



## People with Disability Australia (PWDA)

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### Royal Commission into Institutional Responses to Child Sexual Abuse

### Submission regarding Criminal Justice

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**Submission  
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## About People with Disability Australia

**People with Disability Australia Incorporated (PWDA)** is a national disability rights and advocacy organisation of and for people with disability. We operate within the human rights framework and provide advice and information; individual, group and systemic advocacy; training and education; and a representative voice of people with disability in New South Wales, nationally and internationally. We were founded in 1980, in the lead up to the International Year of Disabled Persons (1981), to provide people with disability with a voice of our own. We have a fundamental commitment to self-help and self-representation for people with disability, by people with disability.

We have a vision of a socially just, accessible and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. Our purpose is to be a leading disability rights, advocacy and representative organisation of and for all people with disability, which strives for the realisation of our vision of a socially just, accessible, and inclusive community.

We have a cross-disability focus – membership is open to people with all types of disability. Individuals with disability and organisations of people with disability are our primary voting membership. We also have a large associate membership of people and organisations committed to the disability rights movement. Our services are not limited to members; they are available to people with all types of disability and their associates.

We are governed by a board of directors, drawn from our members across Australia, all of whom are people with disability. We employ professional staff to manage the organisation and operate our various projects. Many of our staff are also people with disability.

## Introduction

People with Disability Australia is both impressed with the breadth and depth of the analysis in this Consultation Paper, and alarmed by the lack of recognition of the specific barriers to justice that children and adults with disability – many of whom have acquired disability as a result of childhood abuse – face. As a general comment, we would highlight that while the giving of evidence clearly disproportionately affects children and adults with disability, other aspects of the criminal justice system can also prevent this cohort from accessing justice.

PWDA reminds the Royal Commission that Australia is a party to the Convention on the Rights of Persons with Disabilities, and as such, is bound to align domestic legislative change with the Convention. We highlight for the Royal Commission some of the key articles relevant to the concerns of the Consultation Paper, and encourage the Royal Commission to give due recognition and weight to both the barriers that people with disability face in accessing justice for child sexual abuse, and Australia's international obligations.

Article 5 focuses on equality before the law and non-discrimination, and emphasises that people with disability are entitled to the equal protection and benefit of the law. The current justice system response to child sexual abuse does not provide this equality of protection or benefit. PWDA recommends that this be a key concern of the Royal Commission.

Article 7 emphasises that States Parties must ensure that children with disability enjoy their human rights on an equal basis with other children. This is particularly of concern where amendments to the

justice system are proposed that do not adequately address the needs of children with disability, but enhance the rights of children without disability.

Article 12 guarantees equal recognition before the law. It emphasises, particularly, that persons with disability enjoy legal capacity on an equal basis with all others, and that any supports that a person with disability may require in order to exercise their capacity must be provided by the States Parties.

Article 13 focuses on access to justice, and again requires 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.’ This is of particular relevance to the consideration of witness intermediaries both in court and by police in the Royal Commission’s Consultation Paper. We would highlight, however, that this article also problematises any potential use of, for example, parents as witnesses in place of people with disability themselves.

Article 16 emphasises that States Parties must protect all persons with disability from abuse, violence, exploitation and neglect. It also emphasises the importance of effective legislation and policies ‘to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated, and, where appropriate, prosecuted.’ Our current criminal justice system fails to deliver on this requirement, including for survivors of child sexual abuse. Whilst the proposals in the Royal Commission’s Consultation Paper are likely to enhance the general identification, investigation and prosecution of perpetrators of child sexual abuse, we would emphasise that greater consideration of the needs of victims with disability is required to ensure fulfilment of this Article.

In order to respond adequately to the Royal Commission’s extensive exploration in the Consultation Paper, this submission will address each chapter in turn, and will particularly focus on the requests for views emphasised in the Executive Summary. However, the submission does not address every chapter, as there were some about which we found it unnecessary to express our views.

## **Chapter 2: The importance of a criminal justice response**

PWDA supports the Royal Commission’s approach to criminal justice responses to child sexual abuse, and shares many of the concerns raised within the Consultation Paper. We especially emphasise that children and adults with disability are entitled to the same protections, investigations, prosecutions and so on as any other member of the community. Currently, people with disability are frequently denied access to justice. Some of the barriers they experience are experienced by other victims, especially victims with trauma. However, there are some barriers which are specific to children and adults with disability.

Barriers to justice have an array of alarming impacts on children and adults with disability – beyond the failure to achieve justice and fulfil the human rights of the individual. Many may be put at risk due to failures to convict perpetrators. In many circumstances, unconvicted perpetrators move between the disability sector, the aged care sector, and the children’s services sector. The failures of the criminal justice system thus have further impacts. Additionally, the problems with the criminal justice system can create impunity amongst perpetrators, who may seek out children with disability because they are low-risk targets whose abuse is unlikely to result in prosecution and conviction.

The adversarial nature of Australia’s system of justice has particular impacts for victims, survivors and witnesses with disability, so PWDA supports the Royal Commission in its attempts to shift key elements within it to increase justice for this cohort.

## Chapter 3: Issues in police responses

People with disability, including children with disability, are frequently stymied in their attempts to access justice by inadequate police responses. These happen in a variety of ways, many of which are outlined in the Victorian Equal Opportunity and Human Rights Commission's report, *Beyond Doubt*. Although this report reflects the jurisdiction of Victorian, our individual and systemic advocacy has found that the same issues exist in all other Australian jurisdictions. This was also highlighted in last year's Senate Inquiry into Violence, Abuse and Neglect against People with Disability, specifically in the chapter on justice responses.

While this chapter appears to suggest some important changes, we would remind the Royal Commission that there are substantial problems for children and adults with disability seeking to report to police, and these must be addressed. Current response issues for victims with disability seeking to report to police include:

- Refusing to take a report, which may be because an officer believes a person with disability to not be telling the truth, or that an officer believes it to be otherwise a waste of time (due to a low likelihood of conviction)
- Failing to ensure that the victim has adequate and appropriate support – both emotional and disability support – to make the report.
- Taking the word of disability service providers above the word of a victim with disability
- Failing to put enough time and effort into investigation
- Failing to prioritise investigation of allegations made by people with disability
- Failing to recommend matters with people with disability as victims and witnesses for prosecution (this may be due to a correct or incorrect assumption that conviction is unlikely)<sup>1</sup>

As is clear, these are not simply problems with how the police communicate with people with disability, although this is also a problem. It is also about how significant crimes against people with disability are understood within the police, and the priority given to these matters. One of the key problems, raised even by multidisciplinary teams in the Royal Commission's *A systematic review of the efficacy of specialist police investigative units in responding to child sexual abuse*, was the lack of availability of expertise in interviewing people with disability, particularly those with communication needs and intellectual disability.<sup>2</sup> This was particularly highlighted by the Joint Investigation Response Team (JIRT) themselves, and does not appear to have been a lens of the original research.

Given the Royal Commission's commitment elsewhere in the Consultation Paper to the consideration of the UK model of witness intermediaries, it is concerning that the aspect of this system that supports the police responding to victim-witnesses is not discussed in this chapter. It is clear that police require highly specialised expertise to respond adequately to, and interview, children and adults with disability. It is equally clear that current training and education even for specialists from multidisciplinary teams is sorely lacking; in Case Study 38, it was revealed that in

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<sup>1</sup> These are drawn primarily from Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond doubt: The experiences of people with disabilities reporting crime*, State of Victoria and Australian Human Rights Commission (2014) *Equal before the law: Towards disability justice strategies*, Australian Human Rights Commission.

<sup>2</sup> Powell, M., Westera, N., Goodman-Delahunty, J. and Pichler, A. S. (2016). *An evaluation of how evidence is elicited from complainants of child sexual abuse*. Royal Commission into Institutional Responses to Child Sexual Abuse.

police training, half a day in a multi-day training course was spent focussing on interviewing techniques for people with disability.

Providing police with the expertise that they require during the investigation of a case of child sexual abuse against a person with disability is therefore essential. Relying on ad hoc arrangements including requesting that family or a support worker be present as a communication aide is inadequate. We encourage the Royal Commission to elaborate the benefits of witness intermediary arrangements for the initial phases of report-taking, police response and investigation, including the increased likelihood of prosecution being pursued. In terms of specific recommendations, this matter is of particular import for this policy area.

Finally, general principles have long been in existence regarding police responses to and interviewing of people with disability. We believe that detailed recommendations are required to ensure adequate responses across Australian jurisdictions.

**PWDA recommends that witness intermediaries be introduced to support police in responding adequately to children and adults, including those with disability, and to enhance interviewing and investigation techniques.**

Whistleblowers may be of particular importance for children and adults with disability, especially given that, as currently, few of this cohort are adequately supported through police responses, reports, investigations and so on. Protections for whistleblowers are particularly important in the case of institutional child sexual abuse.

**PWDA recommends that the Royal Commission support the ALRC and NSWLRC's recommendations regarding the protections against disclosing the identity of mandatory reporters in the context of institutional child sexual abuse.**

The charging of police for costs in unsuccessful prosecutions has particularly poor impacts on people with disability. Few cases involving people with disability are recommended for prosecution. Some data suggests that this is because police believe that in court, a witness with disability will be understood to not be credible.<sup>3</sup> Unfortunately, evidence given by Crown Prosecutors and Directors of Public Prosecutions during Case Study 38 also suggests that there is an unwillingness to make use of elements of evidence legislation that would enable access to the supports people with disability require in court; supports which may render that witness competent and credible in court.

Police are no doubt aware of all of these factors when they decide whether to recommend a case for prosecution. In this context, decisions on the merits of the case in fact have more to do with systemic factors than with the individual case itself. Police may make conservative decisions regarding prosecution to ensure they are not unnecessarily exposed to costs, resulting in cases involving victims with disability being unlikely to even make it before a court to be heard.

**PWDA recommends the abolition of all costs being imposed on police for prosecutions not resulting in conviction, to ensure that people with disability are not disproportionately affected by cautious decision-making on the part of police.**

In line with our concern regarding the impediments that people with disability face in giving evidence, we also support the Royal Commission addressing the question of the use of interviews as evidence-in-chief.

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<sup>3</sup> Victorian Equal Opportunity and Human Rights Commission (2014) Beyond doubt: The experiences of people with disabilities reporting crime, State of Victoria

**PWDA recommends the use of interviews as evidence-in-chief be expanded, available to all people with disability and other victims who may be retraumatised by being forced to repeat their experiences.**

## **Chapter 5: Child sexual abuse offences**

We are pleased to note that the Royal Commission is taking seriously the problems posed for conventional approaches to criminal allegations by persistent child sexual abuse. We are also encouraged to note the attention paid to the particularities of children's development in relation to memory, and the differential experience and recollection of time by some people with disability and some Aboriginal and Torres Strait Islander people.

**PWDA recommends that strategies designed to enable the inclusion of instances of criminal conduct without requiring the victim to recall precise dates and times be enabled.**

In many circumstances, children and adults with disability will be substantially delayed in disclosing. The intervening years, as well as the impacts of impairment on conventional understanding of time and on memory, are likely to mean that this cohort are enabled to access justice only if the retrospective operation of persistent child sexual abuse offences is enabled.

**PWDA recommends that the retrospective operation of criminal offences be implemented.**

In many circumstances, grooming of children is not the only aspect of a perpetrator's manipulation. Many perpetrators in disability services – including those discussed in Case Study 41 – groom those within the institution and those beyond it, including families.

For families of children with disability, this can be particularly difficult because

- a) they may build substantial social and support networks through a disability service provider or special school;
- b) they are frequently so isolated and at times lacking in support that perpetrators may find it simpler to build pathways to accessing children; and
- c) perpetrators who work with children with disability are frequently understood by the broader community to be especially moral, upstanding members of the community because of their work with children with disability, making it even more difficult for families and the community more broadly to recognise grooming.

Recognising the breadth of forms that grooming takes, and that it may involve more victims than solely the child, supports a community-based, prevention-focussed response. That is, such crimes help to name the broader wrongs done to a family and community, and to enhance awareness of what such criminal behaviour looks like.

We would also like to highlight, however, that grooming charges should be understood to apply only where it is clear that child sexual abuse was an intent of the behaviour. Some adults with disability may have had limited education regarding social mores, community expectations and so on. They may also be treated with more suspicion by a community, and it is important that they do not get criminalised for innocent behaviour.

**PWDA supports the creation of 'grooming' offences for those other than the victim themselves.**

In many of the experiences recounted to us by victims and survivors with disability, the issue of people in authority refusing to respond, responding inadequately, or even responding in breach of

their own policies has been a repeated feature. This alarming tendency was also on strong display during Case Study 41, where a number of employees of service providers failed to respond, and/or assumed that someone else was responding. In these cases, there had been no consequences even for those in charge of an organisation for failing to adequately respond to allegations.

PWDA is aware that many young people may seek consensual relationships with those older than them, and that many of these relationships may be positive. However, we do not believe that this applies to relationships between a young person and a person in a position of authority over them, as the power imbalance between the two is a key part of the risk of the relationship.

**PWDA supports the creation of persons in position of authority offences for children up to the age of 18 years.**

## **Chapter 6: Third party offences**

The failure to report is a common factor in the experiences recounted to us by victims and survivors. In some circumstances, children and adults with disability, at some personal risk, had sought to report their experiences to people with some level of authority within the organisation. Additionally, in a troubling number of cases, there was broad awareness within the institution of the problems related to child sexual abuse, yet little or nothing was done about them.

PWDA has some concerns about the creation of criminal offences in relation to failures to report without adequate attention being paid to the lack of protections for whistleblowers. In most cases where we have encountered staff of institutions who were aware of child sexual abuse but did not report, we have found that they feared retribution from above, not unreasonably or without grounds.

In some circumstances, it has been the youngest members of staff who have had the closest relationships with the children under their care, and the pathways for them to report to authorities have been in many circumstances closed. It is important to emphasise that for many of these ex-staff members, their decision not to report, or not to fully investigate or report rumours that they heard from children and young people, haunts them now.

However, it is also important that there is an obligation on the part of staff in institutions to respond to allegations that they hear, to report them, and to ensure that the response to the victim is adequate. In this context, we believe that it is more important to ensure the pathway to reporting is clear than to criminalise those who do not report.

**PWDA supports the creation of a criminal offence designed to protect whistleblowers who disclose child sexual abuse or grooming from detrimental action on the part of the institution.**

There are important and very good reasons that victims and survivors may not wish to have crimes committed against them reported. It may impede disclosure if victims and survivors are aware that crimes may be reported without their consent. Additionally, disclosure is a sensitive matter that can expose a traumatic incident to narratives of criminality which may be experienced by a victim as a loss of control. Whilst we would of course encourage reporting, we believe that centring the victim's needs is more important than creating a criminal offence for those who do not report even without the victim's consent.

**PWDA recommends that a failure to report offence be created, but only where the victim has consented to the sharing of the report. The standard of suspicion should apply.**



Criminalising the failure to protect is a remarkable innovation in a field where workplace health and safety requirements may result in more significant or substantial penalties than the sexual abuse of a child. It also meaningfully shifts accountability to ensure adequate recognition of the significance of failing to protect, contributing to a greater community awareness of the importance of children's safety, especially in institutions.

**PWDA recommends the creation of the offence of failure to protect.**

## **Chapter 7: Issues in prosecution responses**

As mentioned in the response to chapter 3 above, we have grave concerns regarding prosecution responses to cases involving victims with disability. Unfortunately, given that there have been many changes to, for example, the uniform Evidence Act, designed to encourage the prosecuting of cases where a person with disability is a victim, it does not appear that this has been particularly effective.<sup>4</sup>

In this context, we suggest that principles for prosecution responses and charging and plea decisions, be positively phrased regarding people with disability; that is, that there are positive obligations on prosecutors to fully consider all of the possible means to achieve conviction where a person with disability is a victim. This should include some positive direction to make use of available evidence legislation, given that during the public hearing for Case Study 38, there were suggestions from various DPPs and Crown Prosecutors that they had never made use of s.31 of the uniform Evidence Act 2008. This section allows people with disability access to the supports they may need in court. As highlighted in the opening to this submission, Australian law has international obligations in relation to people with disability which our justice system does not currently reflect.

**PWDA recommends very specific guidance for prosecutors in considering prosecution responses, charging and plea decisions, to help address the barriers that people with disability face as a result of these decisions**

Part of the ongoing problem in responding to the barriers to justice that people with disability experience is that there are numerous decisions made within the justice system which are not easily subject to review, complaints and oversight. Although complaints to police can be made, they are frequently unsuccessful for people with disability – and even where they are, they often relate to issues which can no longer be addressed. Examples include failures to take physical evidence in a timely fashion due to concerns about whether the victim had 'capacity' to consent (she did), and the closing of cases and destruction of investigation files without due cause (in this particular case in breach of existing policies).

However, the decisions of prosecutors are of particular concern, especially where there is no oversight mechanism with adequate understanding of the situation of people with disability, and there is evidence of reluctance to make use of the availability of supports under evidence legislation. The reality is that if support is adequate and appropriate all people, including people with disability are competent. All people equally have rights, have the capacity to act on those rights, and to have those acts recognised by law. It is the quality and appropriateness of the support available that affects a person's competency (capacity).

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<sup>4</sup> The uniform Evidence Act 2008 includes specific provisions such as s. 31. However, as heard in the evidence given to the Royal Commission during Case Study 38 by various prosecutors, this section is infrequently used, if at all.

PWDA has outlined our position in terms of a national oversight mechanism to govern the whole spectrum of ways a person can exercise their legal agency.<sup>5</sup> PWDA emphasises that the situation of so-called 'vulnerable' people should be a core concern of such oversight.

## **Chapter 8: Delays in prosecutions**

PWDA is pleased that the Royal Commission is giving due weight to the issue of prosecutorial delays, given that they have such severe impacts on victims, and can lead to significant problems of complainant attrition. It is also important to note that many victims take a long time to disclose, and substantial wait times for trial can be particularly trying.

We would highlight that for people with disability, long wait times can be a particular difficulty. For some, this may be because their memory may become less clear with time. For others, the impacts of waiting can exacerbate the psychosocial disability (arising from mental illness) which frequently attends trauma. It is also important to note that many people with disability face ongoing discrimination in other facets of their lives, and dealing with multiple legal matters is both common and may exhaust their resources.

PWDA has no specific recommendations to make in this context, except that we would encourage the Royal Commission to reflect this awareness of the particular situation of people with disability, and ensure their guidance supports these victims.

## **Chapter 9: Evidence of victims and survivors**

PWDA is very pleased to note the commitment of the Royal Commission to ensuring a system that allows the best possible evidence to be drawn from every victim, survivor and witness. We are also encouraged to note the concern raised that modes of questioning by police, prosecutors and defence counsel can compromise evidence. We would emphasise that this is particularly the case for children and adults with disability.

PWDA is also gratified to see recognition of the heightened likelihood of sexual abuse of children with disability due to their increased access to disability and medical services, and the tendency for such services to be provided in a segregated fashion. The problems stem from a lack of explicit or accessible education regarding their rights, bodies and protective behaviours, and particularly the impact this has on giving evidence, whether in reports, interviews or during cross-examination in trial.

The issues regarding competence and its interaction with the availability of adequate support is key. We would note that competence is frequently understood to only be in question when a person with disability has a cognitive impairment; however, this is relevant for people with other impairments, including autism, or impairments impacting on communication.

A person's competence (or capacity) will depend on the quality and appropriateness of the support they are provided. For a person with disability, their competency is inherently linked to the support they are being provided at the time i.e. if the support is inadequate, then the person's competency is affected.

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<sup>5</sup> Please see People with Disability Australia and National Association of Community Legal Centre's joint 2014 submission to the Australian Law Reform Commission's inquiry into *Equality, capacity and disability in Commonwealth Laws: Discussion paper* which is accessed: <http://pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-NALCLC.doc>

We support Professor Penny Cooper's observation that 'an intermediary can make the difference between a child [or person with disability] being assessed as competent or not, as they can play a role in helping a witness to understand and answer questions, which is the basic test of competency.' This resonates with both PWDA's broader position regarding capacity<sup>6</sup> and the CRPD's clear requirement that all supports required for a person to exercise capacity must be provided to them (see introduction above).

**PWDA supports the simplification of 'tests' for competence or capacity. Any 'test' should focus on the quality and appropriateness of support available for an individual.**

**If a tests identifies a need for a witness intermediary (or other communication support), this should be made available to a witness as soon as required.**

PWDA would like to highlight that people with disability, especially those with cognitive impairment which may not be diagnosed or which is in the 'borderline' region, may not initially appear as requiring supports. Nonetheless, they may display the tendencies referred to in Ms Henning's testimony at Case Study 38, which highlighted that 'vulnerable witnesses' may attempt to answer questions even if they don't understand.

Additionally, many people with disability have developed strategies for dealing with authority figures during their life. In many circumstances, this includes acquiescing even if they do not mean it, or it is not true, in order to avoid any unpleasant repercussions. It is particularly important to note that the dynamics at play in institutional child sexual abuse thus prepare victims poorly for being witnesses in court. Research shows that in many cases, defence counsel seeks to produce a narrative about the violence which is counter to the narrative provided by the complainant; the complainant's refusal to consent to this new narrative is often situated as demonstrating the veracity of the claims to non-consent or violence.<sup>7</sup>

The Consultation Paper also discusses further evidence provided by Ms Henning regarding the duty of judges to disallow improper questions. We would agree with her evidence provided, but also highlight that there may also be circumstances where judges are aware of the potential bias of an jury against a complainant with disability. This may make them less likely, rather than more likely, to intervene in questioning, due to concerns that the jury may perceive such intervention as indicative of a lack of trustworthiness or credibility.

Pre-recording has had positive impacts in jurisdictions where it has become widely used. This is also likely to support people with disability giving their best possible evidence. However, we would highlight the importance of a witness having a support person of their choosing present, in addition to any communication supports (including Registered Intermediaries, as discussed below).

**PWDA recommends the allowing of the pre-recording of evidence for people with disability, children, and other 'vulnerable' witnesses.**

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<sup>6</sup> Please see People with Disability Australia various submissions to the Australian Law Reform Commission's inquiry into *Equality, capacity and disability in Commonwealth Laws: Discussion paper 2014*: with the Australian Centre for Disability Law and the Australian Human Rights Centre: <http://pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-ACDL-AHRCentre.doc>; with the National Association of Community Legal Centres: <http://pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-NACLC.doc>; and with the University of Sydney: <http://pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-USYD.doc>

<sup>7</sup> Larcombe, W (2002) 'The ideal victim vs successful rape complainants: Not what you might expect' in *Feminist Legal Studies* 10: 131.

PWDA thanks the Royal Commission for their detailed description of the Registered Intermediary Scheme in England, Wales and Ireland, a comprehensive and thoughtful summary which relates the Scheme to the current function of the Australian criminal justice system. We believe that the introduction of such a Scheme in Australia is urgently needed to address the barriers to justice that children and adults with disability experience.

We would highlight, however, that the current trial in NSW is focussed solely upon court use of intermediaries rather than police as well. We would reiterate that the availability of up-to-date and regularly-updated communication expertise (such as by a Registered Intermediary with a professional obligation to professional development) to the police – rather than requiring additional education and training to particular officers which is likely to deteriorate over time – is likely to smooth the ongoing difficulty of the pathway from police to prosecution.

Additionally, it is unclear at this stage whether the evaluation of the NSW pilot will address the impacts of intermediaries for people with disability (including, given the pilot's scope, children with disability). The UK schemes see roughly equivalent numbers of children and adults with disability, demonstrating that need is not confined to children. It is essential that any recommendation about a Registered Intermediary Scheme explicitly recommend its availability for children, adults with disability and other vulnerable witnesses.

PWDA welcomed news of the South Australian Disability Justice Plan, particularly as it aligned well with the recommendations of the Australian Human Rights Commission in *Equal before the law: Toward disability justice strategies*. However, we are troubled to note that 'communication partners' are volunteers. This is likely to limit participation to retired communication experts, and this in turn may limit how up-to-date the communication partner's expertise is. While we understand that there are costs involved in fully addressing barriers of justice for people with disability, we would again emphasise that this is required of all States Parties to the CRPD, not to mention for the demands of justice.

**PWDA recommends, in the strongest possible terms, the introduction of a Registered Intermediary Scheme in Australia in line with the Schemes implemented in England, Wales and Ireland, to ensure all witnesses can give their best possible evidence, and to ensure that the human rights of all witnesses are fulfilled.**

Ground rules hearings play an important role in enabling the adequacy of the support from witness intermediaries, and also in preventing problematic questioning, rather than simply responding after the fact. This protects witnesses from defence counsel who may use multiple improper questions to unsettle them, even if a judge may intervene.

**PWDA recommends that ground rules hearings be introduced, particularly for those cases which involve a person with disability or a child as a witness.**

PWDA includes psychosocial disability, or mental illnesses, even those arising from traumatic experiences, in our understanding of 'disability'. We would highlight that disability is poorly recognised and understood throughout the justice system, and that the availability of special measure may also assist in capturing those whose disability has not yet been recognised or diagnosed.

**PWDA recommends that special measures be extended to all witnesses who may be characterised as 'vulnerable'.**

There are many stereotypes, presuppositions and other biases that people with disability, including children, may face in a courtroom. Strategies such as training in trauma-informed support, and the impacts of trauma on witnesses, should be provided to all court personnel, including judges, are important. This should be supplemented with a Bench Book designed to support judges in their work.

**PWDA recommends the use of Bench Books and training to ensure that judges and other court personnel are adequately resourced to respond to children and adults who have experienced child sexual abuse, including people with disability.**

In relation to interpreters, we would highlight that there are ongoing issues for Deaf people accessing Auslan interpreters throughout the justice system. In Tasmania, such interpreters are not permitted by evidence legislation. One of the key problems reported to PWDA, however, is that few courts have adequate provision for such interpreters, and so corners are cut. Many witnesses are provided with an interpreter solely for their own giving of evidence, rather than to ensure that they understand the whole trial, leaving them at substantial disadvantage. Additionally, there are children and young people from Aboriginal and Torres Strait Islander backgrounds who use modified sign language in their everyday life, rather than Auslan; sometimes this is a result of the uneven interaction between a local nation's language, English (as spoken by services, in many cases) and Auslan (for which there may be inadequate teaching in remote areas). Provision must be made for them to have access to an appropriate interpreter.

**PWDA recommends that adequate provision for interpreters for Deaf people, as well as for Aboriginal and Torres Strait Islanders, are made.**

## **Chapter 10: Tendency and coincidence evidence and joint trials**

In many circumstances, especially in the past, children with disability were housed in Children's Homes and Orphanages alongside children without disability. Where both cohorts experienced abuse, the differential outcomes across the two groups have been substantial.

In one circumstance that we know of, the adults without disability were able to seek compensation through civil courts, but the adults with disability were unable to pursue this route. We believe that the availability of tendency and coincidence evidence and joint trials may help to ensure that people with disability are better able to access justice in these circumstances.

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

This highlights the potential benefits of enabling tendency and coincidence evidence and joint trials for children and adults with disability.

**PWDA recommends reform of laws to enable tendency and coincidence evidence and joint trials.**

## Chapter 12: Sentencing

In many circumstances, the ableism and discriminatory attitudes still evident within the Australian community means that any person who works or volunteers with children or adults with disability is understood to be inherently virtuous, good and moral. These judgements have impacts throughout the justice system, despite the fact that such perceptions frequently contribute to tipping the balance of a particular case towards the alleged perpetrator rather than the victim.<sup>8</sup>

**PWDA recommends that ‘good character’ be excluded as a mitigating factor in sentencing for child sexual abuse offences, and additionally that provision for ‘good character’ as an aggravating factor, where that good character facilitated the abuse, be added to legislation governing sentencing.**

**PWDA recommends that sentencing be in accordance with the laws at the time of sentencing rather than the sentencing standards from the time of the crime.**

PWDA thanks the Royal Commission for the opportunity to make this submission, and reiterates its ongoing commitment to providing the Royal Commission with whatever support it may require in considering and exploring the impacts of the criminal justice system on people with disability, and developing recommendations that address the barriers they face.

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<sup>8</sup> See, for example, Frankie Sullivan (forthcoming), ‘Not just language: An analysis of discursive constructions of disability in sentencing remarks’ *Continuum* special issue: Legal cultures of normalcy and disability