations of people with disability.

With the advent of the social model of disability, propelled by the ratification of the CRPD and the progression of the disability rights movement in Australia, we initially saw an increase in direct and tailored teachings of disability rights to people with disability. Many of our member organisations received funding which was used to provide individuals with disability with tools to know their rights. Simultaneously, disability representative organisations were advocating for the advancement of disability rights in public policy and law. This advocacy enabled people with disabilities to exercise their rights in all areas of life, including education, employment, housing, and healthcare. With the legal recognition of disability rights and subsequent public policy now in place, the need for education on disability rights for people with and without disability became a pertinent issue.

Currently, the main places where people can learn about disability rights is from resources provided by disability representative organisations. Some of these resources are constantly available (e.g., fact sheets and online material) and other resources are tailored to specific audiences (e.g., a seminar on the right to education). Unfortunately, the current offerings of disability rights education rely upon individuals to seek out this information. For example, a person with a disability may wish to know more about their right to housing, so will access information available from the Summer Foundation, or a young person with disability may

learn more about their rights from Children and Young People with Disability Australia (CYDA).

We recommend that disability rights education is inserted into mainstream school curriculums, mainstream workplace training and through government-initiated publicity campaigns so that people with and without disability, who are not in search of their rights can be generally educated on disability rights.

What advocacy or advocacy assistance is currently available to people with disability? What are your suggestions for reform or improvement to advocacy, to help prevent and improve responses to violence, abuse, neglect, and exploitation of people with disability?

Advocacy is a broad term and can encompass:

- **Citizen advocacy:** matching people with disability with volunteers.
- **Family advocacy:** helping parents and family members advocate on behalf of the person with disability for a particular issue.
- **Individual advocacy:** upholding the rights of individual people with disability by working on discrimination, abuse, and neglect.
- **Legal advocacy:** upholding the rights and interests of individual people with disability by addressing the legal aspects of discrimination, abuse, and neglect.
- **Self-advocacy:** supporting people with disability to advocate for themselves or as a group.
- **Systemic advocacy:** removing barriers and addressing discrimination to ensure the rights of people with disability.⁶

These different types of advocacies are funded differently and are inconsistently available (i.e. some more than others). We do not propose to make submissions with respect to each type of advocacy, but do note the following:

- **Citizen advocacy** is caught within the National Disability Advocacy Program (NDAP) funding and has also been sporadically funded through Information Linkages and Capacity Building (ILC) grants. However, it is piecemeal and inconsistent. There were also elements of citizen advocacy within the Community Visitor Schemes throughout the states and territories, for those in closed or segregated environments such as prisons or group homes. Many Community Visitor Schemes have been cut in the wake of the transition to the NDIS.
- **Individual advocacy** is primarily funded through the NDAP. NDAP funding is provided to state and territory organisations to provide predominantly individual advocacy to people with disability. At various times, each state and territory may have pockets of funding for individual advocacy, however, that funding is again inconsistent or piecemeal. We have seen, through the funding of advocacy organisations to assist people with disability make submissions to the Disability Royal Commission, that properly funded advocacy can be effective and meaningful. Assisting people with disability to tackle difficult, complex, and often sensitive topics is critical.

⁶ DSS 2020

- **Legal advocacy** is generally available through purpose-built legal services, most of which are community legal centres such as the Australian Centre for Disability Law, Disability Law Queensland, or the Victoria Advocacy League for Individuals with Disabilities (VALID). Legal Aid Commissions and State and Territory Community Legal Centres, accredited by the National Association of Community Legal Centres, also receive funding with key performance indicators including the provision of legal services to people with disability.
- **Systemic advocacy** is fundamental in advancing the rights of people with disability. This advocacy allows reforms to be planned and implemented and provides a key link between civil society and government to inform Australia's approach to disability. There is currently an underfunding of systemic advocacy. The underfunding is such that it leaves systemic advocacy agencies with scarce resources and uncertain futures. Critically, it sends the message to civil society that government does not place a high value on systemic advocacy and in doing so, discounts the voice of lived experience in reforming structures and systems.

In our view, to properly protect people with disability from abuse, neglect, and exploitation, **disability advocacy of all forms must be properly funded**. Funding must support individuals to know their rights, get help when they need it, and learn tools to address incidents of violence, abuse, neglect and exploitation. Organisations must be funded so that they can properly organise and influence systemic and structural change. Some of the most violent and serious incidents of violence, abuse, neglect, and exploitation of people with disability occur as a result of structural and systemic failings. It is fundamental to the safety and wellbeing of all people with disability that the organisations responsible for ensuring their voices are heard in the reform of structures and systems are adequately funded.

How do attitudes contribute to violence, abuse, neglect, and exploitation against people with disability?

Attitudes play a fundamental role in inciting violence, abuse, neglect, and exploitation against people with disability. In some acts of violence, abuse, neglect, and exploitation, the attitude of the perpetrator towards people with disability is a key motivator of their actions.

In 2015, the Senate Committee into the violence, abuse, and neglect of people with disability in institutional and residential settings found that "... the root cause of violence, abuse, and neglect of people with disability begins with the de-valuing of people with disability".⁷ The report goes on to explain, "[t]his de-valuing takes many forms. People with disability are often communicated about, not communicated to, and are frequently denied the right to make the most basic of decisions about their lives."⁸ In our view, Australia has long held a culture where people with disability are not seen as human. This attitude has bred a culture of violence, abuse, neglect, and exploitation of them. The commonly held view that people with disability are broken, less than, unable, and unworthy has permeated our laws, public policy, and collective consciousness as a community.

⁷ Commonwealth of Australia 2015, p. xxvi

⁸ Commonwealth of Australia 2015, p. xxvii

The de-valuing of people with disability was entrenched in the medical model of disability, which can still be seen in different areas of law, policy, and general community discourse. Although the social model continues to advance the rights of people with disability in Australia, it is our view that the core attitude held by the Australian community is that people with disability are less human than other people in the community. This has seen people with disability subject to criminal acts of violence, abuse, neglect, and exploitation without criminal responsibility for the perpetrator. It has seen schools, employers, and business owners permitted to discriminate against and exclude people with disability from their establishments because it is “too expensive”, or “too difficult”, or, in the words of the *Disability Discrimination Act 1992* (Cth) “unjustifiable hardship” to include people with disability in their service offerings.⁹

We strongly recommend that the Australian Government invest in educating the broader community on the value of people with disability, and the need to recognise them as equal citizens. Such education needs to be proactive by public campaigns and funding for advocacy organisations to run specialist events and create resources. However, we also need laws and policies to value people with disability as equal citizens by upholding their rights.

How do poor rights awareness and negative attitudes contribute to laws, policies, and practices that discriminate against people with disability, ignore the experiences of people with disability, or lead to unintended consequences for people with disability?

In our submission, the fundamental issue with laws, policies, and practices that directly or indirectly discriminate against people with disability is that they have been created and upheld by people who hold inherently negative attitudes toward people with disability. There is a direct correlation between the negative attitudes, or lack of understanding of disability, and discriminatory laws, policies, and practices. For some, it is as simple as not knowing any better – for example, the local café that does not have ramp or the cinema without audio description. But for others, it is deliberate, and their negative attitudes are reflected in their exclusion of people with disability from their workplaces, community organisations, or other organised activities.

While there is a correlation between negative attitudes and discriminatory laws, policies, and practices, it is difficult to identify which comes first – negative attitudes or discriminatory approaches. On the one hand, discriminatory laws, policies, and practices are created by people who hold a negative attitude against people with disability, and thus their negative attitude brings these discriminatory practices into existence. However, on the other hand, said laws, policies, and practices further perpetuate negative attitudes in the community by reinforcing the idea that people with disability should be excluded.

There has been an increased recognition of the need to consult with people with disability and their representative organisations over the last 10-15 years. However, the general approach of some institutions, including government and large organisations, has been

⁹ Disability Discrimination Act 1992 (Cth)

questionable. It is critical that voices of lived experience inform structural and systemic change. Approaches to consultation should contain a rubric requirement or contractual KPI that reflects an authentic commitment to centring the voice of lived experience, naturally adding value to the reform of a government or organisation's policies and practices. Without the voice of lived experience, it is impossible for structures and systems to adequately recognise, protect, and promote the rights of people with disability.

The consequence of failing to include people with disability in law, policy, and practice or failing to listen to their voice is that people with disability are excluded. They are not visible or considered in all areas of community life and participation.

What can be done to improve attitudes towards people with disability? Please consider policy, laws and other approaches. What good practice examples should we know about?

Overarching review of all current laws which apply to people to ensure that they do not exclude people with disability or discrimination is required. Reform of those laws as required should take place.

Disability Representative Organisations should be funded to provide best practice training and resources on policy development for mainstream services and organisations to ensure they remove any unconscious bias and proactively include people with disability in their work.

How can improvements in rights awareness and attitudes towards people with disability support a more inclusive society?

Creating rights awareness programs and initiatives that empower people with disability to protect and promote their rights will create a safer future for people with disability. Currently, the lack of knowledge on their rights leads to a loss of agency and ability to call out rights abuses. When people know their rights, they are more able to be included and participate equally in society.

Improving attitudes towards people with disability, including calling out negative attitudes and re-training attitudes to be positive and inclusive, is fundamental to creating systemic reform. As outlined above, the attitudes held by the community are evidenced in laws, policies, and practices created by people from the community. It is critical that the negative attitudes, conscious and unconscious, are re-educated and shifted towards an inclusive, rights-based approach. Doing so will guarantee a more inclusive society that believes people with disability are equal citizens and are both able to and deserve to be included in our society.

Promoting Inclusion

Creating an inclusive society

Australia is not an inclusive society for people with disability. We agree with the concept of an inclusive society as expressed in the Issues Paper, being 'an inclusive society for people with disability values difference and respects the dignity and equality of all human beings'.¹⁰

Practically, in our view, this would include:

- Every child with disability having equal access to healthcare, education, family, and safety.
- Every person with disability being able to access their local community freely and as they choose.
- Every person with disability being treated equally when seeking medical treatment, housing, employment, and safety.
- People with disability being seen as equal to, not less than, those without disability.
- People with disability being celebrated and supported, rather than shamed and ignored.

We know from the lived experience stories told by our member organisations, conveyed through their work, annual reports, and constant campaigning, that we do not live in an inclusive society. We also know that Australia is not an inclusive society from the statistics, which tell us:

- Only 48% of working age people with disability are employed, compared to 80% of people without disability.
- 24% of adults with disability experience very good or excellent health, compared with 65% of people without disability.
- 1 in 10 people with disability experienced disability discrimination in the last year.¹¹

All features of our current society which prevent people with disability in myriad ways from existing or participating within it are the products of systemic and structural failures. From a legal, public policy, and community perspective, our society has been built on the premise that people with disability do not exist. Over time, that premise has morphed into the acceptance that, while people with disability may exist, it is acceptable for them to be denied participation and a full life. The work of the Disability Royal Commission has already highlighted the significant barrier that attitudes present to the ongoing oppression of people with disability in Australia. And while we acknowledge the significant role attitudinal barriers

¹⁰ DRC 2020b

¹¹ AIHW 2020

have in preventing or prohibiting an inclusive society, we submit that these attitudinal barriers are derived from the systemic and structural barriers on which they are built.

It is our submission that structures and systems must be reformed immediately, with an inclusive society for people with disability at the centre. Reforms such as the National Disability Strategy (NDS) are moving in the right direction, but they are slower than what we can afford given the severity and frequency of human rights abuses against people with disability as a result of the current systems and structures that perpetuate discriminatory and segregated participation for people with disability.

The role of government in achieving an inclusive society

The role of government is crucial in achieving an inclusive society. In our view, the role of government is threefold:

- Leadership
- Reform
- Funding

Without government leadership, Australia cannot be an inclusive society. We require the government to make clear to the community that people with disability are valued and equal citizens. Government should amplify the voices of people with disability through consultation and leadership. This leadership must be present at all levels of government; federal, state, and local. The very cornerstone of representative government is to reflect the community's values and attitudes. The government must lead the conversation in the Australian community towards an inclusive society. The government is responsible for almost all of the structures and systems that fail people with disability, leaving them subject to segregation, discrimination, and exclusion from the community. Urgent reform is needed at all levels of government to create an inclusive society.

Law and public policy reform must address two aspects:

- The advancement and protection of the rights of people with disability, for example, through a Federal Bill of Rights; and
- The repealing or amendment of current laws which discriminate against people with disability, for example, through repeal of the Migration Act regulations which prohibit people with disability from permanent settlement in Australia due to the imposition of the 'health cost' on their visa applications.

Government must commit funding to both leading the community conversation towards an inclusive society and to appropriately administering the reform agenda. This funding must support the involvement of people with disability at every level of reform and leadership.

Measuring inclusion

We submit that the measurement of inclusion is fundamental to creating an inclusive society. Measuring inclusion involves:

- Annual collection of data tracking both the welfare and social and economic participation of people with disability, including:
 - Employment rates and labour force participation
 - High school achievement rates
 - Self-reported health and wellbeing
 - Incidents of discrimination experienced
 - Safe and secure housing
 - Life expectancy
- Accurately and frequently reporting on the programs, public policies, and laws aimed at creating an inclusive society.
- Ensuring the active participation of people with disability in the reforms and recording that participation (quantitatively).
- Achieving the same rates of participation and growth for people with disability as those without disability (i.e., there should be no disparity).

The link between an inclusive society and living free from violence, abuse, neglect, and exploitation

There is a link between an inclusive society and people with disability living free from violence, abuse, neglect, and exploitation. This link occurs in both the environment created when people are segregated from the broader community, but also as a direct result of discriminatory structures and systems that govern the lives of people with disability. We submit that people with disability who live in segregated communities are inherently more likely to face violence, abuse, neglect, and exploitation. In segregation, there is often a lack of knowledge of rights and limited oversight, both of which are key to preventing violence, abuse, neglect, and exploitation. We also submit that those living in segregated or closed settings, such as group homes or prisons and forensic disability units, face increased risk of violence, abuse, neglect, and exploitation because they do not have anywhere else to go. Being unable to “escape” can be a core factor in perpetrations of violence, abuse, neglect, and exploitation.

Further, in our submission, many realities that exist without an inclusive society are in fact violence, abuse, neglect, and exploitation. For example, the structural denial of social security benefits is, in our submission, a form of neglect and exploitation. Acts of

discrimination like exclusion from school or work can also be forms of violence and abuse. Without an inclusive society it is, in our submission, impossible for people with disability to live free from violence, abuse, neglect, and exploitation.

Quality and Safeguards

Preferred ways to safeguard people with disability who may be at risk of violence, abuse, and neglect

Safeguarding for people with disability will look different depending on circumstances, intersectionality, and preference. However, we are of the view that there are core foundations to safeguarding that should be applied to ensure that people with disability are able to live free from violence, abuse, neglect, and exploitation.

In disability services and settings

When a person with disability receives disability services or lives or works in a disability setting (i.e., group accommodation, special school or sheltered workshop), safeguarding should be formalised. Each organisation must have an internal complaints handling process accessible to people with disability. When needing to use an internal complaints handling process, the person should be advised, encouraged, and supported to access independent advocacy services. Internal complaints handling processes should:

- Be transparent
- Be accountable
- Have appeal mechanisms that escalate to an external body (i.e., professional regulator or similar)
- Afford the person with disability with natural justice and procedural fairness
- Ensure time allowances can be made for the person with disability to participate where additional time is needed

There must also be a formal, external complaints body that has jurisdiction to hear all complaints that arise from disability services and settings. Currently, the NDIS Quality and Safeguards Commission view their jurisdiction to be limited to receive complaints only with respect to NDIS registered providers.¹² This sees complaints related to all closed environments, from prisons and Forensic Disability Units to special schools and group homes, being declined. This is extremely problematic and removes a valuable complaints body from those who are the most vulnerable.

While the expansion of the NDIS Quality and Safeguards Commission is imperative to the safety of people with disability going forward, we submit that **a National Disability Commission be established, capable of receiving complaints from any person with disability that is receiving disability services (paid or unpaid) or is in a disability setting (voluntarily or by force).** The **National Disability Commission** should have the following features:

- Independence
- Disability-led
- Statutory investigative powers (similar to an Ombudsman)
- Reporting powers to Parliament
- Best practice accessibility and inclusion practices
- A focus on conciliation and alternative dispute resolution processes

¹² NDIS Act 2013 (Cth), s 73X

- A pathway to an external body, such as the Administrative Appeals Tribunal or Federal Court

Informal areas of life

It is recognised that people with disability receive many other services outside of disability-specific services. It is fundamental that people with disability can access existing complaints mechanisms that govern those services. For example, when buying goods and services, people with disability must be able to make complaints to the Australian Competition and Consumer Commission, as per ordinary processes. However, we see that mainstream agencies have a lack of understanding when it comes to (a) providing accessible and innovative practices to complainants, and (b) understanding the intersection between disability and the mainstream service or activity.

We recommend that existing complaints mechanisms such as the Commonwealth Ombudsman, ACCC, and other regulatory bodies undertake disability awareness training for all staff, and reform their existing complaints processes to ensure they are accessible and inclusive. These reforms must be done in consultation with people with disability.

Upholding independence, choice and control for people with disability when implementing safeguards against violence, abuse, neglect, and exploitation

It is fundamental that safeguarding is against the violence, abuse, neglect, and exploitation and not against the person with disability themselves. There is an inherent risk that when creating safeguards, the person with disability may be limited in some way – either directly and physically, or indirectly through routine restrictions or rules imposed in daily life. However, if safeguarding policy and law is properly formulated and administered, this inherent risk should not exist. All focus when developing and implementing safeguards against violence, abuse, neglect, and exploitation should be centred on the independent choice and control of people with disability. This means:

- The person with disability is provided with the tools and knowledge to self-advocate and self-protect where possible. Teaching people with disability their rights and how to enforce them is fundamental to effective safeguarding.
- The person with disability chooses what safeguards are in place, when they are in place, and for how long. If the person lives, works, or learns in an environment where there are inherent risks to the person's safety, then those inherent risks must be addressed rather than imposing restrictive safeguards on them. For example, if a woman with intellectual disability receives personal care and her service provider determines there is an inherent risk in men providing her with her personal care services due to the increased rates of abuse perpetrated by men, it is inappropriate for the safeguarding measure to be simply to allow only women support workers to provide her personal care services. The appropriate safeguarding mechanism is to allow the woman with disability to make an informed choice about who provides her personal care services. If the woman chooses to have male staff, then the service provider should implement safeguarding measures within their workforce to ensure the safety of that woman, rather than imposing safeguarding measures upon her.
- The person with disability must be in control of when safeguards are in place and when they are not. While this statement may seem counterintuitive in light of the prevalence of violence, abuse, neglect, and exploitation in our current community, it remains fundamental that the reforming of safeguarding laws, public policy, and

systems occurs in a way that advances the rights of people with disability. People with disability have the right to make their own decisions,¹³ and to live free from violence, abuse, neglect, and exploitation.¹⁴ Safeguarding must reflect and advance both of these fundamental rights.

Safeguards for people without informal support

We acknowledge that for all people, especially those with disability, informal supports such as family and friends are a key safeguarding mechanism. Having someone to “check in” or to reach out to when something goes wrong is fundamental to all humans. However, the prevalence of violence, abuse, neglect, and exploitation makes this even more vital to the safety of people with disability.

For many people with disability, the recent history of institutionalisation, ongoing barriers to social and economic participation, and disproportionate rates of poverty contribute to the absence of informal supports. It is our submission that the Government must fund Community Visitor Schemes (CVS) at a national level to ensure consistency and reliability of the system. While the CVS should be focused on providing isolated people with disability with regular visits to “check in”, the Principal Community Visitor should be authorised with coercive statutory powers to enter premises, investigate concerns, and refer matters to appropriate authorities such as the Police or Ombudsman. The Principal Community Visitor should report annually to the Parliament. It is imperative that the CVS incorporates both a visiting function and an investigative and reporting function. This will ensure that those without informal supports have a reliable and friendly person to “check in” with them, but also, when something is not right or requires a formal response (i.e., by Police or a mental health service) the visitors are professional enough to know who to go to and how to navigate those systems.

¹³ UN 2006, art. 12

¹⁴ UN 2006, art. 16

Criminal Justice

The treatment of people with disability in the criminal justice systems of Australia has been a consistent topic of advocacy for AFDO. We recognise that the right of people with disability to be treated equally in the criminal justice system is often violated at a systemic level through the development of discriminatory policies and practices and by individual treatment where people with disability are refused inclusion or subject to violence, abuse, and neglect in these settings.

The treatment of people with disability in the criminal justice system invites discussion on more specific issues, such as legal capacity, the interaction with the NDIS, and ineffective complaint processes. However, it is noted that comment on those topics is not being made in response to this Issues Paper.¹⁵ Where necessary, we will note these specific issues throughout this paper but not provide any detail. We look forward to sharing those insights in future responses.

As the Disability Royal Commission (DRC) is aware, the treatment of people with disability in the criminal justice system has been subject to Commonwealth and State inquiries. The reports to date have considered the criminal justice system in its entirety¹⁶ as well as the more nuanced issues arising from particular parts of the criminal justice system.¹⁷ AFDO has provided policy and advocacy advice on these inquiries, consistently calling for the end of the violence, abuse, neglect, and exploitation of people with disability in all criminal justice systems around Australia.

The criminal justice system in 2021

While it is recognised that each State and Territory government has responsibility for their criminal justice systems, it is our view that across all Australian jurisdictions there are consistent failings that result in the violence, abuse, neglect, and exploitation of people with disability. From a systemic and public policy perspective, most criminal justice systems in Australia expose people with disability to risk of violence, abuse, neglect, and exploitation through:

- Criminalising disability through disproportionate arrests and involvement in the criminal justice system due to attitudinal barriers and lack of understanding of disability by first responders within the criminal justice system, including police officers.
- Reasonable adjustments required by people with disabilities when incarcerated, either while on remand or when serving a sentence, are often not recognised, not provided, or provided sporadically. These adjustments can vary and include mobility aids, access to medication, and continued access to therapies and support.
- In every part of the criminal justice system, including police interviews, court processes, and time spent in prison or detention, there is often minimal accessible information provided to a person with a disability about their rights and who could support them. Examples of ways to make information accessible include Easy Read

¹⁵ DRC 2020a, p. 2

¹⁶ For example, AHRC 2014

¹⁷ For example, Human Rights Watch 2018

documents, communication partners, or assistance and time to process the information being presented.

- Participating in prison life for people with disability can present specific challenges such as access requirements or continued use of therapies and supports. These challenges can lead to violence, abuse, neglect, and exploitation including isolation, bullying by other prisoners and guards, and the prisoner demonstrating complex behaviours which are not properly addressed in a prison environment and often met with violence.
- Leaving prison is complex due to the operation of current sentencing laws in various jurisdictions which result in indefinite detention for some people with disability (and disproportionately those with cognitive impairments), as well as a significant shortage of appropriate accommodation settings in the community where people with disability can be kept safe.

It is recognised that some of these fundamental issues are more prevalent in certain jurisdictions. For example, the indefinite detention of people with disability in Western Australia, Queensland, and the Northern Territory is more severe due to the specific operation of their sentencing laws. Overall, the way in which criminal justice systems around Australia are structured and operate creates inherent risks of violence, abuse, neglect, and exploitation of people with disability. And in our respectful opinion, that risk is almost always a reality for people with disability participating in the criminal justice system.

Entering the criminal justice system

Understanding way in which people with disability enter the criminal justice system is critical. The pathways to the criminal justice system often indicate the risk of violence, abuse, neglect, and exploitation a person is likely to experiencing throughout their dealings with the criminal justice system. For some, the pathway itself is an act of violence, abuse, or neglect. We note that the DRC is aware of the current research which evidences that, in Australia, the criminalisation of disability is a common practice.¹⁸ We emphasise that this practice is of grave concern and reiterate that the criminalisation of disability is one of the core threats to people with disability living free from violence, abuse, neglect, and exploitation.

At a systemic level, we are aware that there are a number of systems gaps that result in a disproportionate number of people with disability entering criminal justice systems around Australia. These systemic issues include:

- First responders, such as police officers, confusing a person's disability with criminal behaviour. As a result, people with disability are more likely to be arrested or targeted by police. In our view, this stems from a lack of disability inclusion training. Examples reported by the media have included people with physical disability being mistaken as intoxicated based on the way they walk or speak,¹⁹ or police officers using violence during arrests in response to a young person with Autism failing to comply with their directions.²⁰

¹⁸ DRC 2020a, p. 6

¹⁹ Maddox 2020

²⁰ A4 2017

- The disproportionate experience of unemployment, poverty, lack of education, and inadequate support increases criminal offending and creates a pathway to the criminal justice system for people with disability.
 - People with disability do not know their rights as well as the broader community. Historically, people with disability have faced significant rights oppression and violations. The lived experience of disability has often featured being institutionalised; a denial of the basic human rights to independent living, education, and privacy, among others. They face systemic barriers in everyday life, ranging from discrimination at work to the inability to access goods and services. Given this lived experience, it is incredibly challenging for people with disability to know what their rights are and how they should be treated. This can result in people with disability being victims of crime, witnessing crimes, or offending. Compounding people with disabilities' lack of intuitive understanding of their rights is the scarce availability of resources for people with disability when they come into contact with the criminal justice system. It is imperative for people with disability to understand their rights when interacting with the criminal justice system, and for that information to be given to them in an accessible format.
 - For example, the South Australian Legal Services Commission developed a suite of resources for people with intellectual disability and cognitive impairment about their rights with police.²¹
- There is a lack of legal and advocacy services available to people upon arrest or when incarcerated. People with disability have an increased need to access legal services in these settings to ensure that their case is being appropriately addressed and there is not an unconscious (or conscious) bias impact to the presentation and management of their case. People with disability also need active advocacy while incarcerated to ensure that they are able to access any required services or therapies and to protect and promote their rights as required.

Living in the criminal justice system

The way of overrepresentation and how it affects people with disability

People with disability are overrepresented in the criminal justice system. There is a significant overrepresentation of people with cognitive impairments and First Nations people. In the report *No End in Sight – The Imprisonment and Indefinite Detention of Indigenous Australians with Cognitive Impairment*²² the key issues facing people with cognitive impairments in prisons were:

- They are more likely to be charged, remanded in custody, and be sentenced and imprisoned.

²¹ Legal Services Commission of SA 2021

²² Sotiri et al. 2012

- They spend more time in custody than people without cognitive impairment, have fewer opportunities in terms of program pathways when incarcerated, and are less likely to be granted parole.
- There are substantially fewer program and treatment options, including drug and alcohol support, both in prison and in the community when released, compared with non-disabled and non-Indigenous counterparts.
- What indefinite detention will look like for people with disability depends on the jurisdiction. For those in Western Australia and the Northern Territory, the detention will occur in prisons, generally in maximum security settings. For those in Queensland and Tasmania, detention occurs in psychiatric hospitals.

While each case will be unique, at the systemic level it is fundamental to understand that there is a causal link between the person's alleged offending and their disability. For example, a person with a cognitive impairment may not be given accessible information on their bail conditions, breach bail, and then be placed back into detention. That detention can be indefinite. People with disability will stay in indefinite detention due to the construct of laws in particular jurisdictions, such as the Northern Territory and Western Australia, or because there is insufficient funding or community housing and supports options available, meaning that to release them would be a risk to themselves or others.

In order to redress these myriad issues, two issues must be addressed immediately and simultaneously: (1) supporting people with disability who are detained so that they are able to rehabilitate while in detention; and (2) preventing the criminalisation of disability that causes people with disability to go to prison in the first instance.

The regime of indefinite detention is broken

There are significant legal issues within many jurisdictions with respect to the laws which find people unfit to plead. The Melbourne Social Equity Institute authored the Unfitness to Plead Project which provides practical options to address the problem of people with cognitive impairments being found "unfit to plead" and subjected to indefinite detention in Australia.²³ This Project provides significant detail on the jurisdictional issues from a legal perspective and should be referred to in order to properly understand the complexities of unfitness to plead requirements in Australia. Suffice to say, however, that these laws disproportionately impact people with cognitive impairment and that those found "unfit to plead" are often left in indefinite detention. A serious human rights concern for people who are faced with indefinite detention is the lack of any end date to the detention. This is incredibly harmful and is a violation of their human rights. In 2018, Human Rights Watch detailed in their report "*I Needed Help, Instead I Was Punished*" Abuse and Neglect of Prisoners with Disabilities in Australia' the human rights violations faced by prisons with

²³ Melbourne Social Equity Institute 2021

disabilities. The report found ‘conditions of indefinite detention can have a devastating effect on the mental health of people with psychosocial disabilities’.²⁴

For many people with cognitive impairments, they will enter detention and when (if) released, will re-offend and be put back into detention. This “revolving door” of detainment can be created by a variety of complex social, trauma, and economic factors. However, re-entering detention perpetuates trauma, abuse, violence, neglect, and exploitation of people with disability. For some, this will be intergenerational.

Apply Abolitionism: The Pathway to a Fairer Experience of Justice for People with Disability

Traditionally, detention, prison, and remand are built on the foundation of ‘security’. That is, a person must be removed from the community for the security of themselves or others. However, in the context of the detention of people with cognitive impairment, this must change. In our submission, the approach utilised must be based on support, not security. While this is a fundamental shift in the current Corrective Services Policy, we say that it is integral to the advancement and protection of people with disability from a life of violence, abuse, neglect, and exploitation.

The treatment of people with disabilities in prisons and forensic disability units is woeful at best. Such treatment has been recorded by Human Rights Watch in the abovementioned report, released in 2018. There are heightened and horrifying incidents of sexual violence, physical abuse, neglect, and exploitation of prisoners with disabilities. The use of solitary confinement is harsh and unjust in these prisons. Correctional staff may misunderstand disability or be ignorant to the impacts of disability on the prisoner, leaving them vulnerable to the arbitrary application of corrective punishment, such as removal of privileges, solitary confinement, or even physical abuse.

At the time of writing this Paper, the Optional Protocol on the Convention Against Torture (OPCAT) is being adopted in Australia.²⁵ It is hoped that the implementation of OPCAT in Australian prisons will enable a much-needed layer of oversight that at present does not exist. There is great hope that this will better protect prisoners with disabilities.

When a person with disability is detained, the supports provided are crucial in the person’s stability and rehabilitation. There is often a lack of clarity about how the person will access disability generalist and specialist support when detained. It is often not known who will pay for the support, who will organise the support, and who will implement, monitor, and evaluate the support. There has been an absence of leadership or ownership in this space by the National Disability Insurance Agency. We understand that usually, people with disabilities are left without the vital disability supports they need, and their guardians or advocates find it near impossible to get them in place. This issue is explored in detail by the Australian Human Rights Commission in their 2014 report, *Equal Before the Law*.²⁶ We call for there to

²⁴ Human Rights Watch 2018

²⁵ UN General Assembly 2002

²⁶ AHRC 2014

be clear provision of planning and funding for NDIS Packages for NDIS participants in prisons and forensic disability units.

In our submission, it is fundamental that cultural safety in places of detention is embedded for Indigenous Australians with Disability. The implementation of cultural safety at a systemic level must be led by the voices of lived experience from people with disability.

We are concerned that where funding is put into keeping people with disabilities in prison, it could instead be more appropriately allocated to diversion from and pathways out of prisons. In our view, it would cost substantially less to put in place diversion programs that prevent people with disabilities, especially cognitive impairments, from being detained. Where diversion is not possible or appropriate in the given circumstances, we submit that funding should be used to create pathways out of detention. This relates both to restorative programs within prisons and in-community support programs available upon release.

Rights Protections for People with Disability who are detained

In 2018, through the Human Rights Watch report, Australia learnt that there were significant human rights breaches against people with cognitive impairments in prisons and detention. However, since that time there has been no substantive shift to greater oversight or intervention for people living in detention. There is an absence of independent oversight. Furthermore, when these serious matters are raised at a domestic or international level, the Government of the day and successive governments thereafter fail to act. This is of paramount concern and violates the CRPD, to which Australia is a signatory.

To date, the NDIS Quality and Safeguards Commission have refused to receive complaints from people with disabilities in prisons. The Commission say that they cannot receive the complaint because their treatment is at the hands of a correctional service, and they are not NDIS Providers.²⁷ We submit that the role of advocates and Community Visitor Schemes need to be strengthened and expanded to ensure that concerns of violence, abuse, neglect, and exploitation are raised and properly investigated through independent oversight.

From a public policy and legal perspective, it is unclear what the future of Forensic Disability Units will be in an NDIS-dominated disability landscape. It is unclear whether the NDIS would fund a person's placement in a Forensic Disability Unit. In the case that they would not, we question what funding would be made available for that person to re-enter the community.

Fundamentally, we demand that there is full and effective rights protection of people with disabilities who are detained through independent oversight, funded advocacy, and proper supports.

²⁷ NDIS 2013 (Cth), s 73X

Where do they go? Life after prison

As discussed in the previous section, a significant barrier to leaving prison or correctional environments is having a suitable place to go once released. However, it is important to canvas what options are available to prisoners with disability who are due to leave prison.

- **Planning for release:** The intersection of the NDIS with the criminal justice system has evolved since its inception. Initially, the National Disability Insurance Agency (NDIA) formed the public policy position that the NDIS would not support a person who is incarcerated and would not be accessible again until the person was living in the community. This was on the basis that the NDIS would not fund supports ‘more appropriately funded or provided through other general systems of service delivery or support services offered by an agency as part of a universal service obligation’.²⁸ That is, prisons and processes applied to prisoners with disability were assumed to be equal and inclusive. This approach left prisoners with significant unmet need in the prison environment and curtailed their capacity to be released safely. Since then, the NDIA have reviewed that position, and through the *Planning Operational Guideline – Deciding to include supports in a participant’s plan* (‘the Planning Operational Guideline’) detail what the NDIS will fund to a person not in custody (but still involved in the justice system), persons in custody, and transition supports. The role of NDIS funding is critical in the success of people with disability coming out of prison and staying out. Funding transition supports, including core supports such as personal care, therapy supports, and capacity building supports, provides practical avenues for people with disability to create a safe life after prison.
- **Community housing options:** The disproportionate disadvantage of accessing private housing options, either as home owners or private renters, facing people with disability often means that the prisoner will need a housing option sourced before being released. It is important for community housing providers to play a key role in the provision of housing for prisoners with disability returning to the community.
- **Engagement with informal supports, including reunification with family:** The natural ties that people have with friends, family, and the community are often severed when a person is incarcerated. Some people with disability may be vulnerable in reconnecting those support systems, including people with psychosocial disabilities or cognitive impairments. We must ensure that support services (funded or unfunded) are planned to help prisoners with disability to reconnect with their informal supports upon release.
- **Release to forensic disability centres:** while Forensic Disability Centres are not, in and of themselves, a community living option, for some people with complex needs they can serve as an important step to re-entering the community. Forensic Disability Centres need to be properly set up to advance the rights of people with disability, and must ensure that they do not recreate a “mini-prison” environment with no real prospects of community re-integration.

²⁸ NDIS Act 2013 (Cth), s 34F

- **Services to keep people out of prison:** In addition to all of the above, we believe that strategies need to be put in place to connect people with disability to other life areas, such as education and employment, to increase their chances of successfully reintegrating into the community. The continued denial of education and employment to people with disability is a significant issue generally. However, in the context of a prisoner being released from prison, being able to access these core services is imperative to their successful release. Overcoming entrenched barriers, both physical and attitudinal, to education and employment requires significant attention for prisoners with disability, and it cannot be assumed that connecting them with a training program or entry-level job will suffice. A specialist and monitored connection to these areas is required.

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Appendix 1 – Case Studies

Roseanne Fulton

1. Roseanne Fulton is a young Aboriginal woman who was born with Foetal Alcohol Spectrum Disorder (FASD). In 2014, Roseanne spent 18 months incarcerated after she was charged with driving offences in Western Australia. She was found unfit to plead, and placed in detention until suitable accommodation could be found.
2. Since 2014, Roseanne has been incarcerated on numerous occasions following minor offending.
3. The application of the criminal law and inadequacies of the criminal justice system to respond to Roseanne's disability in the context of her offending sees her detained and punished through punitive methods. However, these methods do not work for her, and their purpose – to punish or deter – has had no lasting impact. A less structured, less targeted approach, requiring fewer resources, is the clinical and cultural support Roseanne requires on a daily basis.
4. Providing equity between detention and punishment and specialist and generalist disability support would allow a space to open up in a very complex and dynamic way, allowing for alternatives to detention and punishment that are less restrictive, culturally safe, enable growth and development, and do not criminalise the person and their disability.

Malcolm Morton

5. Malcolm Morton is a young Aboriginal man who was held in a maximum security prison in Alice Springs after being found unfit to plead for the murder of his uncle.
6. In detention, Malcolm was subject to violent forms of restraint including a restraint chair, solitary confinement, and chemical restraint.
7. Malcolm continues to be within the criminal justice system, with the Northern Territory Government failing to provide proper community support for him to have a safe and good life in the community.
8. Malcolm's story was heard by the Disability Royal Commission in Public Hearing 11.