

28 March 2019

Department of Social Services
disabilityroyalcommission@dss.gov.au

Dear Sir or Madam

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

On behalf of National Legal Aid (**NLA**) we commend you for committing to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**).

National Legal Aid (**NLA**) represents the directors of the eight state and territory legal aid commissions (**LACs**) in Australia.

This contribution has been prepared on behalf of NLA, by Legal Aid NSW (**LANSW**) and Victoria Legal Aid (**VLA**). The points raised are agreed by all eight LACs but, given the timeframes, the data and evidence are provided by LANSW and VLA.

National Legal Aid and our work with Australians with disability

As you know, Legal Aid Commissions (**LACs**) are independent statutory agencies responsible for providing information, advice and assistance in response to a broad range of legal problems. Working alongside our partners in the private profession and community legal centres, we help people with legal problems such as criminal matters, family breakdown, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration, tenancy and debt.

LACs offer specialist legal services that provide advice and representation at courts, tribunals and psychiatric hospitals for people with disabilities and mental health conditions. LACs receive funding from the Department of Social Services to provide legal representation in National Disability Insurance Scheme (**NDIS**) matters on review at the Administrative Appeals Tribunal (**AAT**). Since 2013, VLA and LANSW have provided legal representation to over 370 people with NDIS AAT appeals. This

work has increased significantly over time. For example, LANSW dealt with 25 matters in 2016–17, but this number increased to 153 matters in 2017–18.

A significant proportion of clients of LACs are people with disability. For example, across all of LANSW’s practice areas, in 2017–18, 21% of in-house grants of legal aid for casework, and 40% of all extended legal assistance services, were to clients who identified as having a disability. During 2017–18, VLA helped 94,485 unique clients: 26% disclosed having a disability or mental health issue and 11% were in custody, detention or psychiatric care.

In addition to LACs’ specialist work with clients with disability, through our work across criminal law, child protection and family law, we see the flow-on effects when our systems and services for meeting the needs of people with disability are not working at their best.

Scope of the Disability Royal Commission

We welcome and commend you for the broad scope proposed by the Draft Terms of Reference, including:

- *All forms* of violence, abuse, neglect and exploitation of people with disability
- *In all settings and contexts*, with a particular focus on what governments, institutions and the community should do to prevent and respond to,

We note our particular interest in the following five priority issues and settings.

1. Prisons, corrective services and the justice system

The Disability Royal Commission should consider the way in which a person’s disability and the services and supports available to them directly impacts on their justice outcomes, including their entry into and exit out of the criminal justice system. This includes early intervention and diversion (including the role of police), courts, secure therapeutic facilities, prisons, and transition back into the community. The Royal Commission should also consider the impact of prolonged detention in prison on people with disability (including people who have been found unfit to be tried, or not guilty by reason of mental impairment) for their stabilisation, recovery and wellbeing. In particular, consideration should be given to the growing pressure on prison populations, limited access to programs and supports and the use of custodial management techniques.

People with disability are at particular risk when they are in prison. For example, we know that prison can have serious detrimental consequences for people with cognitive impairment, including:

- entrenchment in a culture of criminality because of a desire to be accepted by peers
- vulnerability to assault and mistreatment
- significant trauma experienced by the use of segregation and isolation as behaviour management tools, and
- post-release readjustment problems because of impaired adaptive skills.¹

Some of these issues LACs identify were recently examined by the Victorian Ombudsman in her *Investigation into the Imprisonment of a Woman Found Unfit to Stand Trial*, which found that there is a need for therapeutic responses and increased community support to stop people with disability spending time in the prison system.² In that matter, ‘Rebecca’, a 39 year old woman with a significant developmental disorder, and a client of VLA’s, was in prison for 18 months. As the Ombudsman said, ‘[s]he remained in prison simply because there was nowhere else for her to go’; there was no housing or supports in the community. Importantly, the Ombudsman also noted that Rebecca’s case is not unique and we strongly support the examination of prisons, corrective services and the justice system by the Disability Royal Commission.

In LANSW’s experience, these problems can be exacerbated further by failures to gain access to the NDIS. For example, eligible people with disability who are released without an adequate NDIS plan in place may find themselves homeless, and without the support they need to transition to and live successfully in the community. This can lead to increased interaction with the criminal justice system, and repeated incarceration of extremely vulnerable individuals.

2. National Disability Insurance Scheme (NDIS)

We support the Disability Royal Commission’s consideration of the NDIS, including, but not limited to the quality and safety of services provided to people with disability under the NDIS. We suggest that the Disability Royal Commission also consider the *availability* of services provided to people with a disability under the NDIS.

Our organisations welcome the great promise the NDIS holds for our clients and we will continue to work closely with your Government, our State departments and the National Disability Insurance Agency to help make the NDIS work at its best for the people we work with. When the NDIS is not working as intended (including because of barriers to access, ‘market failure’, ‘thin markets’ or difficult interfaces between

¹ E Baldry, L Dowse and M Clarence, *People with intellectual and other cognitive disability in the criminal justice system* (2012) Sydney, University of NSW 4, 34.

² See, eg, Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018) (available at: <https://www.ombudsman.vic.gov.au/News/Media-Releases/imprisonment-of-woman-found-unfit-to-stand-trial>).

the NDIS and mainstream health, justice and housing services),³ we see that the consequences for individuals and for the system and communities are serious, including extended detention in mental health services,⁴ prolonged custody without conviction,⁵ inability to obtain bail, homelessness, deterioration in health, increased risks of re-offending, and family breakdown.

We continue to see the need for a framework of NDIS service provision and accountability that makes sure people receive the supports and services they need, and that provides an established process for when supports fail.⁶

3. Tailored, appropriate, culturally safe services

We welcome the recognition that people with disability have specific needs, priorities and perspectives based on their personal circumstances, including their age, sex, gender, sexual orientation, intersex status or race, and the particular circumstances of Aboriginal and Torres Strait Islander people and culturally and linguistically diverse people with disability. In relation to Aboriginal and Torres Strait Islander people with disability, we reiterate the importance of trauma-informed care, cultural strengthening, Aboriginal self-determination and of having community inform the Disability Royal Commission of their needs.

4. Leadership and co-production

People with disability should continue to shape and have influence over the process and outcomes of the Disability Royal Commission. We suggest that this includes: leadership positions in the Disability Royal Commission held by people with disability; and processes to ensure that people with disability can contribute to and be heard by the Disability Royal Commission.

³ For more information regarding market failure see, eg, Victoria Legal Aid, 'Explainer – the NDIS and the need for a provider of last resort' (November 2017) (available at:

<https://www.legalaid.vic.gov.au/about-us/news/explainer-ndis-and-need-for-provider-of-last-resort>).

⁴ See, eg, Miki Perkins, "'We are drowning': Sam doesn't have mental illness, yet he's living in a psych ward" *The Age* (7 March 2019) (available at: <https://www.theage.com.au/national/victoria/we-are-drowning-sam-doesn-t-have-mental-illness-yet-he-s-living-in-a-psych-ward-20190306p5128a.html>).

⁵ See, eg, Emma Younger, 'Man with intellectual disability released from Melbourne prison after judge 'horrified' by conditions' *ABC* (24 November 2017) (available at: <https://www.abc.net.au/news/2017-11-24/judge-releases-man-with-autism-from-melbourne-jail/9186352>); 'Emergency intervention removes disabled young man from prison' *7.30* (9 November 2017) (available at: <https://www.abc.net.au/7.30/emergency-intervention-removes-disabled-young-man/9135942>).

⁶ See, eg, Victoria Legal Aid, 'The NDIS: Six priority issues and models that are working well', Submission to the Joint Standing Committee on the National Disability Insurance Scheme: Inquiry into general issues around the implementation and performance of the NDIS (March 2019) (available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/General_NDIS/Submissions). See also Legal Aid NSW, Submission to the Joint Standing Committee on the National Disability Insurance Scheme: Inquiry into market readiness for provision of services under the NDIS (March 2018) (available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MarketReadiness/Submissions).

5. Interdependent services and systems and related legal issues

We welcome the recognition in the terms of reference of the need to improve systems and services to promote inclusion and access by people with disability. The Disability Royal Commission should consider the way in which services and systems, including housing, employment, income support and justice fail to accommodate the particular needs of people with disability and to effectively intersect with disability specific supports, including the NDIS. We encourage specific consideration of: the lessons from the Office of the Public Advocate's report regarding disproportionate rates of child protection removals for parents with disability;⁷ the discrimination faced by people with disability, including in employment, service provision and education;⁸ the lack of access to appropriate housing for people with disability, and the risk of eviction for conduct directly related to a person's disability; and the high rate of refusal of disability support pension claims and the impact this has on people's health, wellbeing and independence.

We reiterate the importance of advocacy and legal assistance to support people to understand and engage with the Disability Royal Commission. We would welcome the opportunity to discuss how LACs might, subject to resourcing, be able to respond to the impact of the Disability Royal Commission in two key ways: (1) meeting increased demand for current services prompted by the awareness created through the Disability Royal Commission (eg, assistance in relation to rights and discrimination or NDIS appeals); and/or (2) providing services that are specific to people's engagement with the Royal Commission (eg, promoting opportunities to participate for people who might not otherwise participate, including people in prison, inpatient units or living in rural or regional areas, supporting engagement, and providing advice and referrals).

We look forward to contributing the evidence we have through our diverse practice experience working with Australians with disability to the Disability Royal Commission.

Please contact us on the details below if you would like to discuss any of the issues raised in this short submission.

⁷ Office of the Public Advocate, *Rebuilding the village: Supporting families where a parent has a disability*, Report 2: Child Protection (2015).

⁸ See, eg, VLA's cases *Ella Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT No H107/2014 (18 December 2015) regarding discrimination by insurance companies in relation to mental health issues; *Slattery v Manningham CC* (Human Rights) [2013] VCAT 1869 regarding mental health discrimination by a council. See also Victoria Legal Aid, *Submission to the Australian Human Rights Commission, Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (December 2015) (available at: https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities#Willing_to_Work_Inquiry).

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Yours sincerely



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Chair