

Advocates Zoom In On... *Criminalisation*

Monday 26 October
12:30pm AEDT



Between 19 October and 7 December, Disability Advocacy Network Australia ran the "Advocates Zoom In On..." series of weekly hour-long discussions via Zoom - creating an opportunity for interested advocates to take a closer look at and speak about a number of key topics emerging in the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission or DRC) and its examination of abuse, violence, exploitation and neglect.

Participants were encouraged to share their insights, observations, stories and case studies, and the discussion questions each week included opportunities to share perspectives on what recommendations advocates would like to see being made by the DRC, in relation to the topic in focus.

Identifying details have been removed from the edited transcript below. Participants in each session are identified as advocates from their State and Territory, and are also numbered, where multiple advocates from that jurisdiction took part. Participants were informed that sessions would be recorded to capture their insights and observations. Care has been taken but errors may exist in the transcription.

DANA would like to acknowledge the Traditional Owners of the various lands around Australia from which advocates participated in these virtual meetings and pay our respects to Aboriginal and Torres Strait Islander Elders, past, present, and emerging.

DANA would also like to acknowledge the time and generosity of participating advocates from a diverse range of advocacy organisations around Australia, and the funding of the Australian Government Department of Social Services for DANA to provide DRC systemic advocacy support. Visit www.dss.gov.au for more information.

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Transcript of Zoom discussion – 26 October 2020

How do people with disability experience violence, abuse, neglect and/or exploitation in Australia’s criminal justice systems?

[NSW Advocate]:

For people with intellectual disability, it starts from the very beginning, often not having the support they need to help them keep out of trouble and the assumption that if someone gets into trouble it is inherently their fault, as opposed to the lack of appropriate supports being provided through the NDIS or otherwise. The police all too often do not have the skills or willingness to respond to a person’s intellectual disability, assuming they are aware of it in the first place. And that all too often leads to problems escalating: a person is having a blue with a neighbour, the police get called, the police arrive and use formal language that the person does not understand. The person gets agitated and anxious and police respond to that in an authoritarian way. The person gets more anxious and agitated and before you know it the person is in trouble not just for the general issue but for resisting arrest and assaulting a police officer as well.

The court system, especially in the local courts, is so rushed and legal aid solicitors have enormous caseloads and often wouldn’t recognise or respond to a person’s disability or provide appropriate communication and support and so on through the system. At all levels there are major issues of disadvantage and I would argue that is a matter of systemic neglect and in some cases, abuse by police, correctional officers, or whoever.

[VIC Advocate 1]:

I have worked with several clients in criminal justice matters, sometimes they have witnessed or are a victim of crime, but more often they are caught up in the criminal justice system. Police are ill equipped and sometimes lack willingness to understand the person’s disability. I am working with a range of people with disability: intellectual, ABI, autism, sometimes psychiatric or psychosocial. Police are often not understanding their basic requirements to have an independent third person when interviewing. It does not matter whether that person is the witness, victim, or perpetrator.

They can become quite aggressive and escalate the behaviour, and often come in with a predetermined outcome as to what they perceive has happened.

I’ve seen in a couple of instances in accommodation facilities where there are semi-independent living arrangements, perhaps designed to provide housing for people with ABI for example, where there are behaviours and the support worker service may be delivering services around physical

support needs but lack very little insight into cognitive impairment, behaviours and communication difficulties.

I have seen one person where there are intervention orders in place by the accommodation's support worker service against a resident, because they cannot manage the behaviours. We are talking about long term intervention orders here. And constantly goading that resident to get them to breach the intervention order where that person has ended up in the criminal justice system, where they should never have ended up in the first place. This person needs support with communication and managing their upset and being able to express their distress about things quite clearly.

Another resident had been left in a standing frame for too long and there was an accident as a result. That resident sustained two broken legs and my client was trying to raise the issue and they breached him for going and speaking to him. I have serious concerns when we have service providers using an intervention order system to manage behaviours. That they are being paid to support that person to self-regulate their emotions etc and now we have someone who is in the criminal justice system. The police arrived at that with a predetermined view on what had happened. They were not prepared to spend the time communicating with this person and it just escalated from there. Then he was detained and remanded. He had his communication device, walking frame, and mobility aids removed by Corrections. It is just appalling, there is no way to describe this in any other manner.

And then you get to court level where often the magistrates are not understanding disability, so we have it right from the service provider, to police, to corrections, to court. And the court saying 'well I would be upset if I received that many emails too'... but that's the way that person communicates with oral communication difficulties, they needed to email but needed to send a short email, so broke those emails down. So of course, it looks like you have been bombarded. But a lack of understanding of that, and on that basis a magistrate determined that this person was breaching the intervention order and was found guilty. So, it is this lack of understanding on a range of levels. On the flip side, I'm seeing in Victoria in the Magistrates Court level, the assessment and referral court system where a person who is engaging in ongoing offending behaviour (who meets the eligibility criteria) comes into this assessment and referral court process. I am finding my engagement so far with that has been quite positive in terms of what I am seeing happening. It is a specialist court, like the Koori Courts or the Drug and Alcohol Courts. It looks at what is coming from this person's disability that is contributing to this person's offending behaviour and what supports can be put in place.

What changes would help people with disability avoid the criminal justice system in the first place?

[NSW Advocate 2]:

I would challenge that second question about avoiding the criminal justice system because definitely in the DRC's definition of the criminal justice system that includes people who are witnesses, and includes people who make complaints. So often because people with disability are

the victims of crime we would like to see more people with disability engaging with the criminal justice system rather than avoid it, as it is something that becomes more supportive of them.

Just one thing that has come up on a couple of occasions with people that I have supported is the interview technique, the way that an officer will sit down and interview somebody who has experienced violence or abuse or has in some other way, come into contact with the police. How that interview process takes place can make a huge difference to the kind of evidence and the kind of understanding that the criminal justice system will gain from what is actually going on for somebody with disability. I heard one person talk about the difference it made to have somebody who took the time to go through and ask the questions in a way that the person was able to understand and best respond to and I think that's one of the primary ways that will allow people with a disability to participate on an equal footing with others in the criminal justice system.

[SA Advocate]:

I would just like to echo a few of the points that [VIC Advocate] and [NSW Advocate] brought up. The fact that part of the contributing factor to people entering the criminal justice system in a negative sense is support and not appropriately managing behaviours. Some of the points we've come across regularly is people, who are unable to fully convey what their needs and wants are, use behaviour as a method of communication, and if the underlying issue is not addressed the behaviour just escalates. That will eventually escalate to calling the police.

The other thing I would mention in terms of [NSW Advocate], I agree that there should be more support for people to enter in terms of either witnesses or victims because a lot of the prevailing attitude around how the justice system approaches that is, firstly, in order to access the court or justice system there's a prevailing sense that there needs to be enough evidence to prosecute. So a lot of the time when being interviewed by the police or even getting to the prosecution stage, a person with an intellectual disability will be falsely judged as either not telling the truth or, because they can't necessarily remember things in particular order, such as sequence of events or time concepts that people with an intellectual disability can struggle with, there's not enough support to proceed, and if there's very little chance of it going through they just get denied access to any sort of justice.

I would also note that in terms of what we found, just getting access to the justice system can be frustrated by, particularly in closed environments such as group homes, a particular mechanism of internal investigations. If the perpetrator of the violence or abuse is a group home staff, there is a lot of: we investigated ourselves and found nothing wrong. Often without external support, which can be physical in terms of having access to a phone to report, or going to a police station, they can't further escalate to the justice system and the support providers are unlikely to provide support to do themselves in. I think there is a whole range of issues within the criminal justice system.

In terms of some things that do good I have heard a story from one of our advocates. A person was being interviewed by the police and the police were made aware the person had an intellectual disability, and they had an actual process for that. It was a specialised police officer, and the

advocate was able to go in. A protocol was designed early on in the piece that allowed the advocate to indicate to the police interviewer that they wanted to provide clarification or ask a question etc and the advocate and police officer would leave the room so as not to influence the witness. The advocate said that was a positive experience.

The last point I would make in terms of the criminal justice system is we have had a couple of incidents of people who, due to their marginalisation and mental health issues such as anxiety, have called the police for seriously legitimate reasons but ended getting to the point where the police have charged them with making a false report etc. This is despite having been told in multiple conversations that if you feel unsafe to call the police. A person with an intellectual disability does not necessarily have the insight to determine what is a genuine emergency and what is not. Quite often, once that has been brought to attention, advocates can work things out with police to best strategize and manage. But then it falls into the issue of the plans not being implemented because either they are not circulated or the person you are dealing with moves on. I think that summarises a lot of the broad issues that we have faced and raised with the DRC.

What is being done or should be done to encourage effective investigation and reporting of violence, abuse, neglect, or exploitation in the criminal justice system when it occurs?

[NSW Advocate 2]:

One of the things that keeps coming up is the poor reporting processes. I've had one person talk about how when they had trouble with police and they put in a complaint to the law enforcement conduct commission that complaint was then referred back to the same police station where the problem occurred. So, there is a need for some independence in investigation, particularly if there are allegations against policing in some form.

[VIC Advocate 1]:

It is not so much the reporting but done on a more informal basis, we are engaging more and more with the proactive policing teams. Particularly where there are some ongoing issues, and they are not one-off types of incidences we will liaise (with the client's permission) with proactive policing. We had one young person who is engaging in high risk-taking and offending behaviour (entering railway space under trains and a lot of things like that), so proactive policing have been really good in, where appropriate, being on the care team to discuss approaches. They listen to the psychologist and other allied health professionals. These things are not done to lay charges but to address down-the-line behaviours of that individual, to address that so that the risks are not there.

And that's included training, so the proactive police officer appointed will go out to transit police teams and they will go with the person with a disability, and they will introduce the person with a disability to the different police teams who they can go and ask for help when they are feeling escalated. They also explain the responsibilities and what will happen when they do not stop doing something they need to stop doing. It is done in a very wholistic approach. And it worked quite well for this person.

The proactive policing team also liaise with light metro rail to get data on the number of incidences, so we are able to measure is the behaviour tapering off and fundamentally, is it addressing the safety of that person with a disability. At the same time, it is reducing the offending behaviour and those reports then go to the assessment and referral court as well. So that has worked very well. We also work with the police (with the client's permission) to put information about their disability and how to communicate with that individual when something happens, into their system. The person that may be ringing frequently may not be making pest calls, they may just not know what to do and are seeking help. So instead of wanting to charge, let us look at what is happening. The police put as much information as they can into their system so that police going out in vans understand that person and how to communicate with that person. It is hit and miss because it is only as good as the police officer going out. Some will read it, some will not...but it is working when it is read and when police engage with it and follow what is said. It is more of a preventative measure as opposed to having to get to the point of reporting. It is working here and there, and we are seeing good results.

[DANA CEO, Mary]:

Regarding examples advocates are talking about, what we want the Royal Commission to do is to pick up the stories that show when systems have failed people. Thinking on the other side of that about the recommendations that the Royal Commission will make, is the frame that we want to be thinking through the way the Royal Commission want to gather evidence. For them having a witness at a hearing, or advocates and other people putting in submissions that clearly show the things that have happened both in the negative and where some of these systems are working so they can then make clear recommendations to other states and territories police forces who are not using that kind of proactive policing approach or where it is not working as well, for them to pick it up as well.

I am trying to think about the systemic advocacy that must go along with this to get the issues to the Royal Commission, so the Royal Commission get them into their final report. No matter what it is that the Royal Commission gets into their reports and what recommendations they make it will still be up to the advocates to push for those recommendations to get implemented. So, there will still be even more than the normal advocacy work, all the systemic advocacy to push for those things to happen. That will not go away just because the Royal Commission says something is important. The Government might or might not act on it straight away. It depends on every single state govt picking up what should their police force do.

Part of this is about passing all of this onto the Royal Commission and that is the purpose of getting advocates together to talk about these issues in this context. It's about thinking about all of this systemic advocacy that's required to get the good examples that are happening in each state and territory, whatever they are, to have them shared widely so that even while we're waiting for the Royal Commission to do their processes we're still taking the opportunity as state elections happen and various other opportunities arise. How does the advocacy sector get its head around that and start to try and put a framework on it in some way? It is not enough for us to shovel everything to the Royal Commission and all advocates go back to individual issues they are working on.

Anybody who is interested in how we frame up all of the systemic advocacy that needs to be acted on going forward please feel free to get in touch and help do some thinking about what we do. Do we do it by state and territory, by system, by what, it is a big piece of work. The other national peaks and organisations would need to be involved. We are only at the beginning. Contact Siobhan or myself if you have any thoughts about where we take some of these issues and how do we plan it in a way that allows everyone to understand what is being done and what role they can play in it.

[VIC Advocate 1]:

It is a huge task, it is complex. Corrections alone in Victoria is an issue for people without a disability when they enter the justice system, and they are in corrections. It is magnified for people with a disability. They seem to be a law unto themselves. The courts will say that once someone leaves the court system, they are handed over to Corrections and police say a similar thing and it is a difficult system. That is a huge task, looking at Corrections alone, state by state and territory by territory.

There is some good stuff in policing in Victoria but there is some terrible stuff too. Is it addressed by Corrections under each heading etc? It is an important thing for us to address because we are trying to tell the stories and get that information to bring about change in the best way possible and for the current systems that are broken, where there are things that are working well, for them to be picked up and replicated. How we can all come together with these services and work...

Sometimes proactive policing is working well but sometimes it comes down to the individual police officer and the station. If there is a culture at a police station, there is very little we can do to change it and to get inside to help educate and upskill etc, but other stations are fantastic. And that is huge, that could just be within a couple of catchment areas. Police stations within the one LGA [Local Government Area] could all be different. I have had instances where I have said: 'don't go to that police station to lodge your family violence application, go to this other one because you will get more sympathy there'. We should not have to be doing that, we want more consistency. How we get that is a big question.

[NSW Advocate 2]:

Part of the complexity is the fact that justice has a justice budget, and a lot of the stuff is greater than that especially when you look at police attitudes to people who live in social housing and all of those issues come out. Then the whole overlap with health where police will send somebody to a psych ward. Even somebody who experiences domestic violence might find themselves in a psych ward undergoing chemical restraint and those kind of things, so it becomes complex because people want to fit everything into the one budget line and a lot of the stuff isn't. Again, it is attitudes and if you change attitudes you are going to change a lot of other things.

There needs to be that circuit breaker, there are so many stories where: I got given this label by a police officer, or child protection services, somewhere and that label has continued to follow me. Because I have that label the courts, police treat me this way, and that's where there needs to be the ability to have an independent reporting process, assessment, so that I don't walk into every court room or police station wearing the same clothes. I'm able to go to somebody who can help me to have different clothes or have someone speak for me in a way that means I'm not tainted by

that report my abusive husband put in about me 25 years ago that has followed me ever since. That independent reporting can be the circuit breaker that allows somebody to start to be free of the system.

What existing (or potential) role is there for access to independent advocacy in the achievement of better justice outcomes for people with disability?

[SA Advocate]:

On the topic of advocacy, the initial/first barrier that needs to be overcome when someone goes to a police station to make a report or is a victim of crime is for someone to be assigned an advocate, they need to be recognised as in need of an advocate. A lot of people with intellectual disability will not identify readily that they have an intellectual disability which means the police just think this is another so and so person and treat them accordingly. This is one of the primary issues that has to be dealt with, how we do that other than an attitudinal change from police not jumping to the worse conclusions to start with, I don't really have too much insight there.

Advocacy is a great benefit to anyone interacting with the justice system in terms of making sure they are treated right, their voice is heard, and helping them understand the process. One thing we have noticed, especially in terms of dealing with criminal justice issues is it is important for the advocate to have a relationship with the person they are advocating for, especially on topics where they have been the victim or they think they might get in trouble, as they may or may not be comfortable with a person who rocks up out of nowhere and says I'm your advocate. In cases where a person doesn't have a pre-existing advocate there should be some sort of mechanism to allow the advocate and person to develop at least the beginnings of a relationship so that they can understand the person and better help guide them through the process, whichever path that might take. In terms of SA we are always at capacity and cannot get to everyone, so never going to say we do not need more funding.

[VIC Advocate 1]:

We are often having to triage and choose in terms of which person gets our support and we must look at, will they have a legal practitioner supporting them at court etc. We are small agencies, and we must make a call on who gets our support at any given time, so funding for advocacy will be important. It would increase the ability to provide support to more people.

The legal profession, not police or courts, but the lawyers, need to gain some skills in how to communicate. The one good thing I see out of the assessment and referral court, is a consistent lawyer that is there right from start to end, and they spend time with communicating. We are trying this a little bit in places like VCAT [Victorian Civil and Administrative Tribunal] in terms of some community legal services are trying it, having a liaison person at VCAT for example, and that's not criminal justice, but why can't we have a disability liaison that is independent of the court workers and court system based at courts? They are very busy places and when I'm sitting in the public gallery with a client I can see a multitude of people with disability who are not getting support, wouldn't know how to ask for support and probably wouldn't know what an advocate is.

The legal profession understanding indicators that someone may have a disability, would be a starting point. Upskilling them, having a liaison person, we have family violence liaison now at courts, why can't we extend this to disability liaison? Some people may be for or against it, there could be issues, but it needs to be explored further. I have seen from Villamanta Disability Rights Legal Service had for a while a trial period at VCAT and members at hearings were saying 'we think this person needs some support to understand what is happening' and they were referring them to the liaison person that was there. It was once a week for a trial period.

I have thought of having disability liaison at hospitals as well. These are all institutions within our society that do not have supports.

[NSW Advocate 2]:

If we as advocates can see that people with disability do need or benefit from a liaison service in the court system or legal system using an insurance model mentality they would be reasonable and necessary supports which would be very cumbersome and difficult to program into somebody's individual support plan. But it would make sense from an insurance model to have an NDIS funded disability liaison office at courts so that it would be a streamlining of reasonable and necessary supports given at point of need.

[DANA CEO, Mary]:

The NDIA have put hospital liaison officers in some of the bigger hospitals. They are just starting Justice Liaison Officers, do not know how many or where they are going to be situated. Do not know what the intention of them is, will follow up.

[VIC Advocate 2]:

It is a reasonable thing to have the support in the courts for people with disability. Organisations like domestic violence have their own people in the courts to help people who have undergone domestic violence to get through the justice system. If there is a need for this, regarding people with disability, how do we push that so that the organisations who do the funding can support it. Are we as a group able to find a solution?

[DANA CEO, Mary]:

There were positions in SA, something like Communication Officers that were brought in that operated for a couple of years and then stopped again. Then Tas attempted to copy the same idea and piloted them very briefly. That was in the court system, does that still happen in SA, [SA Advocate]?

[SA Advocate]:

The example I brought up earlier was an example from that scheme. Whether or not it still operates I am not sure. We have not had anyone go through the process recently, so no firsthand feedback.

On the topic of embedding specialists, it's a good idea in theory but it needs to be underpinned by a general overall upskilling in knowledge and awareness, because the main issue that occurs when you instil a specialist is that as soon as someone gets one whiff of 'this is for the specialist' it just

gets handed over and caseloads explode. There is no point in having a specialist that cannot be accessed. So, while it is a good recommendation, a degree of caution needs to be noted that it needs to be a more systemic change rather than passing the buck.

[DANA CEO, Mary]:

Good point, you have to be careful what you wish for because using the police as an example, if there was the occasional specialist nice police officer that gives all the rest of them full permission to be as rough as they like because they're not the official nice guy. So, the thinking about what it is we do systemic advocacy for is that we would argue strongly for the entire police force to be better trained in their initial training and have regular professional development in working with people who have disability. Especially if the specialist response is a tiny, tiny little under-resourced thing, then it is not going to be a solution anyway.

Comments typed in Zoom chat function:

[VIC Advocate 1]:

Another issue relates to those who have gone to trial - found guilty. Sentenced to a period of detention. The period of detention is complete yet some [people with disability] continue to be detained because there is a lack of accommodation and other services...

Multi-faceted approach definitely needed [SA Advocate]