



12 April 2023

Targeted Review of Divisions 270 and 271 of the Criminal Code Act 1995 (Cth)

Dear Attorney General's Department,

Inclusion Australia is the national Disability Representative Organisation representing the rights and interests of Australians with an intellectual disability and their families. Founded in 1954, our mission is to work to make sure people with an intellectual disability have the same opportunities as people without disability. We have teams in Victoria, Western Australia, and the Northern Territory, and we have member organisations in New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.

We thank the Attorney General's Department for the invitation to the consultation held on 23 February 2023. We are grateful for the encouragement to provide this written submission to the Targeted Review outside of the official consultation period.

Inclusion Australia has a long history of systemic advocacy for open and self-employment for people with an intellectual disability. Extensive consultation with people with an intellectual disability, their families, as well as researchers, advocates and other experts, has culminated in several recent major submissions. We are pleased include the following as Appendices to this letter, which were both submissions to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People (the Royal Commission):

- A) Submission to the Disability Royal Commission – The Omnibus
- B) Equal Pay, Equal Rights: Inclusive Employment for people with an intellectual disability

Context of this letter

The experiences and expertise provided to us by people with an intellectual disability and their families highlight the ways in which people with an intellectual disability are excluded from employment in the mainstream workforce. Instead, they experience a 'polished pathway'¹ to work in Australian Disability Enterprises (ADEs) for below minimum wage alongside mainly other people with an intellectual disability, separate from the rest of the community.

This is a system of segregation. People with an intellectual disability do not get adequate opportunity to exercise **consent** and genuine **choice** about getting a job in an ADE; may experience

¹ The 'polished pathway' refers to the incremental journey to poorly paid, segregated and congregated work. The pathway is shaped by low community expectations and supported by interlinking systems, including Disability Employment Services; Centrelink; the National Disability Insurance Scheme; JobAccess and many more. The ways these cultural conditions and systems intersect mean it is very difficult for people with an intellectual disability to get a job outside of an ADE: they close the door to opportunity. Once people with an intellectual disability are in these systems, they don't leave: they will not enter mainstream employment or have the same opportunity for choices and experiences as other people with disability or the wider community. Please see Appendix B, p. 27.

coercion or **pressure** to stay at an ADE; and are shut out of other work options in mainstream employment because of significant barriers to other jobs in the mainstream workforce.

People with an intellectual disability and their families have told us about the **power imbalance** that exists inside ADEs between people with an intellectual disability and other staff, which further diminishes peoples' opportunities to speak up, provide consent and have genuine choice about their employment, including the decision to leave an ADE.

There are several significant outcomes of this system. Key among them is that people with an intellectual disability are much **more likely to live in poverty** than other Australians,² with 72% of people with an intellectual disability relying on a government payment—usually the Disability Support Pension—as their main source of income.³

Key issues for consideration

We believe the issues, evidence and recommendations raised in the attached submissions are particularly relevant to the following issues raised in the Discussion Paper:

Section 4 – Division 270 – Slavery and slavery-like practices, p. 31-36 of Discussion Paper.

- **Servitude, Question 13, p. 33.**

Based on the evidence contained in the Appendices, we believe it would be desirable to legislate and include additional guidance about factors that might indicate 'significant deprivation of personal freedom' to clarify the distinction between servitude and forced labour.

In the context of the experiences of people with an intellectual disability, this additional guidance should include systemic factors—such as the polished pathway, attitudinal barriers that exclude people with an intellectual disability from the mainstream workforce, and power imbalances within ADEs—as these factors have been shown to significantly impinge on peoples' opportunities for genuine choice, provision of consent, and personal freedom regarding their employment.

These issues were substantiated in detail during the public hearing 22 of the Royal Commission, which examined the experience of people with disability working in ADEs.⁴ Evidence provided by witnesses demonstrated that having genuine choice and control about working in an ADE is affected by systemic and structural issues, including:

- i. The information and support that is available to people with disability

² One third (33%) of adults living in poverty have a disability. The rate of poverty among adults with a disability who have a core activity limitation is 20% (295,000 people).

See Davidson, P; Bradbury, B; and Wong, M (2023), *Poverty in Australia 2023: Who is affected Poverty and Inequality Partnership Report no. 20*. Australian Council of Social Service and UNSW Sydney, p. 55.

³ The latest Henderson's measure³ shows that the poverty line is \$414.98 per week (excluding housing costs) for a single person. The DSP is \$468 per week.

See Melbourne Institute for Applied Economic and Social Research (2022). *Poverty Lines: Australia*. Retrieved from: [Poverty-Lines-Australia-June-2022.pdf \(unimelb.edu.au\)](https://www.unimelb.edu.au/files/2022-06/Poverty-Lines-Australia-June-2022.pdf)

⁴ Counsel Assisting Submissions, Public hearing 22. (19 July 2022). *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*. p. 62-82. Retrieved from:

<https://disability.royalcommission.gov.au/system/files/2023-03/Public%20hearing%2022%20-%20Submissions%20of%20Counsel%20Assisting%20-%20SUBM.0028.0001.0126.PDF>

- ii. The complexity of the NDIS
- iii. Concerns about the impact of earnings on DSP entitlements
- iv. Systemic barriers which exist for people with disability accessing open employment.⁵

We strongly recommend that such structural and systemic factors should be considered as relevant to the deprivation of personal freedom to clarify the distinction between servitude and forced labour in legislation.

Another issue to consider as a systemic factor in this context is whether a person had access to Supported Decision Making (SDM). SDM is increasingly recognised as a necessary and critical measure which enables Australia's obligations under Article 12 of the United Nations Convention on the Rights of People with Disabilities (UNCRPD), which recognises that people with disability have legal capacity on an equal basis with others.

In 2014, the Australian Law Reform Commission (ALRC) recommended a set of National Decision-Making Principles to guide a whole-of-government approach to law reform to recognise people with disability as persons before the law and their right to make decisions for themselves.⁶ More recently, the Royal Commission built upon the ALRC recommendations and put forward a framework for best-practice in supported decision-making.⁷

These resources reflect critical paradigm shifts signalled by Article 12 of the UNCRPD and international moves toward implementing SDM within legislation.⁸ They provide useful mechanisms for the provision of appropriate guidance about factors that might indicate 'significant deprivation of personal freedom', as well as broader legislative reform in relation to Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) as it relates to the experiences of people with an intellectual disability and their rights under the UNCRPD.

- **Reasonable person test, Question 15, p. 35.**

The list of matters in subsection 270.10(2) do not provide appropriate guidance in relation to people with an intellectual disability. Additional factors to be considered should include systemic factors that impinge on the decision-making abilities and opportunities for people with an intellectual disability.

They should also include consideration of acquiescence. This describes the way many people with an intellectual disability are likely to say 'yes' to questions or accept and agree with things, regardless of what has been asked, and often without really wanting to. Acquiescence often happens as a result of people masking their communication difficulties to avoid the stigma of

⁵ Counsel Assisting Submissions, Public hearing 22 (19 July 2022). *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*. p. 63. Retrieved from: <https://disability.royalcommission.gov.au/system/files/2023-03/Public%20hearing%2022%20-%20Submissions%20of%20Counsel%20Assisting%20-%20SUBM.0028.0001.0126.PDF>

⁶ Australian Law Reform Commission (2014). *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124). Retrieved from: <https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/>

⁷ Bigby, C., Carney, T., Then, S-N., Wiesel, I., Sinclair, C., Douglas, J., & Duffy, J., (2023). Diversity, dignity, equity and best practice: a framework for supported decision-making. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*. Retrieved from: <https://disability.royalcommission.gov.au/policy-and-research/research-program>

⁸ Browning, M., Bigby, C., & Douglas, J. (2021). "A process of decision-making support: Exploring supported decision-making practice in Canada". *Journal of Intellectual & Developmental Disability* 46:2, 138-149, DOI: 10.3109/13668250.2020.178926

being labelled as having a disability, or to adhere to the status quo. It is very common for people with an intellectual disability to adopt a passive communication style, allowing the more powerful person to control the conversation.⁹

- **Through coercion, threat or deception, Question 16, p. 36.**

As the Discussion Paper points out, being able to cease labour or services or leave the place where labour or services are provided are not necessarily the only factors relevant to establishing whether a person has offered themselves voluntarily to undertake labour or services. We believe there are other factors that are relevant to establishing whether servitude or forced labour has occurred.


Once again, those other factors relate to broader systemic conditions in which people with an intellectual disability are shut out from mainstream employment and obliged to undertake employment in an ADE for less than the minimum wage. Within this system, and within ADEs specifically, it is clear that people do not have genuine choice about their employment.

Evidence provided by Mr Gregory Tucker during public hearing 22 of the Royal Commission demonstrates the extent to which these systemic factors can create coercive conditions which impinge on personal freedom and genuine choice. When asked by Senior Counsel Assisting, Ms Kate Eastman SC, whether Mr Tucker had asked for a pay rise at the ADE where he received less than minimum wage, Mr Tucker replied he had not, “because I’m ... scared to”.¹⁰

This is a powerful example of how systemic factors—such as those listed on page 2 of this letter—create coercive conditions through fear that take away peoples’ ability to have genuine choice. This is why the question of simply ‘being able’ to cease labour or services or leave the place where labour or services are being provided is not adequate: legislation must account for other systemic factors and the ways they impact people with an intellectual disability.

We thank the Attorney General’s Department for the opportunity to provide feedback on behalf of the people with an intellectual disability and family members we represent. We invite any further opportunities to discuss the issues raised in this letter.

Kind regards,



Catherine McAlpine
Chief Executive Officer

⁹ Speak Out Advocacy and Inclusion Australia (2023). Communication – It’s not a spectator sport. p.9. [Communication-is-not-a-spectator-sport.pdf \(inclusionaustralia.org.au\)](https://inclusionaustralia.org.au/communication-is-not-a-spectator-sport.pdf)

¹⁰ Transcript of Proceedings, Public hearing 22 (12 April 2022). *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability*. p. 85. <https://disability.royalcommission.gov.au/system/files/2022-04/Transcript%20Day%20%20-%20Public%20Hearing%2022%2C%20Virtual.pdf>