



Law Council  
OF AUSTRALIA

# National Disability Strategy

Department of Social Services

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*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its Equal Opportunity Committee, Indigenous Legal Issues Committee, National Elder Law and Succession Law Committee, National Human Rights Committee, the Law Society of New South Wales and the Law Society of South Australia, in the development of this submission.

## Executive Summary

1. There are approximately 4.4 million people with disability in Australia, each with their own unique story.<sup>1</sup>
2. The current National Disability Strategy 2010-2020 sets a positive vision for an Australian society that enables people with disability to fulfil their aspirations and potential as equal members of the community. The full participation and inclusion of people with disability benefits all Australians.
3. The Law Council of Australia (**Law Council**) welcomes the opportunity to participate in stage 2 consultations for the next 10-year National Disability Strategy (**Strategy**). It acknowledges the ongoing relevance of the current strategy's vision and associated outcomes, but considers that a stronger approach to implementation is needed.
4. While the Law Council's submission has a particular focus on proposed outcome 3 – rights protection, justice and legislation for people with disability – it has regard to the interdependence of the six outcome areas.
5. At the outset, the Law Council underlines that the Strategy is the central mechanism for Australia's implementation of the Convention on the Rights of Persons with Disabilities (**CRPD**).<sup>2</sup> Accordingly, the new Strategy should expressly reflect Australia's obligations under the CRPD in protecting, promoting and fulfilling the human rights of people with disability.
6. The Law Council supports the proposal for a stronger emphasis on community attitudes. However, the Strategy must clearly outline how it intends to achieve this aim. In the Law Council's view, legal structures such as an improved anti-discrimination law framework, including through the introduction of positive duties, as well as the adoption of a federal human rights act would help foster ongoing attitudinal change. The Law Council also highlights the potential of organisational initiatives such as peak body forums to allow best practice approaches to be shared, and improved government procurement practices which give weight to organisations which employ people with disability.
7. The Law Council also supports the proposal to seek to enhance government accountability, recognising that disability inclusion should be the work of all portfolios. It is essential that the Strategy not only sets out the roles and responsibilities of government generally, but identifies specific actions, timeframes and actors (eg, portfolios) so that outcomes can be measured. To this end, the Law Council supports the proposal for targeted action plans for each outcome area.
8. In terms of rights protection, justice and legislation, there are strong examples of initiatives to support people with disability to participate in the justice system on an equal basis with others. Where they have not already done so, Commonwealth, state and territory governments should implement Disability Justice Plans to champion cultural change and practical improvements across the justice system.
9. Within the criminal justice system, people with disability face worryingly disproportionate outcomes, as well as many systemic and structural barriers to accessing justice. Legislative reforms, better access to legal assistance services, as well as preventative and rehabilitative critical support services to address the underlying factors which cause

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<sup>1</sup> The Australian Institute of Health and Welfare (**AIHW**) 'People with disability' (2020) <<https://www.aihw.gov.au/getmedia/ee5ee3c2-152d-4b5f-9901-71d483b47f03/aihw-dis-72.pdf.aspx?inline=true>>.

<sup>2</sup> Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008).

many people with disability to become embroiled in the system in the first place, are all needed to overcome these barriers.

10. Solutions include a review of current laws concerning unfitness to plead, as well as evidence laws to allow and prompt a more flexible approach to adducing evidence from witnesses with complex communication needs, the expansion of communication intermediary schemes, the adoption of a National Justice Interpreter Scheme and targeted measures to train all parts of the criminal justice sector – including the police, judiciary, legal practitioners and corrections - on better identifying and responding to the needs of people with disability. Federal, state and territory governments all have a role to play in addressing these issues, including with an emphasis on regional, rural and remote areas. These actions must address the intersectional needs of First Nations People with disability – including through better diagnosis, community-controlled, multi-disciplinary service responses, justice reinvestment models, throughcare models, and access to culturally appropriate bail and parole accommodation and support.
11. Other actions considered in this rights protection and justice sphere include reforms to enhance the accessibility of Australia’s anti-discrimination framework, a shift towards formal recognition of supported decision-making, nationally consistent laws dealing with individual decision-makers, and removing barriers that prevent people with disability from participating in jury service.
12. It is important that there is a robust oversight mechanism to monitor implementation of the new Strategy. While government reporting is fundamental, in the Law Council’s view there should be a greater emphasis on independent monitoring and evaluation to provide a full picture of progress and where gaps lie. Consideration should be given to the Australian Human Rights Commission (**AHRC**) to perform this function.
13. The new Strategy must also provide support for a strong disability-inclusive research agenda. The Law Council is concerned by the dearth of good data and research that is needed to improve mainstream programs and policies which affect people with disability.
14. Finally, the Law Council acknowledges and welcomes the Australian Government’s efforts to involve and engage people with disability during consultations leading to the next Strategy. It is fundamental that people with lived experience of disability are involved on an ongoing basis with its design, implementation and evaluation. Intersectional perspectives are critical in this regard. Appropriate funding should be made available under the Strategy for the full and effective engagement of diverse groups of people with disability including through their representative organisations.

## Introduction

15. The Law Council is grateful for the opportunity to provide a submission to the Department of Social Services in relation to Stage 2 consultations for the new 10-year Strategy. This submission responds to the eight guiding questions identified in the Position Paper.
16. The Law Council is conscious of the significant impact that the 10-year Strategy will have on the lives of people with disability, including through their formative years. For example, when the next Strategy ends, a 10-year old child with disability will be 20 years old – a fully developed adult.
17. In preparing its submission, the Law Council has had regard to its previous submissions, including the:
  - 2020 [submission](#) to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**) in response to its Issues Paper – the *Criminal Justice System*;
  - 2019 [submission](#) to the Australian Human Rights Commission (**AHRC**) in response to its Discussion Paper – *Priorities for Federal Discrimination Law Reform*;
  - 2019 [submission](#) to the Attorney-General’s Department in response to its Review of the Australian Human Rights Commission Regulations 1986 and the Disability Discrimination Regulations 1996; and
  - 2017 [submission](#) to the Disability Discrimination Commissioner in response to its National Consultation Paper – *Shaping our future: discussions on disability rights*.
18. In addition, the Law Council has also had regard to its [submission](#) on the draft terms of reference to the Disability Royal Commission. It anticipates providing a broader submission to the Disability Royal Commission shortly. The Law Council considers it important for the development of the next Strategy to have careful regard to the Disability Royal Commission’s emerging findings and recommendations, as well as the recommendations of the Royal Commission into Aged Care Quality and Safety, where pertinent to people with disability.
19. This submission is also informed by the Law Council’s ‘Justice Project’: a comprehensive review of the state of access to justice in Australia for those identified as facing significant economic and other disadvantage. The Justice Project focused on 13 marginalised groups, including people with disability.<sup>3</sup>
20. This consultation is particularly timely, coinciding with the COVID-19 pandemic. The pandemic highlights the ongoing need for a disability strategy to guide governments in ensuring that all their policies, programs and services consider the needs of people with disability and remove barriers to inclusion.

## Overarching comments

21. The existing Strategy helps Australia fulfil its obligations under the CRPD by establishing a framework to promote, protect and monitor the implementation of the Convention, as required under article 33(2). The new Strategy must continue to make specific reference to Australia’s international human rights obligations under the CRPD.

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<sup>3</sup> Law Council, Justice Project (Final Report, August 2018).

22. In addition, development of the new Strategy should be informed by the ongoing dialogue between the Australian Government and the UN Committee on the Rights of Persons with Disability (**UN Committee**). It should aim to address key failings identified by the UN Committee in its consideration of Australia, in particular those concerning national implementation and monitoring of the CRPD pursuant to article 33.<sup>4</sup>
23. The new Strategy should also be informed by relevant findings of the Productivity Commission Review of the National Disability Agreement (2019).<sup>5</sup> This includes an identified failure to outline clearly the roles and responsibilities of governments through a performance reporting framework which measures progress towards improving outcomes.<sup>6</sup>
24. While the new Strategy relies on government and community involvement, stage 1 consultations on the new Strategy found that almost half of participants had not heard of the existing Strategy.<sup>7</sup> To achieve its vision, it is critical that effort is made to communicate the new Strategy across all sectors of the community.
25. The development of a new Strategy provides an opportunity to address the limitations of the current Strategy. Although the existing outcome areas and ‘areas for future action’ remain relevant, in the Law Council’s view, improvements that should be made to enhance government accountability include:
- clearly describing roles and responsibilities by identifying specific and robust actions, actors, and timeframes;
  - providing a rigorous outcomes and implementation framework to track progress and hold governments and service providers to account;
  - incorporating an independent oversight and monitoring mechanism to monitor and report on progress; and
  - a commitment to the collection of relevant data to enable effective monitoring and evaluation of policy and programs.
26. Structural issues relating to the delivery of the existing Strategy must also be addressed. While the national Strategy is overseen by the Department of Social Services, ‘solutions do not sit in single departments’.<sup>8</sup> One of the stated purposes of the Strategy is to ‘guide government activity across mainstream and disability-specific areas of public policy’<sup>9</sup> and it must be made clear how the Strategy is embedded in other Commonwealth portfolios.
27. At the federal level, policy responsibility for people with disability is somewhat nebulous. Senator the Hon Anne Ruston, leading consultations on the Strategy, is the Minister for Families and Social Services. Under Senator Ruston, the Hon Stuart Robert MP is the Minister for the National Disability Insurance Scheme (**NDIS**), but for the 4.4 million people in Australia who live with disability, more than 85 per cent will not be eligible to become

<sup>4</sup> UN Committee, *Concluding observations on the combined second and third reports of Australia*, UN Doc. CRPD/C/AUS/2-3 (15 October 2019).

<sup>5</sup> Productivity Commission, *Review of the National Disability Agreement* (2019) <<https://www.pc.gov.au/inquiries/completed/disability-agreement/report>>.

<sup>6</sup> *Ibid*, 6.

<sup>7</sup> Department of Social Services, *Right to opportunity – consultation report to help shape the next national disability strategy* (Report, December 2019) <[https://www.dss.gov.au/sites/default/files/documents/12\\_2019/nds\\_beyond2020\\_fullreport-161219\\_0.pdf](https://www.dss.gov.au/sites/default/files/documents/12_2019/nds_beyond2020_fullreport-161219_0.pdf)>.

<sup>8</sup> Professor Anne Kavanagh, Co-director and lead investigator at the Centre of Research Excellence in Disability and Health, speaking at the National Disability Strategy: Beyond 2020 (Webinar, 24 September 2020) <<https://credh.org.au/news-events/past-events/national-disability-strategy-webinar/>>.

<sup>9</sup> Council of Australian Governments, *National Disability Strategy 2010-2020* (13 February 2011) <[https://www.dss.gov.au/sites/default/files/documents/05\\_2012/national\\_disability\\_strategy\\_2010\\_2020.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf)>.

NDIS participants.<sup>10</sup> By way of comparison, New Zealand has a Minister for Disability Issues, with statutory responsibility for establishing and reporting on the New Zealand Disability Strategy.<sup>11</sup>

28. The current lack of structural responsibility in Australia means that people with disability may be at risk of falling through the cracks. This was illustrated by the Federal Government's initial emergency response plan to the COVID-19 pandemic which made no mention of people living with disability, although this was later rectified.<sup>12</sup> In the Law Council's view, there is a need for a stronger 'universal design' approach to mainstream policy and law development to address the needs of people with disability. Consideration should be given to the establishment of an Office of Disability Strategy, placed in a central agency, as recommended by the Senate Standing Committee on Community Affairs in 2017<sup>13</sup> and supported by the UN Committee,<sup>14</sup> to ensure effective coordination.

## Response to questions

### 1. During the first stage of consultations we heard that the vision and the six outcome areas under the current Strategy are still the right ones. Do you have any comments on the vision and outcome areas being proposed for the new Strategy?

#### Vision

29. The Law Council suggests rewording the proposed vision of the new Strategy, to recognise that 'potential' is informed and inspired by 'aspiration':

*An inclusive Australian society that enables people with disability to fulfil their **aspirations and potential** as equal members of the community.*

#### Outcomes

30. As outlined in the Position Paper, the six outcome areas of the current strategy remain valuable and provide a sound basis for action:
- Economic security;
  - Inclusive and accessible communities;
  - Rights protection, justice and legislation;
  - Personal and community support;
  - Learning and skills; and
  - Health and wellbeing.

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<sup>10</sup> Department of Social Services, *Right to opportunity – consultation report to help shape the next national disability strategy* (Report, December 2019) <[https://www.dss.gov.au/sites/default/files/documents/12\\_2019/nds\\_beyond2020\\_fullreport-161219\\_0.pdf](https://www.dss.gov.au/sites/default/files/documents/12_2019/nds_beyond2020_fullreport-161219_0.pdf)> 7.

<sup>11</sup> *Public Health and Disability Act 2000* (NZ) s 8.

<sup>12</sup> Australian Government, 'Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19) (2 February 2020) <[https://www.health.gov.au/sites/default/files/documents/2020/02/australian-health-sector-emergency-response-plan-for-novel-coronavirus-covid-19\\_2.pdf](https://www.health.gov.au/sites/default/files/documents/2020/02/australian-health-sector-emergency-response-plan-for-novel-coronavirus-covid-19_2.pdf)>. See also *In the Matter of a Royal Commission into Violence, Abuse, Neglect And Exploitation Of People With Disability* (Transcript of proceedings, 21 August 2020) P-315-316.

<sup>13</sup> Senate Community Affairs References Committee, Parliament of Australia, *Delivery of outcomes under the National Disability Strategy 2010-2020 to build inclusive and accessible communities* (Report, November 2017) recommendation 2.

<sup>14</sup> UN Committee, *Concluding observations on the combined second and third reports of Australia*, UN Doc. CRPD/C/AUS/2-3 (15 October 2019).

### Outcome 1

31. With respect to outcome 1 – *economic security* – the Law Council notes that people with disability are often underrepresented in the workforce. Fifty-three per cent of working-age people with disability are in the labour force, compared to 83 per cent without disability.<sup>15</sup> Workforce participation is key to economic security and results in greater social inclusion. Emphasising workplace participation serves to highlight that employment is a realistic and achievable goal for people with a disability. The Law Council therefore suggests that outcome 1 is amended as follows: ***Economic security and workforce participation***.

### Outcome 3

32. The Law Council particularly highlights the significance of outcome 3 – *rights protection, justice and legislation*. There is a need for concerted, specific actions to support this outcome, including:
- addressing barriers preventing people from accessing the legal system including the accessibility of court premises and processes, the adversarial nature of judicial proceedings, and lack of aids, accommodations, adjustments and critical support services;<sup>16</sup>
  - promoting disability training for justice system personnel who are likely to have close contact with people with disability, including the judiciary, legal practitioners, police and corrections officers;
  - strengthening Australia’s statutory protections such as anti-discrimination and human rights legislation;
  - ensuring supported-decision making safeguards for those people who need them are in place; and
  - removing legislative barriers that prevent people with a disability from progressing past the summoning stage of the jury selection process.

These are discussed further below.

33. Under outcome 3, it is also particularly important to address the striking over-representation of people with disability in the criminal justice system, both as victims and offenders. Currently, little is known about the prevalence of people with physical disabilities in prison but studies have found that 25-30 per cent of people in prison have borderline intellectual disability, and 10 per cent have a mild intellectual disability.<sup>17</sup>
34. First Nations people with disability are noticeably over-represented, with some estimates that this group is 14 times more likely to be imprisoned than the rest of the population.<sup>18</sup> As identified in the current strategy, actions must support people with disability with heightened vulnerabilities in any contacts with the criminal justice system, with an emphasis on early identification, diversion and support.

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<sup>15</sup> AIHW, *People with disability in Australia 2019* (Sep 2019) 17.

<sup>16</sup> These concerns are set out in Law Council, Submission to the Disability Royal Commission, *Criminal Justice Issues Paper*, (17 August 2020).

<sup>17</sup> The Australian Institute of Health and Welfare (AIHW), *The health of Australia's prisoners 2018* (May 2019) 77 citing Hellenbach M, Karatzias T & Brown M 'Intellectual disabilities among prisoners: prevalence and mental and physical comorbidities' (2017) 30(2) *Journal of Applied Research in Intellectual Disabilities*, 230–41.

<sup>18</sup> Human Rights Law Centre, Submission to the Disability Royal Commission, *Stopping solitary confinement*, (31 March 2020) citing Australian Civil Society CRPD Shadow Report Working Group, *Disability Rights Now 2019*.

35. The Law Council also acknowledges the inextricable links between the six proposed outcome areas. For example, legislation and access to justice play a critical role in ensuring:
- economic security, through non-discrimination in employment; and
  - educational outcomes, through inclusive schools.
36. Additionally, it is well known that legal (outcome 3) and health issues (outcome 6) coalesce, hence the benefits of multidisciplinary joined-up solutions such as health-justice partnerships (**HJP**). Since 2012, health and legal organisations in Australia have been building HJP collaborations to improve their responsiveness and effectiveness in meeting health and legal needs. Due to established interaction and trust, many non-legal professionals are often best placed to identify legal issues (as well as other relevant issues such as disability or language barriers) at an early stage and to make appropriate referrals to legal services before issues arise or escalate. These services reduce burdens on clients to locate multiple levels of help in fragmented service environments, to re-tell their stories to different professionals, to identify their legal problems and to overcome their distrust of the justice system.<sup>19</sup> Such approaches may be particularly important for people with disability, including those who are frequently in contact with health services.
37. The Law Council considers that the next Strategy must reflect the importance of access to appropriate housing, on outcome 3, which is also closely related to better justice outcomes. For example, without accessible bail hostels that have the resources and infrastructure to accommodate the needs of people with disability, there is a risk that bail will be denied and, consequently, lengthy periods will be spent in prison on remand.<sup>20</sup> Once in custody, people with disability are less likely to be granted parole as they are often unable to formulate an appropriate post-release plan, including finding suitable and secure accommodation.<sup>21</sup> The Law Council's Justice Project indicated that there is an insufficient availability of disability-responsive post-release accommodation.<sup>22</sup> Homelessness in turn is likely to increase a person's interactions with the criminal justice system.<sup>23</sup>
38. Moreover, a lack of appropriate accommodation for people found unfit to stand trial and forensic patients has resulted in prison being used as an alternative accommodation option. This is very problematic as prisons are unable to accommodate the complex needs of people with disability.<sup>24</sup> Given inevitable advances in technology over the next 10 years, actions under outcome 3 should also address the issue of equality of access to technology. While the Law Council wishes to see the benefits of new technology realised, they must be designed with accessibility in mind, to avoid further disenfranchisement and exclusion of people with disability.<sup>25</sup>

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<sup>19</sup> Law Council, Justice Project (Legal Services Chapter, Final Report, August 2018) 78 citing Productivity Commission, *Access to Justice Arrangements*, 176-180; Maria Karras et al, Law and Justice Foundation of New South Wales, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW* (May 2006) 98; Victoria Legal Aid, *Submission No 18*.

<sup>20</sup> Law Council, Submission to the Disability Royal Commission, *Criminal Justice Issues Paper* (17 August 2020) 52.

<sup>21</sup> *Ibid*.

<sup>22</sup> Law Council, Justice Project (People with Disability Chapter, Final Report, August 2018) 52 citing Office of the Public Advocate South Australia, *Submission No 49*; Queensland Advocacy Incorporated, *Submission No 43*; Mental Health Commission New South Wales, *Submission No 96*; Jesuit Social Services, *Submission No 30*.

<sup>23</sup> Law Council, Justice Project (People who are Homeless Chapter, Final Report, August 2018).

<sup>24</sup> *Ibid* 53.

<sup>25</sup> Law Council, Submission to the AHRC, *Human Rights and Technology* (25 October 2018). See also Law Council, Submission to the AHRC, *Human rights and technology* (21 April 2020).

## Recommendations

- The proposed vision be amended as follows: ***An inclusive Australian society that enables people with disability to fulfil their aspirations and potential as equal members of the community.***
- The current six outcome areas be retained under the next Strategy. In particular, rights protection, justice and legislation be retained as an outcome and be supported by specific actions.
- Outcome 1 is amended as follows: ***Economic security and workforce participation.***
- The Strategy reflect improved access to accessible housing as an important outcome underpinning broader identified outcomes including for people with disability in the justice system.

## 2. What do you think about the guiding principles proposed here?

39. The Law Council considers that the guiding principles proposed in the Position Paper are constructive. Broadly, these are:
- involve and engage;
  - design universally;
  - engage the broader community;
  - address barriers faced by priority populations; and
  - support carers and supporters.
40. However, given the underlying importance of the principles in article 3 of the CRPD these should also be explicitly set out in the new Strategy. These are:
- respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
  - non-discrimination;
  - full and effective participation and inclusion in society;
  - respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
  - equality of opportunity;
  - accessibility;
  - equality between men and women; and
  - respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

### Design universally

41. Universal design is defined under article 2 of the CRPD as 'the design of products, environments, programmes and services to be usable by all people, to the greatest extent

possible, without the need for adaptation or specialised design,' not excluding 'assistive devices for particular groups of persons with disabilities where this is needed.' The Law Council considers it important to examine legal structures which can ensure that this principle is built into mainstream law and policy thinking and design. The role that a federal human rights act, as well as the anti-discrimination law framework, can play in this regard is explored further below.

### **Address barriers faced by priority populations**

42. People with disability often experience cumulative and intersectional disadvantage. The CRPD acknowledges:

*the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.*<sup>26</sup>

43. In relation to the principle of 'address barriers faced by priority populations', the Law Council notes that 'priority populations' are not defined in the current, nor new Strategy. It suggests that the new Strategy include the following groups in the formation of 'priority populations':

- First Nations People;
- people living in rural, regional and remote areas;
- children and young people;
- older persons;
- LGBTI+ persons;
- refugees and asylum seekers; and
- women and girls, particularly within the aforementioned groups.

In addition, regard should be had to the particular needs of NDIS participants, while also reflecting that the majority of people with disability fall outside this group.<sup>27</sup>

44. The Law Council's Justice Project highlights the intersectional disadvantage faced by several of these groups in the context of the justice system. It notes in particular First Nations people who experience higher rates of disability compared to other Australians,<sup>28</sup> and often experience cumulative discrimination. This intersectional disadvantage places First Nations people with disability at heightened risk of an impairment worsening or going untreated over a lifetime.<sup>29</sup>
45. The intersecting disadvantage of women with disability was also outlined in the Justice Project. For example, women who experience intersectional inequality due to disability and gender often experience higher rates of violence and face additional barriers to seeking help and support. This is recognised in the CRPD, which states that 'women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation'.<sup>30</sup>

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<sup>26</sup> Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008) preamble.

<sup>27</sup> AIHW 'People with disability' (2020) < <https://www.aihw.gov.au/getmedia/ee5ee3c2-152d-4b5f-9901-71d483b47f03/aihw-dis-72.pdf.aspx?inline=true>>.

<sup>28</sup> Law Council, Justice Project (People with Disability Chapter, Final Report, August 2018) 4.

<sup>29</sup> Ibid 13.

<sup>30</sup> Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008) preamble.

## Additional principles

46. In addition to the principles set out above, the Law Council suggests the inclusion of a principle along the following lines to integrate national strategies such as 'Change the Story: a shared framework for the primary prevention of violence against women and their children in Australia'<sup>31</sup> and *Respect@Work: Sexual Harassment National Inquiry Report* (2020):<sup>32</sup>
- *is the approach to the policy, process or program trauma-informed and in line with principles that promote gender equality and prevent violence against women and their children?*
47. The Law Council further suggests the inclusion of a principle that promotes accountability and compliance, such as:
- *Is independent monitoring of the progress of the policy, process or program taking place to ensure compliance with objectives?*
48. The proposed guiding principles largely reflect the approaches set out in the current strategy, with the omission of:
- 'life course' – takes into account a person's likely needs and aspirations over their lifetime, paying particular attention to milestones and times of transition; and
  - 'person-centred approach' – policies, programs and services for people with disability are designed to respond to the needs and wishes of each individual.<sup>33</sup>
49. The Law Council considers that both of these approaches remain essential and should be reflected in the new Strategy. For example, in the context of rights protection, justice and legislation, the life course approach provides a holistic understanding of common pathways into, through and out of the criminal justice system of people with disability. This helps reinforce the role of governments at all levels to address this issue, not only state and territory governments, and ensures that policy and program services are targeted to common transitions or trigger points.
50. Similarly, the person-centred approach reinforces the role of joined-up legal and non-legal service responses to reduce the burden on individuals and ensure a comprehensive approach to underlying, as well as legal issues. As highlighted above in the context of HJPs, legal problems are often related to non-legal needs and the potential benefits of multi-disciplinary service approaches for people with disability should be harnessed.

### **Recommendations**

- **Priority populations of people with disability should be defined. These may include:**
  - **First Nations People;**

<sup>31</sup> Australia's National Research Organisation for Women's Safety (ANROWS), Our Watch, VicHealth, *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia* (2015).

<sup>32</sup> The AHRC, *Respect@Work: Sexual Harassment National Inquiry* (2020).

<sup>33</sup> Council of Australian Governments, *National Disability Strategy 2010-2020* (13 February 2011) <[https://www.dss.gov.au/sites/default/files/documents/05\\_2012/national\\_disability\\_strategy\\_2010\\_2020.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf)> 23.

- people living in rural, regional and remote areas;
  - children and young people;
  - older persons;
  - LGBTI+ persons;
  - refugees and asylum seekers;
  - National Disability Insurance Scheme Participants (noting however that the majority of people with disability fall outside this group); and
  - women and girls, particularly within the aforementioned groups.
- Additional guiding principles should be included to reflect:
    - the need for trauma-informed, gender-responsive and family violence prevention in relevant policies, programs and processes; and
    - appropriate independent monitoring to ensure compliance with objectives.
  - Life course and person-centred approaches should be reflected in the new Strategy.

### 3. What is your view on the proposal for the new Strategy to have a stronger emphasis on improving community attitudes across all outcome areas?

51. The Law Council supports the proposal for a stronger emphasis on improving community attitudes, as attitudes inform behavioural change. However, it recommends that the Strategy clearly outlines how it intends to achieve this aim. The Law Council underlines that a change in community attitudes will not be achieved by public campaigning and advertising alone.
52. During national consultations on the new Strategy, Professor Karen Fisher, Social Policy Research Centre of the University of New South Wales, highlighted the need for government led initiatives at three levels to change attitudes: personal, organisational and legal structures.<sup>34</sup> The Law Council agrees that all three are important and particularly emphasises that legal structures are critical to set norms, obligations and drive attitudes in practice. In this regard, it highlights the role of an improved anti-discrimination law framework and federal human rights act.

#### Legal structures

##### *The role of an improved Disability Discrimination Act 1992 (Cth)*

53. The Law Council notes that the Commonwealth anti-discrimination regime, including the *Disability Discrimination Act 1992 (Cth) (DDA)*, provides an important legislative

<sup>34</sup> The AHRC and Centre of Research Excellence in Disability and Health, *National Disability Strategy – Beyond 2020* (Webinar, 24 September 2020).

framework for promoting equality in Australia. However, the framework is in need of reform to enhance current protections and foster ongoing attitudinal change.

54. In this regard, the Law Council supports the introduction of positive duties on all organisations under federal anti-discrimination laws including the DDA, as reflected in its submission to the AHRC regarding its Free and Equal Inquiry.<sup>35</sup> A positive duty would ideally oblige employers to take all reasonable steps to prevent discrimination from occurring, and impose civil penalties for breaches of this positive obligation. One advantage of such a positive duty is that it would help to prevent discrimination before it occurs, requiring organisations to think proactively, rather than waiting for complaints to be made, by implementing policy measures or internal reporting mechanisms in relation to discrimination.
55. Consideration should be given to the Victorian model,<sup>36</sup> including key lessons from its operation. During the Law Council's Justice Project, a number of Victorian-based stakeholders highlighted that the introduction of positive duties on government agencies had had practical and beneficial outcomes in breaking down barriers, instigating agency-wide conversations on how to address discrimination and the introduction of positive measures which would not otherwise have occurred.<sup>37</sup>
56. For improved anti-discrimination laws to be effective, they must not only be known and understood by lawyers – they must be incorporated in the practice of everyone in the Australian community. To assist duty-holders to fulfil their obligations under a 'positive duty', targeted guidance should be developed to assist organisations at all levels. Particular regard should be had to informing small to medium enterprises (**SMEs**), as larger companies will be in a better position to respond and scale up their existing operations.

#### *Federal human rights act*

57. The Law Council strongly supports the adoption of a federal human rights act that reflects Australia's obligations under the principal United Nations human rights treaties to which it is a party, including the CRPD.<sup>38</sup> A well-drafted federal human rights act would embed a general and fundamental understanding across the Australian community, that people with disability, are persons of equal dignity and worth, whose rights must be respected, protected and fulfilled alongside all others.
58. In practice, the Law Council considers that a human rights act would have the role of requiring public authorities to assess their actions according to human rights standards and is likely to lead to an improved national culture of respect for the human rights of persons with disability.
59. While proposals for human rights legislation at the federal level have, to date, largely failed to gain traction, there has been an increasing acceptance of human rights protections at the state and territory level. In January 2020, Queensland's *Human Rights Act 2019* (QLD) fully commenced. This follows the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

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<sup>35</sup> See Law Council, Submission to the AHRC, *Response to discussion paper: Priorities for federal discrimination law reform*, (20 December 2019) 32-33.

<sup>36</sup> *The Equal Opportunity Act 2010* (Vic) s 15.

<sup>37</sup> Law Council, Justice Project (LGBTI+ Peoples Chapter, Final Report, August 2018) 45.

<sup>38</sup> Law Council, *Policy statement on a Federal Human Rights Charter* (2020).

60. In 2012, the Human Rights Law Centre (**HRLC**) published a report into the Victorian Charter's first five years of operation, highlighting case studies from that period.<sup>39</sup> It found that the Charter played a crucial preventative role in stopping human rights abuses (and the associated social and economic costs) before they occur. This was illustrated by its impacts through government policies, local council projects or the affording of protected rights to vulnerable individuals and groups.<sup>40</sup> Rather than resulting in a 'lawyers picnic', it found that the Charter's key impacts often lay outside formal court proceedings. It had:
- required the Victorian Parliament to more fully consider and safeguard human rights in legislation;
  - enabled government departments and public authorities to undertake organisational and cultural change to embed its principles in their work – through early identification of potential human rights issues, providing a platform for effective advocacy on human rights issues, and an impetus for cultural change;
  - initiated human rights education programs to create a better awareness of Charter rights and empower people to take action;
  - provided a framework of language and ideas by which human rights could be more effectively articulated and realised without the need for litigation;
  - had a notably beneficial impact in the courtroom, where although seldom employed, it had been used to challenge arbitrary or unjust policies and decisions.<sup>41</sup>
61. Examples of benefits illustrated in the HRLC report included a better outcome for a 40-year old man with disability living in an aged care home. His grandparents communicated his Charter rights to the Transport Accident Commission. It accepted responsibility for its failure to respond to an opportunity to assist him to live in a more appropriate care facility within a specified timeframe, revisited its decision and recognised the need to uphold his rights.<sup>42</sup>
62. The most recent review of the Victorian Charter was undertaken in 2015. It found that 'implementation of the Charter has helped to build a greater consideration of and adherence to human rights principles by the public sector'.<sup>43</sup> For example, Local Government Victoria has published *Guidelines for Local Laws*, which advises councils to review draft local laws for Charter compatibility. Whittlesea City Council's review led it to adopt a new law for council meetings that made it easier for people with disabilities to ask questions.<sup>44</sup>

### Organisational initiatives

63. With respect to organisational initiatives, it is essential to inform organisations how they can work to improve disability employment outcomes. In this context, there may be scope to foster peak body forums in which best practice approaches are shared across different sectors. There are relatively few such forums currently in place to cross-fertilise ideas

<sup>39</sup> Law Council, Submission to the AHRC, *Free and equal: An Australian conversation on human rights* (13 November 2019) 39 citing HRLC, *Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation* (March 2012).

<sup>40</sup> *Ibid*, 5.

<sup>41</sup> *Ibid*, 5-10.

<sup>42</sup> *Ibid*, 39.

<sup>43</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government, 2015).

<sup>44</sup> *Ibid* 194 citing Victorian Equal Opportunity and Human Rights Commission, *The Charter of Human Rights and Responsibilities: Local Government and the Operation of the Charter 2012* (2013) 17.

between peak bodies, which often play a significant sector leadership role at the federal, state and territory levels.

64. The Law Council further suggests that all levels of government show a commitment to removing barriers through their recruitment and procurement practices, as this may positively contribute to a change in community attitudes in relation to employing people with a disability.

#### **Recommendation**

- **To ensure that attitudinal changes are prompted by appropriate legal structures:**
  - **positive duties should be introduced upon all organisations, under federal discrimination laws including the DDA, including but not limited to public authorities and organisations exercising public functions, to eliminate unlawful discrimination and to advance equality; and**
  - **a federal human rights act should be adopted.**

#### **4. How do you think that clearly outlining what each government is responsible for could make it easier for people with disability to access the supports and services they need?**

65. The Law Council considers that responsibilities should be outlined according to the life course approach of the existing strategy. This approach, discussed above, would clarify that achieving the new Strategy's vision requires laws, programs and policies that are clearly targeted to common pathways, transitions and trigger points over their lifetime and that all levels of government have a role to play.
66. To enhance government accountability, it is essential that the new Strategy not only sets out the roles and responsibilities of government generally, but identifies concrete actions, attached to goals and targets within specific timeframes.
67. Within governments, it is important that disability inclusion is embedded in the work of mainstream policy and program development and is not sidelined to disability-specific portfolios. The new Strategy should inform the budgets and resource allocation of all relevant government agencies. In terms of actions to support this, the Law Council suggests that key performance indicators for senior leadership across central and relevant Commonwealth line agencies could be introduced to encourage all portfolios to play their part in lifting outcomes for people with disability.

#### **5. How do you think the Strategy should represent the role that the non-government sector plays in improving outcomes for people with disability?**

68. Achieving the new Strategy's vision requires the involvement of all organisations. The Law Council is aware of its own role, as the national peak body for the legal profession, in promoting stronger awareness of disability amongst the profession, and supporting the efforts of its constituent bodies to this end.

69. However, the Law Council also underlines that the Strategy should not only 'represent' the role that the non-government sector plays, but actively facilitate and support it in improving outcomes for people with disability.

### Positive duties

70. As highlighted above, the Law Council supports reforms to the DDA to introduce positive duties to require organisations to take proactive measures to eliminate unlawful discrimination and advance equality. These duties should actively prompt greater responsibility by all organisations, including those in the non-government sector. They should be supported by the availability of detailed guidance to assist organisations at all levels comply with their obligations.

### Support for the non-government sector

71. Additionally, the Law Council suggests that incentivisation strategies be developed by governments to encourage inclusivity in the non-government sector including businesses. For example, the Law Society of New South Wales notes that this might include the introduction of a disability diversity criterion in government procurement processes, a public star rating system for diversity, and/or tax breaks.
72. Within the rights protection, justice and legislation sphere, support should include additional resourcing for specialist legal assistance services. Ongoing, sustainable funding is required so that these organisations are able to deliver culturally safe, informed and accessible services to persons with disability. These services play an essential role, for victims and accused persons alike, and are often under resourced.<sup>45</sup> They are discussed further below in the context of targeted action plans.

### Advocacy and lobbying

73. The Law Council recognises the vital advocacy role played by legal assistance providers, including law reform campaigns on policy matters that have a systemic impact on their work and are undertaken for a public benefit. It is therefore concerned by restrictions on lobbying and advocacy under the National Legal Assistance Partnership 2020-25 (**NLAP**).
74. Although the NLAP does not prohibit legal assistance providers from engaging in lobbying,<sup>46</sup> current restrictions on the use of Commonwealth funding to undertake lobbying activities<sup>47</sup> and the definition of 'lobbying'<sup>48</sup> may have the effect of minimising legitimate and critical forms of lobbying undertaken by frontline legal services, noting that the Productivity Commission has previously remarked that such advocacy is an effective use of resources.<sup>49</sup>
75. While the Law Council opposes the NLAP clauses which limit the ability of legal assistance providers from undertaking lobbying activities, if these provisions are to remain, the Law Council submits that supporting material should be developed in close collaboration with the legal assistance sector to provide clarity as to how this limitation applies in practice. This material would provide pragmatic guidance (including examples)

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<sup>45</sup> Law Council, Justice Project (People with Disability Chapter, Final Report, August 2018).

<sup>46</sup> *National Legal Assistance Partnership 2020-25* (30 June 2020) <<https://www.ag.gov.au/system/files/2020-06/National-Legal-Assistance-Partnership-Agreement.pdf>> cl A18.

<sup>47</sup> *Ibid*, cls A18-A23.

<sup>48</sup> *Ibid*, cl 98(n).

<sup>49</sup> Law Council, Justice Project (Legal Services Chapter, Final Report, August 2018) 8 citing Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 30-31.

to which legal assistance services may have regard when interpreting the lobbying restrictions within the NLAP.

#### Recommendation

- **Commonwealth, state and territory governments should commit to additional, long-term funding for specialist disability legal services and community-controlled organisations to deliver culturally safe, informed and accessible legal assistance services to improve justice outcomes for people with disability.**

## 6. What kind of information on the Strategy's progress should governments make available to the public and how often should this information be made available?

76. The Law Council suggests that information on the new Strategy's progress be made available regularly (eg, annually) as government reporting is fundamental to transparency and accountability. While reporting with respect to individuals must have regard to privacy and confidentiality obligations, more broadly, there should be an open, transparent approach to releasing information on the Strategy's progress.
77. The new Strategy is intended to be a living document and a strong evidence base is essential to realign policies and initiate new actions over its ten-year course. In the Law Council's view, there should be a strong emphasis on addressing data collection and evaluation strategies with respect to the outcome areas. The Justice Project highlights specific concerns regarding the dearth of justice sector data, having regard to a range of diverse groups, and the significant knowledge and research gaps in this area.<sup>50</sup> These concerns were reiterated by the UN Committee in its review of Australia with respect to people with disability.<sup>51</sup>
78. One reporting option proposed in the Position Paper is for the responsible Ministerial Council to release an annual, public statement outlining government policy commitments to lift outcomes for people with disability. While this is important, the Law Council considers that there needs to be greater emphasis on independent monitoring and evaluation, rather than self-reported outcomes. The UN Committee recently expressed concern regarding the lack of an effective monitoring mechanism under the existing Strategy, in particular the limited scope and power of the AHRC to perform this task.<sup>52</sup>
79. Lessons may be learnt from New Zealand's Disability Strategy 2016-2026 (**NZ Strategy**) in this regard. In addition to annual reporting by the Minister for Disability Issues to Parliament, the Independent Monitoring Mechanism (**IMM**),<sup>53</sup> comprising of New Zealand's Human Rights Commission, the Ombudsman and the Convention Coalition Monitoring Group, provides an independent perspective on progress toward achieving the NZ Strategy's outcomes and goals. It does this in a number of ways including meeting with government ministers from a variety of portfolios on a quarterly basis.

<sup>50</sup> Law Council, Justice Project (Governments and Policymakers Chapter, Final Report, August 2018) 72.

<sup>51</sup> UN Committee, *Concluding observations on the combined second and third reports of Australia*, UN Doc. CRPD/C/AUS/2-3 (15 October 2019) 7.

<sup>52</sup> *Ibid* 15.

<sup>53</sup> The IMM was established by the New Zealand Government in 2011. It was developed in accordance with Article 33 of the CRPD.

80. The Productivity Commission, as the Australian Government's independent economic research and advisory body, should also be asked to evaluate outcomes for people with disability with respect to economic and workforce participation. The Law Council suggests that as part of this inquiry, the Productivity Commission be asked to examine the following percentage of people with disability:

- in priority populations applying for government roles;
- who require recruitment process adjustments for government roles;
- who were satisfied with the provision of recruitment adjustments for government roles; and
- who are employed in a government role and have workplace adjustments.

It could also examine information about the experiences of people with disability with government recruitment processes and staff.

#### **Recommendations**

- **Governments should report regularly (eg, annually) on the Strategy's progress.**
- **Governments should lead a coordinated and sustained effort to improve data collection with respect to each of the Strategy's outcome areas and to fill knowledge gaps to ensure that decision-making and law and policy development is evidence-based and progress is being achieved.**
- **Establish a formal and independent monitoring mechanism under the Strategy, ensuring sustainable and adequate funding. Consideration should be given to the role of the AHRC to perform this task.**

## **7. What do you think of the proposal to have Targeted Action Plans that focus on making improvements in specific areas within a defined period of time (for example within one, two or three years)?**

81. To deliver tangible outcomes, the new Strategy must be supported by a strong implementation framework. Accordingly, the Law Council supports the proposal to have targeted actions plans for each outcome, with a time frame of one to two years. These actions will need to evolve to reflect emerging challenges. In accordance with article 4.3 of the CRPD, people with disability and other relevant lived experience should be involved in the development and implementation of these plans.

82. Lessons may be learnt from New Zealand's Disability Action Plan 2019-2023.<sup>54</sup> This Action Plan aims to deliver New Zealand's Disability Strategy 2016-2026. To do this, it presents priority work programmes and actions that relate to each of the outcomes in the Strategy. Importantly, the Action Plan has been developed through a co-design process by government agencies, disabled people and their representative organisations.

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<sup>54</sup> New Zealand Government, *Disability Action Plan 2019-2023* (adopted November 2019) <<https://apo.org.au/sites/default/files/resource-files/2019-11/apo-nid267996.pdf>>.

83. Targeted action plans are highly relevant to outcome 3 – rights protection, justice and legislation – of the new Strategy. In the Law Council’s view, these should include the adoption of Disability Justice Plans, as well as legislative and program improvements.

#### Disability justice plans

84. The Law Council considers that it is particularly important to have overarching action frameworks in place to address outcome 3 (rights protection, justice and legislation). In this vein, where they have not done so, Commonwealth, state and territory governments should implement Disability Justice Plans to champion cultural change and practical improvements with respect to disability across the justice system.<sup>55</sup>
85. In August 2019, the Australian Capital Territory Government launched the Disability Justice Strategy for 2019 - 2029.<sup>56</sup> A series of action plans sit under the Disability Justice Strategy which describe the commitments and engagements made by agencies across the Territory to move towards equality before the law for people with disability. The first round of actions to be delivered under the Disability Justice Strategy include:
- developing accessible information to ensure people with disability are able to understand their rights, access information and better understand the justice system; and
  - introducing a supported decision-making program as an alternative to substitute decision-making.<sup>57</sup>
86. Similarly, the Tasmanian Government released its Disability Justice Plan for 2017-2020<sup>58</sup> in December 2017. This plan aims to develop a justice system in Tasmania that is responsive to the needs of people with disability and provides equality before the law and equal access to justice. It includes measures to:
- ensure that services are disability ready and responsive;
  - prevent and respond to violence, abuse and neglect;
  - respond to the needs of people with disability who are at risk of experiencing family violence;
  - safeguard the rights of people with disability to make decisions that affect their lives;
  - provide access to advocacy and communication support;
  - develop disability-responsive legal services, police practices, prosecution services, youth justice services and corrections services;
  - adopt disability-responsive court processes;
  - promote the rehabilitation and reintegration of offenders with disability;

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<sup>55</sup> Law Council, Justice Project (People with Disability, Final Report, August 2018) 85.

<sup>56</sup> Community Services (Australian Capital Territory), *Disability Justice Strategy 2019-2029* (9 August 2019) <[https://www.communityservices.act.gov.au/disability\\_act/disability-justice-strategy](https://www.communityservices.act.gov.au/disability_act/disability-justice-strategy)>.

<sup>57</sup> ACT Government, *First Action Plan 2019-2023* <

[https://www.communityservices.act.gov.au/disability\\_act/disability-justice-strategy/first-action-plan-2019-2023](https://www.communityservices.act.gov.au/disability_act/disability-justice-strategy/first-action-plan-2019-2023)>.

<sup>58</sup> Department of Justice (Tasmanian) *Disability Justice Plan 2017-2020* (2017) <[http://www.justice.tas.gov.au/news\\_and\\_events/disability-justice-plan](http://www.justice.tas.gov.au/news_and_events/disability-justice-plan)>.

- safeguard the rights of forensic mental health patients; and
- continuously monitor and improve performance.<sup>59</sup>

87. In 2014, the South Australian Government launched its Disability Justice Plan to ‘make the criminal justice system more accessible and responsive to the needs of people with disability’.<sup>60</sup> It includes a range of overarching objectives, including:

- upholding, protecting and promoting the rights of people with disability;
- supporting vulnerable victims and witnesses in the giving of evidence;
- support for people with disability accused or convicted of a crime; and
- continuous monitoring and improvement of performance.<sup>61</sup>

88. The Law Council considers that such Disability Justice Strategies should be more widely adopted across Australian jurisdictions, having regard to emerging lessons from those adopted so far. They should also be expanded where necessary (eg, the South Australian Disability Justice Plan focuses on the criminal, rather than civil justice system).

### Legislative reforms

#### *Criminal justice system*

89. There are strong examples of initiatives to support people with disability to participate in the criminal justice on an equal basis with others. In the Law Council’s view, legislative reforms that should be reflected in targeted action plans to improve justice outcomes, for people with disability who are both accused and victims of crime, include the following.

- A review of unfit to plead laws to ensure:
  - a person who has been found unfit to be tried should not be detained as a result of that finding, but only after having been found to have committed the offence charged or to be not guilty by reason of mental illness;
  - there is individual assessment of the necessity of detention for each person, taking into consideration their circumstances. A person should only be held in a detention facility (other than a correctional facility) if assessed as posing an unacceptable risk of harm to the community, or themselves, and if that risk cannot be met in a less restrictive way;
  - legislative limits on the period of detention that can be imposed;
  - regular and independent period review of detention orders; and
  - access to judicial review of decisions, and alternative, non-custodial accommodation.

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<sup>59</sup> Ibid.

<sup>60</sup> Attorney-General’s Department (South Australia), *Disability Justice Plan*, Government of South Australia <<https://www.agd.sa.gov.au/projects-and-consultations/disability-justice-plan>>.

<sup>61</sup> Ibid.

- A review of evidence laws and, where appropriate, amendment to allow and prompt a more flexible approach to adducing evidence from witnesses with complex communication needs.

These actions are discussed further in the Law Council’s comprehensive [submission](#) to the Disability Royal Commission in relation to people with disability and their interaction with the criminal justice system.

#### *Federal human rights act and reforms to the DDA*

90. As above, the Law Council submits that the implementation of a federal human rights act would improve the experience of people with disability who interact with the justice system. While it recognises that much of this system is state and territory based, the implementation of a federal act is nevertheless likely to lead to an improved national culture of respect for the human rights of persons with disability.
91. In addition to the positive duties flagged above with respect to the DDA, the Law Council supports broader reforms to increase its accessibility. These include:
- enhancing the powers of the AHRC to investigate incidents of discrimination on its own motion, rather than relying on individuals to make a complaint which can be a significant burden;
  - simplifying and making consistent definitions used in federal discrimination law;
  - adopting a shifting onus of proof, in line with the approaches adopted in the Fair Work Act 2009 (Cth)<sup>62</sup> and Equality Act 2010 (UK);
  - establishing a ‘no costs’ jurisdiction subject to limited exceptions; and
  - reassessing the complaint handling process for example, clarifying the standard of proof.

These reforms are discussed further in the Law Council’s [submission](#) to the AHRC’s Free and Equal Inquiry in response to the discussion paper – priorities for discrimination law reform.<sup>63</sup>

#### *Decision-making*

92. To ensure equality before the law, there is strong consensus that a shift towards formal recognition of supported decision-making in favour of substituted decision-making is needed. This shift, to recognise the autonomy and independence of persons with disability who may require support in making decisions, is signalled by the CRPD.<sup>64</sup>
93. In 2014, the Australian Law Reform Commission (**ALRC**) undertook a comprehensive inquiry to consider how Australia could move towards supported decision-making.<sup>65</sup> The Law Council supports, in principle, a move towards a model of supported decision-making in states and territories.<sup>66</sup>
94. However, the Law Council notes that it will require ongoing consideration of the specific measures, reforms and practical supports which are needed across different jurisdictions

<sup>62</sup> Rebuttable presumption under s 361 of the *Fair Work Act 2009* (Cth).

<sup>63</sup> Law Council, Submission to the AHRC, *Response to discussion paper: Priorities for federal discrimination law reform* (20 December 2019) 32-33.

<sup>64</sup> See Committee on the Rights of Persons with Disabilities, *General comment on Article 12: Equal recognition before the law (2013)*, UN Doc. CRPD/C/11/4 (25 November 2013) 2 [3].

<sup>65</sup> ALRC, ‘Equality, Capacity and Disability in Commonwealth Laws’ (Report No 134, 24 November 2014).

<sup>66</sup> See discussion Law Council, Submission to the ALRC, *Elder Abuse Issues Paper* (17 August 2016) 29.

to implement supported decision-making.<sup>67</sup> Supported decision-making must be grounded in an evidence-based framework in terms of what works. Real examples are needed which shed light on the practical differences which can be achieved.

95. As highlighted in the ALRC's Report, the development and implementation of supported decision-making will require significant cultural and attitudinal change within the community.<sup>68</sup> As suggested by the National Association of Community Legal Centres, any changes should be accompanied by education and training for those engaged directly in decision-making, as well as a national community awareness campaign to inform the public of changes.<sup>69</sup>
96. The ALRC also outlined the desirability for consistency between Commonwealth, state and territory legislation dealing with individual decision-making.<sup>70</sup> The Law Council has recently called for greater consistency regarding enduring financial powers of attorney laws across Australian jurisdictions.<sup>71</sup> It considers that this would reduce the current complexity and overlap in the application of the law.
97. More broadly, the Queensland Law Society (**QLS**) has particularly raised its concerns regarding overlapping, and perhaps conflicting, substitute and supporting decision-making roles. Currently, it is possible for multiple substitute decision-makers and persons supporting decision-making to exist in relation to the financial and personal dealings of the same adult, arising pursuant to a number of separate acts and subsidiary legislation. For example, the Centrelink regime and the NDIS both give rise to a number of substitute decision-makers and persons supporting decision-making.<sup>72</sup> The QLS considers that a review is needed which captures the full range of overlapping, and perhaps conflicting, substitute and supporting decision-making roles that have been created, with a view to creating a framework for legislative reform that is intended to simplify the system and remove duplication of powers.
98. In this context, the Law Council adds that within other jurisdictions, different decision-makers for financial issues and personal issues can lead to conflicts with fundamental issues like accommodation, personal services, medical treatment and the provision of health services. If one decision-maker doesn't support the other's decision, paralysis can result which requires an application to the relevant tribunal.
99. This is compounded by the lack of uniformity between jurisdictions flagged above – not only with respect to enduring powers of attorney, but enduring guardian appointments and tribunal appointments. Inconsistencies also arise with respect to cross-jurisdictional recognition of appointments and other decision-making arrangements.
100. For this reason, the Law Council considers that greater consistency is required across a range of laws concerning individual decision-making. These include enduring powers of attorney laws (including where the local legislation allows, those relating to personal, health or medical matters as well as financial matters), as well as guardianship laws.<sup>73</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> ALRC, 'Equality, Capacity and Disability in Commonwealth Laws' (Report No 134, 24 November 2014) 127.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid 31.

<sup>71</sup> Law Council, Submission to the Attorney-General's Department, *Consultation on Enhancing Protections relating to the use of Enduring Power of Attorney Instruments*, 19 March 2020.

<sup>72</sup> See eg, *Re KTT* (2014) NSWCATGD 6 and *Re KCG* [2014] NSWCATGD 7.

<sup>73</sup> Law Council, *Response to Elder Abuse Issues Paper*, Submission to the ALRC (17 August 2016) 24.

## *Jury service*

101. The Law Council supports making amendments to remove legislative barriers preventing people with a disability from progressing past the summoning stage of the jury selection process. It notes that the Australian Capital Territory amended its *Juries Act 1967 (ACT)* in 2018 to ensure that people with a disability are able to participate, as jurors, in court proceedings,<sup>74</sup> and that the Western Australian Department of Justice is currently considering similar amendments to the *Juries Act 1957 (WA)*.<sup>75</sup>
102. The Law Council considers that people with a disability who are able to participate in jury service should have the opportunity to do so and juries should more accurately reflect the community they represent. The Law Council supports reasonable adjustments and accommodations that allow people with a disability to serve on juries and more fully engage with their civic responsibilities.

## **Program delivery**

### *Criminal justice system – prevention, and early intervention*

103. Many people with disability who encounter the criminal justice system have a long history of undiagnosed or untreated impairment.<sup>76</sup> In addition to the legislative reforms discussed above, the Law Council's submission to the Disability Royal Commission, underlines the need for concerted efforts by governments to increase resources for targeted prevention and early intervention programs for people with disability, to address the underlying reasons why many people become embroiled in the system. Critical support services – such as better diagnosis, health, counselling, disability support, drug rehabilitation, family support and housing - can help people avoid the criminal justice system altogether. Particular regard must also be had to the delivery of these programs in rural, regional and remote areas, due to worse justice outcomes in those areas.<sup>77</sup>
104. Justice reinvestment approaches, designed to identify the life events and pathways into the system, are one example of a promising initiative. The Law Council submits that all levels of government should support the establishment of an independent national justice reinvestment body to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives.

### *Criminal justice system – supports*

105. Within the criminal justice system, the Law Council notes important initiatives to support people with disability to participate in the criminal justice system on an equal basis as others.
106. The Law Council welcomes the Minister for the National Disability Insurance Scheme's announcement that the National Disability Insurance Agency would introduce Justice Liaison officers in each state and territory to support NDIS participants interacting with the justice system.<sup>78</sup> The Law Council considers that disability advocates play an important role in facilitating access to justice for people with disability at all stages of the justice

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<sup>74</sup> See *Courts and Other Justice Legislation Amendment Act 2018 (ACT)* which amended the *Juries Act 1967 (ACT)*.

<sup>75</sup> See Government of Western Australia Department of Justice, *Participation of people with a disability in jury service* (Discussion Paper, March 2020) < <https://www.wa.gov.au/sites/default/files/2020-04/participation-of-people-with-disability-discussion-paper.pdf> >.

<sup>76</sup> Law Council, Justice Project (People with Disability Chapter, Final Report, August 2018) 4.

<sup>77</sup> Law Council, Submission to the Disability Royal Commission, *Criminal Justice Issues Paper* (17 August 2020) 21.

<sup>78</sup> The Hon Stuart Robert MP, 'Federal-State cooperation continues NDIS build with improvements in transport, mental health and justice' (Media release, 9 October 2019).

system.<sup>79</sup> It will be important to monitor this initiative and support programs for people with disability who are not NDIS participants.

107. Other relevant program priorities include the following.

- The expansion and evaluation of communication intermediary schemes by state and territories, involving appropriately qualified, trained and remunerated communication intermediaries who provide impartial and independent advice to the judicial system regarding the person's communication needs.
- The adoption of a National Justice Interpreter Scheme to meet a diverse range of needs, including for hearing and Auslan interpreters.
- Targeted measures to train justice system personnel, including police, legal practitioners, judiciary and corrections officers, on better identifying and responding to the needs of people with disability. This could include for example, support for the National Judicial College of Australia to establish a dedicated disability committee with experts on disability, including people with relevant lived experience of disability. A primary purpose of the committee would be to develop and promote disability training for judges, magistrates and tribunal members, with the overarching aim of championing cultural change with regards to disability. The Law Council notes the leadership role of the judiciary in setting the tone for the broader legal sector in this regard.

*Criminal justice system – rehabilitation and exit strategies*

108. The Law Council is concerned about the insufficiency of corrections and juvenile detention programs which meet the different underlying needs of persons with disability, noting that this presents an important opportunity for diagnosis and response. It also supports a stronger focus on successful 'exits' such as throughcare models to support the successful transition of people out of the corrections and juvenile detainees systems and into the community. It is important that these programs are accessible to people with disability and are culturally competent.

*Culturally responsive, informed, community-controlled services*

109. Governments, First Nations bodies and the broader justice sector should work together to address the intersectional needs of First Nations people experiencing disability. Informed and culturally competent responses developed and resourced throughout the criminal justice system should include:

- supporting community controlled organisations to play a leading role in improving justice outcomes for First Nations peoples with disability;
- strategies to enable better identification of disability amongst First Nations groups by justice and broader personnel; and
- holistic approaches, including co-locating disability support workers with Aboriginal community-controlled legal services, and employing Aboriginal liaison officers.

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<sup>79</sup> Ibid, 41.

110. Access to culturally appropriate bail and parole accommodation and support programs should also be prioritised.

#### *Legal assistance services*

111. While some people with disability are well able to represent themselves with reasonable accommodations and support within the justice system, the availability of legal advice and representation is critically important, particularly, for persons with severe mental health conditions, cognitive impairments or difficulties communicating.<sup>80</sup>
112. It is well recognised that the legal assistance sector generally, along with specialist disability legal services, is facing severe resource constraints and as a consequence, is struggling to meet the growing demand and having to turn large numbers of vulnerable people away.<sup>81</sup> Research has found that legal services ‘are under-resourced and not necessarily prepared to respond to the access needs of persons with disabilities’.<sup>82</sup> In particular, the limited availability of affordable legal services for people with mental health conditions in rural, regional and remote areas has been identified.<sup>83</sup> Even ‘where services do exist, they may not have the capacity of funding to take on clients with more complex needs’.<sup>84</sup> As a consequence, people with complex needs may need to travel large distances to access affordable, specialised legal advice. However, inaccessible transport options as well as cost and inconvenience can make travel especially challenging for people with disability.<sup>85</sup>
113. Culturally competent, informed service provision is a hallmark of success with respect to diverse client groups.<sup>86</sup> Such organisations ‘have the unique capacity to provide culturally appropriate services, and are able to provide localised, tailored solutions that have the support of the community’.<sup>87</sup> However, these services have been vastly under-resourced. For example, during the Justice Project, some Aboriginal legal service providers identified that junior solicitors could be dealing with extremely high caseloads, particularly those in rural, regional and remote areas. Some were only able to have five to ten minutes with each client on court days, while others may be dealing with up to 20 indictable matters at a time.<sup>88</sup> These scenarios vastly undermine the likelihood that a client with disability, who may require additional time for a solicitor to recognise and accommodate their needs, will receive a just outcome.
114. As above, Commonwealth, state and territory governments should commit to additional, long-term funding for specialist disability legal services and community-controlled organisations to deliver culturally safe, informed and accessible legal assistance services to improve justice outcomes for people with disability.

### **Recommendations**

<sup>80</sup> Law Council, Justice Project (Legal Services Chapter, Final Report, August 2018) 21 citing Karras et al, Law and Justice Foundation of New South Wales, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW* (2006) 153-154.

<sup>81</sup> See generally Law Council, Justice Project (Legal Services Chapter, Final Report, August 2018).

<sup>82</sup> Law Council, Justice Project (People with Disability Chapter, Final Report, August 2018) 56 citing Bernadette McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities*, 10.

<sup>83</sup> *Ibid* citing Maria Karras et al, *On the Edge of Justice*, 110.

<sup>84</sup> *Ibid*, 111.

<sup>85</sup> *Ibid*.

<sup>86</sup> Law Council, Justice Project (Introduction and Overview, Final Report, August 2018), 39.

<sup>87</sup> Law Council, Justice Project (Aboriginal and Torres Strait Islander Persons Chapter, Final Report, August 2018), 38-39.

<sup>88</sup> *Ibid*, 39.

- **Disability Justice Plans should be more widely adopted across Australian jurisdictions, building on the examples of South Australia, Tasmania and the Australian Capital Territory models.**
- **The Commonwealth anti-discrimination framework, particularly the DDA, should be reviewed and, reformed to increase its accessibility to people with disability.**
- **States and territories should harmonise powers of attorney and guardianship laws to reduce the current complexity and overlap in their application.**
- **Legislative reforms are needed to improve criminal justice outcomes for people with disability including a review of laws concerning unfitness to plead, as well as evidence laws to allow and prompt a more flexible approach to adducing evidence from witnesses with complex communication needs. All remaining governments should also address barriers that prevent people with disability from participating in jury service.**
- **Governments should prioritise targeted prevention and early intervention programs for people with disability, particularly in RRR areas, to address the underlying reasons why many people become embroiled in the criminal justice system. This includes critical support services such as better diagnosis, health, counselling, disability support, drug rehabilitation, family support and housing.**
- **All levels of government should support the establishment of an independent national justice reinvestment body to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives.**
- **Governments should support programs that help people with disability participate in the criminal justice system on an equal basis as others. Program priorities include disability advocates, communication intermediaries, a National Justice Interpreter Scheme and disability training, education and awareness raising initiatives for justice system personnel.**
- **Corrections and juvenile detention programs which address the diverse needs of persons with disability should be expanded, as well as successful 'exit' programs such as throughcare models to support the successful transition of people out of the corrections system and into the community.**
- **Governments, First Nations bodies and the broader justice sector should work together to develop informed and culturally competent responses throughout the justice system to address the intersectional needs of First Nations people with disability.**

## 8. How could the proposed Engagement Plan ensure people with disability, and the disability community, are involved in the delivery and monitoring of the next Strategy?

115. The AHRC, in particular the Disability Discrimination Commissioner, has strong and active links with people with disability and the disability community. The Law Council considers that through the AHRC, ideas should be sought as to how to best engage with diverse groups of people with disability.
116. The Law Council refers to its comments above with respect to addressing the intersectional needs of First Nations People with disability. Particular regard should be had to engaging with First Nations People, such as through the First Nations Peoples Disability Network Australia, as well as other priority populations identified earlier.
117. The Law Council recommends that ongoing, sustainable resources be provided to enable these organisations to actively engage with people with disability, and the disability community, around the new Strategy. The limited funding available under the existing Strategy for the full and effective engagement of persons with disabilities, through their representative organizations, in policy development, implementation and monitoring of actions relating to the CRPD was recently raised by the Committee.<sup>89</sup>

### Recommendation

- **Additional resources should be made available to ensure that groups representing diverse memberships of people with disability can effectively engage in delivery and monitoring of the next Strategy.**

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<sup>89</sup> UN Committee, *Concluding observations on the combined second and third reports of Australia*, UN Doc. CRPD/C/AUS/2-3 (15 October 2019).