



Law Council
OF AUSTRALIA

Office of the President

27 March 2019

Ms Anna Fieldhouse
Director
NDIS Quality and Safeguards Policy Branch
Department of Social Services
GPO Box 9820
Canberra ACT 2601

By email: anna.fieldhouse@dss.gov.au

Dear Ms Fieldhouse

Draft Terms of Reference – Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

The Law Council of Australia welcomes the proposed establishment of a Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**the Royal Commission**) and supports the decision to consult with the community prior to settling the Royal Commission's detailed Terms of Reference (**the ToR**). In view of its role as the peak body representing the Australian legal profession, the Law Council also acknowledges, with appreciation, the agreement of the Department of Social Services to receive and consider a submission made by the Law Council in narrative, rather than survey, format.

The Law Council has briefly consulted with its Constituent Bodies and relevant committees for review and feedback on the draft ToR. In particular, the Law Council has been grateful for the input provided through the Law Institute of Victoria, the New South Wales Bar Association, the Law Society of New South Wales, the Law Society of South Australia, the Law Society of the Northern Territory, and the Law Council's National Elder Law and Succession Law Committee regarding the draft ToR.

In general, the Law Council supports the ToR as drafted, and it welcomes the apparent design of the ToR to ensure broad applicability, without limitation to particular institutional, demographic or geographic contexts. The provision of an inclusive definition of disability is, itself, also important to ensure that the full range of related experiences within the community, most critically the lived experiences of people with disability themselves, can be reflected.

In addition to its high-level support for the draft ToR, the Law Council, on the basis of the views and advice of its Constituent Bodies, makes the following specific recommendations:

Redress

The Law Council recommends that consideration be given to the inclusion of a specific term authorising the Royal Commission to address issues relating to redress. This would be consistent with the terms of reference adopted by the Royal Commission into Institutional

Responses to Child Sex Abuse and, similarly, acknowledge challenges faced by people with disability in securing justice and restitution through the criminal and or civil law systems.

The Law Council proposes that a new term be added after paragraph c), to the following effect:

what institutions and governments should do to address, or alleviate the impact of, past and future instances of violence, abuse, neglect and exploitation of people with disability, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution, and support services.

Definition

While the Law Council welcomes the deliberately inclusive definition of disability provided in the draft ToR, it notes the potential that persons whose disability results from deliberate actions may be excluded. By way of example, this might be the case for persons suffering the effects of petrol sniffing or prolonged alcohol abuse giving rise to an acquired brain injury.

Accordingly, the Law Council recommends that the definition term be amended to read: ‘...all kinds of impairment from birth or acquired through illness, accident, the ageing process, or in any other way.’

Lack of services

Paragraph f) of the draft ToR focuses on ‘all aspects of quality and safety of services, including informal supports, provided by governments, institutions and the community to people with disability’. The Law Council recommends that this provision be amended to address ‘all aspects of quality and safety of services, including their acceptability, availability and accessibility’.

The Law Council’s Justice Project¹ highlighted systemic barriers reducing or preventing access to services by people in the justice system, including those in prisons and juvenile detention. These barriers included a lack of preventative and early intervention services, particularly in regional, rural and remote locations and a lack of appropriate diversionary and rehabilitative support. This represents a clear area of neglect—potentially leading to an overcriminalisation of people with disability, particularly Aboriginal and Torres Strait Islander peoples—which the Law Council believes should fall within the ToR.

The issue of access to services is also relevant in light of the ToR’s particular focus on the National Disability Insurance Scheme, noting that concerns have been raised with the Law Council that people with disability in the criminal justice system have difficulties in accessing this scheme, as well as Medicare and PBS funded services.

Human rights framework

The Law Council considers it important to emphasise that the inquiry and its analysis and recommendations should be firmly based on a human rights framework. While the *Convention on the Rights of Persons with Disabilities* is rightly mentioned in the preamble to the draft ToR, the Law Council recommends that consideration be given to explicit

¹ *The Justice Project*, Law Council of Australia. Final report published August 2018 and available online at <https://www.lawcouncil.asn.au/justice-project>

reference in the substantive ToR to the international human rights framework. This could be achieved, potentially, through the inclusion of a new term after paragraph j), directing the Royal Commission to have regard to Australia's obligations arising from the above Convention and other relevant international instruments and standards.

Additionally, a slight change in the wording of paragraph 4 of the preamble is suggested, replacing the phrase 'promote the human rights of people with disability' with 'ensure the full enjoyment by persons with disability of all fundamental human rights and freedoms'.

Australian law, policy and practice

Following on from the above, the Law Council's Justice Project identified several areas of law, policy and practice that disproportionately affect people with disability, entrench their disadvantage and inequality before the law, and exacerbate their barriers to accessing justice. Some of these raise concerns as to whether Australia is meeting its international human rights obligations. For example, under current laws in several Australian jurisdictions, people who are found unfit to stand trial may face protracted, sometimes indefinite periods of detention in unduly restrictive and harsh conditions. For this reason, the Law Council suggests that, in addition to the specific matters raised at paragraphs e) to j), there should be included an additional paragraph concerning 'laws, policies and practices which have the potential to increase vulnerability to violence, abuse, neglect and/or exploitation amongst people with disability'.

Anti-discrimination legislation

The Law Council recommends that consideration be given to express inclusion of anti-discrimination legislation within the scope of the ToR. This could be achieved, potentially, through inclusion of a new term after paragraph c), along the lines of the following:

whether anti-discrimination legislation can be reformed as a tool to better address discrimination against people with disability, whether individually or systematically, in circumstances where such discrimination can contribute to, aggravate or interfere with prevention or and redress for, violence, abuse, neglect and exploitation.

Areas of priority focus

Within the full scope of the draft ToR, the Law Council recommends that a degree of priority be accorded by the Royal Commission to consideration of the situation of people who fall within certain categories of heightened risk additional to their disability status. People with disability in the criminal justice system, and particularly those who are Aboriginal and Torres Strait Islander peoples, are an example of one such vulnerable category. Other examples include children and young people with disability who are in out of home care, people with disability in remote and rural locations, older people with disability who are isolated from family or community support structures, and refugees and asylum-seekers with disability.

Other input

Several additional points of specific feedback received by the Law Council are also put forward for your kind consideration.

Certain amendments to the wording of the draft ToR are proposed as follows:

- a) *what governments, institutions and the community should do to ensure that people with disability fully enjoy the right to be free from violence, abuse, neglect and*

exploitation, having regard to the extent of violence, abuse, neglect and exploitation experienced by people with disability in all settings and contexts;

And

- c) *what should be done to promote a more inclusive society which ensures the enjoyment by people with disability of their right to autonomy and independence, and their right to live free from violence, abuse, neglect and exploitation;*

The Law Council suggests that paragraph h) be broadened to include extended family and cultural/linguistic groups; and that paragraph i) be broadened to include innovative cultural and social good practices and models, in addition to the consideration that may be given to clinical and other models.

The importance of ensuring, with respect to paragraph k), the full accessibility of Royal Commission materials to people with disability should be highlighted as a component of the support available to their comprehensive engagement with the Royal Commission.

It is proposed that the issue of the resourcing required on an ongoing and sustainable basis to implement any recommendations flowing from the Royal Commission be addressed within the ToR. To this end, an amendment to paragraph h) is proposed, to include, at the end of the current provision, the phrase 'and whether appropriate recognition and resources are available to support this role'.

With further regard to resourcing, it is suggested that the recommendations of the Royal Commission should be paralleled by corresponding clear commitments at all levels of government to ensure that resources are fully available for the implementation of these recommendations.

Finally, the Law Council notes that it will be important for the development of the next National Disability Strategy to have careful regard to the Royal Commission's recommendations.

In view of the brief time available for consultation on the draft ToR, the Law Council is not in a position to provide exhaustive comments on the draft, however we would be pleased to expand on the above or provide any further information that may be requested by the Department. Additionally, the Law Council looks forward to making detailed a submission to the Royal Commission in due course.

Should you wish to discuss further, please do not hesitate to contact Mr Mike Clayton, Senior Policy Lawyer, on 02 6246 3755.

Yours sincerely



Arthur Moses SC
President