



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mr Jeremy Hanson MLA (Chair), Dr Marisa Paterson (Deputy Chair), Ms Jo Clay MLA

Submission Cover Sheet

Inquiry into Community Corrections

Submission Number: 019

Date Authorised for Publication: 08 December 2021



advocacy
for inclusion



People with
Disabilities
ACT Inc

Inquiry into Community Corrections

Submission

About Advocacy for Inclusion

Advocacy for Inclusion incorporating People with Disabilities ACT¹ is a leading independent organisation delivering reputable national systemic advocacy informed by our extensive experience in individual advocacy and community and government consultation. We provide dedicated individual and self-advocacy services, training, information and resources in the ACT.

As a Disabled People's Organisation, the majority of our organisation, including our Board of Management, staff and members, are people with disabilities. Advocacy for Inclusion speaks with the authority of lived experience and is strongly committed to advancing opportunities for the insights, experiences and opinions of people with disabilities to be heard and acknowledged.

Advocacy for Inclusion operates under a human rights framework. We uphold the principles of the United Nations Convention on the Rights of Persons with Disabilities and strive to promote and advance the human rights and inclusion of people with disabilities in the community. Advocacy for Inclusion is a declared public authority under the Human Rights Act 2004.

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With assistance from the ACT Government through the Office for Disability.



Advocacy for Inclusion acknowledges the Aboriginal and Torres Strait Islander peoples as Traditional Custodians of the lands where we live, learn and work.



We respect and celebrate diversity of individuals, including those amongst the lesbian, gay, bisexual, trans, and intersex communities and we value and promote inclusion and diversity in our communities.

¹ On March 24, 2021, Advocacy for Inclusion (AFI) officially merged with People with Disabilities ACT (PWDACT), a systemic advocacy organisation based in the ACT. Herein, reference to 'AFI' also acknowledges the values and philosophies of PWDACT.

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Introduction

Advocacy for Inclusion incorporating People with Disabilities ACT (AFI) welcomes the opportunity to make a submission to the Standing Committee on Justice and Community Safety on community corrections in the ACT.

Our submission highlights the significance of this inquiry as a disability issue, and the necessity of ensuring disability perspectives and considerations are included in any reforms to ACT community corrections. We recognise the systemic criminalisation of people with disability and are hopeful that this inquiry will result in improvements to the institutional, systemic and social factors which contribute to the over-representation of people with disability in the criminal justice system.

Background

It is widely recognised that people with disability, including mental ill health, are significantly over-represented in criminal justice systems around Australia.² The ACT Government's report, *Towards Disability Justice for the ACT*, provides a comprehensive overview of the issues and barriers for people with disability in the ACT justice system.³ This report informed the development of the *ACT Disability Justice Strategy 2019-2029*, which is premised upon the social model of disability.⁴

AFI commends the ACT Government on the development of this strategy, in addition to other initiatives such as the introduction of the Disability Liaison Officers. We also note the increasing awareness and improvement of physical and sensory accessibility, including at the ACT Courts. We encourage the ACT Government to continue to develop specific, measurable and evidence-based deliverables, to improve outcomes for people with disability in contact with the justice system.

While these reforms are commendable, AFI notes the ongoing need for broad systemic reform within community corrections. The current system comprises blunt and inadequate mechanisms,⁵ which result in the exclusion of people with disability from community corrections, and contribute to their systemic criminalisation. Additionally, despite the ACT Government's commitment to

² Leanne Dowse, Eileen Baldry & Phillip Snoyman, *Disabling criminology: conceptualising the intersections of critical disability studies and critical criminology for people with mental health and cognitive disabilities in the criminal justice system* (2009) 15(1) Australian Journal of Human Rights, p 29-46.

³ ACT Government, *Towards disability justice for the ACT: Summary of research and consultations*, Disability Justice Consultation Report, 2019.

⁴ ACT Community Services, *Disability Justice Strategy 2019-2029*, available at: <https://www.communityservices.act.gov.au/__data/assets/pdf_file/0008/1397924/Disability-Justice-Strategy_v2.pdf>.

⁵ Eileen Baldry, *Disability at the margins: limits of the law* (2014) 23(3) Griffith Law Review, p 370 - 388.

implementing a social model of disability, broad cultural change is still required to eradicate an entrenched medical model view of disability.

Necessary measures include extensive staff training, in addition to an integrated community response which focuses on the living conditions of people with disability. This response is necessary to shape a societal response which supports the social, economic and health needs of people with disability; rather than one which criminalises behaviours that arise due to unmet support needs.

The following discussion outlines the unique challenges and barriers for people with disability in each area of community corrections that is identified in the Inquiry's Terms of Reference.

The Parole System

Parole Considerations

In assessing parole applications, the Sentence Administration Board (SAB) will consider the applicant's accommodation, their behaviour in custody, their participation in activities in custody, and their likelihood of reoffending and complying with parole conditions.⁶ As outlined below, AFI is concerned by the operation of these provisions in three principle ways. Where appropriate, we suggest possible actions to help resolve these issues.

Accommodation

First, parole is unlikely to be granted if 'there is no suitable accommodation, or if the applicant will be released into homelessness.'⁷ AFI is aware of situations in the ACT where people are not granted parole solely because they do not have access to adequate and stable housing. This is concerning as people with disability, women and Aboriginal and/or Torres Strait Islander people are more likely to experience homelessness.⁸ We are also cognisant of the fact that people with sentences over three months are likely to lose their accommodation if they are in social housing.

Despite this, parole applicants receive little support to find appropriate accommodation. AFI strongly urges the government to address this barrier, by providing greater support to detainees to locate adequate housing, including by increasing the availability of social housing. It is anticipated that this will positively impact community corrections, as stable housing is linked to greater community support, whereas homelessness is negatively linked to violence and criminogenic needs.⁹

AFI notes that the provision of stable and accessible housing is particularly important for people with disability, as the criminalisation of people with cognitive disability and mental health conditions is significantly driven by a 'lack of community-based provision and the inadequate nature of support available.'¹⁰ At present, public housing services in the ACT are not equipped to adequately support disability needs. We strongly encourage the ACT Government to ensure that people with disability,

⁶ ACT Government Justice and Community Safety, *The parole process and considerations by the Board*, available at: <<https://justice.act.gov.au/safer-communities/sentence-administration-board/parole-process-and-considerations-board>>.

⁷ Ibid.

⁸ Victoria Apted, Rachel Hew & Tanya Sinha, *Barriers to Parole for Aboriginal and Torres Strait Islander People in Australia*, Research Report, June 2013, available at: <<https://law.uq.edu.au/files/1218/Barriers-to-parole-PLS-June-2013.pdf>>.

⁹ Karen Parhar and J. Stephen Wormith, *Risk Factors for Homelessness Among Recently Released Offenders* (2013) 3(1) *Journal of Forensic Social Work*, p 16-33.

¹⁰ Eileen Baldry, Damon Briggs, Barry Goldson, and Sophie Russell, *Cruel and unusual punishment: an inter-jurisdictional study of the criminalisation of young people with complex support needs* (2018) 21(5) *Journal of Youth Studies*, p 636-652.

including those involved with community corrections, have accessible housing and access to disability supports which enable them to live in the community.

Behaviour in Custody

The SAB will also consider a person's behaviour during custody in parole applications. This can create difficulties for people with disability as unaddressed support needs resulting in behavioural symptoms may lead to additional disciplinary charges. In turn, this increases the likelihood that people with disability will be assessed as being at risk of reoffending. Consequently, people with disability whose needs are not supported may be less likely to obtain parole in the ACT.

To ensure that people with disability are not inordinately impacted by this consideration, it is essential that community corrections appropriately respond to individual support needs. AFI is aware that needs-identification options are being explored, and we consider this a positive development in ensuring people with disability have adequate behavioural support. However, we also highlight the need to evaluate both the suitability and efficacy of any developed tools for people with disability. Specific challenges may arise from relying on an individual self-identifying disability, as many people with disability may not realise that they face certain barriers or have certain conditions. Additionally, people with disability in the ACT criminal justice system may experience harassment and safety concerns from other detainees, meaning that they may choose to not self-identify. As a result, any needs identification measures should be rigorously evaluated and reviewed to ensure that they are appropriate for engaging with people with disability, and that they are producing accurate and effective outcomes. We also note the need to address negative attitudes and bullying towards people with disability, from their peers within community corrections.

Due to the potential limitations of needs identification measures, AFI also emphasises the need to adopt principles of universal design throughout the parole application process. Universal design ensures that systems and environments are accessible for everyone.¹¹ For community corrections, this would involve making information, materials, court processes and services available and accessible for all people, including those with disability.¹² Proactive steps to improve accessibility through universal design are strongly encouraged as this could increase the access and participation

¹¹ For more information, see: Centre for Universal Design, Australia, *Home Page*, available at: <<https://universaldesignaustralia.net.au/>>.

¹² Michael Iseri, *How Universal Design Principles Can Improve Legal Accessibility* May 2018, available at: <<https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/how-universal-design-principles-can-improve-legal-accessibility/>>.

of people with disability, regardless of whether their diagnosis or support needs were individually identified. In this way, universal design can assist in reducing identification issues.¹³

Participation in Reintegration and Release Programs

Third, parole applicants are often required to demonstrate their engagement with reintegration and release programs. However, many of these programs are inaccessible, as they are designed for people who are literate and who do not require support with communication, comprehension, vision or hearing. For example, the programs may allocate homework which involves journaling. As it is hypothesised that a significant percentage of detainees have cognitive disability, the current format of programs presents as a considerable barrier to participation. This negatively impacts a person's parole application. Consequently, AFI notes the need to create accessible reintegration and release programs using universal design principles. We also emphasise the importance of individual support and reasonable adjustments.

Such measures, including Easy English resources, must be co-designed with people with disability and evaluated to ensure their appropriateness and efficacy. This is as we are aware that some Easy English resources may not be being used by staff or people with disability in community corrections, due to difficulties in disseminating such resources to target groups. Where not distributed and utilised appropriately, these resources may not be helping to improve equal access to, and participation in, relevant programs.

The Parole Application Process

In addition to our concerns regarding parole considerations, AFI has broad concerns about the accessibility of the parole application process. Many people engaged with ACT community corrections have low literacy, difficulties comprehending complex information, and/or poor memory.

Despite this, parole applicants are expected to participate in a process which often utilises long, complex written documents and legal jargon. There are no formal procedures or policies in place to ensure parole applicants are supported to understand and participate in the parole application process. Moreover, while sentencing administration officers at the Alexander Maconochie Centre (AMC) may offer some support to detainees, there is some confusion as to what type and how much. For example, officers may be unsure whether they can fill out the application forms for people who cannot read or write. Additionally, these officers do not usually attend the parole

¹³ Ibid.

hearing with the applicant. The variable support through the application process means that the participation of some people with disability is severely limited.

Lack of support in the parole application process is also an issue in the preparation of the parole applicant's release plan. This plan is presented to the SAB to demonstrate the applicant's low risk of reoffending, and it may cover issues such as mental health, physical health and/or substance use issues. Despite this, applicants may not receive professional support to develop these plans. In such instances, detainees are potentially required to develop complex psychological management and relapse prevention plans. This is entirely unreasonable as such processes require professional expertise and support.

This issue also reflects a broader systemic issue within the ACT's parole system: namely, that the onus is on the individual to know their needs and to advocate for their own rights. While AFI notes that people must be supported to be responsible for their own decisions, we are also cognisant that many people within the criminal justice system may not have been taught self-advocacy skills. The inaccessibility of the current parole process perpetuates this disadvantage, meaning that people with disability may be less able to utilise the rules for their own benefit or to participate advantageously in bureaucratic processes.¹⁴

Furthermore, many people with disability in the criminal justice system may have minimal experience in, and thus more difficulties exercising, choice and control. Their behaviour may also be impacted by cultural norms and historical trauma which renders it difficult for them to make normatively positive decisions.¹⁵ This may be exacerbated for women with disability in the criminal justice system, who are highly likely to have experienced sexual or family violence.¹⁶ These factors often mean that they require additional support to reflect upon and articulate their needs.¹⁷ Where support is not available, their ability to exercise choice and control may be significantly reduced.¹⁸

¹⁴ Karen Soldatic, Georgia Van Toorn, Leanne Dowse and Kirsty Muir, *Intellectual Disability and Complex Intersections: Marginalisation under the National Disability Insurance Scheme* (2014) 1(1) Research and Practice in Intellectual and Developmental Disabilities, p 6–16.

¹⁵ Alison Churchill, Mindy Sotiri, and Simone Rowe, *Access to the NDIS for people with cognitive disability and complex needs who are in contact with the criminal justice system: Key challenges*, The Community Restorative Centre Report, January 2017, p 10.

¹⁶ Ibid, p 6.

¹⁷ Kathy Ellem, *Supporting people with cognitive disabilities in contact with the criminal justice system: the importance of relationship-based practice* (2019) 6(2) Research and Practice in Intellectual and Developmental Disabilities, p 164-177.

¹⁸ Alison Churchill, Mindy Sotiri, and Simone Rowe, above n 14.

To overcome these issues, AFI emphasises the importance of creating accessible processes which support people of different abilities to participate fully. We also stress the importance of individual support throughout the parole application process, to ensure that people's individual support needs are recognised and responded to. This may include a trusted individual to support the applicant with paperwork and in SAB hearings. Due to ongoing issues with identification, AFI also notes the need to incorporate universal design principles across all processes within the parole system.

Release Planning in Parole Procedures

AFI is also aware of issues within the parole system regarding difficulties associated with planning for unpredictable situations.¹⁹ The incongruence between people's realities and the administrative rules is evident in the difficulties detainees have in establishing social supports during release planning. Specifically, people are often unable to organise community supports until they receive confirmation that parole has been granted. However, successful applicants are typically released within a week of their parole hearing and it is simply not possible to organise all the necessary supports during this short time. This means that parole applicants are often released without adequate community supports.

AFI notes that this is a pertinent issue for NDIS participants who are seeking parole. This is as the SAB will often not grant parole until an NDIS plan has been established, yet the NDIS will not develop a plan until a release date has been provided. AFI notes significant reform is needed in the release planning process, in order to promote service integration and enable continuity of care. As part of this reform, we support the call for a parole release date system and encourage clearer guidelines on the interface between community corrections and community supports, such as the NDIS.

Communication of Parole Conditions

Finally, AFI understands that inappropriate communication leads to substantial issues regarding breaches of parole conditions and attendance at court dates. These breaches may occur even where the person is willing to comply, as relevant information and support may not be appropriately provided to the person with disability. For example, the person may have difficulty remembering appointment times or they may have no accessible transportation.²⁰ Such factors may lead them to miss a court-mandated appointment and render them in breach of their parole conditions. These situations can be, and have been, overcome using communication strategies such as Easy or Plain

¹⁹ Claire Spivakovsky, *Barriers to the NDIS for people with intellectual disability and/or complex support needs involved with the criminal justice systems: The current state of literature* (2021) 46(4) *Journal of Intellectual & Developmental Disability*, p 329-339.

²⁰ People may be unable to use public transport due to physical, sensory or other barriers.

English; or, where a worker connects with the person on parole to help them comply with parole conditions e.g., by reminding them of appointments or by assisting them to organise transport. The Disability Liaison Officers and disability advocates have been particularly successful in using such strategies to support clients.

Even where people are supported to comply with parole orders, the parole conditions may be unrealistic and unachievable. This is particularly the case where people with a history of substance addiction are required to abstain. The high likelihood of relapse means that these orders often result in parole breaches and re-incarceration. This issue is particularly concerning for people with disability, as people with substance addiction have a high likelihood of comorbid mental ill health. To address this, parole conditions must be realistic and achievable, and people must receive support throughout their parole process.

Sentence Administration Board (SAB)

The barriers experienced by people with disability at the SAB reflect those which prevent people with disability participating fully in all aspects of the justice system. They include:

- lack of support to address communication and cognitive barriers.
- costs associated with legal representation.
- cultural bias and stigma.
- 'highly formalised and ritualised procedures and complicated legal language that people with cognitive disabilities find confusing, incomprehensible, alienating or intimidating.'²¹

This section provides information on how these barriers manifest in the operation of the SAB.

Identification of Support Needs

AFI also aware that the SAB experiences issues in identifying and responding to the support needs of people with disability. Specifically, we have heard that the SAB considers individual requests for reasonable adjustments during hearings. However, there is no overarching policy in place to ensure the accessibility of their processes. This is problematic as it relies on the person with disability identifying and articulating their own needs. As discussed, this may not be possible due to stigma, communication difficulties, or under-diagnosis. AFI notes the need to make universal changes, to ensure that systems and processes are accessible for all people, regardless of whether they are aware of, or choose to disclose, their support needs.

AFI is also aware that people often receive little support throughout SAB processes. Many of these issues are discussed under 'The Parole Application Process', but include:

- The use of long, complex written documents and legal jargon.
- Minimal and varying support to complete SAB documents.
- The lack of support and burden of responsibility on people who may not have requisite skills. to participate in SAB processes.

These issues significantly impact people with disability's access to justice and may mean that the SAB is not operating in accordance with the principles of natural justice. This is as people with disability may not receive a fair opportunity to be heard, where they are not supported to comprehend and/or communicate in hearings. To ensure people with disability have access to justice, and have their human rights upheld under the *Human Rights Act 2004 (ACT)*, AFI recommends implementing

²¹ Parliament of Victoria Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers- Final Report*, 2013, quoting the Submissions of the Legal Services Commissioner, Villamanta Disability Rights Legal Service, Victorian Advocacy League for Individuals with Disability Inc pp xxiv, 103, 178, 205.

universal design principles in SAB processes; and providing social and legal advocacy services to all people before the SAB.

SAB Hearings

SAB hearings typically involve three to four panel members and the person involved in the criminal justice system. The person involved in the criminal justice system often attends these hearings without legal or social support. This has significant ramifications for people who require support in comprehension or reading, in addition to people with complex trauma. This is due to the significant power imbalance between the board members and the person in the criminal justice system, which may cause additional anxiety, trauma, and/or exacerbation of disability symptoms. We reiterate the need for social and legal advocacy services to all people before the SAB, to address this issue.

Prejudicial Assessments

Finally, stigma and misconceptions associated with people with disability negatively shape their participation in sentencing processes. This may be due to staff's preconceived ideas of disability and a person's capabilities, which can lead to insensitivity and negative experiences for the person with disability. Notably, this occurs where behaviours associated with disability and undiagnosed health conditions are interpreted as offending behaviour. As discussed, this can lead to difficulties in the parole process and increased disciplinary hearings.

This issue is exacerbated as the SAB overwhelmingly adopts a medical model of disability, alongside a traditional criminological approach which justifies punishment on the grounds of deterrence. Such approaches 'turn away from considering circumstances relating to the individual perpetrator and focus instead on the ...offence.'²² To overcome this, we emphasise the need to provide face-to-face disability awareness training for SAB board members and support persons for offenders in SAB hearings. We also stress the importance of fully funding and implementing the *Disability Justice Strategy*, due to its commitment to the social model of disability.

²² Jane Dullum, *Sentencing Offenders with Disabilities* (2015) 17(S1) *Scandinavian Journal of Disability Research*, p 60-73.

Intensive Correction Order (ICO)

Assessment Process

To serve an ICO, an offender must undergo an assessment to determine their suitability. An applicant may be deemed unable to complete an ICO due to medical reasons, presence of a major psychiatric or psychological disorder or presence of a major problem with alcohol or a controlled drug.²³ While AFI is conscious that people should not be given orders that they are unable to complete, we have concerns that this provision may result in the exclusion of some people with disability from ICOs. Such exclusion is worrisome, as some people with disability may benefit from the intensive support provided under ICOs yet remain in custody due to the assessment criteria. AFI emphasises the need to ensure that people with complex needs, including disability and mental illness, are not precluded from the benefits and supports associated with ICOs.

AFI also has concerns regarding the accessibility of the ICO assessment process for people with disability. Feedback suggests that this is a lengthy and stressful process for the offender. However, there are currently no adequate, disability-aware processes in place to ensure that the person comprehends the situation and is offering informed consent. Rather, AFI understands that, as in the parole process, people may be agreeing to participate (or not) in processes and to comply with conditions without properly understanding the situation. This agreement may occur due to feelings of embarrassment arising from social stigma, and it can have significant implications on the human rights of applicants. This is as ICOs can involve orders to take medication, undergo medical assessments, drug testing and/or psychiatric treatments. It is essential that disability-aware supports are available to ensure that individuals are fully informed and are not prevented from providing informed consent due to unmet disability support needs.

Police Interactions

People under ICOs may be arrested without a warrant 'if a police officer believes an offender has breached any of the conditions of the ICO.'²⁴ AFI has significant concerns regarding this provision, due to the risk of police misrecognising and criminalising disability-related behaviours. It has been recognised that ACT Policing can face challenges in identifying disability presentations and support

²³ *Crimes (Sentencing) Act 2005* (ACT), section 46D.

²⁴ *Crimes (Sentence Administration) Act 2005* (ACT), section 60.

needs.²⁵ This can mean that police ‘don’t respond appropriately, and an interaction can escalate quickly and badly.’²⁶

Relying on police as first responders can promote the management of people with disability by the criminal justice system. In turn, this can lead to the ‘hyper-surveillance’ of people with disability in which non-compliance is perceived as voluntary disobedience and deviance. In reality, non-compliance may be the result of failure to identify and adequately respond to disability and other support needs.²⁷

To reduce the management of people with disability by the criminal justice system, AFI encourages the development of alternative first responders and culturally responsive and therapeutic community-based support. We also encourage ACT Police to adopt disability-specific communication strategies.

²⁵ Standing Committee on Justice and Community Safety, *Report on Inquiry into the Form of an Evaluation of Current ACT Policing Arrangements*, Report 9, September 2020.

²⁶ Eileen Baldry, Elizabeth Mcentyre and Ruth Mccausland, *Aboriginal people with disabilities get caught in a spiral of over-policing*, 4 November 2015, available at: <<https://newsroom.unsw.edu.au/news/social-affairs/aboriginal-people-disabilities-get-caught-spiral-over-policing>>.

²⁷ Ibid.

Drug and Alcohol Treatment Order (DATO)

Accessibility of Assessment and Treatment

The *Crimes (Sentencing) Act 2005* (ACT), section 46K, outlines matters for assessing an offender's suitability for a Drug and Alcohol Treatment Order (DATO). Section 46K, Item 2, stipulates that an indication of unsuitability includes the presence of major psychiatric or psychological disorders.

AFI is concerned that this provision may lead to the exclusion of people with disability from the intensive support provided under DATOs. In turn, this may contribute to the systemic criminalisation of people with disability. These issues will be explored with reference to [REDACTED] judgement in [REDACTED]

This case concerned an assessment of [REDACTED] which deemed him not eligible for a DATO due, in part, to significant mental health issues which caused difficulties in comprehension. In considering this assessment, Justice [REDACTED] stated that the assessment process had not considered 'whether any supports or assistance [could be provided to [REDACTED] or whether the disabilities identified [could] be mitigated to an appreciable extent.'²⁸ The judge further noted that 'in a less concentrated circumstance with less pressure, [REDACTED] may be able to show that he can participate in the Treatment Order process and that he will be able perform adequately in the rehabilitation processes that will be required of him.'²⁹ Consequently, [REDACTED] ordered a Suitability Assessment and requested that a Disability Liaison Officer be engaged to assist in identifying [REDACTED] support needs.

There are many positive aspects of this judgement, including Justice [REDACTED] heightened awareness of disability support needs. However, the facts of the case nevertheless reveal the systemic issues for people with disability in the DATO process. Specifically, this judgement clearly reflects how people with disability with complex needs may be excluded from support services, and therefore are at a greater risk of entering, and remaining, within the criminal justice system. This is as, while the judge recognises the need for disability supports in the assessment process, [REDACTED] [REDACTED] is still required to demonstrate that he can 'perform adequately in the rehabilitation processes.'³⁰

²⁸ *R v McHughes [2021] ACTSC 92*, 13.

²⁹ *R v McHughes [2021] ACTSC 92*, 16.

³⁰ *R v McHughes [2021] ACTSC 92*, 16.

This is problematic because rehabilitation processes and programs rarely offer disability specific supports. This means that people with disability are often unable to participate due to the lack of communication and/or comprehension support, physical accessibility or sensory accessibility. The inaccessibility of rehabilitation programs increases the likelihood that people with disability, including people with psychiatric or psychological disorders, will be unable to ‘perform adequately in the rehabilitation processes.’³¹ As a result, they are more likely to be deemed unsuitable for a DATO and placed in custody. In this way, section 46K’s stipulation that an indication of unsuitability includes the presence of major psychiatric or psychological disorders, may lead to the exclusion of people with disability from the intensive support provided under DATOs, and perpetuate their criminalisation.

To overcome this, universal design principles and disability supports must be embedded throughout DATO processes. Furthermore, accessible rehabilitation programs must be developed to ensure that people with comorbid conditions can participate effectively in necessary treatment.

Inadequate and Siloed Services

The potential exclusion of people with mental illness from DATOs mirrors a wider systemic problem. Namely, that people with comorbid mental illness and substance misuse receive less support due to siloed services. This is concerning due to the ‘high prevalence of comorbidity between substance use disorders and other mental illnesses.’³²

Siloed systems arise where services limit the scope of their work through exclusionary criteria. While this is often necessary, it may mean that people with multiple and complex support needs are not eligible for specialist support. For example, regarding drug and alcohol dependency, mental health services may refuse to engage with someone with substance use issues; or, as articulated in section 46K, drug and alcohol treatment services may not engage with someone who has significant mental illness. This means that ‘most comorbidity patients [are] ineligible for cross-referral between services’ and therefore receive no specialist intervention.³³ This issue is prevalent in ACT Government and non-government sectors, including community corrections. Consequently, AFI emphasises the need to ensure that people with complex needs, including disability and mental ill health, are not precluded from the benefits and supports associated with DATOs.

³¹ Ibid.

³² National Institute on Drug Abuse, *Common Comorbidities with Substance Use Disorders Research Report*, April 2020, available at: <<https://www.drugabuse.gov/publications/research-reports/common-comorbidities-substance-use-disorders/why-there-comorbidity-between-substance-use-disorders-mental-illnesses>>.

³³ Weaver, T., et al. *Comorbidity of substance misuse and mental illness in community mental health and substance misuse services* (2003) 183(4) British Journal of Psychiatry, p 304-313.

Recidivism

The concerns raised above in relation to parole, SAB processes, ICOs and DATOs intrinsically link to issues relating to the complex support requirements of people with disability, not only within community corrections, but upon release. Unmet needs for people with disability may lead to increased recidivism.³⁴

The ACT Government's strategy *RR25BY25: Reducing Recidivism in the ACT by 25% by 2025* highlights the need to identify and respond to people with disability by providing reasonable adjustments. This 'will assist to prevent, reduce and break the cycle of contact with the justice system.'³⁵ The implementation of actions under the *Disability Justice Strategy* and the future ACT Corrections Disability Framework must be evaluated to ensure they are producing the intended aims of reducing recidivism and improving justice outcomes for people with disability.

Identification of Disability

Noting the discussion above regarding the development of needs-identification measures, the *Disability Justice Strategy* further outlines at 3.2 'Referral for functional assessment':

A process for justice agencies to have ready access to functional assessments is established to inform service responses to people with disability through funding administered by Community Services Directorate. This action will ensure that appropriate supports and adjustments are based on professional advice (where required) and made in a timely way to assist people with disability in their interaction with the justice system.³⁶

AFI recognises that people with disability require support to acquire functional assessments. If detainees with disability are supported to undergo a functional assessment, this could be invaluable in accessing appropriate supports to fulfil corrections' requirements, which can continue into a community setting.

AFI notes this referral process is to be trialled in 2021. Notwithstanding the impact of Covid-19, AFI strongly supports prioritisation of ensuring access to appropriate assessments to better address

³⁴ Australian Human Rights Commission, *People with Disability and the Criminal Justice System*, submission to the Disability Royal Commission, 20 March 2020, p 20.

³⁵ ACT Government Justice and Community Safety Directorate, *RR25BY25: Reducing Recidivism in the ACT by 25% by 2025*, available at: <https://justice.act.gov.au/sites/default/files/2020-08/Plan%20-%20RR25by25%20-%20Plan%20for%20printing%20-%20web-%20%20Final_0.PDF>.

³⁶ Ibid, p 30.

support needs and provide appropriate adjustment, to allow improved participation and outcomes for people with disability.

Continuity of Care

If specific support requirements are identified within a justice setting and access given to functional assessments, support processes could be established before detainees are released. This is essential for offering continuity of care to people with disability involved with community corrections.

Incorporating this responsiveness into the release planning stage could assist in not only meeting the individual's support needs, but also potentially assisting them to comply with parole conditions and reducing recidivism. However, AFI has concerns around the parole to release process.

AFI is aware the parole process can occur in such a way that detainees are sometimes released without access to their health needs, such as medication. In instances where people require medication to support their mental health, this can lead to a mental health crisis. Moreover, the lack of provision of appropriate and necessary support can lead to the repeated criminalisation of unmet disability needs through re-incarceration.

AFI notes the ACT Government's commitment to programs such as the *Transitional Release Program*³⁷ and *Extended Throughcare*³⁸ program. AFI also notes these programs may present difficulties for people with disability to access, as such programs rely on participants to either meet strict access requirements or organise self-participation. Providing access to reasonable adjustments or supports may make these programs more accessible for people with disability and allow them to complete custodial requirements.

Consequently, AFI strongly emphasises the need to adequately identify and respond to people's support needs pre-release. It is essential that community corrections ensure the continuation of supports for people with disability once they are in the community setting.

³⁷ ACT Government Corrective Services, 'Transitional Release Program', available at: <<https://correctiveservices.act.gov.au/reintegration-and-release/transitional-release-program>>.

³⁸ ACT Government Corrective Services, 'Extended Throughcare', available at: <<https://correctiveservices.act.gov.au/reintegration-and-release/extended-throughcare>>.

Other Relevant Matters

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

The Disability Royal Commission's (DRC) *Interim Report* highlights that 'many people with disability regularly come into contact with the justice system throughout their lives, whether as a victim of crime, as a person accused of committing an offence or as a witness.'³⁹

This systemic issue is highlighted in responses to the DRC's *Criminal Justice Issues Papers*⁴⁰ and the DRC Research Report *Police responses to people with disability*.⁴¹

AFI strongly recommends the ACT Government remains cognisant of the continued work of the DRC in this area and incorporates relevant recommendations in the continual roll-out of the *Disability Justice Strategy*.

Data Collection

There is insufficient data on the prevalence of disability among detainees in the ACT.⁴² While options for data collection are being considered, AFI has highlighted the challenges of identification.

We are also concerned that, due to larger numbers of male prisoners and a historically male-centric approach to research,⁴³ there is a particular paucity of comprehensive data regarding women with disability in the ACT's criminal justice system. This is concerning because, in other jurisdictions, evidence suggests that, compared to men, women are more likely to experience shorter sentences, have a higher number of custodial episodes per year,⁴⁴ a higher number of remand episodes per year and move more quickly through a cycle of arrest, release, and repeat.⁴⁵ Research also demonstrates that people who are serving shorter sentences, or who are on remand, are more likely

³⁹ Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim Report*, 2020, p 31.

⁴⁰ Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of responses to the Criminal Justice System Issues Paper*, 2020, available at: <<https://disability.royalcommission.gov.au/system/files/2021-01/Overview%20of%20responses%20to%20the%20Criminal%20Justice%20System%20Issues%20paper.pdf>>.

⁴¹ Leanne Dowse, Simone Rowe, Eileen Baldry and Michael Baker, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Research Report: Police responses to people with disability*, Research Report, University of New South Wales, 19 October 2021.

⁴² ACT Government, above n 2.

⁴³ Eileen Baldry, *Women in Transition: From Prison to...* (2010) 22(2) Current Issues in Criminal Justice, p 253-267.

⁴⁴ Eileen Baldry, Leanne Dowse and Melissa Clarence, *People with mental and cognitive disabilities: pathways into prison, 2012, Background Paper for Outlaws to Inclusion Conference*.

⁴⁵ Baldry, above n 42.

to have mental health and/or cognitive disability.⁴⁶ Together, these studies indicate that people on remand or serving short sentences are more likely to be women and to have a disability. Despite this, AFI is aware that options for data collection in the ACT may not adequately encompass people who do not enter custodial settings, or who enter custody for very short periods.

Consequently, AFI emphasises the need to improve data collection in community corrections, alongside custodial settings, in a manner which is cognisant of the different gendered and cultural experiences of incarceration.

⁴⁶ Ibid.

Recommendations

1. Prioritise the continued resourcing and delivery of the *Disability Justice Strategy* and provide comprehensive evaluation of actions implemented under the Strategy.

AFI commends the ACT Government on the development and funding of the *Disability Justice Strategy*. AFI strongly encourages the prioritisation of ongoing funding for the strategy. Noting the impact of COVID-19, AFI would welcome the prioritisation of actions to meet the timeframe of the *First Action Plan*. The actions implemented under the strategy, including communication and needs-identification strategies, must also be comprehensively evaluated to ensure appropriate and effective outcomes are achieved in line with the goals of the strategy.

2. Adopt a universal design approach.

AFI recommends adopting a universal design approach whereby systems, processes and services are designed with improved accessibility for all people, regardless of whether or not disability is identified. This will increase accessibility for people with misdiagnosed or unrecognised support needs and reduce the onus on people with disability to disclose their support needs. As discussed throughout this submission, AFI particularly notes the need to use universal design principles in the following areas:

- a) reintegration and release programs;
- b) the parole application process;
- c) processes relating to Drug and Alcohol Treatment Orders; and,
- d) communication in court and SAB processes.

3. Increase accessibility and availability of housing.

The ACT Government must increase accessible social housing and support people with disability, including those involved with community corrections, to access this housing. The government must also improve people with disability's access to private housing and disability supports which enable them to live in the community.

4. Improve supports within ACT community corrections.

Specific actions noted throughout this submission include:

- a) improving continuity of care, including by introducing a parole release date system and clarifying system interfaces e.g., the interface between the justice system and the NDIS;

- b) providing social and advocacy services to all people before the SAB. This may include clarifying the support role of AMC sentencing administration officers in the parole process;
- c) ensuring all detainees have trusted and personalised support in release planning;
- d) providing individual support throughout the parole application process, to ensure that people's disability support needs are recognised and responded to;
- e) creating realistic and achievable parole conditions;
- f) the extension or creation of specialist disability services in ACT community corrections;
- g) training staff to use of disability-specific communication strategies.

5. Promote an integrated community response which supports the social, economic and health needs of people with disability, outside of the criminal justice system and community corrections.

The ACT Government must support people with disability *outside* of the justice system. This will involve systemic reform which develops and improves community responses to the social, economic and health needs of people with disability. We note that it is essential to ensure that the net of the criminal justice system is not simply widened; rather, people with disability must be supported in the community. Specific measures may include:

- a) developing and expanding existing programs which use first responders other than police;
- b) expanding culturally responsive and therapeutic community-based support;
- c) improving accessibility of mainstream services for people with disability; and,
- d) improve coordination of services between community corrections and other community supports.

6. Address negative attitudes and bullying towards people with disability, from their peers, within community corrections.

7. Improve data collection for people with disability engaged with community corrections and in custodial settings.

These improvements must be cognisant:

- a) that people with disability should be supported to choose whether to disclose disability;
- b) that people with disability may not be aware that they have disability; and
- c) that women with disability and Aboriginal and/or Torres Strait islander people with disability have diverse experiences, which are not well-measured using dominant male-centric data collection methods.