SACOSS Submission on the Disability Justice Plan Consultation

July 2013

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Contents

Executive Summary

SACOSS welcomes the Attorney General Department's inquiry into access to justice for people living with disability. SACOSS considers fair and easy access to the institutions of the justice system to be a fundamental social justice issue. For many members of our community living with disability the justice system can be inaccessible, frightening, and difficult to negotiate. SACOSS welcomes all measures that improve access to the justice system for people living with disability. SACOSS also welcomes the proposed move to strengthen legislative measures in relation to the prosecution of unwanted and exploitative sexual contact, and to provide additional measures to support people living with disability when they appear as witness in the justice system.

In this submission we have consulted with our members and addressed the questions raised in the Department's consultation paper. We also note that access to justice requires a truly inclusive justice system – one which not only treats people living with disability fairly and reasonably when they are appearing as witnesses, defendants and/or when convicted of crime but in every context as a citizen. We therefore encourage measures that would increase the representation of individuals with disability as employees in all aspects of the justice system and as members of juries.

General Questions

1. What are the greatest barriers that people with disability face in seeking access to justice?

SACOSS believes that there are multiple barriers for people with disability in seeking access to justice. Some of these existing barriers arise from institutional cultures and practices, some arise as physical barriers, and others are, at least in part, an outcome of the prejudicial and discriminatory attitudes that some members of our community still hold in relation to people living with disability. Key barriers are identified below in note form.

Fear of the justice process and of the unknown nature of the system:

- Levels of anxiety caused by the prospect of participating in the justice system creates a barrier to participation – people are reluctant to raise a case or complaint. This is particularly so for individuals who may experience anxiety or depression.
- Enforced dependency in relationships with carers/support workers creates anxiety for personal safety at the prospect of raising a complaint.
- Anxiety extends to consideration of mental health more widely.

Inadequate information transfer:

- People with disability lack relevant and accessible information about the justice system.

Entrenched community values (for example, jurors) and attitudes about the presumed '(un)reliability' of evidence given by people living with disability.

The justice system is resistant to change and the lack of flexibility in the system means that people with diverse needs are not accommodated, instead they are excluded from participating in the justice system:

- People who have difficulty communicating non-verbally are not accommodated.
- Physical access to court buildings, particularly the older buildings, is inadequate.

Lack of education of officials in the justice system.

Lack of empathy and entrenched discrimination in the system – justice issues are not pursued by people with disability for this reason.

An under-resourced justice system exacerbates all of the above.

2. What can be done to overcome these barriers?

Recognising that there are multiple barriers, SACOSS recommends a series of actions to overcome them.

We believe that the justice system needs to be designed to include support people for people living with disability, including, but not limited to, having access to an advocate. Further, people with disability need to have access to an advocate throughout their entire involvement with the justice system. Advocates should have legal recognition. As we note

below, where we address the questions on the Evidence Act, SACOSS believes that the role of advocates should be reviewed as part of the review of the Evidence Act.

Overcoming barriers to justice also requires increased opportunities for people living with disability to be informed of their rights. SACOSS recommends work being undertaken towards this goal.

Taking a more active stance in ensuring that people with disability are employed in the justice system – in a range of roles – would, moreover, have a positive impact on the culture of the justice system. SACOSS strongly advocates taking measures to make the justice system truly inclusive, including through the promotion of justice scholarships specifically designed for people who have a disability, ensuring genuine employment opportunities exist, and not limiting the current review to how people with disability are treated when they access the justice system as defendants and as victims of crime.

3. What support can be provided for victims with disability seeking justice?

SACOSS recommends a range of support measures be undertaken to accommodate the range of experiences and circumstances that people living with disability encounter when seeking justice.

It is important to recognise that being observed by defendants, even indirectly, might serve as a barrier to accessing the justice system. Acknowledging this fact requires additional provisions such as those proposed for 'vulnerable witnesses', but it also means that it is imperative that institutional settings are designed effectively to prevent people from needing to access the justice system in the first place.

Adequate and appropriate training for all police officers, correctional officers, and lawyers is paramount.

All SAPOL should be oriented in relation to disability awareness.

Encourage and ensure people with disability are working in the justice system, including through the promotion of scholarships and genuine employment opportunities.

The justice system needs to welcome third parties who have relevant knowledge of the individual and their situation.

As discussed below in the paper, SACOSS would like to see an extension of the definition of 'vulnerable witness' (in giving evidence).

4. What measures can be taken to protect people with disability and prevent abuse?

SACOSS would like to see an increase in organisations that provide services to people living with disability having and using complaints procedures.

SACOSS also suggests that increased community awareness of rights issues and an understanding of the UN Declaration of the Rights of People with Disability could potentially help to protect people with disability by raising awareness.

The measures proposed and addressed as part of Question 9 in relation to particular kinds of sexual contact being regulated through the criminal justice system are also supported by SACOSS.

5. What supports are necessary for people with disability who are accused of a crime?

It is important to recognise that many issues raised above (Question 1) as relevant for victims of crime are similarly relevant for those accused of crime and for convicted offenders in the system.

Issues of anxiety are relevant to those accused of crime and SACOSS recommends that adequate supports, including access to advocates and support people, should be made available to people with disability who are accused and/or convicted of crime.

SACOSS would also like to see proper training for police officers, correctional officers and lawyers, to enable them to have an adequate understanding of the needs and experience of the justice system for people living with disability.

- All SAPOL should be oriented in relation to disability awareness.
- The justice system needs to welcome third parties who have relevant knowledge of the individual and their situation.
- Correction officers and parole officers need advocate training in relation to disability.
- Diversionary options should be available.
- There is a need to encourage and ensure people with disability are working in the law, including the promotion of scholarships and genuine employment opportunities.
- Follow-up procedures post-release need to be appropriate to the needs of the individual and need to take into account individual situations.
- People living with disability who are accused of crime need to have access to appropriate, high quality, legal representation.
- There is a need for conversation around and awareness of issues affecting the community such as Foetal Alcohol Syndrome.

6. Please share with us any other comments, thoughts or ideas about improving access to justice for people with disability

While SACOSS is very supportive of the current review of the justice system, we note that the impact of exclusion from the justice system occurs at all levels of participating in legal and civil life for people with disability, including performing jury duty and working in the justice system, as well as appearing as victims, accused, offenders, and witnesses giving evidence in cases. It is important that people living with disability are recognised and given the opportunity to participate fully in the justice system.

In relation to people accused of crime and those convicted of crime, SACOSS is concerned that offenders are being dealt with in the justice system when they ought to be in the health

system. We are also concerned about a lack of accommodation and support in the community leading to offending. Connected to this issue is lack of employment opportunities and lack of income for people living with disability.

Proposed legislative changes

7. What are your comments on the proposed changes to the law?

In relation to the government's proposal to make changes to the Evidence Act 1929 (SA) 'to improve the way the criminal justice system responds to vulnerable victims and witnesses' SACOSS makes the following comments.

We understand that the intention of the intended changes is to minimise the number of times vulnerable witnesses have to recount their experiences – we strongly support this goal. As indicated in the responses to questions 1-6 above, SACOSS and SACOSS members feel that the anxiety of being involved in the justice system, considerable for all in our community, is often heightened for people living with disability. Finding effective measures to minimise anxiety is an important way to improve access to and outcomes from the justice system for people with disability. However, from the information so far made available on the proposed changes to the existing laws in this area, it is unclear *how* the proposed changes will achieve this goal and indeed how exactly they improve on existing provisions.

We understand that it is proposed that in sexual assault or violence offences, evidence will be taken from vulnerable witnesses before the trial in an informal setting and audio-visual records will be allowed into evidence. This measure will be paired with more training for police in interviewing vulnerable witnesses and more regulation about the interview process. In addition, evidence from carers and other people about what the victim told them about the offence will be allowed in the trial.

Current measures to protect vulnerable witnesses include allowing the witness to give evidence from outside the courtroom and either transmitting it to the court by closed circuit television or showing an audio-visual record of the evidence to the court. However, the protections must not stop the judge/defendant/jury from being able to observe the witness giving evidence and must not prevent the witness from giving sworn evidence or submitting to cross-examination. Additionally, when a child victim of a sexual offence gives evidence the evidence *must* be video recorded. In the case of other vulnerable witnesses, the court can make an order that the evidence be video recorded if the prosecution makes an application. This recorded evidence can be used in later court proceedings (for example, if the original trial results in a mistrial).

In relation to the proposal that what a vulnerable witness has told their carers be admissible as evidence – it is unclear how this would add to existing provisions. Usually, when a victim talks about the offending with a third person, the court cannot hear evidence about what the victim said to the third person. The reason for this is that what the victim told them does not prove that the offending occurred – just that the victim said it occurred. There are some exceptions to this rule. Firstly, in cases involving sexual assault the court can hear evidence about the initial complaint made by the victim (when, to whom, the content of the complaint, how the information was solicited, why the victim made the complaint to this person etc.).

Secondly, in certain circumstances when the victim is a 'protected witness' (that is, a child or a person who suffers from an intellectual disability that adversely affects their capacity to give a coherent account of their experience or respond rationally to questions) the court can hear evidence of what was said from the third person to whom the statement was made (s34CA Evidence Act). This will only be allowable if the protected witness is available to be called to give evidence if needed. This second-hand evidence can be used to prove the truth of the statement, not just the fact that it was said.

The 'protected witness' provision also allows a video of interview to be tendered as evidence (i.e. what the department is proposing in the current consultation paper) as long as the witness can be made available for cross examination. From the case law (eg R v J, JA) it is clear that the court does allow video recorded interviews to be played as evidence of what was said by the victim. The question that arises then is whether it is the law that needs to be changed (other than the fact that s34CA is poorly constructed) or whether there just needs to be a stronger focus on policies and police practices around video-taping interviews with vulnerable witnesses.

Recognising that similar measures appear to already exist and be practiced in criminal case law, SACOSS nonetheless acknowledges that the proposals will make the criminal justice process easier for vulnerable witnesses as it may save them from having to repeat everything they have explained during interviews. It may also be beneficial for both parties in the trial because the evidence being heard is more proximate to when the (alleged) offending occurred.

However, the use of pre-recorded interviews will only be successful if those who conduct the interviews have sufficient training, both in how to communicate with vulnerable witnesses, *and* in what is allowed to be said in court. A Report of the Disability Discrimination Legal Service in Victoria highlights this point (Goodfellow and Camilleri 2003). The Report finds that not all police are trained in video recording interviews so access to this option is 'dependent upon the availability of an appropriately trained officer' (Goodfellow and Camilleri 2003: 65). If the video contains small portions of inadmissible evidence, this can be edited out. But the more the interview is edited the more the evidence will appear disjointed. Of course, if essential parts of the evidence have to be edited out, the prosecution will be able to ask further questions in chief. The Victorian Disability Discrimination Legal Service reported this issue as a problem with the use of video recorded interviews:

> Feedback from the consultation process indicates that in most cases where a VATE statement has been taken, some or all of it will be ruled inadmissible and the victim/survivor will still have to take the stand to provide evidence-in-chief as well as to undergo cross-examination and re-examination. A primary reason given for all or sections of the tape to be ruled inadmissible was the way the questions have been asked by the member taking the statement, that is it may be assessed that the questioning was too leading or the defence counsel may argue that the viewing of the video tape by the jury will be detrimental and prejudicial to the alleged offender's defence. (Goodfellow and Camilleri 2003: 65)

8. What should the definition of 'vulnerable people' be in the new laws?

We note that some jurisdictions (for example Tasmania and Queensland) extend the definition of a vulnerable witness to people with an intellectual, mental *or* physical disability. However the protections given to special witnesses do not go beyond those given in South Australia.

In relation to the special offence and the changes to the Evidence Act SACOSS recommends that the definition of disability include intellectual disability as well as people whose mental functioning is impaired because of mental illness, dementia, or an acquired brain injury.

9. What do you think about introducing a new offence in South Australia (as in New South Wales) that would make it an offence for an employed or volunteer carer of a person with intellectual disability to have sexual contact with the person in their care? Should consent be a defence to such an offence?

The government proposes to make it an offence for a person who is employed (whether in a paid or volunteer capacity) to look after a person with an intellectual disability to have sexual contact with that person. This is designed to prevent people who work with people living with intellectual disability from abusing their position of trust.

SACOSS notes that there is at present no specific law in South Australia making it unlawful for disability workers to have sexual contact with their clients. However, there is a more general offence with respect to sexual intercourse with a person with an intellectual disability. The *Criminal Law Consolidation Act 1935* (SA) s 49 says that 'A person who, knowing that another is by reason of intellectual disability unable to understand the nature or consequences of sexual intercourse, has sexual intercourse with that other person is guilty of an offence.' This does not apply to sexual intercourse between people who are married. Consent is not a defence. It is also, of course, an offence to have sexual contact with someone without their consent (rape) – but this requires the prosecution to prove that consent was not given.

In addition, an offence committed against someone in a position of vulnerability because of physical or mental disability (and the defendant knew of the disability) is considered to be an 'aggravated' offence. This means that the offence will attract a more severe sentence than a non-aggravated offence. However, this does not help to overcome the hurdle of proving the offence in the first place.

Most Australian jurisdictions make it an offence for 'an employed or volunteer carer' (as referred to in the consultation paper) to have sexual contact with a person with a mental impairment or intellectual disability. The states and territories vary as to how the responsible person is defined. They also vary in relation to the defences available – common defences include that the defendant was married to or in a de facto relationship with the victim, the defendant did not know of the victim's disability, and that the contact was for medical or

therapeutic purposes. In some jurisdictions, the offence applies to a broader range of people in authority (whether or not they provide 'care') or to any person regardless of their relationship with the mentally impaired person. Consent is *not* a defence in any state or territory except Tasmania.

SACOSS believes that the current South Australian provisions do not go far enough to protect vulnerable people with an intellectual disability from sexual exploitation. The Victorian Law Reform Commission (2004) warns against capacity-based definition of mental impairment, such as the ones used in South Australia (also used in Western Australia), arguing that it would make these types of cases more difficult and lengthy to prosecute. In practice, a range of expert witnesses would need to be called to determine whether the intellectually disabled complainant had the capacity to make a choice about whether to participate in the sexual act, and where there are conflicting opinions a jury will be unlikely to convict.

The NSW Attorney Generals Department (2007) discussion paper highlights that there is also a need to protect people with an intellectual disability from sexual exploitation from people other than disability workers and people in authority. Under a previous version of the NSW legislation only these two groups of people were captured by the provisions. The report found that 'In most cases, the accused person was a neighbour, or social acquaintance. These cases would not fall within the authority relationships required under the [now repealed] provision. In other cases, the accused was the partner of the victim's mother. The prosecution may have difficulty in proving that an authority relationship existed in those circumstances' (NSW Attorney General 2007: 12). NSW legislation deals with this concern by making it an offence for any person to have sexual contact with a person with a cognitive impairment with the intention of taking advantage of the cognitive impairment.

SACOSS recommends a combination of the New South Wales, Victorian, and Queensland models. Specifically, we recommend that the offence only relate to disability support workers and health and education providers. SACOSS is concerned about balancing the need to protect people with an intellectual disability from exploitation and maintaining their individual agency as sexual subjects. Extending the offence too far beyond disability support workers and health/education providers might ultimately take away the right of people with an intellectual disability to have sexual relationships. SACOSS therefore recommends that South Australia should allow a defence similar to that in Queensland – where sexual contact is not exploitative. The reason this should be a *defence*, rather than sexual exploitation being an *element of the offence*, is that it should not be the prosecution's burden to prove the contact or relationship was exploitative as this would be difficult to achieve. Rather, the exploitative nature of the sexual contact should be assumed unless the defendant can show it was not exploitative.

10. Guidelines will accompany the new law in order for it to be successful in practice. What should be included in the guidelines for the taking of statements from people with disability in their dealings with the criminal justice system?

The discussion in response to the questions above has highlighted the concerns that SACOSS has and the safeguards that we feel to be appropriate. In terms of specific guidelines for the taking of evidence while we think this issue merits special consideration we believe that much will depend on the actual law. SACOSS would be very happy to contribute to a discussion on the issue of appropriate guidelines once the law has been finalised.

11. What should be included in training guidelines for other staff working with people with disability, such as court staff and the judiciary?

SACOSS considers it imperative that all staff in the justice system understand the role, significance and potential assistance of support people in the lives of people living with disability (this might include parents, paid workers, as well as unpaid friends). These relationships may present a challenge to the existing institutional culture in the justice system.

SACOSS also recommends that all staff need to have an understanding of what the experience of the justice system typically has been for people with disability – there are a range of reports which collate and summarise these experiences and this existing literature should be incorporated into training packages.

12. Please share with us any other comments, thoughts or ideas about the proposed changes to the law

Below we make some further comments on two important issues relating to the proposed legislation: defining disability as relevant to the proposed legislation and mandatory reporting.

13. 1 Defining Disability as relevant to the proposed legislation.

In relation to the special offence and the changes to the Evidence Act, SACOSS recommends that disability be defined to include, not just intellectual disability, but also people whose mental functioning is impaired because of mental illness, dementia or an acquired brain injury.

12. 2 Mandatory reporting

Murray and Powell (2008) comment that mandatory police reporting is counter-productive because it takes away the person's right to make a choice about whether to involve the

police and can therefore be a factor contributing to lower rates of reporting. On the other hand, residential care facilities dealing with complaints internally can often mean that there is an inadequate response. For example, the victim is moved to another area rather than the offender, or the offender receives education but the victim gets no counselling. Murray and Powell (2008) recommend there be a system of mandatory reporting to a specialist sexual assault service, which would have the expertise to determine whether it should be reported to police and to ensure that appropriate counselling and assistance is provided to the victim.

Murray and Powell also recommend sexuality education for adults with disabilities – this is important for both prevention and reporting. People with an intellectual disability are more vulnerable if they are not given the opportunity to understand themselves as sexual subjects who can exercise agency and choice and might not understand that they have been assaulted when under the influence of a person in a position of power. Sexuality education, such as knowledge of the accurate words for body parts (such as penis) and understanding about behaviour (such as rape) and knowing that it is okay to discuss sexual matters, can empower individuals to report what happened.

SACOSS also notes with some concern that mandatory reporting systems – especially in risk averse service delivery contexts – may lead to over reporting in an effort to 'protect' a reporter from subsequent allegations they failed to report a matter. This climate, in turn, can result in the reporting system being overwhelmed by reports thus diminishing their capacity to easily identify those circumstances that demand immediate attention and investigation.

SACOSS would characterise the current climate as being highly risk averse.

References

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