



# Purple Orange

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## Submission by JFA Purple Orange

*Improving the criminal justice system for people living with disability*

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## Introduction

### The Julia Farr Association and JFA Purple Orange

The Julia Farr Association applauds the South Australian Government's initiatives and commitment to achieving appropriate and just outcomes for people living with disability. The proposed Disability Justice Plan and legislative changes set out in the Discussion Paper: *Improving the criminal justice system for people with disability* are important steps to achieving and maintaining improvements and necessary reforms in all parts of South Australia's criminal justice system.

The Julia Farr Association and its predecessor organisations have been involved with the disability community, older people and other vulnerable groups for more than 130 years. The Julia Farr Association is an independent, non-government entity based in South Australia that fosters innovation, shares useful information, and promotes policy and practice that support and improve the life chances of people living with disability.

JFA Purple Orange is the social policy arm of the Julia Farr Association. JFA Purple Orange conducts research and engages with people with lived experience of disability. Our work is anchored in the principles of *Personhood* and *Citizenhood* and is guided by human rights values and social inclusion and founded on four principal avenues of delivery:

- The provision of *Information* to help and enable people living with disability, their families and supporters to live with dignity, autonomy and independence.
- The promotion of *Innovation* in service and support that enable socially valued roles for people living with disability.
- The presentation of ideas and concepts to *Influence* leaders in government and the community to enable change and positive movement towards full participation in society by people living with disability.
- *Integrity* in the application of a clear set of principles to every aspect of our work, informing and focussing our efforts in a sustainable, clear and coherent manner.

JFA Purple Orange is not a service provider – we deliver research, evaluation and information services anchored upon the stories shared by people living with disability and other people in their lives. As such, we feel we are in a good position to offer comment and analysis without vested interest.

### The United Nations Convention on the Rights of Persons with Disabilities

JFA Purple Orange believes improving the participation of people living with disability in the criminal justice system is a pressing necessity in the current environment. It is widely recognised, and apparent in relevant statistics, that people living with disability in Australia

are likely to have the greatest need, but not receive appropriate and effective support, in accessing, participating and interacting with the justice system.

There is national recognition, through the ratification of the United Nations Convention (the 'Convention') on the Rights of Persons with Disabilities by Australia in July 2008, that: *'... access to justice for persons with disabilities ...' [shall be] '... on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages'*<sup>1</sup>.

Article 13 of the Convention sets out a clear manifesto of actions for enabling appropriate access, interaction and participation of people living with disability with the justice system in Australia, and South Australia. Australia was one of the first countries to ratify the Convention; as a leading proponent of the rights of people living with disability Australia, and South Australia, has a particularly important role in the global community as a leader and an exemplar of enlightened policies and governance.

JFA Purple Orange considers any legislative changes or Plans (i.e. proposed Disability Justice Plan) developed by the South Australian Government, no matter how these are structured or implemented, should accord fully with the Convention taking into account its current standing and interpretations. This is not a lightweight obligation; the scope and reach of international obligations was recently addressed in advice provided to a Senate Committee of the Parliament of Australia<sup>2</sup>:

*'... Emeritus Professor Shearer advised the views and recommendations of United Nations' committees and officials, while not legally binding, 'must be considered seriously by Australian governments, at the legislative, executive and judicial levels'.<sup>[3]</sup> Emeritus Professor Shearer's advice also made clear that treaty obligations may evolve with time and international practice and, as such, are subject to an evolving interpretation:*

*The Vienna Convention on the Law of Treaties, article 31(3)(b), allows for taking into account, together with the context, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'<sup>[4], 5</sup>.*

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<sup>1</sup> The General Assembly of the United Nations, 2006. . Convention on the Rights of Persons with Disabilities: Resolution A/RES/61/106. *United Nations Treaty Series Vol. 2515*. United Nations, New York, USA: 13.

<sup>2</sup> Parliament of Australia, Senate Community Affairs References Committee: *The involuntary or coerced sterilisation of people with disabilities in Australia*. Referred by Senate to Senate Committees on 20 September 2012.

<sup>3</sup> 'Advice by Emeritus Professor Ivan Shearer, 24 May 2013, p. 2.'

<sup>4</sup> 'Advice by Emeritus Professor Ivan Shearer, 24 May 2013, p. 3.'

As such, we recognise that the South Australian criminal justice system is as subject to the relevant requirements of the Convention, the *Disability Discrimination Act 1992* and the *National Disability Strategy* as other parts of the South Australian community. It seems timely to note that *Article 13(2)* of the Convention states:

*'In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.'*<sup>6</sup>

Our submission has a strong assumption that the proposed Disability Justice Plan, will have attendant, associated, planning, guidance, procedural structures and funding to train, develop and maintain on an ongoing basis, the capacities of people working in the South Australian criminal justice system to support people living with disability.

### **Our Approach to this Submission**

Our objective in responding to the Discussion Paper (the '*Paper*') is to help the South Australian Government identify those matters that will have the greatest potential for protecting the rights and interests of people living with disability interacting with the South Australian criminal justice system.

We recognise that the *Paper* has certain foci, which are set out in it, suggesting the Government already has a particular perspective on the proposed Disability Justice Plan. This perspective has, undoubtedly, been informed by the submissions to, and deliberations of, the Select Parliamentary Committee on *Access to and Interaction with the Justice System for People with Disabilities*.

We note that a series of information/consultation events have occurred in the wider community about the proposed Disability Justice Plan and that these events may also contribute to the South Australian Government's deliberations.

However, our submission focuses on the publicly available information provided in the *Discussion Paper* and on the values, matters of concern and experiences of JFA Purple Orange drawn from working closely with people living with disability.

The issues that are of primary interest for JFA Purple Orange are those that address the balance between autonomy, choice and risk for people living with disability and how these matters affect lives and life-chances; we fully support efforts to reduce the risk of abuse, however these efforts (and any unforeseen, untoward, consequences of policy

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<sup>5</sup> Senate Community Affairs References Committee, 2013. The involuntary or coerced sterilisation of people with disabilities in Australia. *1<sup>st</sup> Report, 17 July 2013*. Parliament of Australia, Senate Committees, Canberra, ACT: 88.

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

implementation) must not be reductive of access to life chances and personal decision-making.

We make the strong assumption that the reforms initiated by the proposed Disability Justice Plan *will be highly supportive of people living with disability – no matter how, or wherever, someone is situated in the criminal justice system* i.e. as an alleged victim, witness or alleged perpetrator – or, for that matter, jury members, court officials and members of the public or support persons.

JFA Purple Orange clearly envisages there will be a pathway for people living with disability in the justice system, where information and support will be readily available; these supports being not limited to, but including, full information and appropriate support for early intervention, legal rights, access, communication, translation, advocacy, assessment and diversion and appropriate institutional settings.

In the pathway we envisage, the proposed Disability Justice Plan will address the “who, when and how” of substantial and practical supports that would be necessarily funded, arranged, accessed and delivered; an integrated plan would encompass these matters:

- *Who*: alleged victims, witnesses, alleged offenders (as well others living with disability such as jury members, staff and officers of the court system);
- *When* these supports will be *substantially* available at various stages in a person’s progression through the justice system; and closely integrated with the matter of timing, is -
- *How* informational, procedural and human supports will be manifested at each stage of a person’s path through the system.

Similarly, the same triad of “who, when and how” questions arise in the training, orientation, understanding, responsive and other practice considerations that apply to professionals and staff working and operating in the criminal justice system.

### **Further reflections**

The reforms proposed in the *Discussion Paper* will challenge and make demands on the Police, Courts, legal profession, ancillary supports, institutions and affected communities and individuals. These challenges and demands will require self-reflection and *active* ongoing internal reform of the various components that comprise the criminal justice system in South Australia; nonetheless, we recognise these components have complex inter-relationships that, of necessity, requires “distance” – separation - from each part to administer, process and deliver justice, *but* also requires integration to achieve and deliver just results. In addressing these inherent tensions reform initiatives will require careful planning, persistence, adjustment and refinement.

The complexity of inter-relationships and the administration of justice was outlined in a recent report on diversion (a potential alternative to full engagement in the justice system by some people living with disability). The New South Wales Law Reform Commission stated that, as a matter of background:

*'There is strong evidence ... that people with cognitive and mental health impairments are over-represented throughout the criminal justice system. But the great majority of people with cognitive and/or mental health impairment do not offend. The higher rate of offending does not arise from any simple relationship between impairment and crime, but from impairment together with a multiplicity of other factors, such as disrupted family backgrounds, family violence, abuse, misuse of drugs and alcohol, and unstable housing.'*

*Diversion of people with cognitive and mental health impairments generally involves them engaging with a range of providers of treatment and services that have a rehabilitative focus. The relationship between the criminal justice system (police and courts) and the service sector is crucial to effective diversion. Both are complex systems. Effective diversion relies on connecting offenders with the right services and maintaining that connection when problems arise. Understanding and communication between the criminal justice system and services is crucial for diversion to work well. Significant challenges include: the great multiplicity of agencies providing services; different disciplinary understandings; different perspectives on key issues; gaps in the availability of services; and problems of integrating service delivery for people whose needs are complex.'*<sup>7</sup>

Research about aspects of correctional services in NSW outlined the tensions inherent in the use, by staff, of medical or social relational/interactional models of intellectual impairment that have affected the manner in which people living with disability have been treated in correctional settings. Programs to redress these tensions, by training correctional staff and support programs for offenders have been initiated and funded by government; there is no clear indication in this research as to how State Government reforms have driven these (relatively) localised initiatives, and the degree to which the initiatives are integrated into broader, planned, ongoing reforms of the NSW criminal justice system<sup>8</sup>.

The South Australian Attorney-General's *Discussion Paper* addresses the some of the legislative reforms undertaken in NSW. Arguably, some of the agency-related reforms initiated in that jurisdiction are currently some of the most open and accessible in

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<sup>7</sup> New South Wales Law Reform Commission (NSWLRC), 2012. People with cognitive and mental impairments in the criminal justice system. Diversion. *Report 135*. NSWLRC, Sydney, NSW: xv.

<sup>8</sup> Snoyman, P. and Aicken, B., 2011. The concept of intellectual disability, and people with intellectual disability in Corrective Services NSW. *Australasian Journal of Correctional Staff Development* 6(1). Internet available: [http://www.bfcsa.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0018/313461/Concept-of-Intellectual-Disability-Philip-Snoyman.pdf](http://www.bfcsa.nsw.gov.au/__data/assets/pdf_file/0018/313461/Concept-of-Intellectual-Disability-Philip-Snoyman.pdf)



Australia<sup>9</sup>. However, we note that information about the full spectrum of criminal justice system reforms, in relation to people living with disability, undertaken by New South Wales, are not readily accessible for the lay-public; it is not clear how policy and legislative initiatives in that State generate wide-spread and ongoing supportive action for people living with disability.

We also note, as an aside, that some reforms in the NSW criminal justice system have, over time, led to greater rates of incarceration and, accordingly, increasingly larger components of that State's justice budget on correctional services<sup>10</sup>, indicating that some reforms may result in an increased and further entrenched over-representation of people living with disability in the prison population<sup>11</sup>.

Given the inherent complexities of the criminal justice system and the many-faceted needs and requirements of people living with disability, there are consequent difficulties in setting out, mapping, a sufficiently detailed set of prescriptions for a preferred pathway through that system for people living with disability. We provide some examples of good policies, considerations and practices in the second part of this submission.

It seems that a practical response to these difficulties might be to develop a principles-based system which a criminal justice system will operate within. For example, the Department of Justice and Attorney-General (Queensland) developed, and disseminated, the following principles-based policy for the delivery of services to vulnerable people:

*i. Vulnerable people in the criminal justice system, whether they are victims, witnesses or defendants, will have access to justice.*

*ii. The special needs or difficulties of vulnerable people in the criminal justice system are recognised so that they receive fair and equitable treatment.*

*iii. We respect and treat vulnerable people with dignity and consider their needs, wishes or instructions and respond appropriately.*

*iv. That we ensure the best possible services available are provided to the vulnerable person, through the use of appropriate referrals to services provided by other agencies both within and outside the Department.*

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<sup>9</sup> See: Bartels, L., 2011. Police Interviews with Vulnerable Adult Suspects. *Research in Practice Report No. 21*. Australian Institute of Criminology, Canberra, ACT. 13p.

<sup>10</sup> Smith, G., 2009. Opinion: Hard line fine for dangerous criminals but what about the rest? *The Journal of the New South Wales Bar Association*. Summer 2009-2010: 8-10.

<sup>11</sup> New South Wales Law Reform Commission (NSWLRC), 2012. *Op cit*: 48 et seq.

*v. Our staff will be informed about the needs and difficulties vulnerable people encounter in the criminal justice system so that staff may respond in accordance with these principles.*<sup>12</sup>

These principles, which were bases for a Vulnerable Person Policy in Queensland, were commended by the Queensland Office of the Public Advocate for ‘... *the recognition of issues which confront people with impaired decision-making capacity in the criminal justice system ...*’<sup>13</sup>

However, the hyperlink provided by Howard and O’Brien (2009) in their paper - where the preceding quote was obtained - did not actively link, at the time of writing (June/July 2013) to a copy of the Department’s *Vulnerable Person Policy*; a search of the Departmental website for the Policy was not successful, suggesting that the Policy had been removed<sup>[NB: 14]</sup>. The Queensland Police Service has a Web accessible Vulnerable Persons Policy<sup>15</sup> but, apparently, the Queensland Government does not at this time; reasons for that omission are not readily available, although performance audits, monitoring, accountability and funding readily spring to mind as potential barriers to implementation.

The effective implementation of the proposed Disability Justice Plan will be on the minds of its developers in the South Australian Government.

Clement and Bigby (2010) outlined:

*‘... the conditions that some policy implementation theorists suggest are necessary for effective implementation, such as clarity, minimal ambiguity, authority to achieve goals, simple workable models, involvement of limited ‘players’ and a clear chain of accountability...’*<sup>16</sup>

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<sup>12</sup> Howard, M. and O’Brien, J., 2009. Criminal injustice for vulnerable people. A Paper for the Office of the Public Advocate (Queensland). *Presented at the Australian Guardianship and Administration Council Conference: Social Inclusion: The Future of Ageing, Disability and Substituted Decision-making. The Hilton, Brisbane 20<sup>th</sup> March 2009*: 14-15.

<sup>13</sup> Howard, M. and O’Brien, J., 2009. *Op cit*: 15.

<sup>14</sup> NB: A search of the NSW Lawlink – Attorney General and Justice website(s) provided no policy of a similar type at the time of searching [21<sup>st</sup> June 2013]: [http://www.professionalstandardscouncil.gov.au/lawlink/Corporate/ll\\_corporate.nsf/pages/LL\\_Homepage\\_index](http://www.professionalstandardscouncil.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_index)

<sup>15</sup> Internet available:

<http://www.police.qld.gov.au/Resources/Internet/rti/policies/documents/QPSVulnerablePersonsPolicy.pdf>

<sup>16</sup> Clement, T. and Bigby, C., 2010. From Cult to Functional Values: Interpreting the Principles, Goals and Strategies of Disability Policy. *In*: Bigby, C. and Fyffe, C. (Eds). *State Disability Policy for the Next Ten Years - What Should it Look Like? Proceedings of the Fifth Annual Roundtable on Intellectual Disability Policy*. School of Social Work and Social Policy, LaTrobe University, Bundoora, Vic: 42.

The authors outlined these conditions as bases for assessing the effective implementation of the (Victorian) State Disability Plan<sup>17</sup> operative at that time. The conditions set out above could also be a rationale for narrow reductive policies; however, the authors suggest that:

*'... generalities and idealisations in ... [a] ... Plan have an important role. Namely, presenting to our imaginations a future for people with disability, which satisfy a variety of perspectives and interests at the level of broad social policy. However, the vision is presented in such a way that it ignores the real life obstacles to what we want to achieve and masks underlying divergences of intent for different subgroups under the ... Plan's umbrella ...'*<sup>18</sup>

In contrast, there is a strong suggestion:

*'... that a requirement of ... broad, overarching ... disability policy is complementary, effective, mid-level policies and more finely grained guidance about the nature of overarching goals and their meaning for each of the sub-groups who currently fall under the umbrella term 'people with disability'.*

*Differentiated implementation strategies will be more able to take account of the differing pathways and support that may be required to achieve good outcomes.'*<sup>19</sup>

JFA Purple Orange agrees with the thrust of the preceding advice about implementation and looks forward to a Disability Justice Plan that works very effectively for people living with disability, thereby offering some redress for the inherent difficulties in accessing, participating in and being recipients of the justice system:

*'In essence, the difficulties participants faced in almost every aspect of their daily existence are typical examples of the post-welfare state, where the political nature of social problems are converted into the problems of individuals. Jamrozick (2009)<sup>[20]</sup> refers to this pattern as 'the individualisation of the social', where the issues of ... [people] ... with intellectual disability have been removed from the social environment in which they live and their behaviour and responses have been regarded as pathological. Through selective perception, the focus of concern has been ... without due regard for the marginalised and impoverished social conditions of people with intellectual disability ...'*<sup>21</sup>

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<sup>17</sup> Department of Human Services (DHS), 2002. *Victorian State Disability Plan 2002-2012*. Disability Services Division, DHS, Melbourne, Vic.

<sup>18</sup> Clement, T. and Bigby, C., 2010. *Op cit*: 41.

<sup>19</sup> Clement, T. and Bigby, C., 2010. *Op cit*: 43.

<sup>20</sup> Jamrozik, A., 2009. *Social Policy in the Post-Welfare State: Australian Society in a Changing World* (3rd Ed). Pearson Education Frenchs Forest, NSW: 312.

<sup>21</sup> Ellem, K., 2010. Looking at the Whole Picture: Effective and Humane Responses to Offenders with Intellectual Disability. *In*: Bigby, C. and Fyffe, C. (Eds). *State Disability Policy for the Next Ten Years - What*

## **Responses to Discussion Paper: Improving the criminal justice system for people with disability**

### **Part A: General**

Discussion Paper Q1: What are the greatest barriers that people with disability face in seeking access to justice?

In a recent *Issues Paper*<sup>22</sup>, the Australian Human Rights Commission (AHRC) indicated that there were five barriers for people living with disability and these have consequences for interactions with the justice system:

1. *'Community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disability. This means that people with disability are left without protection and face ongoing violence, or have repeated contact with the criminal justice system because appropriate programs and community support are not available.'*
2. *People with disability do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.*
3. *Negative attitudes and assumptions about people with disability often result in people with disability being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.*
4. *Specialist support, accommodation and programs may not be provided to people with disability when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead'). Instead, they are often indefinitely detained in prisons or psychiatric facilities without being convicted of a crime. This situation mainly happens to people with intellectual disability, cognitive impairment and people with psychosocial disability.*
5. *Support, adjustments and aids may not be provided to prisoners with disability so that they can meet basic human needs and participate in*

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Should it Look Like? *Proceedings of the Fifth Annual Roundtable on Intellectual Disability Policy*. School of Social Work and Social Policy, LaTrobe University, Bundoora, Vic: 139

<sup>22</sup> Australian Human Rights Commission (AHRC), 2013. Access to justice in the criminal justice system for people with disability. *Issues Paper: April 2013*. AHRC, Sydney, NSW. 18p.

*prison life. They often face inhuman and degrading treatment, torture and harmful prison management practices.*<sup>23</sup>

These barriers manifest in various ways for people's lived experience, with consequent impacts on lives and professional practices; for example<sup>24, 25</sup>:

- Difficulty for Police in identifying people living with disability, especially those with non-readily apparent impairments, and responding appropriately;
- The concerns about confidentiality of information and attendant issues and consequences for a complainant, about who is used as an intermediary in complex communications;
- The barriers raised by styles of questioning and the responses that some people living with disability will have to these situations;
- The excluding nature of legal and technical language used in the justice system; this matter, combined with the difficulties of English *not* being the main language of some people living with disability is a serious barrier;
- Fear of authority can also generate barriers for some people living with disability;
- Alleged offenses in residential settings are not addressed adequately;
- Insufficient attention paid to accessing relevant supports and modifications for people living with disability who are in the prison system;
- Difficulties for people living with disability in serving the community through jury service.

The barriers to justice compiled by the AHRC cogently and exhaustively encapsulate issues of concern for people living with disability and their interactions and participation with the criminal justice system. We have no reason to believe the South Australian justice system does not create similar barriers, in some instances<sup>26</sup>.

The justice system is adversarial, and the amelioration of the structural and cultural nature of that condition, seems to be a fundamental matter to deal with in its impacts on people living with disability. It is recognised that the essential nature of the Australian justice system, will *not* change its core tenets and principles (as an adversarial system); therefore, it

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<sup>23</sup> AHRC, 2013. *Op cit*: 4-5.

<sup>24</sup> See notes and examples outlined in: AHRC, 2013. *Op cit*.

<sup>25</sup> Information contained in submissions to: Parliament of South Australia Select Committee on Access to and Interaction with the Justice System for People Living with Disabilities. Appointed October 2011.

<sup>26</sup> *Ibid*.

is a matter of how adversariality is managed and manifests itself that is of importance for people living with disability.

A South Australian Parliamentary Select Committee<sup>27</sup> provided substantial information, via submissions and deliberations, about the issues for people living with disability in the South Australian justice system. For example, both the written and oral submissions by members of the South Australian Legal Services Commission were compelling in the details provided about individuals affected by their interactions with the SA justice system. A number of submissions, including one from the Julia Farr Association, provided recommendations to the Parliamentary Select Committee.

The recommendations made by submitters to the Select Committee were, and are, cogent and, the Deputy Premier, the Honorable John Rau, has indicated will be used in the deliberations about the Disability Justice Plan.

*Discussion Paper Qs 2 to 6 (inclusive): Overcoming Barriers and Appropriate Supports and Measures*

As an organisation that is fundamentally concerned with the autonomy, independence and quality of life for people living with disability, the Julia Farr Association recognises there will be interactions with the criminal justice system for *many* people living with disability<sup>28</sup>. There have been, and are, a number of governmental initiatives – including South Australia’s Disability Justice Plan – to address and improve justice systems in light of these complex matters<sup>29</sup>.

Our organisation is particularly concerned that an *inclusive, integrated and supportive* pathway for people living with disability is available *and* actively undertaken at all levels of the justice system; in short the criminal justice system is itself inclusive, just and attends to the substance of the requirements placed on it.

The South Australian Parliamentary Select Committee on *Access to and Interaction with the Justice System for People Living with Disabilities* provided an opportunity for the South Australian Parliament to receive and hear submissions about how the State’s justice system is faring with regard to people living with disability.

JFA Purple Orange (the Julia Farr Association) tendered a submission to the Select Committee which reflected our organisation’s concern for inclusivity and integrated support for people living with disability; the recommendations attended to each stage of how we

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<sup>27</sup> *Ibid.*

<sup>28</sup> See: Coumarelos, C., Macourt, D., People, J., McDonald, H.M., Wei, Z., Iriana, R. and Ramsey, S., 2012. *Legal Australia-Wide Survey: Legal Need. Access to Justice and Legal Needs Volume 7*. Law and Justice Foundation of NSW, Sydney, NSW. 361p.

<sup>29</sup> For example: The Attorney-General of Australia has initiated a process of referral to the Australian Law Reform Commission for a *Review of Equal Recognition Before the Law and Legal Capacity for People with Disability*. Internet available: <http://www.alrc.gov.au/inquiries/legal-barriers-people-disability> [14 June 2013]

conceived a “pathway to justice” would be constructed; the recommendations attended to the locations on that pathway which we believe require particular attention, refinement and improvement.

The recommendations made by JFA Purple Orange to the Select Committee are re-tendered as being still relevant to the consultation being undertaken by the South Australian Attorney-General, particularly with regard to Questions 2-6 (inclusive) set out in the *Discussion Paper for Consultation*. The recommendations were developed in full recognition of the vulnerable nature of people living with disability:

*‘Legal needs surveys have repeatedly found that people with a disability are not only more likely to experience legal problems but are, in fact, more vulnerable to a wide range of legal problems.*

*For example, in Australia regression analyses by Coumarelos et al. (2006)<sup>[30]</sup> on the NSWLNS [New South Wales Legal Needs Survey] revealed that disability stood out as the indicator of disadvantage most consistently linked with increased vulnerability. Disability was linked to high overall prevalence rates and high rates of most problem types — namely, accident/injury, consumer, credit/debt, education, employment, family, general crime, government and housing problems.<sup>31</sup>*

A recent *Staff Working Paper*<sup>32</sup> from the Australian Productivity Commission underscores the structural nature of disadvantage in Australia, and how it impacts on the life chances of people, including people with long-term health problems and those living with disability, excluding them from society. The justice system has, by its very objective, a strong obligation to address, and thereby not be party to maintaining, structural disadvantage in South Australia, whilst administering justice.

### *Recommendations for the South Australian Attorney-General’s Department*

#### *Recommendation 1*

That professionals working in the criminal justice system access professional development to build their capacity to understand the implications of intellectual disability/cognitive impairment and/or communication disorders for understanding and communicating during legal processes.

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<sup>30</sup> Coumarelos, C., Wei, Z., and Zhou, A.Z., 2006. *Justice made to measure: NSW Legal Needs Survey in disadvantaged areas. Access to Justice and Legal Needs Volume 3*. Law and Justice Foundation of NSW, Sydney, NSW. 322p.

<sup>31</sup> Coumarelos, C., et al, 2012. *Op cit*.

<sup>32</sup> McLachlan, R., Gilfillan, G. and Gordon, J., 2013. Deep and Persistent Disadvantage in Australia. *Productivity Commission Staff Working Paper*. Productivity Commission, Canberra, ACT. 236p.

#### *Recommendation 2*

That identification of a person living with disability triggers consideration of, and early referral where appropriate to, a magistrate court diversionary program or appropriate community-based options.

#### *Recommendation 3*

That all police officers are provided with training to enable them to understand the implications of living with an intellectual disability/cognitive impairment and the implications of a communication disorder, and what this means for officer practice during the judicial process.

#### *Recommendation 4*

That all relevant police procedures be reviewed and modified to ensure that alleged offenders living with disability receive the appropriate support to enable them to understand what is being asked or said and the significance of actions such as signing a record of interview or surrendering the right to silence.

#### *Recommendation 5*

That core procedures within the justice system are refined to ensure there is attention to the possible need for a support worker (or significant, trusted other) familiar to the person to be in attendance at all key stages of the person's connection with the criminal justice system.

#### *Recommendation 6*

That police be provided with training about the nature of intellectual disability/cognitive impairment, and communication disorders, their support needs and how to access them, and the implications for interactions with the justice system.

#### *Recommendation 7*

That people living with intellectual disability/cognitive impairment or related circumstances are not questioned by police without a familiar and trusted person being present.

#### *Recommendation 8*

That provision is made at the commencement of a jury trial for the jury to receive an awareness briefing and associated reference materials on the considerations relating to a person living with impaired capacity to understand the judicial process and /or give testimony.

#### *Recommendation 9*

That judges, magistrates, barristers and lawyers should be provided with adequate training in engaging in court with people living with intellectual disability/cognitive impairment or related circumstances. This should have an emphasis on assessing and



identifying appropriate support to enable the person to fairly engage with the justice system in a manner which upholds their rights.

*Recommendation 10*

That people living with intellectual disability/cognitive impairment or related circumstances are supported by a familiar person or trusted other at all stages of the court process.

*Recommendation 11*

That the justice system makes a Supported Decision-Making methodology available, such as that currently being trialled at the Office of the Public Advocate. This will assist people living with disability to make decisions and provide testimony throughout the judicial process.

*Recommendation 12*

That magistrates be provided with training so that they are aware of the nature and effects of disability (including its psychological and socio-economic dimensions), any relationship between lack of support services and offending behaviour, and the appropriateness and impact of diversion and sentencing options for offenders living with disability.

*Recommendation 13*

Development of procedures to ensure Magistrates have available to them adequate time and expert input for cases involving persons living with a degree of disability that has a material impact on their understanding of, and participation in, judicial proceedings.

*Recommendation 14*

The urgent review of any current South Australian legislation to remove/replace content that may be contributing to a view that people living with certain types of disability are deemed unreliable witnesses simply because of the naming of that disability. Any legislation so revised needs to acknowledge that any person living with disability has the potential, with appropriate support where necessary, to give authentic testimony.

*Recommendation 15*

That the courts explore and develop procedural options for appropriately supporting people living with intellectual disability/cognitive impairment and/or related circumstances to ensure they can give authentic and reliable testimony. This may include the participation in court of a trusted significant other in the person's life who can contribute to the court's understanding of the person's testimony; accessing such supports could be included as routine court procedure when dealing with people living with these disabilities.

## Part B. Legislative Changes

### Discussion Paper Q7: *What are your comments on the proposed changes to the law?*

#### *Summary position of the Julia Farr Association on this Question*

The Julia Farr Association is not able to undertake a legally informed opinion about the proposed changes to *Evidence Act 1929* (SA) or to other legislation that might be under consideration.

The brief outline of proposed changes to the legislation, in the Attorney-General's Department *Discussion Paper*, indicates a – necessarily - progressive agenda of improving justice for people living with disability. The Julia Farr Association supports initiatives where reforms are appropriately supportive and inclusive of people living with disability. However, we would expect that any changes to legislation will be framed in such a way that untoward and unforeseen outcomes arising from any such initiatives will not affect the broader community of people living with disability, their formal and informal supporters.

However, the changes outlined in the *Discussion Paper* are not sufficiently detailed to make further, substantial, commentary about them. There are, nonetheless, a number of broader relevant points that underpin our commentary in this part of our response.

#### *Broader considerations*

We recognise the following objectives would, in all likelihood, be in the Attorney-General's mind when considering responses to the *Discussion Paper*. The Julia Farr Association considers these objectives are fundamentally important and '*... acknowledges that the achievement of ... [such] ... objectives [will] involve ... a number of different, and sometimes, conflicting considerations*'<sup>33</sup>. The objectives are:

- a) '*... to preserve, to the greatest extent possible, the integrity of the evidence of a [vulnerable] witness;*
- b) *to limit, to the greatest extent possible, the distress or trauma experienced by a [vulnerable] witness as a result of giving evidence;*
- c) *to ensure that, in a criminal matter, an accused person against whom evidence is given by a [vulnerable] complainant or other [vulnerable] witness, receives a fair trial*'<sup>34</sup>

We also note that both the *Disability Discrimination Act 1993* (Cth) and the *United Nations Convention on the Rights of People with Disability*, and the focus on justice in these legal instruments, have force in the South Australian jurisdiction, and as such should hold sway in

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<sup>33</sup> Queensland Law Reform Commission (QLRC), 2000. *The Receipt of Evidence by Queensland Courts: The Evidence of Children. Report No. 55 Part 2A Summary of Recommendations*. QLRC, Brisbane: 3.

<sup>34</sup> *Ibid.* (NB: the word '*child*' in the original wording of the document has been replaced with [vulnerable])

matters relating to people living with disability in whatever circumstances they find themselves in when interacting with the State's justice system. The *National Disability Strategy* also has relevant foci on matters of justice; these also have relevance to the broader matters related to the *Discussion Paper*.

We also note that the Attorney-General of Australia has provided the Australian Law Reform Commission (ALRC) with Terms of Reference regarding a *Review of Equal Recognition before the Law and Legal Capacity for People with Disability*; this work is pending attention by the ALRC.

We have provided 15 Recommendations (see above) to the Attorney-General as part of this response, these address what we believe, integrated responses to interactions between the justice system and people living with disability would look like.

We also note changes to the *Evidence Act 1929* (SA) have previously been subject to consultation, and a subsequent report by the South Australian Law Reform Institute has been made publicly available<sup>35</sup>. We recognise that the changes to the legislation have been mooted for some time and this appears to be part of an exercise to bring South Australian's *Evidence Act* into harmony with *Uniform Evidence Laws* of other States and the Commonwealth<sup>36</sup>.

It is not abundantly clear but we assume, from the focus and content of the *Discussion Paper* that the Attorney-General's attention is focussed on indictable offences, and further to that major, rather than minor indictable offences; further commentary in this submission is based largely on these assumptions.

*Discussion Paper Q8: What should the definition of 'vulnerable people' be in the new laws?*

*Summary position of the Julia Farr Association on this Question*

There are cogent concerns about the normative and constitutive nature of the concept of '*vulnerable persons*'; these concerns are briefly traversed in the first part of this section of our response. We strongly recommend these concerns are brought into the Attorney-General's considerations about the structure and implementation of the proposed Disability Justice Plan.

However, if the assumptions hold about the Attorney-General's focus on indictable offences, and the vulnerability of some people living with disability to be subjected to such offences, then the Julia Farr Association broadly supports the definitions, proposed in the

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<sup>35</sup> South Australian Law Reform Institute (SALRI), 2012. *Modernisation of South Australian evidence law to deal with new technologies. Final Report 1 – October 2012*. SALRI, Adelaide. 50p.

<sup>36</sup> For example see: (i) SALRI, 2012. *Op cit.* and ii) Australian Law Reform Commission (ALRF), 2005. *Uniform Evidence Law. ALRC Report 102*. Australian Law reform Commission, New South Wales Law reform Commission and the Victorian Law Reform Commission, Sydney, NSW. 779p.

*Discussion Paper*, based on the reasoning underpinning the NSW criminal justice reform initiatives.

*Issues pertaining to 'vulnerable persons'*

The following comment, contained in the *United Nations Handbook on Justice for Victims* (1999)<sup>37</sup> provides a sense of perspective on the progress and rate of reform in relation to victims of crime, and begs some questions as to why some members of our society have not been, and are still not well served<sup>38</sup>.

*'Further, states in Australia and the United States and provinces in Canada have introduced statements of principles about how victims should be treated as well as many other laws and programmes. These safeguard victims' rights that protect their interests in the criminal justice system in addition to providing social and financial support to victims. Successful reform is often a "marathon rather than a sprint", with gradual reforms being introduced from within the existing system.*

*In many cases, these reforms were the direct result of the efforts of non-governmental organizations to convince law and policy makers, officials in law enforcement and justice, and the public of their crucial importance to crime victims. These organizations also play an essential role in keeping officials aware of ways in which victims are ignored and mistreated, and of practical programmes for improving both justice and law enforcement responses and the daily lives of victims.'*<sup>39</sup>

The concept of vulnerable people, as victims, is multifaceted and comprises some inherent tensions; one of the aims of the proposed Disability Justice Plan is to, necessarily and worthily, protect people living with disability who have been, are, or might be, subject to abuse and/or violence. There is a difficult balancing act in ensuring protection, inclusion and personal autonomy.

The South Australian *Minister's Disability Advisory Council* (MDAC) cogently outlines the nature of these tensions:

*'It is clear that neglect and abuse are driven by intricate dynamics which must be understood and analysed with honesty while guarding against social over-*

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<sup>37</sup> Australia is a signatory of the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

<sup>38</sup> See: submissions and transcripts of the South Australian Parliamentary Select Committee on justice and people living with disability.

<sup>39</sup> For international perspectives on associated relevant matters also see: United Nations Office for Drug Control and Crime Prevention, 1999. *United Nations Handbook on Justice for Victims: On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. United Nations Office for Drug Control and Crime Prevention & Centre for International Crime Prevention, New York, New York, USA: 87.

*protection in which the person is restricted in all choices and denied the exercise of life-expanding risk taking. Therefore the drive for inclusion cannot be disconnected from the need for protection. ...*

*This recognition raises disturbing issues for all those who are committed to ensuring the wellbeing and rights of Australians living with disability and their families and carers. We all have to face up to the inadequacy of current systems and to the difficult challenge of protecting people without further limiting their choices and autonomy.*<sup>40</sup>

MDAC also developed an integrated *Framework for Safeguarding Vulnerable Adults*, which was attached to its report to the Minister<sup>41</sup>. The Framework, and supporting information in the body of the report, provides a basis for consideration as an important component of an integrated Disability Justice Plan.

The MDAC report focuses on neglect and abuse in particular:

*'Abuse also may not accurately reflect how the action is perceived through the eyes of the criminal justice system and criminal law. People with disabilities are subject to, and should be able to avail of protection from, criminal law in the same way as other citizens; once an incident is reported by a person, the perpetrated action is treated as a potential 'crime', and the individual is perceived as a 'victim'. It has to be acknowledged though, that the point at which someone becomes a 'victim of crime', and the boundaries between 'crime' and 'abuse', are not always clear cut. For example, there may be numerous situations where cases of abuse are not defined as crimes by criminal codes, but are in contravention of a person's civil or human rights, as is recognised by the UN Declaration on Victims of Crime and of Abuse of Power (1985)<sup>[42, 43]</sup>. Walklate (2007)<sup>[44]</sup> also highlights the potential of the criminal justice system to see some categories of people as more justifiable and 'deserving' victims than others.*<sup>45</sup>

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<sup>40</sup> South Australian Minister's Disability Advisory Council, 2011. inclusion&protection: A dynamic safeguarding schema for South Australian's with disability who are also vulnerable to neglect and abuse. MDAC, Adelaide: 10.

<sup>41</sup> MDAC, 2011. *Op cit*: Attachment A. Internet available:

<http://www.sa.gov.au/upload/entity/1646/DS%20documents/ministers-disability-advisory-council/inclusion-and-protection-attachment-mdac.doc>

<sup>42</sup> United Nations General Assembly, 1985. UN Declaration of Basic Principles of Justice for Victims of Crime and of Abuse of Power. A/RES/40/34. United Nations, New York, New York, USA. Internet available:

<sup>43</sup> Williams, C., 1995. *Invisible Victims: Crime and Abuse Against people with Learning Difficulties*. Jessica Kingsley Publishers, London, United Kingdom. 160p.

<sup>44</sup> Walklate, S., 2007. *Imagining the Victim of Crime*. Open University Press, Maidenhead, Berkshire, United Kingdom. 189p.

<sup>45</sup> Edwards, C., Harold, G. and Kilcommmins, S., 2012. *Access to Justice for People with Disabilities as Victims of Crime in Ireland*. School of Applied Social Studies and Centre for Criminal Justice and Human Rights, Faculty of Law, University College Cork, County Cork, Ireland: 16-17.

The foregoing outlines a much broader need for reforms, such as those proposed by the Disability Justice Plan, as well as for early intervention policies and the implementation of a safeguarding framework the same, or similar, to that proposed by MDAC.

Underpinning some considerations of the concept of ‘vulnerable people’ are common law presumptions of capacity, and the recognition in legal and policy-related instruments, of exceptions to capacity; these perspectives can, sometimes, generate potentially confounding effects, particularly as “capacity” is a dynamic attribute:

*‘Capacity is decision specific and impairment of decision-making capacity for some matters (that is, a person has impaired capacity for some types of financial or personal decisions and not others) only is typical. Adults with mental illness will typically have an episodic impairment of their capacity for decision-making. Even during periods when they are unwell, they will typically have capacity for decision-making about some types of matters but not others. Adults with acquired brain injury typically do not identify themselves as having a disability and often present well unless their plausibility is tested, but nevertheless they may have markedly impaired decision-making capacity as a result of gross impulsivity. Again, however, they may be able to make some types of decisions. Adults with dementia typically progress from early dementia, when they may retain or have fluctuating capacity for decision-making for many matters, but progressively become incapable of making decisions about matters.’<sup>46</sup>*

The recently convened Commonwealth Senate Committee on the involuntary or coerced sterilisation of people living with disability<sup>47</sup> made a number of recommendations in its first report; the following recommendations, among others, are relevant to considerations and legal and societal perspectives on capacity:

*‘Recommendation 10*

*5.117 The committee recommends that each Australian jurisdiction use the same definition of capacity, to ensure that a person's rights to autonomy and bodily integrity do not vary according to, and are not dependent on, the jurisdiction in which they live.*

*Recommendation 11*

*5.126 The committee recommends that all jurisdictions adopt in law a uniform 'best protection of rights' test, replacing current 'best interests' tests, that makes*

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<sup>46</sup> Office of the Public Advocate Queensland, *Submission PR 195* [12 February 2007]. Internet available: <http://www.austlii.edu.au/au/other/alrc/publications/dp/72/>

<sup>47</sup> Parliament of Australia, Senate Community Affairs References Committee: *The involuntary or coerced sterilisation of people with disabilities in Australia*. Referred by Senate to Senate Committees on 20 September 2012.

*explicit reference to the protection of the individual's rights; and the maintenance of future options and choices.*<sup>48</sup>

The Senate report repays reading, as it outlines in detail attitudes and perspectives about the complex and difficult relationship of attitudes to the agency and autonomy of people living with disability, human rights and consent.

A submission to the ALRC's *Review of Australian Privacy Law* highlighted another potentially confounding effect – that of “longevity” of a legal decision about incapacity:

*‘Does it mean that if a particular agency assesses a person as being incapable of making a particular privacy decision that this decision will then constitute a ‘finding’ of incapacity? How long will that ‘finding’ operate? Alternatively, does it mean that the presumption [of incapacity] can only be displaced by a formal finding, such as a determination by a Court or tribunal about the capacity to make a specific privacy decision? Which court or tribunal would make such a finding? ...’*<sup>49</sup>

High Court decisions in the United Kingdom<sup>50</sup> have highlighted concerns about legal constructions of ‘vulnerable adults’ and the tensions between legal notions of protection, intervention and fundamental respect for the individual:

*‘Recent judgments in England and Wales have confirmed and extended the High Court’s inherent jurisdiction to make declarations about interventions into the lives of ‘vulnerable’, rather than simply ‘mentally incapacitated’ adults. We argue that this shift is problematic because of the ways that the ‘vulnerable adult’ has been constructed in order to justify such interventions. The accounts of vulnerability drawn upon in the constructive process highlight the person’s inherent characteristics and/or the circumstances within which that person might be denied the ability to make a free choice. Such an approach parallels the public policy protection of ‘vulnerable adults’ from abuse in care services and the statutory protection of ‘vulnerable witnesses’ in the criminal justice system, and is built on an external and objective assessment of being ‘at risk’, rather than an understanding of the subjective experience of being vulnerable. We argue that this imbalance might act to disempower the ‘vulnerable adult’ by reducing that person’s life to a series of risk factors that fail, first, to place him/her at the heart*

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<sup>48</sup> Senate Community Affairs References Committee, 2013. *Op cit*: x.

<sup>49</sup> New South Wales Guardianship Tribunal, *Submission PR 403* [7 December 2007]. Internet available: <http://www.austlii.edu.au/au/other/alrc/publications/dp/72/>

<sup>50</sup> Also see: Herring, J., 2009. Protecting vulnerable adults: a critical review of recent case law. *Child and Family Law Quarterly* 21(4): 498-512.

*of the decision to intervene, and, secondly, to engage adequately with the experiences through which that person ascribes meaning to his/her life.*<sup>51</sup>

In South Australia, the Office of the Public Advocate (OPA) developed a report about vulnerable older people in South Australia and provided, therein, some comparative approaches to the notion of vulnerability in other jurisdictions (in Australia and overseas)<sup>52</sup>. The report considered that, in the case of older people, vulnerability had two components:

- i) *'an inability to self-protect;'* [and ]
- ii) *'the presence or likelihood of experiencing harm (including self-harm) or exploitation.'*<sup>53</sup>

South Australian legislation has a definition of what constitutes '*vulnerable*' in the *Children's Protection Act 1993* (SA). This legislation frames requirements for employer driven screening of potential employees when working with children. However, both the preceding definitions rely to a degree on chronological age as one consideration in defining vulnerability (i.e. the young and the old as groups of people). Bartels (2011)<sup>54</sup> compares the legislation and (available) police policies in each jurisdiction of Australia with regard to interviewing '*vulnerable adult suspects*' and noting there is no internationally accepted definition of '*vulnerable*' witnesses<sup>55</sup>.

Gudjonsson (2010) reviews definitions of vulnerability for usefulness and states:

*'The focus on groups of vulnerable individuals is helpful but what is also needed is a generic definition related to psychological vulnerabilities that is applicable to witnesses, victims, and suspects.*

*With this in mind, Gudjonsson (2006) defines psychological vulnerabilities as 'psychological characteristics or mental state which render a witness prone, in certain circumstances, to providing information which is inaccurate, unreliable or*

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<sup>51</sup> Dunn, M.C., Clare, I.C.H. and Holland, A.J., 2008. To empower or to protect? *Constructing the 'vulnerable adult' in English law and public policy*. [Abstract]. *Legal Studies* **28**(2): 235.

<sup>52</sup> Office of the Public Advocate (OPA), 2011. *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People. Report for the Office of Ageing and Disability Services*. OPA and the University of South Australia, Adelaide. 104p.

<sup>53</sup> *Ibid*: 104.

<sup>54</sup> Bartels, L., 2011. Police Interviews with Vulnerable Adult Suspects. *Research in Practice Report No. 21*. Australian Institute of Criminology, Canberra, ACT. 13p.

<sup>55</sup> See: Bull, R., 2010. The investigative interviewing of children and other vulnerable witnesses: Psychological research and working/professional practice. *Legal and Criminological Psychology* **15**: 5-23.



*misleading<sup>[56]</sup> ... . In this context, psychological vulnerabilities represent potential 'risk factors' rather than definitive markers of unreliability.<sup>57</sup>*

The Julia Farr Association's substantial experience of working with people living with disability reinforces, on a daily basis, the complexity and dynamic nature of the concept of vulnerability; in proposing a workable definition of 'vulnerable person' for the State's criminal justice system our definition would want to account, as fully as possible, for the complexities of individual responses to an involvement with the justice system. This approach relies on a nuanced understanding of the differences between 'inherent -' and 'situational vulnerability' and how responses to these matters can be limiting and possibly reductive:

*'If we accept that engaging with human vulnerability requires an assessment of both the objective risk factors that impact on that vulnerability, and an understanding of the subjective experience of being vulnerable, we can see the limitations in drawing on inherent and situational accounts to justify protective interventions into the lives of 'vulnerable adults'. Considering a person's inherent vulnerability requires an assessment of the increased risk that the person's age, illness or disability poses for him/her being constrained, coerced, or unduly influenced. When these inherent characteristics impact on that 'vulnerable adult's' situational vulnerability, identifiable risks may be objectively and externally assessed with reference to the specific circumstances within which those characteristics will increase significantly the likelihood of being constrained, coerced, or unduly influenced. ... In the cases outlined above, the common law doctrine of necessity has interpreted a 'necessity to act' no longer just in terms of the immediate harm, or danger, facing a person, but also with regard to the longer-term identification, assessment and pre-emptive management of that harm or danger, reconceptualised as a set of discrete risk factors.*

*What is missing in both inherent and situational accounts of vulnerability is the 'vulnerable adult's' voice itself. By equating vulnerability with risk, attempts to engage meaningfully with the 'vulnerable adult's' experiential perspectives, through the inherent and situational accounts given, are largely absent.'<sup>58</sup>*

The notion of a 'lack of voice' for people living with disability is of considerable concern to the Julia Farr Association and even more so for the people we work for and with, as they have first-hand experience of exclusion.

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<sup>56</sup> Gudjonsson, G.H., 2006. The psychological vulnerabilities of witnesses and the risk of false accusations and false confessions. *In*: Heaton-Armstrong, A., Shepherd, E., Gudjonsson, G. & Wolchover D. (Eds). *Witness testimony. Psychological, investigative and evidential perspectives*. Oxford University Press, Oxford, United Kingdom: 61-75.

<sup>57</sup> Gudjonsson, G.H., 2010. Psychological vulnerabilities during police interviews. Why are they important? *Legal and Criminological Psychology* **15**: 161-175.

<sup>58</sup> Dunn, et al., 2008. *Op cit*: 246.

However, we recognise, and assume, that the Attorney-General has other matters in mind in relation to definitions of 'vulnerable' people; the following part of this section of our response considers these assumed foci.

#### *Vulnerable persons and indictable offences*

Some caring professions in Australia are subject to codes of conduct and associated processes for sanctioning inappropriate and improper conduct<sup>59</sup>; however, there are situations, professional and working relationships, where codes do not apply and people, because of many interdependent factors, are vulnerable to depredation; in some instances, the professional code of conduct will require alleged criminal acts to be reported to police<sup>60</sup>. However, there are situations where codes of conduct are inadequately structured, or enforced, to address criminal misconduct - and more so, where no codes apply.

It seems clear from the direction the *Discussion Paper* takes that the South Australian Attorney-General is primarily concerned with the vulnerability of some people living with disability to be subject to criminal acts by people in trusted positions; the reforms undertaken by the NSW State Government in regard to these issues are the exemplar for the South Australian Government's proposed reforms.

The Criminal Law Review Division (CLRD) of the NSW Attorney General's Department invited submissions from interested parties when considering *Intellectual Disability and the Law of Sexual Assault* in that state (the CLRD reforms were, therefore, relatively narrowly focused). This review apparently led to changes of the *Crimes Act 1990* (NSW) and the development of s66F of that Act (as shown on p.10 of the South Australian Attorney-General's Department *Discussion Paper*).

Submissions provided to CLRD addressed some concerns that have been previously outlined:

*'The NSWLRC [New South Wales Law Reform Commission] recognised the difficulty in finding an appropriate balance between protecting sexual autonomy and preventing the sexual exploitation of persons with an intellectual disability. Such a dilemma is acknowledged by Associate Professors Carmody and Hayes who argue that the concern to protect people with an intellectual disability from exploitation needs to be balanced with the person's right to live full and 'normal' life, including the right to sexual expression.'*<sup>61</sup>

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<sup>59</sup> For example: Australian Medical Council, 2009. *Good Medical Practice: A Code of Conduct for Doctors in Australia*. Australian Medical Council, Kingston, ACT. 35p.

<sup>60</sup> Medical Board of Australia, 2011. *Sexual Boundaries: Guidelines for Doctors*. Medical Board of Australia, Melbourne, Victoria. 5p.

<sup>61</sup> NSW Attorney General's Department (NSWAGD), 2007. *Intellectual Disability and the Law of Sexual Assault. Discussion Paper June 2007*. Criminal Law Reform Division, NSW Attorney General's Department, Sydney, NSW: 9.

The background information provided by the CLRD sets out some groundwork for the conditions under which someone might be considered ‘vulnerable’:

*‘... it is submitted that the requirement of supervision or social habilitation ought to be a threshold requirement in acknowledgement of the fact that some persons with a cognitive impairment will not be inherently vulnerable by reason of their impairment, while others will be particularly vulnerable to sexual exploitation because of the nature of their impairment.’<sup>62</sup>*

The conditional nature of habilitation and supervision (of people living with intellectual disability) apparently formed the basis for the changes made to the relevant legislation in NSW:

*‘Section 66F(2) creates an offence by a person in authority to have sexual intercourse with a person with an intellectual disability. It may be assumed that the prosecution would not have much difficulty in proving that the accused had knowledge of the complainant’s disability.’*

*In order to provide greater protection to intellectually disabled people, the NSWLRC recommended that s 66F(2) be redrafted to cover all relevant carers, including volunteers and staff providing home-based care, but not prohibit sexual relations between consumers of the same service ...’<sup>63</sup>*

Bartels states, in addressing ‘vulnerable persons’ and the criminal justice system:

*‘The legislation in New South Wales is the most extensive and makes special provision for a range of vulnerable persons.’<sup>64</sup>*

The South Australian Attorney-General’s Department *Paper* provides, in full, s66F of the NSW *Crimes Act* (p. 10) as a basis for one of the questions posed in the *Discussion Paper*; given the arguments developed in the NSW reform process it would appear that current definitions of ‘vulnerable persons’ used in the NSW legislation might be considered as workable in the South Australian context:

**‘NSW Courts definition**

*... In the [NSW] Criminal Procedure Act 1986 chapter 6 part 6 a **vulnerable person** is a person who has suffered a personal assault offence and is one of the following*

- 1. a child, or*
- 2. a cognitively impaired person. This includes:*

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<sup>62</sup> NSWAGD, 2007. *Op cit*: 8.

<sup>63</sup> NSWAGD, 2007. *Op cit*: 9.

<sup>64</sup> Bartels, L., 2011. *Op cit*: 11.

- (a) an intellectual disability,*
- (b) a developmental disorder (including an autistic spectrum disorder),*
- (c) a neurological disorder,*
- (d) dementia,*
- (e) a severe mental illness,*
- (f) a brain injury.*<sup>65</sup>

In New South Wales the Police have a parallel and complementary definition of ‘vulnerable person’ to that of the Courts, because:

*‘The NSW Police make special arrangements for vulnerable persons - particularly when they need to give a statement.*

*In the Law Enforcement (Powers and Responsibilities) Regulation 2005 Clause 24 a person who falls within one or more of the following categories is a ‘**vulnerable person**’:*

- (a) children*
- (b) people who have impaired intellectual functioning*
- (c) people who have impaired physical functioning*
- (d) people who are Aboriginal or Torres Strait Islanders*
- (e) people who are of non-English speaking background*<sup>66</sup>

*Discussion Paper Q9(a): What do you think about introducing a new offence in South Australia (as in New South Wales) that would make it an offence for an employed or volunteer carer of a person with intellectual disability to have sexual contact with the person in their care?*

*Summary position of the Julia Farr Association on this Question*

In being consistent with the assumptions about the concerns of the South Australian Attorney-General with specific indictable offences i.e. within the ambit of the reforms undertaken in NSW, the Julia Farr Association broadly supports the proposal for a new offence. Nonetheless, we would expect that any changes to legislation will be framed in such a way that untoward and unforeseen outcomes arising from any such initiatives will not affect the broader community of people living with disability, and their formal and informal supporters.

However, the proposed Disability Justice Plan could reasonably be expected to go much further than this and attend to the implementation of active support of people living with disability across the whole criminal justice system in South Australia.

<sup>65</sup> *NSW Government - Attorney General and Justice Website. Vulnerable persons - Victims Services [13 December 2011]:*

[http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll\\_vs.nsf/pages/VS\\_vulnerableperson](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_vulnerableperson)

<sup>66</sup> *Ibid.*

Our concerns about this broader need for an integrated approach stems from the evidence and submissions presented to the recent Parliamentary Select Committee on justice and people living with disability, about the experiences of people, whether as victims, witnesses, offenders or others involved in the criminal justice system in South Australia.

#### *Commentary*

Some of the issues outlined in the response to *Discussion Paper* Question 8 pertain here (see the preceding section (Q8)).

The first part of Question 9 (i.e. Q9(a)) is framed in such a way that begs some questions; if the necessarily limiting factors were considered important for the changes to the NSW legislation are not outlined (i.e. the reader/responder may not have access to the CLRD Discussion Paper) then, on the face of Question 9, concerns could be expressed about a lack of nuance in the use of the term ‘... *person with intellectual disability*’ and how any such lack of nuance might have impacts on the autonomy and choice of an individual living with disability.

However, Question 9, when framed within the arguments set out by the NSW Attorney General’s Department, has the appearance of a prudent change to legislation in South Australia, particularly in light of the following:

*‘A highly cited Australian study conducted in 1989 surveyed a sample of 158 adults with an intellectual disability in South Australia using questions adapted from the 1983 ABS Victims of Crime Survey ...<sup>[67, 68]</sup>. The study found that adults with an intellectual disability were more than twice as likely to be victims of personal crimes as the general adult population, and 10.7 times more likely to be victims of sexual assault in particular ...<sup>[69]</sup>. Furthermore, the likelihood of victimisation differed according to an individual’s living arrangements, such that those people with an intellectual disability that lived in shared residential care or institutional settings were most vulnerable to abuse. A further key finding of the study is that when victimised, adults with intellectual disability are unlikely to report the crime to police themselves, with a third party such as a family member or carer often doing so. Where the person experiencing abuse is dependent on a carer who is perpetrating abuse, the capacity to report is severely restricted. Wilson and Brewer (1992) found that between 40 and 70% of crimes go unreported, and that sexual assault in particular is least likely to be reported to police. The finding that adults with an intellectual disability are significantly less likely to report a crime themselves also highlights the additional vulnerability of this group to crime victimisation, such that in residential facilities in particular it*

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<sup>67</sup> Wilson, C., 1990. The incidence of crime victimisation among intellectually disabled adults. *Report Series No. 92*. Australasian Centre for Policing Research, Payneham, SA. 41p.

<sup>68</sup> Wilson, C. & Brewer, N., 1992. The incidence of crime victimisation among intellectually disabled adults. *Australian Psychologist* 27(2): 114-117.

<sup>69</sup> *Ibid.*

*is most often “staff, rather than the victim who decide when police intervention is called for” (Wilson, 1990, p. 9).<sup>70</sup>*

The urgency and need for action on the basis of the preceding information is clear. However, issues about people living with intellectual disability and inappropriate institutional settings are matters that the South Australian Government and the criminal justice system must address on its own account; we, as an organisation would welcome an opportunity to contribute to State Government-led initiatives, Inquiries or otherwise, that would substantively address these matters.

The written and oral submissions by the South Australian Legal Services Commission to the Parliamentary Select Committee<sup>71, 72</sup> about the placement of people living with intellectual disability in inappropriate and inadequate institutional settings was disturbing; these situations, if not remedied appropriately, generate an impression that the reforms that might reasonably be expected from a Disability Justice Plan, generated by the State Government, could be inadequate.

*Discussion Paper Q9(b): Should consent be a defence to such an offence?*

*Summary position of the Julia Farr Association on this Question*

Taking the framing of this question and the assumed foci of the Attorney-General as a basis for consideration, the Julia Farr Association broadly supports the notion that consent should not be a defence for the offence proposed in the *Discussion Paper*.

Considered reservations, in relation to a well-considered and implemented Disability Justice Plan are briefly traversed in the commentary that follows.

*Commentary*

The requirement for consent in sexual relationships, and associated issues, has been subject to thoughtful and well-considered research studies and legislative and policy reviews. However, the matter of an alleged offence, under the constrained perspective that the NSW legislature adopted suggests that a person who is providing *professional* services (paid or

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<sup>70</sup> Murray & Powell, 2008. Sexual assault and adults with a disability: Enabling recognition, disclosure and a just response. *Australian Institute for Family Studies and the Australian Centre for the Study of Sexual Assault, Issues 9*: 3-4.

<sup>71</sup> Parliament of South Australia Select Committee on *Access to and Interaction with the Justice System for People Living with Disabilities*. Submission 11 - Legal Services Commission. *Internet available*: <http://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=3&CId=268>

<sup>72</sup> Parliament of South Australia Select Committee on *Access to and Interaction with the Justice System for People Living with Disabilities*. Transcript of Evidence – Independent Advocacy and Legal Services Commission of SA 27.02.2013. *Internet available*: <http://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=3&CId=268>

voluntary) for a vulnerable person living with disability<sup>73</sup> should not have the defence of 'consent' available to them.

The NSW Attorney General Department's Discussion Paper (2007) made a cogent point about the relationship of professional services provision to vulnerable people living with intellectual disability and s66F of the *Crimes Act 1900* (NSW):

*'Section 66F(2) creates an offence by a person in authority to have sexual intercourse with a person with an intellectual disability. It may be assumed that the prosecution would not have much difficulty in proving that the accused had knowledge of the complainant's disability.'*<sup>74</sup> [emphasis added]

It is assumed the point made is that an alleged offender would know about, in their professional capacity, the *degree* of incapacity of a vulnerable person. This matter hinges on issues of exploitation; the NSW Discussion Paper decides on that matter:

*'During the course of preliminary consultation with agencies, the Spastic Centre were concerned that an extension of the provisions to cover people with cerebral palsy, who may not have an intellectual disability but who may have a profound communication problem, and no control over their movements, may be problematic and involved a philosophical dilemma between paternalism and the need to ensure their right to sexual freedom is protected'*<sup>75</sup>.

*While it is accepted that the law should not operate to deny persons with a cognitive impairment the freedom to participate in consensual sexual relationships; the law must serve to protect vulnerable members of society from sexual exploitation.'*<sup>76</sup>

JFA Purple Orange assumes that the reasoning about the purposes of the law will hold sway about the matter of consent *within the limits* outlined previously.

The issues raised above about paternalism, autonomy and right to choose for people living with disability are fundamentally valid and inarguable; a substantial and well considered Disability Justice Plan and appropriately adjusted legislative and procedural changes will attend, in substance and intent, to such matters and not, by default, serve existing interests or "ways of doing things", thereby creating an "old wine in new bottles" situation in the justice system.

*Discussion Paper Q10: Guidelines will accompany the new law in order for it to be successful in practice. What should be included in the guidelines for the taking of statements from people with disability in their dealings with the criminal justice system?*

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<sup>73</sup> I.e. In consideration of relevant factors such as: reduced capacity in decision-making, minimal or no access to appropriate knowledge and requiring support and habilitation.

<sup>74</sup> NSWAGD, 2007. *Op cit*: 9.

<sup>75</sup> 'Telephone submission of the Spastic Centre.'

<sup>76</sup> NSWAGD, 2007. *Op cit*: 11.

### *Summary position of the Julia Farr Association on this Question*

This question is confusing to the lay-reader, particularly as the ‘new law’ has not been outlined in sufficient detail in the *Discussion Paper*, neither is there an easily accessible commentary on the reasoning and framing of the ‘new law’ to understand what is envisaged ‘in practice’.

Hence, reasonably informed commentary on any proposed guidelines is, by these means, limited. The nature of the wording of Question 10 suggests that the proposed Guidelines would primarily be a procedural document for the South Australian Police.

However, as the Julia Farr Association is concerned with an integrated and supportive approach for people living with disability, no matter where or how they are situated in the justice system, and how such an approach is implemented through a Disability Justice Plan, we would suggest that procedural documents could be adapted from other jurisdictions. We would suggest, for the Attorney-General’s consideration that documents such as the following:

- *Achieving Best Evidence* (UK)<sup>77</sup>;
- *Information Book for Prisoners with Disability* (UK)<sup>78</sup>
- *Equal Treatment Bench Book* (UK)<sup>79</sup>; and
- Publicly available equal treatment *Bench Books* for some Australian jurisdictions<sup>80</sup>.

The preceding examples fulfill a number of requirements with regard to expectations, appropriate conduct, informational substance, transparency and accessibility when dealing with vulnerable and disadvantaged people. It would be a reasonable expectation of the Julia Farr Association that any guidelines developed in conjunction with a Disability Justice Plan would be wider ranging in the scope of guidelines, procedural and practice documents than just for police procedures (possibly restricted to obtaining evidence) important as that type of document would be.

### *Commentary*

In the examples provided above, there are several matters of interest that emerge. The first is that those documents are publicly available, they are understandable and informative, and they set out complicated matters and procedures in reasonably clear terms and

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<sup>77</sup> Ministry of Justice, 2011. *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures*. Ministry of Justice, London United Kingdom. 243p.

<sup>78</sup> Department of Health and Prison Reform Trust, 2009. *Information Book for Prisoners with a Disability. Easy-read Edition*. Prison Reform Trust, London, United Kingdom. 13p.

<sup>79</sup> Judicial Studies Board, 2008. *Equal Treatment Bench Book. Part 5 Disability*. Equal Treatment Advisory Committee, Judicial Studies Board, London, United Kingdom.

<sup>80</sup> E.g. Judicial Commission of New South Wales (JCNSW), 2006. *Equality before the Law Bench Book* [updated version, 2013]. JCNSW, Sydney, NSW. 12 Sections of numbered pages.



language and in address some components of accessibility. In summary, these are documents that provide information about support and support measures for all parties participating in the criminal justice system.

However, it is recognised that not everyone has access to the internet, and possibly those with most need of access to such documents are those people who might need to inform themselves or people they care for, or care about would be considerably disadvantaged<sup>81</sup>; as such, there may be a requirement for the State Government to consider how such documents could be transmitted widely and readily.

We shift the perspective of this commentary to the particular foci of the *Discussion Paper* (i.e. police procedural documents); it would seem to be reasonable to look to reviews of police procedures in other jurisdictions, for example, New South Wales:

*'Examination of the relevant police policies and manuals indicated that New South Wales and Tasmania provide detailed instruction to officers in relation to their dealings with vulnerable witnesses and suspects, with such information readily available online.'*<sup>82</sup>

The *NSW Police Handbook*<sup>83</sup> and *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*<sup>84</sup> set out, in reasonably clear terms, policies and procedures to be followed by police when interacting with people living with disability. However, on our own investigation of these documents it was clear that knowledge of the contents would be a large undertaking for someone with a reasonable laypersons' understanding of legal and procedural matters, let alone some people living with disability.

Bartels also comments on overseas initiatives:

*'In examining this issue, the international experience should be taken into account. For example, Gudjonsson<sup>[85]</sup> has observed that 'England has taken the lead in improving the police interview process and the protection of vulnerable interviewees', although 'there still remains a huge unmet need among vulnerable witnesses with regard to identification and implementation of the special measures'.*<sup>86</sup> [emphasis added]

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<sup>81</sup> See: McLachlan, R., Gilfillan, G. and Gordon, J., 2013. *Op cit*: 93 et seq.

<sup>82</sup> Bartels, L., 2011. *Op cit*: 11.

<sup>83</sup> Internet available:

[http://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0009/197469/NSW\\_Police\\_Handbook.pdf](http://www.police.nsw.gov.au/__data/assets/pdf_file/0009/197469/NSW_Police_Handbook.pdf)

<sup>84</sup> Internet available: [http://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0007/108808/Code\\_CRIME\\_-\\_January\\_2012.pdf](http://www.police.nsw.gov.au/__data/assets/pdf_file/0007/108808/Code_CRIME_-_January_2012.pdf)

<sup>85</sup> Gudjonsson, G.H., 2010. *Op cit*: 165.

<sup>86</sup> Bartels, L., 2011. *Ibid*.

The Ministry of Justice (UK) has developed a standalone document that brings together the processes, procedures and policies for obtaining evidence from vulnerable people<sup>87</sup>. The Judiciary in the United Kingdom (and in some jurisdictions in Australia) have developed manuals for Equal Treatment in courts<sup>88</sup>; manuals, provided in *Easy-read* format, for prisoners living with disabilities about their rights and other relevant information<sup>89</sup> are also readily accessible online.

While we recognise this response is beyond the limited terms of Question 9, we would nonetheless suggest that these documents, and how the content is compiled and presented, offer an effective and achievable template for supporting the types of reforms that a Disability Justice Plan demand of the criminal justice system.

In contrast, Bartels' (2011) review of Police policies and procedures for interviewing people living with disability was sparsely informative about the South Australian Police (SAPOL); that does not imply there are no SAPOL policies and procedures but rather there is an issue about wider accessibility of relevant information; addressing this would help to remove or reduce some barriers for people living with disability e.g. in understanding processes, procedures and their rights in the criminal justice system.

The lack of accessibility to relevant SAPOL policies and procedures might also suggest there is a wider lack of awareness of, or training about, what is required of the criminal justice system, including the police, in relation to people living with disability:

*'... any policy initiatives in this context should not only adopt contemporary terminology, but also comply with Australia's requirements under the Convention on the Rights of Persons with Disabilities to 'promote appropriate training for those working in the field of administration of justice, including police and prison staff' (Article 13) to ensure effective access to justice for persons with disabilities.*<sup>90</sup> [emphases added]

However, whichever guidance document is adopted as a template for South Australia's use in conjunction with the proposed Disability Justice Plan, we iterate that adequate training, resourcing and structural changes in relevant parts of the criminal justice system will need to go hand-in-hand with the South Australian Disability Justice Plan initiative.

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<sup>87</sup> Ministry of Justice, 2011. *Op cit.*

<sup>88</sup> Judicial Studies Board, 2008. *Op cit.*

<sup>89</sup> Department of Health and Prison Reform Trust, 2009. *Op cit.*

<sup>90</sup> Bartels, L., 2011. *Ibid.*