

The background is a deep blue gradient with abstract, glowing white and light blue lines and dots, resembling a digital or scientific visualization. The lines are thin and wavy, with some dots scattered throughout. The overall effect is one of dynamic energy and technology.

# HEAR US

The experiences of persons with  
Complex Communication Needs  
in accessing justice



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## Victorian Legal Services BOARD + COMMISSIONER

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## Executive Summary

### Background

The primary purpose of this research is to add to existing knowledge about the experiences of persons with Complex Communication Needs (CCN) with the justice system, and to consider the impact of their experiences. In this report, the “justice system” refers to the criminal and civil jurisdictions, including the Victorian Civil and Administrative Tribunal (VCAT).

The impetus for this research arose from a discussion between the principal researcher and members of Disability Advocacy Victoria (DAV). DAV member agencies are at the coal face of systemic advocacy and individual advocacy for and with persons with CCN. After initial conversations with DAV, two associated agencies specifically supported this research: Communication Rights Australia and Disability Discrimination Legal Service.

Typically, persons with CCN are often not the primary focus of research, indeed, if included in research, this cohort are commonly on the periphery. Paradoxically, persons with CCN are at greater risk of victimisation, yet they have experienced difficulty in reporting and having their reports heard, investigated and adjudicated at court (VEOHRC, 2014). As defendants, people with disability are also at increased risk of injustice due to limited identification of cognitive impairments, leading to poor responses from justice agencies (AHRC, 2014; Queensland Advocacy Incorporated, 2015; Shepard, Ogloff, Paradies & Pfeifer, 2017). Indeed, justice agencies acknowledge the difficulty they have experienced as agencies to respond effectively to this cohort, whether the person with CCN is a victim, accused or offender. For example, the general duties police acknowledge that this cohort, and similarly, persons with other types of impairments, are a “particular challenge” (VEOHRC, 2014, p.44).

### Aims

The main aims of this research were to better understand, and to make visible, the often invisible experiences with the civil or criminal justice system of persons who identified as having CCN. What can we learn from these experiences that could result in improvements or, in instances where a process or initiative has enabled access to the justice system, could be replicated?

### Participants

Overall, eleven cases are included in this research. The participants included seven persons who identified as CCN and four parent/advocates of people who identified as CCN. There were a range of matters raised by participants that are reported on in this research, including: applications for intervention orders; allegations of sexual assaults made by participants; allegations of sexual assault made against one participant; residential tenancy and administration matters which were heard at VCAT; theft perpetrated against a

participant; and an attempt by one participant to establish a mode of email communication with police in circumstances of family violence.

Without exception, all who participated in this research did so with the anticipation that their experience or the experiences of their family member may be of benefit for other persons with CCN seeking access to justice.

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*“I am glad you can use my experience. Some good will come from my hurt”. (John – Email communication)*

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Participants told their stories openly, exposing their frustrations, hurt, distress, anger and hopelessness. At times, participants also expressed admiration and gratitude for those individuals in the justice system who did listen to participants and take seriously their experiences.

### Recruitment and Methods

The criteria for participation in this research were: that the participants identified as having CCN or were carers or advocates for a person with CCN; and that they had interacted with either the criminal or civil system of justice in Victoria between January 2010 and December 2017. Participants were recruited in several ways, including directly through advocacy agencies or through promotion of the research in disability agency’s newsletters or on websites.

There were several challenges and limitations to this research, including accessing persons residing in disability residential services; ethical considerations; and systems challenges.

Data consisted of interview transcripts, written responses and, in nine instances, files as compiled by the advocacy agencies. The files contained email communications, letters and file notes made by the advocate. The researcher had permission from the participants to access their file. The length of files ranged from 8 to 85 pages. The files were redacted by the agencies prior to researcher access.

Data was analysed using thematic analysis. The files were a valuable source of secondary information. They provided insight into the challenges for participants, the extent of the advocacy required and support provided, and in some cases, the extent of collaboration between advocacy and justice agencies to support the client through the process. Access to the files meant that the time with participants could be more focused, as some information about process, for example, could be ascertained by reading the files.

## Findings

The experiences described in this report were, in some respects, consistent with findings contained in research and in reports by state and national inquiries, particularly over the last decade. This research provides further insights identified through a range of consistent themes which emerged across the data. These themes included:

- The response to persons with CCN, whose primary mode of communication was not speech, were mixed. These included, negative assumptions about capacity and lack of intelligence; caution and ‘trustworthiness’ of the use of Alternative Augmentative Communication. At times there was a reluctance to accept communication where participants used AAC;
- Inconsistent responses were identified across the experiences of five participants in relation to matters involving sexual assault, applications for Intervention Orders, and matters heard at VCAT. The inconsistencies appeared to relate to processes, uncertainty about processes, or potentially the inadequacy of processes to resolve issues;
- Delays (reasonable and unreasonable) at the investigation stage or after reporting to police compounded levels of anxiety and frustration for some participants;
- The poor or inconsistent response to a number of participants was potentially a consequence of a lack of training, resources and time;
- The majority of participants required assistance from family members, residential or support workers, or advocacy agencies to report or seek redress;
- Some matters appeared to be “too difficult” for justice agencies to respond to effectively. This was particularly the case when the person central to the matter was non-verbal or resided in disability accommodation service;
- Participants required support or accommodations of some kind to access the justice system. In some instances accommodations were made, in other instances the system appears to have struggled to respond effectively. Most participants required information about processes, some required support to provide a statement to police;
- The impact of the experiences were mixed. It was clear that in the majority of instances participants’ felt the justice system had let them down; in other instances participants’ felt that they were heard by individuals within the justice system.

This research adds to the evidence gathered in other studies or inquiries which suggests that the current justice system response is either not inclusive or not consistently inclusive of people with CCN. While there have been a number of reforms which seek or have sought to improve access to justice for persons with disabilities, the latest being the Intermediary Program pilot, it is clear that there is still some way to go before persons with CCN can receive equitable access to the justice system.

## Recommendations

1. That further research be conducted to better understand the nuanced experiences with the justice system of ATSI and other culturally and linguistically diverse populations who have CCN. Such research is particularly important as it would provide specific insight into the added cultural dimensions not considered in this research.
2. That the important role of advocacy agencies be acknowledged through the provision of appropriate levels of funding to ensure advocates and the agencies who employ them are able to meet the needs of persons with disability who seek assistance.
3. That recommendation 5.5 included in the Family and Community Development Committee Inquiry into Abuse in Disability Services (2016, p. xxxiii) be implemented, and that the recommendations from previous reports (as mentioned on pages 4-8 of this report) be implemented.

‘The Victorian Government amend the Family Violence Protection Act 2008 (Vic) to ensure that people with disability living in supported residential accommodation are covered by the legal definition of family violence and can access the Act’s protection mechanisms’

4. That Office of the Public Advocate and Victoria Police consider measures to monitor the efficacy and use of the Ready Reckoner among the front line police officers.
5. That Victoria Police develop training about:
  - the use of AAC;
  - the impact on persons’ who use AAC, and;
  - the admissibility of AAC in court;
  - obligations under the CRPD and other Human Rights frameworks in regards to access to justice, the right to communicate and freedom of expression.
6. That judicial officers receive training:
  - to enhance their understanding of the use of AAC;
  - the impact on persons’ who uses AAC, and;
  - obligations under the CRPD and other Human Rights frameworks in regards to the right to communicate and freedom of expression. Such information currently provided through the Access to Justice Bench Book be enhanced.
7. That consideration be given to measuring the efficacy and use of the Disability Access Bench Book by judicial officers and other users as outlined in the Disability Access Bench Book;

8. That Victoria Police and emergency services consider establishing a generic contact email for the use of persons with CCN who use a computer to communicate via email and for whom the use of TTY may not be an option.
9. Increase time allocated to matters (across the justice system) involving persons with CCN.
10. That Section 31 of the *Evidence Act 2008* (Vic) be expanded to clarify the use of AAC in court proceedings and the range of accommodations to assist a witness while giving evidence.
11. That consideration be given to expand the scope of the *Victims' Charter Act 2006* (Vic) to include victims' of some property crimes, so as to ensure that such victims' adversely affected by these crimes are eligible for services to assist their recovery.



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## Definition

As a starting point, the definition of CCN was purposefully broad. The definition provided by the Inquiry into Abuse in Disability Services (2015), which was adapted from other sources including the Department of Communities, Child Safety and Disability Services, Complex Communication Needs, Queensland Government (2009, pp. 3-5), provides a framework for defining the parameters of CCN:

‘Complex communication needs’ is a broad term that refers to difficulties communicating using speech and writing, or difficulties understanding how others communicate. Complex communication needs can be associated with developmental disability, such as intellectual disability or autism, or acquired disability like brain injury or stroke (FCDC, 2015, p. 79).

The above definition is also consistent with that used in other states, for example, in Tasmania (Tasmanian Law Reform Institute, 2018), to inform the development of an intermediary program, and the development in South Australia of the *Disability Justice Plan 2014-2017*.

Despite the above definition, CCN is often associated with people who are non-verbal. While the research worked within the definitional parameters as described above, the research did not exclude anyone who self-identified as having CCN.

## Prevalence of CCN

### Non-indigenous population

Accurate data about the prevalence of people with speech and communication impairments is “... patchy” (Parliament of Australia, 2014, p. 17). Notwithstanding the limitations in regards to prevalence of disability among various cultural groups, geographic locations and residential settings, the data collected is improving. According to the Disability, Ageing and Carers survey conducted by the Australian Bureau of Statistics (ABS), the range of speech and communication impairments can be characterised as “... mild, moderate, severe and profound” (2015). Amongst the Australian non-indigenous population, children and young people up to the age of 24 have a higher prevalence of severe and profound communication impairment, while the communication impairment of people between 25-64 and 65 and over are categorised as mild or moderate (ABS, 2015). The population aged 65 years and over, represent the highest proportion of people with communication impairments overall (ABS, 2015). The effect of communication impairments can be either lifelong, acquired at any point across the life span, or short term, depending on the nature and cause of the impairment. Of those who indicated a need for formal assistance with communication (144,400 across Australia), approximately 49.7% indicated their needs were unmet. The

highest proportion of those who required formal assistance with communication were children.

In Victoria, 307,000 people (26.1%) are recorded as having a communication impairment (ABS, 2015). The Disability, Ageing and Carers survey (2015) also notes that among this cohort, males are highly represented, as is the prevalence of other coexisting impairments which affect a person's mobility, self-care, employment and schooling.

### Prevalence of disability in the Aboriginal and Torres Strait Islander population

Data which accurately reflects the prevalence and types of disability amongst the Aboriginal or Torres Strait Islander (ATSI) population, is limited. ABS (2015) indicates that the prevalence of disability amongst the ATSI population increases with age, as it does with the non-indigenous population. In Australia, approximately one-quarter (23.9%) of the total ATSI population (523,200) residing in households, have a disability, compared with 17.5% of the non-indigenous population (ABS, 2015).

When comparing the prevalence of the various disability types amongst the ATSI and non-indigenous populations, the ATSI population recorded "significantly higher crude rates of physical disability (14.8% compared with 11.4%), psychosocial disability (6.6% compared with 3.8%), intellectual disability (5.9% compared with 2.5%), and head injury, stroke or acquired brain injury (2.1% compared with 1.1%)" (ABS, 2015). The prevalence, according to the ABS (2015), of speech or sensory disability was less significant with 5.8% of non-Indigenous compared with 6.1% of the ATSI population.

Another statistically significant difference between the ATSI and non-indigenous populations as identified by the ABS (2015), includes that the ATSI population with disability "were more likely than non-Indigenous people to need assistance with cognitive or emotional tasks (28.1% compared with 21.4%)" (ABS, 2015).

### Human Rights

This report considers the experiences of people with CCN within the framework provided by the Convention on the Rights of Persons with Disabilities (CRPD), to which Australia became a signatory in 2008.

Prior to highlighting the sections of the CRPD which have specific relevance to the focus of this report, the following two sections from the Preamble provide further insight into the rights for inclusion of people with disability in society globally.

The Preamble of the CRPD and Optional Protocol include a series of statements about which there is, at least, an in principle agreement by signatory states. Two of these statements are particularly relevant to this current research, they are:

(c) Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination, and

(k) Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.

The first statement reiterates that persons with disabilities are entitled to “full enjoyment without discrimination” to all “fundamental freedoms” as articulated in the Universal Declaration of Human Rights (UDHR). The second statement acknowledges that despite the presence of previous human rights instruments, people with disability “continue to face barriers” to equal participation. The statement, in part, provides a justification for the CRPD, in that, despite the intent of successive human rights instruments to be inclusive of all human beings, there is a need for a specific convention which focused on the needs of people with disabilities, as ‘... persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights’.

For the first time since the development of the UDHR in 1948, ‘disability’ is no longer described as a ‘condition’, rather, the CRPD Preamble recognises disability as:

an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others (CRPD, 2006).

While the focus of this paper is not to evaluate the effectiveness of human rights instruments, the acknowledgment of “concern” that the “various instruments and undertakings” have not effected change in regards to discrimination and equal participation for persons with disability, is worthy of note. Further, it provides a context within which the experiences of people with CCN, and the advocacy by people with disability more broadly, for equal recognition and treatment, can be better understood.

The Articles contained within the CRPD, which are of particular relevance to this research and people with CNN, are Articles 12 and 13:

#### Article 12 – Equal Recognition before the Law

State Parties shall...

1. recognize... that persons with disabilities have the right to recognition everywhere as persons before the law.
2. recognize... that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. ...take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. ...ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.
5. ...take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

#### Article 13 – Access to Justice

1. ...shall ensure effective access to justice for persons with disabilities 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.
2. In order to help to ensure effective access to justice for persons with disabilities ... shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

At a state level, the *Charter of Rights and Responsibilities Act 2006* (Charter), is also pertinent to this report. In particular, Section 8 of the Charter, which states:

#### Recognition and equality before the law

1. Every person has the right to recognition as a person before the law.
2. Every person has the right to enjoy his or her human rights without discrimination.
3. Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
4. Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

### Access to justice for people with disability: Context

As discussed later in this report, during the last decade, the research in the field of access to justice for people with disabilities, in particular, as accused and offenders (Australian Human Rights Commission, 2014; Australian Law Council, 2018; Fogden, Thomas, Daffern and Ogloff, 2016; Queensland Advocacy Incorporated, 2015; Shepard et al., 2017; McCausland &



Baldry, 2017; McSherry, Baldry, Arstein-Kerslake, Gooding, McCausland and Arabena 2017;), and as victims with disabilities (Camilleri, 2008; Goodfellow & Camilleri, 2003; French, 2007; VEOHRC, 2014; Parliament of Victoria, 2016), has continued to grow. The combined efforts of independent researchers and activists have been influential in raising awareness of discrimination faced by people with disabilities in the justice system (see literature review). Shining a light on the systemic and structural impediments to equal access to justice has resulted in various inquiries and reports in Victoria and nationally, identifying areas where legislative, policy and programmatic reform is required.

The following provides a representative snapshot of the main reports and key commentary as they relate to people with CCN, policy and legislative reform, which specifically reference people with CCN in Victoria and, in some instances, other jurisdictions in Australia since 2012. The list of reports and key legislative and programmatic reform in Victoria and nationally is presented in chronological order.

### [Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities](#)

**210** Training in providing accommodations and supports to people with disability is neither compulsory nor consistent across different jurisdictions for judicial officers, legal practitioners and court staff. A lack of awareness about disability issues leads to discrimination and negative attitudes which create barriers to accessing justice. (See also Article 8)

**211** People with disability can face barriers to establishing credibility when interacting with the justice system. Assumptions about the credibility of people with disability, in particular people with cognitive disability are constantly made by police and court officers, such as prosecutors, judges and magistrates. (Civil Society, 2012, p.78).

### [Final report: Equality, Capacity and Disability in Commonwealth Laws](#)

While the scope of this report was purposefully narrow, focusing on “... laws and legal frameworks affecting people who may need decision-making support” (p. 183), the report did highlight that a:

... range of personal and systemic issues may affect the ability of persons with disabilities to participate fully in court processes.

These include:

- communication barriers;
- difficulties accessing the necessary support, adjustments or aids to participate in the justice system;

- issues associated with giving instructions to legal representatives and capacity to participate in litigation;
- the costs associated with legal representation; and misconceptions and stereotypes about the reliability and credibility of people with disability as witnesses' (ALRC, 2014, p. 192).

### Disability Justice Plan, South Australia

The South Australian Plan has been developed in recognition of the fact that some people with disability are more vulnerable to victimisation and abuse in the community, particularly those with cognitive and/or intellectual disability. Research also shows that people with cognitive and/or intellectual disability are over represented in our prisons. Every effort must be made to ensure that people with complex needs are supported and able to assert their rights before the law (Government of South Australia, 2014, p. 1).

### Beyond doubt: The experiences of people with disabilities reporting crime - Research findings

To assist people with disabilities to report crime, police need to be able to identify and understand different forms of disability, and then determine what reasonable adjustments are required to meet different access needs (p. 11).

Areas of particular challenge identified by police included knowing how to assist people with:

- complex communication needs, especially if the person is non-verbal
- an intellectual disability or other cognitive impairments
- mental health disabilities
- autism spectrum disorder, attention deficit hyperactivity disorder (ADHD) and behavioural disabilities
- multiple and complex disabilities (p. 29).

We found that while some progress has been made, basic adjustments are not always made to adapt court practices and facilities to meet the access needs of witnesses with sensory, physical, learning or communication disabilities (VEOHRC, 2014, p.11).

### Disability Access Bench Book

A key recommendation to emerge from the VEOHRC (2014) report was the development of the Disability Bench Book. Using the Social Model of Disability as the foundations upon which the distinction between functional impairment and disabling environments are

understood, the Bench Book identifies courts as an environment which can provide targeted support and highlighting the important role of judicial officers.

...requiring targeted support and adjustments to ensure people with a disability can participate on an equal basis with others and realise their rights'. This Bench Book recognises the important role of judicial officers in facilitating this and provides practical guidance on matters to consider when a party or witness has a disability (Judicial College of Victoria, 2016).

### Commonwealth Senate Community Affairs References Committee Inquiry into Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings

**Access to justice 10.31** The committee is disturbed at the evidence presented which highlights the lack of progress to improve access to justice for people with disability. Previous expert inquiries by the Law Reform Commission, the Human Rights Commission and the Productivity Commission have made detailed recommendations on how to address this issue (2015, p.272).

### Equal Before the Law: Towards Disability Justice Strategies

Access to justice in the criminal justice system for people with disabilities who need communication supports or who have complex and multiple support needs (people with disabilities) is a significant problem in every jurisdiction in Australia. Whether a person with disability is the victim of a crime, accused of a crime or a witness, they are at increased risk of being disrespected and disbelieved and of not enjoying equality before the law (Australian Human Rights Commission, 2014, p. 5).

The Commission also identified that the human rights based principles of accountability, equity, participation and empowerment is fundamental to facilitating positive change (p. 9).

### Reporting and investigation of allegations of abuse in the disability sector, Phase 1: the effectiveness of statutory oversight

The overwhelming conclusion of this investigation is that despite areas of good practice, oversight arrangements in Victoria are fragmented, complicated and confusing, even to those who work in the field. As a result there is a lack of ownership of the problem and little clarity about who is responsible for what. In some areas there are overlapping responsibilities between agencies and no clear understanding of the boundaries. In others, there are legislative barriers to sharing information or jurisdictional gaps. Thus, problems are regularly raised – including by many well-meaning players in the system – but rarely fixed.

This means that the system is fundamentally failing to deliver protection in a coherent and consistent way. If these arrangements are confusing to people well versed in the system, how much more confusing they must be to the public, including people with disabilities (Victorian Ombudsman, 2015, p. 4).

### [Family and Community Development Committee Inquiry into Abuse in Disability Services](#)

Broadly, the Committee found that there is a widespread pessimism about the ability of people with disability to access justice, with many people questioning the likelihood that reporting abuse to the police would lead to a successful prosecution. Stakeholders identified a range of barriers to accessing justice including a fear of not being believed or taken seriously by police, a lack of accessible information on how to report, inadequate legal support, and negative views on the capacity of people with disability to be competent witnesses. The Committee found that these negative encounters with police act as a significant barrier to reporting abuse (Parliament of Victoria, 2016, pp. 73-74).

### [Access to Justice Review. Vol 1 Report and Recommendations](#)

The gaps identified by stakeholders and available research between legal needs among different groups in Victoria and assistance presently available suggest that people in these groups experience barriers to accessing the justice system. Reducing these barriers is important to ensure that people in Victoria have their human rights respected and protected, including rights such as equality before the law, which is enshrined in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian State Government, 2016, p.70).

### [Access to Justice Review: Summary Report. Victorian State Government](#)

There is a strong connection between how confident individuals are that they will be treated fairly if they need to enforce their rights, and their willingness to respect and obey the law. Fair treatment promotes trust and encourages a positive relationship between individuals, organisations and government. In this way, an accessible justice system is fundamental to social cohesion and community safety: people have a greater commitment to the common interests and the laws of the broader community if they can resolve disputes and know they will be treated fairly in the justice system (Department of Justice and Regulation, 2016, p. 3).

### [Royal Commission into Family Violence: Report and Recommendations](#)

People with disabilities: The Commission heard that people with disabilities face a number of difficulties associated with the police response to family violence. Victoria Police acknowledged that reporting of family violence by people with a disability

does not reflect the prevalence of violence against people with disabilities. The Victorian Equal Opportunity and Human Rights Commission noted in its *Beyond Doubt* report that it had received reports of police members failing to take family violence reports from victims with disabilities. The Code of Practice for Investigation of Family Violence states that police should engage the services of a support person or independent third person as soon as possible in an investigation involving people with disabilities. The Commission received evidence from the Victorian Public Advocate, however, that police do not always do this, and that there are disparities in the use of the independent third person program in Victoria (2016, p. 11).

## Literature review

The experiences of people with Complex Communication Needs (CCN) in the justice system is an area that has only recently received attention in the literature. Nonetheless, existing studies and numerous recent inquiries, mentioned previously in this report, show that people with CCN encounter significant barriers in their attempts to access the justice system as victims of crime, witnesses to crime, accused of crime, perpetrators of crime, and as jurors (Barmak, 2011; Collier et al., 2006; Law et al., 2007; nacro, 2011; Nelson Bryen et al., 2003; Nelson Bryen & Wickman, 2011; People with Disability Australia [PWDA], 2014; Togher et al., 2006). Such barriers are experienced globally, demonstrating that the issue is transnational in scope. While there is a wealth of literature focused on the experiences of people with disabilities in the justice system, there is a paucity of literature with a specific focus on the experiences of people with CCN in the justice system.

This literature review will begin by first unpacking some of the terminology centred on the experiences of people with CCN in the justice system. Definitions of communication, CCN, alternative and augmentative communication (AAC), and the justice system will be provided. Following this, the review will discuss the key themes of the literature. These include:

- The construction of disablement as a medical and social phenomenon;
- Access to justice as a basic human right;
- Barriers to justice for people with disability;
- Barriers to justice for people with CCN, and;
- Recommendations and accommodations to overcome the barriers to justice for people with disability and CCN.

After considering these themes, the literature review will conclude by considering the current gaps in the literature.

## Terminology

### Communication

Communication is a fundamental human capacity and is carried out in a variety of ways. Communication, Williams (2000) argues, is “a basic human need, a basic human right ... [and] a basic human power” (p. 248). Although speech is all too often privileged as a dominant mode of communication, people utilise an array of communicative techniques in their daily lives, which include — but are not limited to — body language, sign, touch, writing, and other verbal and non-verbal gestures (Department of Communities, 2009, p. 2).

### Complex communication needs (CCN)

The Family and Community Development Committee (FCDC) (2016) explain that people with CCN have difficulties communicating with speech and/or writing (p. 79). However, this

definition could imply that communicative issues reside with individuals, when the privileging of speech and writing as primary modes of communication is a societal issue. Far from being unable to communicate, people with CCN use alternative communicative methods such as those previously outlined (i.e. body language, sign, touch, and verbal and non-verbal gestures).

Nevertheless, a person with CCN is often characterised as someone who has little to no speech (Department of Communities, 2009). People with CCN can also have difficulty understanding the oral and written communication of others (FCDC, 2016). The State of Queensland's Department of Communities (2009) explain that CCN can be the result of developmental disabilities (e.g. down syndrome, intellectual disabilities, cerebral palsy and autism) and acquired disabilities, which can occur as a result of an injury or illness (e.g. stroke, multiple sclerosis, traumatic brain injury, spinal cord injury) (p. 3).

#### Alternative and augmentative communication (AAC)

Alternative and augmentative communication (AAC) is something we all use; it consists of any type of communication other than speech (Victorian Equal Opportunity & Human Rights Commission [VEOHRC], 2014, p. 8). AAC devices, on the other hand, are utilised by people with CCN and include speech generating apparatuses such as voice output communication aids; communication boards such as e-trans (eye-transfer boards); as well as books, cards, and charts (Iacono et al., 2013, p. 392).

Light and McNaughton (2014) contend that AAC devices assist people with CCN to develop “communicative competence so that these individuals have access to the power of communication — to interact with others, to have an influence on their environment, and to participate fully in society” (p. 1). Indeed, the literature reveals that appropriate communication support is essential to guaranteeing the autonomy of people with CCN (Parliament of Australia, 2015, p. 161). Yet it should be reiterated that the purported lack of communicative competency on the part of people with CCN is largely a result of the societal privileging of speech over other methods of communication. This relates to the social construction of disablement, which will receive further attention in an upcoming section of this literature review.

#### Justice system

Contrary to its name, the justice system is not a unified and coherent system (Daly & Sarre, 2016, p. 358). It is, rather, a complex arrangement of government and non-government institutions and agencies broadly involved in dispute resolution; penalties and fines; policy-making and law reform; policing; courts and tribunals; and prisons, corrections and parole (Victorian State Government, n.d.).

The justice system is a formal and historically conservative institution, which gives primacy to oral communication. As such, other modes of communication have only relatively

recently been accepted within the Evidence Act 2008 (Vic). Section 30 of the *Evidence Act 2008* (Vic) states that

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact (n.p.).

Section 31 of the *Evidence Act 2008* (Vic) further affirms, “[a] witness who cannot hear adequately may be questioned in any appropriate way” (n.p.) and that “[a] witness who cannot speak adequately may give evidence by any appropriate means” (n.p.).

However, the VEOHRC (2014) note that although the *Evidence Act 2008* (Vic) makes provisions for witnesses without speech to give evidence by any means appropriate, it does not specify what these means entail (p. 38). A level of distrust, caution and scepticism about AAC permeates throughout the justice system. As the VEOHRC (2014) indicate, courts remain cautious of people using AAC devices when providing evidence (p. 38-39; Barmak, 2011). Barmak (2011) explains that one of the reasons for this is because personnel in the justice system can find it difficult to determine whether the communication of the person using an AAC device is original and authentic or if it is “a pre-programmed message of the device” (n.p.).

### The construction of disability

This literature review has mentioned on a few occasions that the privileging of speech is a societal issue that places restrictions on people who rely on other modes of communication. “[T]he ‘problem’”, as Davis (2013) remarks, “is not the person with disabilities; the problem is the way that normality is constructed to create the ‘problem’ of the disabled person” (p. 1). While this view is becoming increasingly accepted in the literature, this has not always been the case.

Harpur and Douglas (2014) outline three approaches to the construction of disablement, which they classify as medical, social and critical. The medical approach conceives disability as an individual pathos that requires medical intervention (Harpur & Douglas, 2014, p. 413) in order to ‘fix’ the ‘problem’. Under this model, disability is construed as internal to the individual, wherein people with disability are regarded as being significantly impaired (Harpur & Douglas, 2014), the deficit residing in the individual. The medical model consequently suggests that the oppression of people with disability is a result of medical and/or biological impairment (Harpur & Douglas, 2014). However, Harpur and Douglas (2014) criticise the medical view for disregarding the rights of people with disability and of denying them of their autonomy, privacy, sexuality and, ultimately, their humanity.



Disability scholars, advocates and activists have transformed contemporary understandings of disability by distinguishing between biological and medical impairment and the social construction of disablement (Edwards et al., 2015, p. 90; Goodley, 2001; Oliver, 1990; Rapley, 2004; Shakespeare, 2013). Rather than viewing disability as the result of the former, the social model — as the name suggests — considers the social factors that contribute to disablement (Harpur & Douglas, 2014, p. 413). The social model of disability is evident in a range of contemporary studies and reports. For instance, the VEOHRC (2014) adopt a social definition of disablement in recognising that it is society’s response to people with disability that has the disabling effect (p. 8). Edwards et al. (2015) also support “the need to move towards a social model of disability which recognises the barriers that society presents to people with impairment, thus creating the experience of disability” (p. 90).

Notwithstanding the merits of social explanations of disablement, Harpur and Douglas (2014) warn that this framework might downplay the medical dimensions of disability. In light of this, they favour a critical approach to disablement, which bridges the divide between the medical and social views (Harpur & Douglas, 2014). Like the social model, critical disability studies reject the idea that disability is internal to the individual. Indeed, the critical model recognises disablement as a complex, variable, and situational phenomenon that “sits at the intersection of biology and society and of agency and structure” (Harpur & Douglas, 2014, p. 414). In other words, the critical approach to disablement conceives disability as necessitating both biological and social factors in the construction and embodiment of disability.

While social understandings of disability are criticised for disregarding the impact of impairment (Harpur & Douglas, 2014), Thomas (2006) suggests the social model still views impairment as “a prerequisite of disability” (p. 571). She explains, nonetheless, that “at the heart of this social interpretation [is] a conceptual severing of any causal connection between impairment and disability” (p. 571). In this way, the social model of disablement does in fact take into consideration the effects of impairment on individuals, but it does not see disability as intrinsic to impairment, nor does it posit impairment as the cause of disability. Individuals may very well have impairments, but it is through social exclusion, isolation and disadvantage that they become constructed as ‘disabled’ (Thomas, 2006). Thomas (2006) thus argues for a revival of a social relational model of disablement, which conceptualises disability as “forms of oppressive social reactions visited upon people with impairments” (p. 579).

A vast array of literature evokes a human rights framework to support equal access to justice for people with disability (Australian Human Rights Commission [AHRC], 2013; Barmak, 2001; Beqiria & McNamara, 2014; Edwards et al., 2015; Flynn, 2013; Department of Communities, 2009; Harpur & Douglas, 2014; Kilcommins et al., 2013; McEwin, 2016; nacro, 2011; Parris, 2011; Parliament of Australia, 2015; PWDA, 2014; VEOHRC, 2014). To illustrate, the VEOHRC’s report, *Beyond Doubt: The experiences of people with disabilities reporting*

*crime* (2004), states that it is a fundamental human right that everyone be treated equally before the law. Accordingly, people with disability should be afforded this right on an equal basis as other members of the community (VEOHRC, 2014).

Such rights are detailed in the United Nations' 2006 Convention on the Rights of Persons with Disabilities (CRPD). Australia ratified the CRPD in 2008 and thus has an international human rights obligation to facilitate equal access to justice for people living with disability (AHRC, 2013). To paraphrase, Article 13 of the CRPD states that:

- People with disabilities should have effective access to justice on an equal basis;
- The role of people with disabilities as direct and indirect participants should be facilitated effectively at all levels of the justice system, and;
- All people working in the administration of justice should be appropriately trained to work with people with disabilities (2006, p. 11).

However, the literature reveals that the right to justice for people with disability, as well as their equal recognition before the law, are not being met in both Australian and international contexts (AHRC, 2013; Barmak, 2001; Beqiria & McNamara, 2014; Edwards et al., 2015; Flynn, 2013; Department of Communities, 2009; Harpur & Douglas, 2014; Kilcommins et al., 2013; McEwin, 2016; nacro, 2011; Parris, 2011; Parliament of Australia, 2015; PWDA, 2014; VEOHRC, 2014). Harpur and Douglas (2014) argue that although Australia has ratified the CRPD, the Australian justice system still exhibits a failure to both understand and to apply this human rights framework (p. 407).

While various Australian studies agree that the right to justice for people with disability is not being met, there are a number of international studies that report similar findings, indicating that the issue is transnational in scope. Nacro are a UK organisation who published a briefing paper titled *Speech, language and communication difficulties: Young people in trouble with the law* (2001). The paper considers the increased likelihood of offending behaviour for youth who experience difficulties with speech and language (nacro, 2001). The report further reveals that “[s]peech, language and communication problems can also mean that young people are unable to grasp the jargon, abstract language and complex terminology frequently used by professionals in a variety of criminal justice settings” (nacro, 2001, p.2).

A Canadian study found that people with CCN experience a range of harms and injustices including sexual abuse, a lack of health literacy on abusive relationships, communication barriers and inequalities within the justice system (Collier et al., 2006). An Irish study utilises a socio-spatial perspective to examine barriers to justice for people with disability (Edwards, 2013). Edwards (2013) considers physical, communicative and structural restrictions that foreclose equal access to the justice system for people with disability. These are only a few

examples of the international literature that confirms that the right to justice for people with disability is not being delivered in a global context.

Much of the literature in the field openly embraces the human rights framework stipulated by the CRPD; however, there are some who take a more critical stance towards the convention (Soldatic & Grech, 2014). In an article on transnational justice, Soldatic and Grech (2014) criticise the *CRPD* for conflating human rights and citizenship rights. Where human rights are universal, citizenship rights are premised on the distinction between those who belong to a nation-state and those who do not (Soldatic & Grech, 2014). The authors contend that one of the primary constraints of the CRPD is that it posits disability justice as the responsibility of the nation-state and inadvertently assumes that everyone belongs to one (Soldatic & Grech, 2014). This means that when people do not belong to a nation state — e.g. refugees and asylum seekers with disability — their human rights are not being administered and enforced (Soldatic & Grech, 2014). If the right to justice for people with disability with citizenship of a nation-state is in serious jeopardy, this issue is even more pronounced for asylum seekers and refugees with disabilities.

#### Barriers to justice for people with disability

Edwards et al. (2015) argue that “if one is to explore how people with disabilities encounter the criminal justice system, one has to understand the system as a series of structures, processes and attitudes which have the potential to act as barriers and disable people with impairments” (p. 90). While the justice system is complex and multifaceted, the general focus of the literature is on barriers to justice faced by people with disability in the context of the police, courts and prisons (AHRC, 2013; Parliament of Australia, 2015; Edwards, 2013; Edwards et al., 2012; Edwards et al., 2015; Flynn, 2013; Hepner et al., 2015; Henshaw & Thomas, 2012; Harpur & Douglas, 2014; Kilcommins et al., 2013; Kilcommins & Donnelly, 2014; Vanny et al., 2008; O’Mahony, 2010). This section of the literature review will provide a general overview of the barriers to justice faced by people with disability, before considering these barriers in the context of the police, courts and prisons. While this section will assume a broad focus on the barriers to justice faced by people with a range of disabilities, the next section will specifically focus on the barriers to justice experienced by people with CCN.

The Parliament of Australia’s senate report into *Violence, abuse and neglect against people with disability* (2015) highlights the significant barriers that people with disability encounter when accessing the justice system. The report acknowledges that Australia has “international obligations to improve access to justice for people with disability and [... a] moral obligation to protect people with disability from violence, abuse and neglect” (Parliament of Australia, 2015, p. 149). However, during the senate inquiry “[t]he committee heard that people with disability are particularly disadvantaged in seeking access to justice and are not adequately supported by existing legal systems” (Parliament of Australia, 2015, p. 149).

The AHRC's Issues Paper (2013) reveals that unequal access to justice for people with disability is occurring at an alarming rate. This is the case for people with disability from all walks of life who are accused of crime, victimised by crime, and witnesses to crime (AHRC, 2013, p. 3). The AHRC (2013) identifies five key barriers to justice for people with disability. The first barrier is the lack of support provisions to prevent violence, disadvantage, and social and health risk factors for people with disability (AHRC, 2013, p. 5). The second barrier is that "[p]eople 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" (AHRC, 2013, p. 7). The third barrier is the negative assumptions and attitudes exhibited towards people with disability (AHRC, 2013). Indeed, the report indicates that people with disability are all too often viewed by judicial personnel as unreliable; lacking in credibility; incapable of making legal decisions; unable to participate in legal proceedings; and incapable of providing legal evidence (AHRC, 2013, p. 8). On the latter point, the AHRC (2013) recounts numerous instances in which police and lawyers have not initiated investigations or prosecutions for allegations advanced by people with disability.

The fourth barrier to justice identified by the AHRC (2013) is that "[s]pecialist 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')" (p. 10). When criminal charges are made against people with disability, they are often deemed 'unfit to plead' and are "indefinitely detained in prisons or psychiatric facilities without being convicted of a crime" (AHRC, 2013, p. 10). The fifth barrier to justice is the lack of adequate adjustments, aids, and support provisions provided to prisoners with disability (AHRC, 2013). As a result, prisoners with disabilities are denied their basic human needs and are unable to participate in prison life (AHRC, 2013, p. 11).

#### *Barriers in reporting to the police*

The VEOHRC (2014) outlines the key barriers faced by people with disability in reporting crime to the police. Some of the barriers identified in the report include:

- A lack of information on where and how to report a crime;
- Disrespectful attitudes exhibited by police officers towards people with disability;
- Police officers refusing to take reports from people with disabilities;
- Feelings of embarrassment and shame on the part of victims with disabilities;
- A fear of negative repercussions from the alleged offender/s and;
- Limited support services that are in place for people with disability (VEOHRC, 2014).

One of the strongest findings in the report is that people with disability are afraid that the police will perceive them as lacking in credibility (VEOHRC, 2014, p. 9). This particular finding is not limited to the discoveries of the VEOHRC (2014), it is also reflected in further studies in the field which traverse international boundaries (AHRC, 2013; Edwards et al., 2012; FCDC, 2016; O'Mahony, 2010).

The VEOHRC (2014) found that victims with disabilities report a higher level of satisfaction with the police when the officer they engage with demonstrates an understanding of disability. However, the report contends that the experiences of people with disability in reporting crime to the police depends too heavily on the subjective attitude of the particular officer they engage with (VEOHRC, 2014). The FCDC (2016) also found that negative encounters with the police in the past impedes the willingness of people with disabilities to report future incidents of victimisation.

Edwards et al. (2015) assert that although people with disability are at a much greater risk of being victimised by crime than other members of the public, crimes committed against people with disability are significantly under-reported. The authors identify barriers to justice at structural, procedural, attitudinal and environmental levels (Edwards et al., 2015). They also note that police officers often fail to refer victims of crime with disabilities to support organisations (Edwards et al., 2015).

Henshaw and Thomas (2012) investigate the experiences and perceptions of Victoria Police in their interactions with people with intellectual disability. The specific focus of the study is on the frequency of, and contexts in which, members of Victoria Police encounter people with intellectual disabilities (Henshaw & Thomas, 2012). The research also examines how the police identify people with intellectual disability and the challenges that the police face in their interactions with them (Henshaw & Thomas, 2012). Members of the police revealed that they interact with people with intellectual disabilities on a regular basis and in a wide variety of contexts (Henshaw & Thomas, 2012). They identify people with intellectual disabilities based on their previous encounters with people with intellectual disabilities and through behavioural and physical observations (Henshaw & Thomas, 2012). The most common challenge reported by police members is communicating with people with intellectual disabilities and accessing services from specialist providers (Henshaw & Thomas, 2012).

Henshaw and Thomas (2012) conclude that further education and training needs to be implemented to ensure that members of Victoria Police are in a better position to differentiate between intellectual disability and mental illness. The authors also recommend that Victoria Police members receive training focused on communicating with people with intellectual disability (Henshaw & Thomas, 2012). A report by the Parliament of Australia (2015) similarly recommends that “compulsory modules on working with people with disability” should be incorporated into training programs for the police (p. 150).

Studies reveal that people with disability are reluctant to report crime to the police for a variety of reasons, such as those listed at the beginning of this section of the literature review (VEOHRC, 2014). The AHRC (2013) found that when people with disability do decide to report incident/s of crime to the police, there is a lack of assistance and intervention. On the occasions that police officers do identify the need for assistance, there are insufficient

services available to them (AHRC, 2013). The FCDC (2016) also indicate that when service providers are called on for assistance, police tend to engage directly with them at the expense of engaging with the victim.

After the publication of the VEOHRC's 2014 report, Victoria Police released an *Accessibility Action Plan 2014-2017* (2015), which detailed ways to overcome the barriers outlined by the VEOHRC. In this plan, Victoria Police Chief Commissioner, Graham Ashton, states:

It is a key priority of Victoria Police to develop a consistency of service delivery for people with disabilities, so that people can feel confident in the service they will receive across the organisation, and have equal access to safety and justice (2015, p. 3).

The accommodations advanced in Victoria Police's *Accessibility Action Plan 2014-2017* (2015) will be outlined in the 'Recommendations and accommodations' section of the literature review.

#### *Barriers to justice in the context of courts*

While the VEOHRC's *Beyond Doubt* (2014) is primarily focused on interactions between people with disability and the police, the report found that there are also significant barriers for people with disability in accessing the courts. Research has indicated that even when people with disability reported positive interactions with police, there were many instances in which the matter did not precede to court (FCDC, 2016, p. 73). When members of the police assess the credibility of victims and witnesses with disabilities, they often assume that they are not in a position to provide enough evidence for the case to succeed in court (FCDC, 2016, p. 30). Indeed, people with disability are all too often perceived as incompetent and non-credible witnesses (Edwards et al., 2012, p. 2).

When cases do progress to court, court facilities and practices are often not altered to meet the needs of people with learning, communicative, sensory, and physical disabilities (VEOHRC, 2014, p. 12). The VEOHRC contend that it is the role of prosecutors to ensure "that the court is made aware of a disability, and the way that disability may affect their evidence" (VEOHRC, 2014, p. 40). Nonetheless, there are practical barriers for people with physical disabilities in accessing courts due to the layout of some courthouses (Edwards, 2013, p. 307) and a lack of private areas in some courts (Kilcommins et al., 2013, p. 46). In view of these barriers, Hackett (1998) warns that "[i]f vulnerable witnesses with special needs cannot access our courts, then our system will be an obstacle in their quest for justice, which will increase their vulnerability" (p. 143).

The process of cross-examination can be especially confronting and, indeed, confusing for people with disability (Edwards et al., 2015, p. 92; Kilcommins & Donnelly, 2014, p. 314). Inappropriate questioning styles are often used in courts, which makes it difficult for some — but not all — people with disabilities to understand the proceedings (FCS, 2015, p. 41;

Goodfellow & Camilleri, 2003; Law et al., 2007, p. 49; nacro, 2011, p. 3). Nacro's (2011) briefing paper on the offending behaviours of young people with "speech, language and communication difficulties" (p. 1) indicates that "young people are unable to grasp the jargon, abstract language and complex terminology frequently used by professionals in a variety of criminal justice settings" (p. 2). When a group of young people with communicative issues were asked to list words they were likely to hear in court, such as "'offence', 'comply', 'breach', 'conviction', 'alleged' and 'magistrate'" (nacro 2001, p. 3), the participants revealed that they struggled to understand the meanings of these words. Given this, the New South Wales Government's Family and Community Services (2015) advise that the courts need to "take into account oral language competence and literacy skills in offenders helps to highlight some of the complex issues involved" (p. 42).

The VEOHRC (2014) found that the probability of a successful prosecution for victims with disability is the exception rather than the norm (p. 11). It was, nonetheless, discovered that for many people living with disability, having the right to participate in court is perceived as a successful outcome in and of itself (VEOHRC, 2014). It is thus necessary to increase access to participation in court for people with disabilities. To achieve this, it is important that the negative attitudes of court personnel are addressed and "that appropriate standards of conduct are met at all times" (VEOHRC, 2014, p. 11).

When agencies affiliated with the courts "adjust their practices to meet the access needs of people with disabilities, assess these needs prior to the hearing and ensure the court is aware of them" (VEOHRC, 2014, p. 38), there is a much higher chance of people with disabilities being able to actively participate in court proceedings (VEOHRC, 2014). The rates of successful prosecutions are also increased when measures are implemented to increase the accessibility of courts for people with disability (VEOHRC, 2014). In a case study of a victim/survivor of sexual assault with cognitive impairment, Camilleri (2008) considers the successful prosecution and conviction of the perpetrator, noting that the success of this case is highly unusual. The author indicates that factors that appear to have aided the success of the case include the diligence of the police officer in establishing a relationship with the victim/survivor and their advocate along with the advocate's and police officer's unwavering commitment to justice (Camilleri, 2008).

#### *Over-representation of people with disabilities in prisons*

Ben-Mosh (2013) contends that life in an institution — whether it be "in a prison, hospital, mental institution, nursing home, group home, or segregated 'school'" (p. 132) — is an all too common reality for people with disability. This is not only the case in North America, where the research was conducted, but globally (Ben-Mosh, 2013). McCarthy (2016) reveals that people with disability and mental illness are over-represented in prisons due to the inadequate support services that are available to them in the community. Mental illnesses, such as schizophrenia, depression and acquired brain injury, are evidenced at an overwhelmingly higher rate amongst alleged offenders than they are in the general public

(McCarthy, 2016). What is more, the prevalence of intellectual disabilities is much higher amongst offender populations than the general Australian population (Shepard et al., 2017). Where 2.9% of the general Australian population is estimated to have an intellectual disability, it is estimated that 8-15% of offenders have an intellectual disability (Shepard et al., 2017).

Shepard et al. (2017) explain that some of the factors that increase the likelihood of people with cognitive impairment coming into contact with the criminal justice system include: “difficulties regulating behaviour, impaired decision making, problems communicating, a poor understanding of criminal justice procedures, poor memory and attentiveness and social immaturity” (p. 2). Another important factor that increases the probability of incarceration for people with disability is that disability and social disadvantage are often synonymous (Shepard et al., 2017; McSherry, Baldry, Arstein-Kerslake, Gooding, McCausland and Arabena 2017; Baldry et al., 2012). Such disadvantage “enhances susceptibility to homelessness, substance misuse, poor general health, low levels of community support, visibility to police and ultimately criminal engagement” (Shepard et al., 2017, p. 2).

There is a tendency for offenders with mental illnesses and cognitive disabilities to be treated less equitably before the law than other offenders, and rates of recidivism are higher for the former cohort than they are for the latter (Shepard et al., 2017). People with intellectual disabilities are more likely to be detained for minor public order offences than their non-disabled peers (Shepard et al., 2017). Shepard et al. (2017) report a higher rate of cognitive impairment amongst Indigenous Australians in custody in comparison to non-Indigenous Australians. As previously stated, the AHRC (2013) found that prisoners with disability are often not provided with aids, adjustments and support provisions. In such instances, prisoners with disability are not only unable to participate in prison life, they are also denied their basic human needs (AHRC, 2013).

#### Barriers to justice for people with CCN

A wealth of literature is focused on the experiences of people with disability in the justice system; however, much of the research has a broad focus on disability in general and does not provide a sustained analysis of the specific barriers to justice faced by people with CCN. The AHRC (2013) contends that the rights of “people with disability who need communication supports and multiple support needs are not having their rights protected, and are not being treated equally, in the criminal justice system” (p. 3). People with disabilities encounter a range of obstacles in their attempts to access the justice system, but these barriers are exaggerated for people with CCN (FCDC, 2016; nacro, 2011).

Research reveals that people with CCN are at a substantially greater risk of victimisation than other members of the community (Togher et al., 2006). Nelson Bryen and Wickman (2011) explain that people “who have little or no functional speech face a double



vulnerability when it comes to crime, abuse, and neglect as they are often the voiceless and invisible members of society” (n.p.). Yet when it comes to ascertaining justice, the criminal justice system is ill-equipped to support people with CCN (Togher et al., 2006). In a literature review on communication support needs, Law et al. (2008) discuss the extraordinary obstacles faced by people with CCN in accessing the criminal justice system. Some of the issues experienced by people with CCN include the verbal nature of the system; their perceived lack of credibility as reliable witnesses; and the difficulties they face in providing testimony (Law et al., 2008).

#### *Literature with brief considerations of people with CCN in the justice system*

The FCDC’s *Inquiry into abuse in disability services* (2016) does not primarily focus on people with CCN and instead pursues a broader focus on disability in general. It does, nonetheless, contain a section that considers interactions between people with CCN and the justice system. During their inquiry, the committee found that people with CCN face significant barriers in reporting abuse to the police (FCDC, 2016). The FCDC (2016) also found that the evidence provided by people with CCN is often not recognised, especially if their primary method of communication is non-verbal (FCDC, 2016). A lack of access to AAC specialists further compounds the difficulties that people with CCN face in their interactions with the justice system (FCDC, 2016)

The VEOHRC’s, *Beyond doubt* (2014), has a general focus on disability, but it does acknowledge the additional barriers faced by people with CCN in accessing the justice system. The report indicates that people with CCN can have significant difficulties in even expressing the need to contact the police, “either because they have never been equipped to communicate or have no access to an independent person who can communicate with them” (VEOHRC, 2014, p. 45). The VEOHRC (2014) found that police make insufficient use of Auslan interpreters and relied on family members (including the children) of people with CCN in their interactions (VEOHRC, 2014, p. 46). Police are reluctant to appoint interpreters for people with CCN due to a lack of knowledge about the service as well as concern about the financial cost of hiring a qualified interpreter (VEOHRC, 2014). The VEOHRC (2014) further contend that although “the Victoria Police Manual advises that interpreters can be called where required, it does not specify other types of communication support that should be provided, such as Augmentative and Alternative Communication” (p. 22).

It is essential that people with communication disabilities are able to give evidence to the best of their ability in court (VEOHRC, 2014, p. 38). However, the oral nature of the court system exacerbates the significant barriers experienced by people with CCN (p. 22). As previously noted in an earlier section of this literature review, the *Evidence Act 2008* (Vic) allows for appropriate provisions to be made for witnesses with little to no speech, but it does not specify exactly what these provisions entail (VEOHRC, 2014). Indeed, some believe that the *Evidence Act 2008* (Vic) is not flexible enough to meet the requirements of people with CCN (VEOHRC, 2014). The VEOHRC (2014) also notes that courts exhibit a critical and

cautious attitude towards the use of AAC devices, which severely impedes the ability of people with CCN to provide evidence.

#### *Literature focused on CCN, but not the justice system*

A number of studies and reports are focused on people with CCN, but do not examine their experiences in the justice system. The State of Queensland's Department of Communities' *Complex communication needs* (2009), provides a detailed overview of CCN. While it does not provide a prolonged analysis of the encounters between people with CCN and the justice system, it does acknowledge that the diminished capacity of people with CCN to report crime renders them more vulnerable to neglect, assault and abuse than others.

Owens' (2002) project examines access to communication information for people with CCN. The research highlights a range of factors that impact the provision and use of accessible information by people with CCN (Owens, 2002). Perry et al. (2004) respond to the paucity of demographic information that represents the number of people with CCN in Victoria, Australia. At the time of the study, the authors indicated that there were approximately 1 in 500 people with CCN in the State of Victoria (Perry et al., 2004). Iacono (2014) considers the complexity of what it means to have CCN. The author concludes that CCN is indeed a complex phenomenon. A further study by Iacono et al. (2013) examines the experiences of people with CCN using 'low tech' AAC devices, comprising of non-electronic components such as charts, cards, books and boards. This study responds to concerns that some people with CCN hold about seemingly convoluted 'high tech' AAC devices (Iacono et al., 2013).

#### *Literature on people with CCN in the justice system*

As this literature review has demonstrated, there are numerous studies that broadly focus on access to justice for people with disability and only briefly consider CCN, as well as literature that provides sustained considerations of people with CCN without considering their experiences in the justice system. There are, nonetheless, some studies that provide prolonged discussions of the experiences of people with CCN in the justice system. To illustrate, Togher et al. (2006) draws on anecdotal evidence from people with CCN who report a significant lack of satisfaction in their interactions with the justice system. This lack of satisfaction is evidenced in reporting crimes to the police, providing witness testimony in court proceedings, and performing jury duty (Togher et al., 2006).

Wszalek and Turkstra (2015) consider the high level of juvenile offenders with traumatic brain injury (TBI) and the associated risk of "impairment in language comprehension and expression, which may have profound effects on juveniles' ability to understand and express themselves in criminal proceedings" (p. 86). The article examines the effects of the communicative impairments associated with TBI on people's encounters with the police and the trial process (Wszalek & Turkstra, 2015). Bryan et al. (2007) reflect on the high level of people in prison who have language and communication disorders, with a specific focus on

incarcerated juvenile offenders (Bryan et al., 2007). The authors conclude that interventions for speech and language therapy should be enacted so that support is available for juvenile offenders with language and communication difficulties (Bryan et al., 2007).

Collier et al. (2006) report an incident where a victim of sexual abuse with CCN made a report to the police which was not followed up because the police deemed him to be lacking in credibility due to his reliance on AAC devices (p. 70). In a blog entry, Barmak (2011) considers the various issues that arise in the legal representation of people using AAC devices. He writes that although advocates have tried to ensure that “a person using AAC is provided with expert and effective legal representation and participation in the legal system ... many barriers continue to exist” (Barmak, 2011, n.p.).

Nelson Bryen et al. (2003) examine the victimisation experiences of people with CCN who are reliant on AAC devices. Their study considers the extent to which people with CCN are victims of crime; the types and location of the crimes perpetrated against them; their relationship to the offender; whether they reported the crime to the police; and the effects of the crime on the victim (Nelson Bryen et al., 2003). The authors found that most of the respondents had experienced multiple crimes, with the most frequently occurring crimes being theft and threats of physical assault (Nelson Bryen et al., 2003). The most commonly reported offenders were professionals such as personal assistants, staff, teachers, and medical professionals (Nelson Bryen et al., 2003, p. 131). Most of the respondents informed family members of their victimisation and were less likely to inform personnel in the criminal justice system (Nelson Bryen et al., 2003). Of the respondents who had their complaints investigated, the majority of the investigations did not lead to arrest or conviction (Nelson Bryen et al., 2003).

### Recommendations and accommodations

A number of recommendations have been made as to how the justice system can better accommodate people with disabilities, including — but not limited to — CCN. Once more, the bulk of this literature focuses on disability in general, with a smaller number of studies pertaining to people with CCN. Flynn (2013) examines the experiences of people living with a broad range of disabilities and argues that the right to state-operated advocacy has significant potential to deliver equal recognition before the law. The VEOHRC (2014) similarly recommend that further investment be made in advocacy and peer-led education programs that recognise and support the autonomy and capacity of people with disability to engage in the justice system.

Others argue that more training needs to be implemented so that personnel in the justice system are better able to communicate with people with disabilities (Henshaw & Thomas, 2012; Parliament of Australia, 2015). Vanny et al. (2008) argue for the need for court diversion programs for people with intellectual disability in the criminal justice system. The authors contend that court diversion initiatives assist in maintaining justice, minimising the

negative impact of judicial intervention, and maximising the prospect of rehabilitation through therapeutic methods (Vanny et al., 2008).

The Victoria Police's *Accessibility Action Plan 2014-2017* (2015) details the organisation's strategies for tackling issues affecting the interactions between people with disability and the police. Amongst others, the Plan provides the following goals:

- To enhance the accessibility of the service and to provide equitable practice to people with disability;
- To increase the reporting of crime by people with disability, and;
- To improve "police awareness and understanding of the needs of people with disabilities" (Victoria Police, 2015, p.5).

The Parliament of Australia (2015) maintain that it is essential that people with disability are provided with effective and appropriate communication support when accessing the justice system. O'Mahony (2010) suggests that the use of intermediaries can facilitate communication for witnesses and offenders with disabilities participating in court. The FCDC (2016) advise that legislative changes are required for people with CCN to participate in the justice system on an equitable basis. More specifically, the Committee recommends that the Victorian State Government amend the *Evidence Act 2008* (Vic) to allow for communication intermediaries to assist people with CCN to provide evidence in court (FCDC, 2016).

Communication Rights Australia (2013) advance a series of recommendations regarding the need for each Australian state and territory to establish an Independent Communication Support Worker (ICSW) service to aid people with communication disabilities. The FCDC (2016) recommends that the Victorian State Government investigate the possibility of introducing the UK's Witness Intermediary Scheme (WIS). Hepner et al. (2015), as well as Plotnikoff and Woolfson (2015), confirm that the WIS has proven to be a beneficial program. Through the WIS, mediators are made available to people with disability to ensure effective and appropriate communication between interlocutors (Hepner et al., 2015; Plotnikoff and Woolfson, 2015). While these studies are not specifically focused on people with CCN, strategies such as these have been proposed as a means for people with CCN to achieve equal access to justice. It should be noted that on 1 July 2018, an intermediaries pilot program was introduced in the state of Victoria. Given the recent implementation of this pilot program, studies of its impact are presently unavailable.

Togher et al. (2006) discuss a way of enhancing access to justice for people with CCN through their development of an educational training program for judicial personnel. This program seeks to rectify the inequitable treatment of people with CCN before the law by assisting judicial personnel to identify and reduce communication barriers (Togher et al., 2006). A report by the State of Queensland's Department of Communities (2009), recommends various strategies for accommodating people with CCN in the justice system.

One such recommendation includes minimising “the number of times vulnerable witnesses have to recount their experiences by providing alternative measures for their evidence to be presented to the court, including the use of pre-recorded evidence and investigative interviews at trial” (p. 285).

Bornman et al. (2011) reflect on their development of communication boards for people with CCN which can be used to disclose information about crimes. Bornman et al. (2011) conducted a series of focus groups with participants with CCN to develop communication boards in four South African languages (English, Afrikaans, isiZulu, and Sepedi). The authors hope that “the process of developing communication boards developed in this study might be useful to the AAC community in other countries” (Bornman et al., 2011).

As previously noted, there is a pervasive reluctance within the justice system to allow people with CCN to use AAC devices due to confusion as to whether the communication truly belongs to the person who uses the AAC device (Barmak, 2011; VEOHRC, 2014). However, Barmak (2011) suggests that this issue can be rectified. The authenticity of the communication can be ascertained by investigating background information of the client, how the AAC device assists the user, and the capabilities of the AAC device (Barmak, 2011). In so doing, “the recipient will understand that the AAC is a method of providing expressive communication, with the linguistic creativity of the client remaining intact, and to assuage the presumption that limitations in communication do not necessarily denote limitations in cognitive abilities” (Barmak, 2011, n.p.).

Nelson Bryen and Wickman (2011) argue that “[e]nding the silence of crimes against individuals” (n.p.) with CCN requires:

- Assisting people’s understanding of what to do in instances of victimisation;
- Providing training in self-defence and personal safety;
- Providing education in distinguishing between healthy sexual behaviour and sexual abuse;
- Establishing cooperative partnerships between advocates, service providers and the justice system;
- Amending legislation so it is more inclusive, and;
- Generating global awareness through personal narrative.

### Gaps in the literature

A review of the literature reveals that studies of the experiences of people with disabilities in the justice system are gaining momentum. Although some of this literature provides preliminary considerations of individuals with communication disabilities and the justice system, most of these discussions are unsustainable. Moreover, much of the research that does focus on people with CCN does not consider their interactions with the justice system. Given the paucity of literature on the topic, it is evident that further research on the

experiences of people with CCN in the justice system is required to enhance access to justice for this hitherto overlooked cohort.

## Methods

### Sample, recruitment and participant composition

As this research was specifically interested in the experiences of people with CCN within the justice system, a purposive sampling method was utilised in order to include the direct experiences of interacting with the police, court or tribunal. Oliver (2011), describes purposive sampling as:

A form of non-probability sampling in which decisions concerning the individuals to be included in the sample are taken by the researcher, based upon a variety of criteria which may include specialist knowledge of the research issue, or capacity and willingness to participate in the research (Oliver, 2011, p. 1)

Given the research focus, it was essential that the research be informed by participants who had first-hand experience of the justice system in Victoria and identified as having CCN, or had advocated with or on behalf of a person with CCN.

The research was conducted with support from the Disability Advocacy Victoria (DAV) (formerly Victorian Disability Advocacy Network VDAN). DAV is the peak body representing a coalition of independent, community based organisations that advocate with and for people with a disability. Two DAV member agencies (Communication Rights Australia and Disability Discrimination Legal Service) were involved in recruiting some of the participants included in this research. These agencies were asked to identify, within their files, the clients whose matters met the research criteria.

The criteria for inclusion included participants,

- who identify with the definition of CCN;
- who may have been victims, offenders or those who have interacted with VCAT or VoCAT hearings;
- aged 18 and older;
- had contact with the justice system — i.e. police, courts (either as a victim or accused), or tribunals — between 1 Jan 2012 to 31 Dec 2016 in Victoria. The timeframe was later expanded to between 2010 and Dec 2017, in order to attract additional participants;
- who were no longer receiving services from the advocacy agency at the time of recruitment;
- who had all justice system matters finalised at court or tribunal.

A de-identified (no names and addresses) list was then provided to the researcher who then selected a small cohort of potential participants, who would then be contacted by the agencies. In addition to the criteria listed above, other factors such as the type of matter, a variety of justice agencies, jurisdiction (civil or criminal) were also considered.

The research was also promoted on websites and through newsletters of other disability agencies. Three participants who identified as CCN contacted the researcher directly, as a result of this promotion.

Overall, eighteen individuals, including advocates, carers, guardians and people who identified as having CCN, expressed an interest in participating in this research. Twelve of the eighteen individuals participated in one-on-one interviews and three advocates participated in a focus group. Of the three remaining individuals who indicated their interest in participating, one interview did not proceed because of the participant's personal circumstances. Of the remaining two interviews, one was not included, as the participant did not have contact with justice agencies. The second interview was also not included, as it was deemed by the researcher that the participant would be identifiable.

In four instances parents and/or guardians were the primary interview participants, either because the person with CCN was under 18 years of age or because the individual with CCN resided in disability accommodation, and access to these individuals was not possible. In one instance both the parent and person with CCN were interviewed. Seven interviews were conducted directly with persons who identified as having CCN, three of which were non-verbal; two participants had impairments which affected their speech, however they were able to respond verbally to interview questions; and a further two used speech as their primary mode of communication, however their impairments affected their capacity to receive and process information. In these instances, questions were reframed and further clarification by the researcher was required in order to ensure that the participants' experiences were accurately represented.

There were a range of matters raised in this research, that included: applications for Intervention Orders, allegations of sexual assaults made by participants, allegations of sexual assault made against one participant, residential tenancy and administration matters which were heard at VCAT, theft perpetrated against a participant and an attempt by one participant to establish a mode of email communication with police in circumstances of family violence.

As the research progressed, it became clear that people with various impairments that were often, but not always, related to speech, were also self-identifying as someone with CCN. As such, if a participant self-identified as having CCN, their relevant experiences were then included in the research.

### Data collection

This research uses qualitative data collection methods. Data was gathered from three sources: a focus group interview; individual interviews; and case files, where files were available and permission to access files was provided.



## Case files

Electronic files were available in instances where research participants were previously assisted by an advocacy agency. In two instances, the participants were not receiving advocacy assistance from an agency; hence, a case file was not available. The case files were redacted by the advocacy agency prior to the researcher receiving them. Case files contained all communication (emails and letters) between the advocate, client (participant) and other agencies, government departments and justice agencies. Files ranged from six to 86 pages in length.

## Interviews and transcripts

Interviews were chosen as a mechanism to “... generate data which gives authentic insight into people’s experiences” (Silverman, 1993, p. 91). Depending on participants’ mode of communication, access to files (where files were available) provided another perspective and/or further detail about various aspects and stages in the process leading to the resolution, or at the very least, the participants’ interaction with the justice system.

Individual interviews of half hour to two hours duration were conducted with a range of participants, including guardians, carers and people who identified as having CCN. It was not possible to communicate directly with two individuals with CCN who were residing in disability residential services. On these occasions, the parent/advocate of the person with CCN were interviewed. In all instances where a guardian or carer were interviewed, these individuals played a key role in supporting and advocating for their daughter or son. In one instance, both the person with CCN and their parent were interviewed separately. The duration of the majority of interviews was typically one hour, however, in two instances the interview was approximately 30 minutes and in a further two instances, the duration of the interview was one and a half hours. In all but one instance, interviews were recorded and transcribed. One participant’s preferred mode of communication was to share their experience by writing responses (via computer) to the interview questions.

Interviews were structured using open-ended questions for most participants, except where the participant used AAC. Questions were chosen to encourage responses about both positive and negative experiences with the justice system. Where participants used forms of AAC, a series of closed and open questions were used which focused primarily on whether their experience with the justice system was ‘good’ or bad’, ‘what was good?’ and ‘what was bad?’ and ‘how did that experience make the participant feel?’

## Analysis

Interview transcripts were analysed using thematic analysis (TA), a process by which the researcher “... looks for recognisable reoccurring topics” (Hawkins, 2018, p. 2). The process of identifying themes within the transcripts includes re-reading the transcript several times to identify and code sections of the text that inform the research questions.

A deductive approach to TA was utilised to identify themes. According to Hawkins (2018), identifying themes deductively refers to “... search[ing] for themes in the data that fit an existing theory, theoretical framework, or typology” (p. 4). As this research has used the Social Model of Disability as a framework within which to better understand the experiences of people who identify as having CCN, themes which informed the research question were identified using a Social Model lens. Data was coded using the software program NVIVO. Coded data was categorised into three broad umbrella themes including ‘enablers’ which facilitated and ‘disablers’ which impeded access to justice. The third umbrella theme captured the experiences and impact on those participants for whom, for a range of reasons, the justice system was not able to respond.

The narrative, letters and emails contained in the case files were analysed using TA. Similar to other research where case files were examined (Sanders, Munford, Thimasarn-Anwar, Liebenberg, Ungar, Osborne, Dewhurst, Youthline New Zealand, Henaghan, Mirfin-Veitch, Tikao, Aberdein, Stevens and Urry, 2013), quantitative data was collected from each case file using a template created by the researcher. Data of interest to this research included the type of matter, the number and types of agencies involved (government, justice and other), the duration of the interaction between justice system and participant, the number of communications between the advocate, the justice agency and other organisations involved.

### Ethical considerations and limitations

When contemplating research involving vulnerable participants, as it is with any other groups, the premise of engagement, is to ‘do no harm’. The National Statement on Ethical Conduct in Human Research (NHMRC, 2018) suggests that the value most central to conducting research is that of respect:

... respect is central. It involves recognising that each human being has value in himself or herself, and that this value must inform all interaction between people. Such respect includes recognising the value of human autonomy – the capacity to determine one’s own life and make one’s own decisions NHMRC.

Conducting qualitative research is complex, particularly when the group central to the research may, for a variety of reasons, be described as disadvantaged. Indeed, as researchers we have an obligation to acknowledge the history and current position of such participants, in society. Barton (2005) advocates that researchers

... need to be more open and self-aware in relation to their own values, priorities and processes of interpretation. This is particularly important in a context in which the subjects of research are marginalized people who experience varying degrees of social exclusion, stereotyping and discrimination (Barton, 2005, p. 320).

In conducting research, Barton (2005) asks himself a series of underpinning questions to establish the researcher's position in relation to the conduct of research. Such questions as, "[w]ho is my research for? [w]hat right have I to undertake this research? [w]hat responsibilities arise from the privileges I have as a result of my social position? [d]oes my writing and speaking reproduce a system of domination, oppression or challenge it?" (p. 325), provide a sound basis through which researchers can seek to gain greater insight into themselves as researchers and place the purpose of the research in the foreground.

Ethical considerations in regards to conducting research with and about people with disability have been the subject of debate for several decades. In particular, researchers have raised questions in regard to the ethically appropriate level of involvement of people with disability, in research in which people with disability are the focus. The primary purpose of this study was to hear from people with CCN. To hear of their experiences in the justice system, what worked and what did not work from their perspective, and what was the impact of their experience on them as individuals. Ultimately, the participants elected to participate because they wanted change and hoped that their experience could affect systemic and process change for the benefit others to follow. This sentiment was reflected in comments made by Nind (2008), when discussing methodological issues when conducting research-involving participants with learning difficulties. Consequently, while this current study has elements of what Walmsley (2001) describes as emancipatory and participatory research, this current study makes no claim to aligning with either approach exclusively.

Research involving people being asked to recall complex and difficult issues often presents challenges for both the researcher and the participants. Conducting interviews with people identifying as having CCN added a level of complexity that was challenging for the researcher, and presented several ethical dilemmas. In particular:

#### Time allocation to conduct the interview

The standard time allocated for interviews is between thirty minutes to one and a half hours per participant. How much time was it reasonable to ask people to participate in this research? While all those who participated indicated they were willing to do so, I was aware that for some participants the act of participation would cause frustration and take a physical and, indeed, mental toll. Case files were consulted to provide further detail about the matters for which support was provided to participants. This allowed sufficient time during interviews with participants with CCN to focus on the impact of their experience.

#### Whose voice to privilege?

Not all participants in this research were people with CCN. I was mindful that, in inviting guardians and carers to participate, I was privileging additional voices in along with the person they were there to represent. In some instances, the participants' were parents who were representing their teenage children. I was also mindful that this research did not

deliberately seek to reflect the experiences of people from Aboriginal and Torres Strait Island populations or the experiences of people from other cultural and linguistic backgrounds.

#### Accessing people within disability service accommodation

Accessing potential participants within residential support accommodations services was not possible. Participants with CCN, despite the severity of the communication impairment, did respond to web-based promotional material, as long as they subscribed to email lists or were members of a specific agency. However, the same was not the case for people living in residential accommodation. In cases that involved the person living in the residential support accommodation, the parent was the primary contact.

The lack of access to participation was highlighted in the Family and Community Development Committee *Inquiry into abuse in disability services Final Report* (Parliament of Victoria, 2016) who suggested that the lack of submissions made to the inquiry by people with CCN was

... indicative of the numerous barriers faced by people with disability in disclosing abuse, such as a lack of support and advocacy services to assist with making a submission, or the difficulty of attending a public hearing without the assistance of the very person who may have perpetrated abuse. Concurrent inquiries may have also played a role in the lack of submissions from people with a disability. (Parliament of Victoria, 2016, p.1)

## Experiences of people with Complex Communication Needs in the Justice System

### How the data will be presented

The data collected during this research project is presented in multiple forms within this report. In the first instance, an overview of each case is provided while ensuring that participants' anonymity is preserved. Secondly, the data consisting of case files and or interview transcripts or written responses to questions, were thematically analysed.

In each case study key information is presented, including participant's gender; the type of matter; data; mode of communication and duration from when advocacy was sought or when person first interacted with the justice agency and which justice agency. An overview of the matter is also provided.

All names used in the presentation of data are pseudonyms. Preserving participant anonymity was considered paramount, hence the level of detail presented in some of the case overviews is necessarily limited.

## Case Study One

Gender

Woman – [Janice]

Matter

Seeking an alternative method to contact 000 in an emergency or to contact police in other instances where information was required

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*“This only took a decade! Pity help those without my persistence & smarts there’s many of them but I doubt few who dare 2 live alone” (Interview transcript)*

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Justice Agency

Police

Duration

4 months from when assistance was sought from advocacy agency

Data

Case file – 21 pages

Interview transcript

Mode of communication

Speech - multiple impairments affecting mobility and speech

Case Overview

[Janice] has been subject to ongoing family violence. She felt vulnerable and anxious as she was not able to use the phone to contact police or 000, for she was not always understood. In her own words, [Janice] describes her attempts at using TTY as “have tried & failed at TTY”. [Janice] had negotiated direct email to individual police officers, however this arrangement did not persist, as officers changed locations or went on leave. Further, the emails were not monitored 24 hours a day. The advocacy agency were involved in this matter for 12 months, however, [Janice] has made independent attempts to negotiate alternative form of contacting police or 000 for ten years.

## Case Study Two

Gender

Male – [Ben]

Matter

Historical sexual assaults — multiple perpetrators

Justice agency

Police and court

Duration

Four years from when support was sought to finalisation at court. This does not include the two years from when the allegations was first made to police.

Mode of communication

Nonverbal; uses E-trans; Communication partner; sounds and gestures

Data

Case file — 84 pages

Interview transcript

### Case Overview

Although outside the timeline originally suggested for this project, the inclusion of this case is important as it is a unique opportunity to consider some of the issues and the level of support that was required to ensure this case was prosecuted. An adult [Ben] was the victim of sexual assault.

Given the various impairments, a range of specific supports were required in order to support [Ben] to provide police interview and then give evidence at court. While an overview of the case is available in the public domain, some of the information pertaining to communication has not been discussed fully. Access to [Ben's] advocacy case file sheds further light on the issues confronting people with CCN to order to participate. The process of supporting [Ben] to give evidence was complex and required significant coordination and collaboration between the Witness Assistance Service from the Office of Public Prosecutions and the advocacy agency.

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### ***Giving evidence in court:***

*A: Looking back on it, I felt lost.*

*Q: What was it about the experience that made you feel lost?*

*A: Everything.*

### ***Referring to the Magistrate during the Acquittal hearing:***

*A: He was great.*

*Q: What was great about the magistrate?*

*A: He didn't assume that I had an intellectual disability. (Interview transcript)*

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The mode of communication used by [Ben] was the subject of much discussion both in terms of acceptability within the justice system but also the impact it would have on [Ben] in terms of the time to provide evidence in court. To reduce the impact and duration of providing evidence, an application to have some words most frequently used in his evidence, to be provided in full using predictive text, was made to the court. This first extract provides some insights into how the predictive aspect of the communication could be understood. The application for the use of predictive text was not granted.

I [advocate] said to [solicitor] there are 3 levels of validation for the 'prediction' in my view: 1) Obviousness of the particular word once he gets halfway through spelling it; 2) the context of the sentence; and 3) the CLEAR affirmation [Ben] gives (or doesn't) when the suggested word is put to him. All this really does leave no doubt or room for anyone to be putting words into his mouth, and will be abundantly clear to everyone. Indeed, to not have prediction will frustrate the jury no end, especially when the word is obvious to them! (File notes - Ben)

The following extracts describe the process and efforts that [Ben] went to use electronic technology using eye gaze. The extract also highlights the precariousness of some technology in various environments. The second extract concludes with [Ben's] decision not to use the device concerned with what might be made of any issues which may arise when he gave his [evidence]

I spoke to [worker] from [technology supplier] who said that they do have an eye gaze device in the library. Consideration needs to be given as to whether it would work for [Ben]. An Occupational Therapist and Speech Pathologist would need to facilitate a session to ensure his [Ben] eye movements would target the device. In addition it impacts on the device as to where it would be set up as it is very sensitive. With saying that it may not work in court as it needs to be stable environment. Further it needs to be plugged in and it is not reliable in some environments. Someone would need to set up the device so that he could use it. This is why it is better to be used at home or in a classroom not in a setting where people are coming and going. I again explained our predicament and requested that they discuss it with her team and see if anyone can help (File notes - Ben).

[staff member from advocacy agency] attended an appointment organised by [advocacy agency] at short notice with [technology supplier], held at [name of] hospital. 2 [technology supplier] workers in attendance worked with [Ben] for 2 hours with eye-gaze technology. [Ben] was able to spell short sentences but was unfamiliar with the technology and how to use it. It was clear much practice and more training was needed. [Advocate] and [technology supplier] offered to organise a trial for [Ben] at home over next week. However [Ben] decided that it was too stressful to try to learn the technology at short notice. All seemed to be in agreement



that it had been a worthwhile trial but there was not enough time to assess its effectiveness for the upcoming trial. In particular [Ben] was concerned about what would happen if the technology failed in court and what the defence would make of this (File notes - Ben).

The succession of extracts below provide further insights into the level of support and coordination involved in supporting the communication partners, including training and debriefing. Further, the extracts describe the delays experienced in the higher courts and that despite the VARE recordings of [Ben] describing his experience of the sexual assault, the VARE may not be used, perhaps requiring [Ben] to retell his experience to the jury.

Would [date and time] suit you for a conference at our office? We have a few things to discuss and you can view your tapes if you would like. However, we may not be using the tapes and you will have to tell the jury what happened in your own words at court. Accordingly, it is more important that you read what you said in the tapes and at the committal. We will discuss this further at the conference. I will book a communication partner for the conference if the date is suitable. Please let me know if you would also like a personal carer arranged for the conference. (Email communication)

The court would like the names of the communication partners (and personal carers, which I will get from [Ben] prior to [date]. Would you please provide me a list of the names and qualifications of the communication partners that we will be using in the trial (particularly if there are any that we didn't use at the committal)? (Email communication).

We had the Directions Hearing this morning for [Ben] and we have been given a trial date ... As expected, it is almost a year away... I apologise for the delay. I will keep you updated with any developments and we will arrange a conference closer to the trial date to explain the difference between committal and trial and to show you a County Court Room. I will liaise with [advocate] to arrange for communication partners at Court. Please let me, and [advocate], know if you think that the communication partners would benefit from some individual training with you prior to court (Email communication).

On behalf of [Ben] and [advocacy agency] I would like to thank you for your work last week as a communication support worker in court. Access to justice is a fundamental human right which is too often denied to people with little or no speech. However last week [Ben] was able to exercise that right, with your assistance. As you are aware it is a confronting case, and if anyone would like us to organize de-briefing, please let us know. (Email from advocate to the Communication Support Workers who supported [name at the court]).

## Case Study Three

Gender

Male – [Greg]

Interview participant

Mother – [Rosa]

Matter

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*“The magistrate expressed significant reluctance at ordering an interim intervention order that would require the relocation of the respondent” (File notes).*

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Physical assaults in residential accommodation

Duration

Finalised in one month after involvement of advocacy agency

Jurisdiction/Agencies

Magistrates’ Court and Police

Mode of communication

Combination of pictures and letters

Data

Case file – 9 pages

Interview transcript

Case overview

[Greg] was allegedly subjected to physical assault by another resident in a residential disability service operated by the Department of Health and Human Services (DHHS). At times the injuries sustained by [Greg] necessitated hospital visits due to their serious nature. The family, with the support of the advocacy agency, applied for an intervention order on behalf of the victim. Despite the initial reluctance by the magistrate to issue an interim order, it was subsequently granted on presentation of further evidence. The interim order was withdrawn, once the housing providers were able to move the offending resident into accommodation more suited to their needs. Of interest in this case is that the assaults and abuse appear to have been identified quickly. The DHHS worked quickly in collaboration with the advocate and [Greg’s] family to arrive at a speedy resolution, ensuring [Greg]’s safety and security. The other resident was rehoused in “more appropriate accommodation” (File notes).

## Case Study Four

Gender

Woman – [Grace]

Interview participant

Mother - [Irene]

Matter

Violence and abuse by another resident in residential accommodation

Jurisdiction

Magistrates' Court

Mode of communication

Non-verbal – “no formal method of communication” (file notes)

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*“I stood up in front of the court not knowing what to do, not knowing what to say and after the judge dismissed the case, I thought, no something’s gotta be said here. Something has to be said. So I got up in front of the court and I said exactly what’s been happening in that house. I felt humiliated because I was shaking and it was embarrassing, and I didn’t know what I was saying, and I didn’t know if what I was saying I should’ve been saying and there was no one to help me, no one to advise me.” (Interview transcript - Irene)*

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Other impairments

Not mobile – requires wheelchair; very poor eyesight

Duration

Four months from when advocacy sought

Data

File notes – 25 pages

Interview transcript

Case overview

Disability residential accommodation privately operated receiving funding from DHHS. One resident was subjected to verbal and physical abuse. The alleged perpetrator was another resident. At times the physical abuse necessitated hospital visits due to the serious nature of the injuries. The accommodations service contacted the police due to the nature of violence. The police sought an intervention order. In this case the assaults and abuse had occurred over two years. [Irene] (Grace’s mother) had indicated that at times she was unaware of injuries as she had not been kept informed by the disability accommodation service. The other resident was represented at court, however the police, for reasons which were unclear from the file notes, advised the advocate and [Irene] not to attend the court.

Similar to case three presented above, the magistrate was reluctant to grant the intervention order. Unlike the previous case, in this case the IO was not granted. [Irene] did attend the court when the application for the IO was being made. As [Irene]'s interview transcript attests (quotes from which are included elsewhere in this report), her distress at court was palpable and still confronting for [Irene] at the time of the interview.

## Case Study Five

Gender

Male - [Jack]

Matter

Intervention order

Justice agencies

Police and Magistrates' Court

Mode of communication

Mobility and speech impairments

Duration

Ten months from when advocacy agency got involved

Data

Case file – 16 pages

Interview transcript

Case overview

[Jack] alleged threats of violence from a previous housemate. In addition, [Jack] had become aware that various things were missing from the unit. [Jack] sought assistance from an advocacy agency to apply for an intervention order. [Jack's] impairments mean that it can be difficult to fully understand what he is saying, as such time is required for the communication to occur. The IO was granted. Indeed, [Jack] spoke positively of the magistrate. The issues which [Jack] raised during the interview was that of "accommodations" he required at court and in providing his statement to police. In regards to attending court, [Jack] is used to providing assistance to court staff in order to assist them to understand why he presented at court. Similarly, his experience with police was positive, however his use of a mobility scooter means that traveling and entry into buildings can be somewhat problematic. In addition, his mobility scooter means that he cannot travel long distances. While [Jack] is able to get himself out of his scooter, he cannot walk for extended periods.

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*"Yes, they ... I tell them [court staff] that if they don't understand me, to ask me to repeat myself. I try to make it as easy as I can. Because they have a job to do and I know that they can't solve all my problems, but if I'm there I'm there for a reason" (Interview transcript).*

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## Case Study Six

Gender

Male – [John]

Matter

Multiple sexual assaults

Justice agencies

Police

Mode of communication

Uses AAC

Justice agencies

Police

Data

Typed response to interview questions

File notes – 44 pages

Case overview

[John] alleged experiencing sexual assault "more than four times" during his life. The assaults were allegedly perpetrated by "multiple assailants". On two occasions, the reports were made by a third party, either advocacy or other agency. On these occasions, [John] wrote to a person or an agency to disclose the assaults. [John] uses AAC to communicate. At one interview, a number of factors hampered [John] being able to provide his best evidence, including the delays in responding to the reports, the timing of the interviews and [John's] frustration at the limitations of the AAC. On one occasion when [John] attempted to report, police would not accept his mode of communication and challenged his competency to give a statement. On one occasion when [John] provided a statement, he did so by using a communication partner. [John] was very embarrassed to provide such intimate details about the assault in front of the communication partner. [John] appears to have received inconsistent responses from the police.

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*"I am glad I reported the assaults to the police. I didn't report the last assault because it was so upsetting that nothing ever happened. The police were kind but my case didn't go to court because of my communication impairment. After police took my statement, they never contacted me. Eventually I learned why. This process left me feeling as though I did something wrong. The process is still upsetting to think about. I live the embarrassment of the statement when I think about the process."*  
*(Typed response to interview questions)*

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## Case Study Seven

Gender

Male – [Noah]

Matter

Fraud

Justice agency

Police

Police Prosecutions

Magistrates' Court

Mode of communication

Verbal communication; requires assistance to process and understand information

Data

Interview transcript with [Noah]

Interview transcript with parent

Case overview

[Noah] is aged between 20-30 years and resides with his parents in a rural town in Victoria. [Noah] was a victim of crime, categorised as a property offence "Obtaining financial advantage by deception" (Crimes Act, 1958 s82); the perpetrator used threats to extract several thousand dollars from [Noah] over many months. During this period, [Noah's] behaviour changed: he grew increasingly withdrawn, anxious and was reluctant to leave his home. Eventually, [Noah] disclosed to his parents, who subsequently accompanied [Noah] to report the crime at the local police station. The police station is classified a 'non-24 hour' station.

Initially, police did not take the report. [Noah's] parents advocated with police at a more senior level asking why their son's report was not taken. The matter did eventually proceed to court, largely due to the advocacy from [Noah's] parents. The matter endured another setback when the brief of evidence was lost and subsequently all evidence was gathered for a second time. There are other factors pertaining to this case, each of which had an impact on [Noah] and his parents. In all, two interviews conducted by the police with Noah. Initially, an interview was attempted at the local police station. As Noah recalls, "[w]e did try a voice recording interview and they said maybe it's better off being a video interview. That's [be]cause I was a little nervous to start from the beginning, because it started with a

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*"I was a little scared. I was scared of ... I was more scared of seeing ... eye to eye with [perpetrator] again. I avoided eye contact with him. I just, I just turned my head as he walked past me. I didn't want him to look at me." (Interview transcript - Noah)*

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mistake I made and I was panicky about it” (interview transcript - Noah). The second interview was conducted at the regional station, a distance of approximately 200 kilometres return journey. While the interview did proceed, police were unsure about the quality. While the extent of police training in regards to interviewing a witness with cognitive impairment is unclear. [Noah’s] parents were not asked by interviewing police to provide information about [Noah’s] communication needs.

The charges were downgraded and a decision, informed in part by [Noah’s] interview, was made to have the matter heard at the Magistrates’ Court rather than the County Court was originally intended. As [Vicki] recalls:

They did say he would have to go into the box, he would have to give evidence. He would have to do such and such, whereas if it was a lesser charge, then he might not have to do this. And they’re more likely to convict him on the lesser charge, than what they are on the other charge (Interview transcript – Vicki).

They [police] said that it would be very difficult to prove with [Noah], ‘cause he wouldn’t be able to take the stand successfully (Interview transcript – Vicki).

Prior to the hearing, plea negotiations had taken place. On the day of the hearing the accused plead guilty. [Noah] was pleased not to be required to give evidence in court, however his parents were upset that he was not able to have his day in court.



## Case Study Eight

Gender

Male – [Brendan]

Matter

Sexual assault allegation against a teenager

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*“I’ve got to say, the police were actually really good. They even admitted that they were out of their depth – admitted.”*  
*(Interview transcript - Liz)*

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Interview

Interview – [Liz]

Justice agency

Police

Mode of communication

Autism and intellectual disability

No functional communication

Data

Interview transcript

Case overview

This case was interesting and very complex. It involved a teenager [Brendan] with multiple impairments. The teenager attends school and has very little functional communication. [Brendan’s] mother noted that:

The school did engage “a speech therapist to assess him and put in a functional communication system. But nobody, none of the staff, none of the teachers knew how to drive that. They may have had some workshop, but they weren’t actually fully trained in how to communicate and use [the communication device].” Supports for this young man were at some point made available, until a “certain incident happened at the school, which I still don’t have the information for.” (Interview transcript – Liz)

[Brendan’s] behaviour had changed dramatically over a short period, coinciding with a program being withdrawn and the person managing the program leaving. During this time, [Brendan] had been accused of sexually assaulting a teacher. When [Brendan’s] mother arrived at the school to collect him, [Brendan] was in a classroom with an adult male standing at the doorway as if to contain [Brendan] and prevent him from leaving the room. While [Brendan’s] mother does not have evidence to substantiate a claim, she is concerned

that something had happened to [Brendan], leading to the sexualised behaviour. Despite [Brendan] being suspended from school and the subsequent involvement of the police, [Liz] had not been provided with an incident report by the school. Indeed, [Liz] was not even aware that the police were called in regards to the alleged sexual assault until the school had asked if the police had been in touch.

[Brendan] was not charged with sexual assault and as such returned to school. [Brendan] did resume school, however unbeknown to his mother, [Brendan] was isolated from the other students and physically restrained while at school.

While the main issue for [Liz] was the school's inability to develop a communication plan for [Brendan] that would facilitate assistance for [Brendan], the issue of relevance to this research is the interaction with police. Police were called and did, according to [Liz], conduct interviews. It is unclear why charges were laid against [Brendan], however, it is clear from the interview that police found this to be a difficult case. One of many issues with which [Liz] is particularly concerned, is that the report of alleged sexual assault is now on file with the police.

## Case Study Nine

Gender

Male – [Callum]

Matter

Alleged sexual assault

Administration and Guardianship

Interview

Mother – [Sarah]

Justice agency

Police

VCAT

Mode of communication

Body language; Gestures; Sounds

Data

Files notes – 13 pages

Interview transcript

### Case overview

There were two matters pertaining to [Callum]. The first matter was in relation to an application to VCAT Administration and Guardianship list lodged by a doctor attached to the disability service with which [Callum] is connected. [Callum's] family were wanting to use funds (held in trust) for him to participate in a personal development program. [Callum] had already participated in a brief version of the program and, according to his family, enjoyed it immensely. Despite [Callum's] impairments, he is able to gain enjoyment from a range of activities. As the following extract of file notes attests:

Even if the doctor's labelling of [Callum] as profoundly retarded was totally correct, that does not mean that he is unaware or unable to enjoy himself. The term 'Profound Retardation' applies to adults with a mental age of up to 4. No-one would suggest 4-year-olds were unaware or couldn't appreciate activities or didn't have opinions. Or 3 year olds or 2 year olds (File extract of email communication).

Responding to the application to challenge the family's use of [Callum's] money, the family provided statements and consequently they and [Callum] attended the hearing. According

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*“Well, we went to the rehearing and we had, obviously, a senior member. He was a lovely man and he said straight off, ‘I have taken a lot of time to read through all your documents.’ And [Callum] just sighed a sigh of relief.” (Interview transcript - Sarah)*

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to the interview transcript, the magistrate did not speak to the family or to [Callum], rather, the magistrate appeared to rely solely on the doctor's perspective.

And the doctor said what he thought, that he didn't think he had the intelligence to enjoy a trip ... And [Callum] started talking, [Callum] was going ... Woo, woo, you know. "Would you like us to interpret what he is saying?" I/we said to the member. And the doctor piped up, "it's just their interpretation." And she nodded at him and that was it (Interview transcript).

The family were granted a second hearing in which they were appealing the outcome of the first hearing. The second hearing was presided over by a different magistrate. According to the interview transcript and file notes, the second hearing was quite different to the first, in that the magistrate did read all the statements provided by the family and also spoke directly with the family. The magistrate also took note of [Callum's] reactions to various comments during the hearing. The outcome of this matter was that the funds were released so that [Callum] could participate in the personal development program.

The second matter raised during the interview was that of an alleged sexual assault perpetrated against [Callum] while in the care of a disability service. Despite a positive response from the Victoria Police member who "communicated well" (Interview transcript) with [Callum], the timing and delay of the interview meant that [Callum] was not in a good space and hence the investigation did not proceed. The allegations were subsequently subject to an internal agency investigation.

## Case Study Ten

Gender

Male – [Reece]

Matter

Multiple sexual assaults

Interview

[Reece]

Carer

Justice agency

Police

Mode of communication

Non-verbal; uses ACC

Duration

12 months advocacy agency involved

Data

Interview transcripts

File notes – 12 pages

### Case overview

[Reece] is non-verbal, in addition to sounds and gestures, he uses AAC to communicate. As [Reece's] arms move involuntarily, the process of using the AAC to communicate appears to be a slow and, at times, frustrating, difficult and tiring process.

[Reece] reported the assaults to two different police stations, the response from both stations to [Reece's] mode of communication was vastly different. Police officers at one station would not proceed with the interview as [Reece's] mode of communication was discredited by the disability service with whom the alleged perpetrator was employed. The second police station did take his report, however, neither report progressed to prosecution. The first incident, which was a historical report, did not proceed to interview or investigation. The second report was withdrawn by the victim.

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*[Advocate] informed [Reece's carer] that she had spoken to the police about [Reece] making a statement and that she will need to know if [Reece] would just like to make a statement to the police about what happened. [Advocate] also explained that officer was cautious of [Reece's] method of communication with the information that is out there discrediting it, which [advocate] explained and ensured she understood that it was Reece's right to freedom of expression. [Police officer] just wants to make sure that whatever Reece has to say isn't able to be dismissible in court should he be cross examined or his method disproven (File notes).*

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## Case Study Eleven

Gender

Woman – [Rebecca]

Matter

Tenancy

Justice agency

VCAT Residential Tenancies

Mode of communication

Verbal, although impairment means that receiving information delivered

verbally takes time to process. Impairment also means that difficult to maintain focus.

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*“... even though I delivered a letter, because I delivered a copy of the letter to ... I’d addressed it to both the VCAT Registrar and the real estate agency. The real estate agency ignored it as well. They just dealt directly with the advocate and totally ignored me.” (Interview transcript - Rebecca)*

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### Case overview

[Rebecca] identifies as someone with CCN. She has an ABI which affects her ability to process and respond to information. In order to participate in VCAT proceedings, for example, [Rebecca] requires specific accommodations such as only one person speaking at one time and for whomever is speaking to do so slowly so that [Rebecca] has time to process the information. [Rebecca] had gone to the Residential Tenancies Tribunal. Prior to her attending the tribunal, she had written requesting that specific adjustments be made to facilitate her participation in the hearing. Unfortunately, according to [Rebecca], the letter was lost, hence these accommodations were not provided. An advocate, sent by a service provider to assist in other matters being heard on the day, attempted to provide advocacy assistance. Even though [Rebecca] had attempted to advocate on her own behalf, the magistrate, the real estate agent and the advocate ignored [Rebecca] and continued to negotiate. As the conversations did not proceed according to [Rebecca’s] adjustment needs, she was not included nor was she able to fully comprehend what transpired on the day.

## Data: Main Themes

Overall, there were 224 pages (files) and approximately 70 pages of interview transcripts from which themes were identified and categorised. There were ten themes which emerged from the data overall. These were then categorised into four overarching themes, these were 'Enablers' – denoting the actions of magistrates or police officers whose actions in response to the person with the disability facilitated either access to, or a sense of inclusion in, the justice system itself, irrespective of the outcome of the matter for which the person with CCN was seeking a resolution. The second theme, 'Disablers', refers to the actions, attitudes, processes or systems which individually or collectively impeded access to justice. The third theme, 'Impact on participants', provides some insight into how the interaction with the justice system affected the participants. In some instances, it was the combination of the justice system and other organisations, either school or disability accommodation service, that may have compounded the impact of the disabling environment.

### Enablers

The 'enablers' identified in this research are the result of individuals in the justice system – either police, magistrates or VCAT member – who were prepared to consult, listen and follow procedures. The 'enablers' of justice reflected the positive attitudinal attributes which justice agencies, and indeed human rights advocates and people with disability, are striving to achieve – that is, that people with disability are treated fairly and equitably.

[Ben's] experience highlighted the absence of deficit assumptions which are a common occurrence in [Ben's] experience. The way in which [Ben] was treated by this magistrate highlighted the respect with which he was treated.

[Ben]: He [the magistrate] was great.

Researcher: What was great about the magistrate?

[Ben]: He didn't assume that I had intellectual disability (Interview transcript - Ben).

The following quote from [Reece] suggests that belief by police that he had indeed been a victim of sexual assault, had a significantly positive impact on [Reece]. This experience was juxtaposed with a negative experience at another police station where [Reece] had reported a historical sexual assault. On that occasion, the police would not accept [Reece's] mode of communication.

The police believed me (Interview transcript — Reece).

The quote from [Sarah] (below) describes her family and, in particular, her son's experience with VCAT. This case was a review of the previous decision made by another VCAT member in relation to the same matter. In this instance, the magistrate did read all the documents

pertaining to the case, and significantly, the magistrate also spoke to family members and to [Sarah's] son [Callum], regarding his decision about how he wanted to use a small proportion of his funds which was held in trust.

He was a lovely [VCAT member] and said straight off, "I have taken a lot of time to read through all your documents" (Interview transcript — Sarah).

"Yes, I [Callum] want my day in court, I will let them know, I will tell them." Of course, he was absolutely shattered with what happened [the first time]. So this time [Callum] was a little bit dubious about it all. However, this man was fantastic. He said, "Just give me a few more minutes." He had to talk to us all and then he said, "Just give me a few more minutes to deliberate". Anyway, we came back in and he said and I quote, "There is absolutely no doubt in my mind whatsoever that the family of [Callum] know exactly what he needs and I am reversing the order." (Interview transcript — Sarah)

And [Callum] just sighed a sigh of relief (Interview transcript — Sarah).

In extracts from a focus group, advocates also highlight the positive responses from police and magistrates in various locations in Victoria:

We go to various courts around the state. And we've had excellent responses from other police officers, who will apply for IVOs without even being asked. They'll press charges without even being asked. They'll take photos and obtain the evidence required. We have magistrates who wholeheartedly support the individuals that we work with (Interview transcripts — advocates)

The following three extracts demonstrate the more positive experiences persons with CCN have had with some magistrates. In the first quote, the person with CCN was given the opportunity to provide their perspective and the magistrate was listening and made sure the court was silent, so that the 'voice' of the person with CCN could be heard.

So, pretty much a polar opposite, when magistrates have actually told the respondent just to be quiet, because they want to ask the person directly. And just to pretty much make everybody be quiet, because it's not about them. So, "be quiet and wait your turn... I will speak to you when I want to speak to you" (Interview transcript — advocates).

The following extract is demonstrable of the effort and care that is taken by magistrates in some circumstances:

Through speaking to us outside the court proceedings, when everybody else has left the courts and inform us that a piece of information ... that, you know, other avenues that we could take to ensure the person's safety is met. We have



magistrates who tell the disability support accommodation providers in the court that they have to make sure that the person is safe. They allow the person whom we are working with to leave the court prior to the person that has the IVO against them. So, that gives the person who we work with safe time to leave the courts, so they are in no further distress. We have magistrates that tell the security officers to give us safe passage through a different private way of the courts (Interview transcript – advocates).

Recognition and validation by someone in authority can have a calming and empowering impact, when your experience is that of being ignored.

... to alleviate their anxiety, because here's a person in power that's actually listening to them, and I'd say, trying to empathise with them (Interview transcript – advocates).

Of course, the interactions described above are positive and described as such by participants when asked about 'positive experiences'. The very fact that these examples come to mind for participants indicates that the effect of such responses is long lasting, irrespective of the outcome. To be believed, to have your views and wishes included and considered and to not have negative assumptions about your level of intelligence were all critical in shaping the experience of these participants. However, in effect, these 'enablers' reflect the response which anyone appearing before or reporting to justice agencies would expect and are fundamental to being treated with dignity and respect. The participants identified these interactions as positive, potentially because they are used to different responses generally, whether by the justice system or their interactions in the broader community.

## Disablers

### Lacking capacity and or intelligence

Negative perceptions about lack of credibility and reduced capacity are common assumptions made about people with CCN (VEOHRC, 2014). Depending on the type or combination of impairments, mediating how the person with CCN presents, assumptions are made about intelligence and ability of people with CCN to present their story.

In [John's] file, the language used in this file note suggests that such assumptions will also be deliberated at court, clearly linking credibility with level and type of disability:

[police] raised that explanation is either that [participant] is serial vexatious complainant or that this kind of situation is last bastion for serial predators who believe these people cannot communicate and are also profoundly intellectually disabled. In a trial, everything comes down to credibility of victim versus credibility of accused (Case file – John).

[John] also commented that his level of intelligence would be tested:

would have to have my intelligence and communication tested before my case could go to court (Interview transcript – John).

The assumption in [John's] case was that the testing of intelligence was required because [John] has multiple impairments which include him being non-verbal.

In describing the experience of reporting the allegations to police, [Noah's] parent reflected on the outcome of informing police that [Noah] has a disability. In [Noah's] case, the assumptions made about his impairment resulted in the initial report not being taken until a complaint was made at a higher level within Victoria Police.

we said that he has a disability. We explained his condition and basically said, oh, you wouldn't get anywhere with it (Interview transcript – Vicki).

After the investigation, a decision was made that the matter would go before the Magistrates' Court rather than the County Court.

Yep, they'd already made up their mind that it would be better for [Noah] to go for the lesser charge [because of his disability] (Interview transcript – Vicki).

The second and third quotes suggest that the police were considering the options. They were aware that [Noah] was anxious about giving evidence and the potential impact on a successful prosecution.

They did say he would have to go into the box, he would have to give evidence. He would have to do such and such, whereas if it was a lesser charge, then he might not have to do this. And they're more likely to convict him on the lesser charge, than what they are on the other charge (Interview transcript – Vicki).

They [police] said that it would be very difficult to prove with [Noah], 'cause he wouldn't be able to take the stand successfully (Interview transcript – Vicki).

Heather, while not suggesting that assumptions were made at court or by police, provides some insights into the negative assumptions made about her, due to the manifestations of her impairment and her impairment being "invisible".

If anyone is like me, and I keep getting called high functioning, so if anyone is like me with the invisible disability, but is technically high functioning, you have got not a hope... You have to sort of ... and especially with me with blackouts, everyone just presumes it's drugs (Interview transcript - Rebecca).

A sexual assault allegation made by [Callum], did not progress. [Callum] has multiple impairments, including being blind and non-verbal. According to [Sarah], an intelligence

assessment was not possible due to the limitations of the current assessment tools, as such the report could not progress. The person against whom the allegations were made is still working in the disability service.

But assumptions are made regarding the person's ability to cope within the Justice System and assumptions of that are made in regard to whether they would be a reliable witness. (Interview transcript – advocates).

### Delays and timing

Delays in the justice system – in particular, delays in the court trials – have been the focus of ongoing discussion (Payne, 2007), much of which on the impact of delayed trials on the accused. One reason attributed to the delays of trials are the large number of cases, many of which have “fail[ed] to proceed as scheduled” (Payne, 2007, p. iii). The Victorian Law Reform Commission (VLRC), made reference to avoidable and unavoidable delays. Delays, according to the VLRC (2016), may generally be a result of “system wide problems”, can be “case specific” or could be due to a need to adjourn a matter to “allow a victim time to prepare their victim impact statement” (p. 100). Reducing “unnecessary and avoidable” delays, such as some technological issues and lack of appropriate preplanning by defence and prosecution are, according to the Commission (2016), “... part of showing respect for victims. It indicates to victims that their time and input is valued and acknowledges their status in the criminal trial process” (p.100).

Delays in the timing of trials, but most particularly in police investigations, were raised by three participants. Delays encountered related to a variety of issues, some of which were unavoidable including the investigating officers being on leave. Another delay related to the loss of the brief of evidence, which necessitated the re-gathering of all evidence, including the victim's statement. In two instances, the cause of other delays were uncertain, as reasons were not provided. The impact of these delays on some participants in this research was clear. In two instances, participants referred to the “timing” of the interviews with victims. While the participants did not explain in great detail, the negative impact appeared to be linked to frustration brought about by uncertainty about the process and the impact of the impairment on the victim. What was clear is that there needs to be greater communication about the process and need for processes that police are required to follow. Ultimately the impact of the uncertainty appeared to have significant effect on the victims and/or the progression of their report.

In addition to delays resulting from trial processes and proceeds, delays can also occur during the investigation stage. Unfortunately, both [Callum] and [Noah] experienced several delays during the investigation stage of their reports.

Some delays are unavoidable as there are periods where police officers, like any other employed person, are required to take leave. In [Callum's] case, the police officer was on leave for an extended period.

It took months because the police officer was on leave then for a couple of months. This was over Christmas and we were concerned because [Callum] wasn't ... he was being affected by all this and he really hadn't told his story (Interview transcript – Sarah).

So it's a few months on and [Callum] still hasn't been able to tell his story (Interview transcript – Sarah).

In [Ben's] case, this file note reiterates to the police that

[Ben] pointed out that it's two years since he launched his allegation to police

[advocate] asked [Ben] how the ongoing waiting is affecting him. [Ben] said 'I just want to get on with my life' and that 'I just want to see him in gaol'.

In [Noah's] case, the police officer was difficult to reach.

She [police officer] was difficult to get hold of, so I had to leave messages and sometimes she wouldn't get back, because she obviously didn't get the message, or she was too busy or whatever. (Vicki)

On other occasions, police processes and administrative errors resulted in delays of months or, in [Noah's] case, one year, requiring a new investigation.

But, somebody up the line from the police officer had told him that he had to have a proper communication report before he could go on (Interview transcript – Sarah).

What you've got to understand is the brief was lost and that caused the case to be put back another year (Interview transcript – Vicki).

Well, he [police officer] believed [Callum]. He talked to [Callum], but of course he was at the stage where he couldn't hear...it wasn't the right time for him [police officer] to hear the whole story...he was just trying to categorise [Callum's] complaint to see where it needed to fit and whether the police needed to be involved and that. Of course, he came to the conclusion that, yes, he did need to be involved and it was a criminal offence. And he was, as I say, he was really great with [Callum]. [Callum] felt comfortable with him, but again, he had to tell [Callum] that he couldn't hear the full story yet, that had to be done later (Interview transcript – Sarah).

The impact of the delays on both [Callum] and [Noah] was considerable. In [Noah's] case the delay was caused by the need to reinvestigate the matter after the police file was lost. This meant that the duration from first report to the hearing date was approximately two and a half years. In [Noah's] case, the crime perpetrated against him instilled fear, this fear was further compounded by the anxiety of attending court.

[Noah] was full of anxiety and unfortunately, when [Noah] becomes anxious he becomes a little bit paranoid with it all. And it becomes a daily, sort of, "I don't know what I'm gonna do, I don't know what I'm gonna say", you know, "I'm so worried about this" and .... And you try and reassure him and try to say, "look we're all going to be there, we're gonna be there for you". "Everything's gonna be alright". "No-one's going to put you in a bad position". This would go on, you know, for months basically. It went on for months and it got worse as the day [court hearing drew closer] (Interview transcript – Vicki).

#### Training, resources and time

Several examples emerged from the data, which raised questions about practice knowledge gaps in several justice agencies and the insufficient time available in comparison with the time required to provide access to justice systems. The first quote from [Jack] indicates that he is used to providing information to, in this case court staff, about a strategy to use if they could not understand what [Jack] was saying:

Yes, they ... I tell them that if they don't understand me, to ask me to repeat myself.

I do try and make it easy on them [court staff] as I can.

Because they have a job to do and I know that they can't solve all my problems, but if I'm there, I'm there for a reason.

That's common sense (Interview transcript – Jack).

[Rebecca] described a similar experience where, to make the necessary accommodations to facilitate [Rebecca's] understanding of the conversation in tribunal.

But anyway, that's when I ended up approaching the chief registrar and saying...why is it my responsibility to remind people to talk slowly...you know, that I have got an ABI...or we asked you to talk slowly ... to do this ... to do that ... to do that (Interview transcript - Rebecca).

In [Noah's] case, at least two interviews were conducted by the police. According to [Noah] and his parent, [Noah] was very anxious. His anxiety increased as the date of the hearing drew closer. The interviews seemed to identify what was an apparent lack of experience on behalf of the police in conducting interviews with victims with cognitive impairment. As this

interview extract suggests, the questions needed to be reframed for [Noah] to be able to understand the meaning and respond:

we didn't say anything and we weren't asked to say anything. But, there was a couple of occasions I interrupted and I put it in another way, 'cause he said, I don't understand. I said, well, [Noah], what she's trying to ask you is such and such. And I would say, I would put it this way (Interview transcript – Noah).

The lack of experience, coupled with [Noah's] heightened anxiety levels, is not conducive to ensuring [Noah] was able to give his best evidence at the time. It is likely that the less than optimal interview was one factor leading to the downgrading of charges and plea bargaining the day before the hearing was scheduled.

right at the end and they did say they felt like the interview was a bit poor. And they weren't sure whether they'd get any sort of conviction with it (Interview transcript – Noah).

The following also suggests that questions police asked [Reece] during his interview may have posed similar issues in terms of comprehension and ability to respond effectively to the questions:

[carer] informed [advocate] that she had been contacted by police ... [advocate] explained the situation and her role in advocating for [Reece] to have equal access to justice and have officers use accessible language with [Reece] when taking the statement. [Carer] explained there had been issues with the officer who was taking the statement was not using the appropriate accessible language which [Reece] requires due to his autism as they were not using literal language – such as: are you happy to go ahead (File notes – Reece).

Advocates raised the importance for sufficient time to be factored into working with persons with CCN irrespective of which part of the justice system the person is interacting. The following two extracts describe that short window of opportunity that the Duty Lawyer may have to seek instructions from their client:

So, that's where for individuals trying to access the courts, if the person needs a duty lawyer, frequently we see duty lawyers not being able to be briefed prior to the day. And given it's a person with complex communication needs, it takes a significant amount of time for them to communicate. So a 10 minute window, to brief a duty lawyer is shocking (Interview transcript – advocates).

Knowing the short time frame available, the advocates see their role in providing the lawyers with information about the communication needs of their client. However, as the second extract suggests, given the limited time the lawyer has to speak to their client, their

priority is to do just that. However, important information which may actually save time could be missed by not also speaking to the advocate. Perhaps not recognising that the advocate may be a source of important information about the client's communication needs.

You have to show up on the day and that's where you can, through advocating strongly, you can find out who the duty lawyer is and brief them ahead of time, but you need to know that well in advance. (Interview transcript – advocates).

...or to speak to advocates because... before they understand the complexity of the issue, they will only want to speak to their client and not through an advocate. But that's problematic, if you don't know how to communicate with a person who uses alternative forms of communication (Interview transcript – advocates).

In [Noah's] case, his parents were not asked to contribute information about how to communicate effectively with [Noah], as such [Noah] the recorded interview did not go well.

The importance of building a relationship, in addition to understanding communication needs, was described by advocates. This highlights that assumptions should not be made about communication and that everyone has their idiosyncrasies.

It's the advocate's role to ensure that if they get a CSW, or whatever Intermediary, does that intermediary know that method of communication and know the person and the person is comfortable with them, to communicate with them without fear of someone finding out beyond, you know, sort of controlling the information? Also, it's around the comfort – the person being comfortable with the intermediary, the intermediary knowing that method of communication and time to engage with the person ... it's not like speech ... you can't just walk up to and talk and expect to communicate with [persons with CCN] straight away. There's an engagement process that needs to occur that...for both really. For the individual to have an understanding and trust the intermediary and for the intermediary to understand how a person says "yes" and "no". There are little idiosyncrasies with communication (Interview transcript – advocates).

This final quote from [Noah's] parent, concerned the availability of police officers at a rural police station. Previous research (AHRC, 2014; VEOHRC, 2014) has identified that for victims of crime and their families being kept informed about the progress of the investigation was particularly important. The following extract also highlights the competing demands on police officers in rural police stations:

It's [rural police station] supposed to be [open 24 hours], but unfortunately they come and go so quickly. And half the time you go there and it's ... during the day ... and it's not open. They do not have enough police (Interview transcript – Vicki).

For victims such as [Noah] and his family, trying to find out what was happening about the case was frustrating.

The lack of understanding of the communication devices or the needs of persons with CCN to want to participate and have their day in court may sometimes lead to inconsistent approaches in similar matters.

#### Inconsistent responses

One strong theme to emerge was that of the seeming lack of constancy across many of the cases described in this research. In selecting the cases in which potential participants would be invited to participate, the type of case was important to ascertain whether case type was a determining factor in the response to participants. In addition to choosing different types of matters, as the interviews were conducted, participants themselves spoke about their various attempts to report, or in appealing the outcome of a hearing and being treated drastically differently by the second magistrate.

The first example is that of [Callum] experience at VCAT. [Callum's] parent and siblings attended the VCAT hearing which the doctor from the disability service had requested. According to [Sarah], the same doctor would see all of the persons with disabilities residing in the same house. It was the doctor who challenged the family's decision to take [Callum] to participate in a personal development program. According to [Sarah], [Callum] had participated in a similar shorter program in Australia. [Callum] got so much pleasure out of this program they wanted to offer him and he wanted to go to the more extensive program which was being offered out of Australia.

The following extracts of the interview describes a family's two very different experiences at VCAT:

We went in there and there was me and my daughter and [Callum] and another son of ours. And the doctor said what he thought, that he didn't think he had the intelligence to enjoy ... And [Callum] started talking, [Callum] was going...Woo, woo, you know. We said to the member, would you like us to interpret what he is saying? And the doctor piped up, "it's just their interpretation." And [the member] nodded at him [doctor] and that was it (Interview transcript — Sarah)

Yes. However, that's when we found [advocacy service]. And we went and saw them and they said, "Well, they have gone against all their own policies with this, because the policy is that the families really know best" (Interview transcript — Sarah)

Well, we went to the re-hearing and we had [description of member]. He was a lovely man and he said straight off, "I have taken a lot of time to read through all your documents" (Interview transcript — Sarah)



And [Callum] just sighed a sigh of relief. The first time he went to VCAT he said, “Yes, I want my day in court, I will let them know, I will tell them.” Of course, he was absolutely shattered with what happened. So this time he was a little bit dubious about it all. However, this [member] was fantastic. [The member] said, “Just give me a few more minutes.” [The member] had to talk to us all and then he said, “Just give me a few more minutes to deliberate.” Anyway, we came back in and [the member] said and I quote, “There is absolutely no doubt in my mind whatsoever that the family of [Callum] know exactly what he needs and I am reversing the order” (Interview transcript - Sarah).

And [Callum] went, ...! Do you want us to tell you what he said? He said no need; I know exactly what he is saying (Interview transcript - Sarah).

The positive view is that the member we had was so in tune and so present. [VCAT member] was amazing (Interview transcript - Sarah).

As I said, [Callum] tried to communicate with him and we said, “Do you want us to interpret?” He said, “You don’t have to, I know what he is saying” (Interview transcript - Sarah).

The experiences of [John] and [Reece] were also inconsistent, informed by seemingly subjective decisions about intelligence and credibility and also a significantly varied understanding of the use of AAC. The result of which that on two occasions, statements were taken using AAC and on other occasions at different police stations, statements were not taken. Interview and file note extracts referred to previously in this report provide examples of these responses.

#### Reliant on others to report

For some people with disability, particularly people with cognitive impairments or people with CCN who have had crimes perpetrated against them, reporting can be difficult. In addition to overcoming the misconceptions about capacity or credibility, sometimes not reporting may be as a result of, or rather the absence of, access to a communication partner (VEOHRC, 2014). Sometimes the reports of violence or other crimes may be reported through a family member, as was the case with [Noah].

Well, I went to speak to them with dad and mum. (Interview transcript - Noah)

Or as in [John’s] case and that of [Irene’s] daughter [Grace], it was staff employed by a disability agency who reported on their behalf. In [John’s] instance, he could write to someone who reported on his behalf, indicating perhaps a lack of opportunity or mechanism for [John] to report directly to police. Alternatively, perhaps [John] wanted support from an agency when the report was made, as previous experiences resonate for [John].

Others reported for me because I can't speak. In three cases, I wrote to someone who reported for me. In one case, a carer reported my being distressed after showering to the house supervisor and she reported to police. I didn't report the last assaults because there was no point. (Interview transcript - John)

In [Grace's] case, her injuries were observed by staff of the day program she attended. It appears from the quote below that [Irene], [Grace's] mother, was not aware of the hospital visits:

During discussions at [disability day program], where [Grace] attends a day program, [Irene] reported that the alleged abuse by another resident has been occurring for over two years and unexplained injuries on [Grace's] body have also been seen by staff at [disability day program]. [Disability program] substantiated these reports, and informed us that [Grace] has been taken to hospital on more than one occasion due to the nature and severity of the injuries (File notes – Grace).

#### Reluctance to accept mode of communication

For some participants, their primary mode of communication appeared to evoke a level of mistrust or caution from police. This reaction is consistent with findings from the Family and Community Development Committee (FCDC) Inquiry into Abuse in Disability Services (2016) who identified the difficulties experienced by people with CCN to have their mode of communication recognised. Barmak (2011) and the EOHR (2014) also comment on the level of caution in the justice system about the use of AAC. The issue, according to Barmak (2011), is the lack of certainty about whether the communication is that of the person with CCN. This is particularly the case when communication occurs with assistance by a communication partner or carer.

The following quotes from [John] echo the experiences shared with the FCDC Inquiry (2016). The first two quotes from [John] suggest that his impairment also raised concerns about [John's] level of intelligence. A comment [Ben] also made when he was pleasantly surprised that the magistrate did not assume he had an intellectual disability.

I had to give my statement to the police twice because the statement I typed unassisted at home was not accepted. The police asked me to do the statement again with assistance at the police station. It was hell. My case didn't proceed because after all that, the police wanted to test my intelligence and communication (Interview transcript — John).

The second two were investigated and statements taken but did not go to court. The first was not investigated because the police would not take my statement. I need help to access the keyboard and the police didn't believe me (Interview transcript— John).

They [police] think because he is nonverbal that he has low intelligence (Reece's Carer)

The following extract from [Ben's] file, indicate how [Ben] was trying to use a form of communication in preparation for one of the hearings related to his report of sexual assault:

Two workers in attendance worked with [Ben] for 2 hours with eye-gaze technology. [Ben] was able to spell short sentences but was unfamiliar with the technology and how to use it. It was clear much practice and more training was needed. Advocate and workers offered to organise a trial for [Ben] at home over next week. However, [Ben] decided that it was too stressful to try to learn the technology at short notice. All seemed to be in agreeance that it had been a worthwhile trial but there was not enough time to assess its effectiveness for the upcoming trial. (File notes – Ben)

The following extract from file notes highlights the level of influence and the impact such influence has on police. In this case the disability services were suggesting to police that the mode of communication was discredited. Consequently, it appears that the statement was terminated. It does raise the question, however, of whether advice received by the police about the legitimacy of AAC should ideally not be provided by the service who employs the alleged perpetrator.

Following the reporting of sexual assaults [by a disability worker] the [disability agency] have discredited his method of communication and engaged a psychiatrist to undertake the assessments to discredit it ... the police terminated taking his statement and informed them [the victim's family] that the [disability agency] are investigating the matter. (File notes – Reece)

#### Too difficult

Some matters, in particular alleged abuse, including physical violence perpetrated by a co-resident in disability residential services pose specific challenges for police and courts (VEOHRC, 2014; Camilleri, 2010). The challenge for justice agencies to respond effectively in such circumstances cannot be underestimated, seeing that such matters should be resolved by the disability service provider. This was the case in regard to [Irene's] daughter, who was the victim of, on some occasions, serious physical abuse.

I was very concerned, because my child was being harmed—and he [the magistrate] turned around and he said, “Well, actually there is nothing the court system can do for these sort of people. It's actually up to the house to ensure that your daughter's safety is their priority,” and that was as much as I got, that's what I got (Interview transcript – Irene's).

[Irene's] explanation for why the justice system may struggle to respond to alleged abuses perpetrated by other residents indicates that to some extent, she understands the rationale

provided to families about the difficulties of responding to such situations, while in the second quote she reminds us that what is happening to her daughter would be considered an assault in any other circumstance. The difference in this case, is that [Grace] resides in a disability service.

... because it's disability, that's why I think, because neither of the people concerned are responsible for their actions. They don't understand the repercussions of their actions. All they know is what they're doing, but they don't understand the repercussions and that to me, is the whole reason why. What can you do? (Interview transcript –Irene)

... they are not willing to do anything. Unless they change their policy and try to deal with these situations. Okay, they're disabled people. Okay, they can't answer for themselves. But okay, there has to be something done. This can't go on. This is a matter of someone being harmed. I mean, this is assault. Why are they letting it happen? I don't understand it. And they won't do anything about it, because they are not responsible for their actions (Interview transcript – Irene).

In another example of physical abuse perpetrated by one resident against another, [Rosa], with the assistance of the advocacy agency, sought to apply for an intervention order as a means to protect her son from physical abuse. In this example, the magistrate was similarly concerned by the implication of granting an interim intervention order.

The Magistrate expressed significant reluctance at ordering an interim intervention order that would require the relocation of the respondent (File notes — Rosa).

[Irene] also describes the police response when they are called by the disability service to respond to a physical assault by a resident.

They [police] do come out, because they have been caught out [not attended] a few times, but really their hands are tied, there's nothing they can do (Interview transcript – Irene).

In his interview, [Jack] recalls his experience of several breaches of an intervention order before the police would attend. As [Jack] explains, the intensity of the behaviour would increase with each successive breach:

I had a ... the first breach, I got one of my friends to speak to the police and they [police] told me that it was probably by accident, just let that slide. But then he...each time, the next three breaches, was...each time that he breached the order it was a bit more ... a bit more (Interview transcript — Jack).

[Noah] and his parents were surprised by the police officers response when they first attempted to report the crime perpetrated against [Noah]. The second quote is the

response provided to [Noah] and his parents once they had informed the police about his impairment.

The police said that there's nothing you can do, we said that [Noah has a disability]. We explained his condition and they basically said, oh, you wouldn't get anywhere with it (Interview transcript - Vicki).

That it would be very difficult to prove with [Noah], 'cause he wouldn't be able to take the stand successfully — they were concerned that he wouldn't be able to, successfully take the stand (Interview transcript - Vicki).

The series of quotes describe various scenarios where police found it difficult to respond as they would in circumstances where the perpetrator is able bodied. In the first quote, [Irene] reflects on the police perspective of the difficulty the justice system have in responding to resident-on-resident physical assaults or other forms of abuse.

No, they [police] just said that ... he said that the justice system—the legal system— does not deal with these sort of cases that it is actually because of the situation with the two clients that it's actually up to [service] to ensure [Grace's] safety (Interview transcript – Irene).

Police are, in some instances, reluctant to act or indeed attend, determining that it is the responsibility of the disability service to keep residents safe and stop the abuse.

First and foremost, the major barrier is getting the police to represent [persons with CCN], because their situation is not taken as seriously. Police may attend and meet with the individual and walk away and say that it's the disability service provider's responsibility to deal with the abuse (Interview transcript – advocates).

alleged perpetrator being a co-resident, or another service recipient, doesn't have the ability to understand the ramifications of their actions, therefore the police can't do anything about it, because it's a person with a disability (Interview transcript – advocates).

The following quotes by advocates similarly identify the reluctance of police and magistrates to respond or grant Intervention Orders in such circumstances:

I found that there has been a couple of cases where I have been encouraged by the police. But if the service provider is also involved, they're going through their process and the police are caught somewhere in that no man's land of not knowing how to manage that situation. And will wait until the service provider identifies whether that person is capable of communicating or has the capacity to communicate (Interview transcript – advocates).

So, when an individual, let's say, client to client assault or abuse, when we may apply for an Intervention Order on behalf of the person we are advocating for and then we come before the magistrate and they turn around and say no, because it's a DHS group home, you know, I'm not going to put an Intervention Order out against like a co-resident. Or secondly, that the alleged perpetrator may have an intellectual disability and so the magistrate turns around and says, I can't grant an IVO against this person or any other order, because they don't have the capacity to understand the IVO and the ramifications of breaking that order, despite us saying to the magistrate and before the court that it's not against that person, it's about holding the system to account, to ensure that both residents are kept safe and have the adequate supports in place (Interview transcript – advocates).

[Rebecca] also recalls that accommodations she required in order to participate in proceedings were not made. In this hearing the advocate was at VCAT for other matters and decided to be involved in this hearing, despite not being requested to do so by [Rebecca]. As [Rebecca] explains, she was ignored during the hearing. While only a single case, hence, extrapolation beyond this case is not possible, it does raise the question of the mediating role played by advocates, to the exclusion of the person with CCN. Such roles played by advocates or indeed intermediaries, may appeal to justice agencies as it no doubt reduces time taken for the matter to be heard.

...even though I delivered a letter, because I delivered a copy of the letter to...I'd addressed it to both the VCAT Registrar and the real estate agency. The real estate agency ignored it as well. They just dealt directly with the advocate and totally ignored me. [Interview transcript – Rebecca]

And at that time we had a [speech pathologist] ... We asked the magistrate to enable our [client] to identify what happened to them using their communication device with the assistance of the [speech pathologist]. [The magistrate said] 'That's why his lawyer was there, to represent him'. And that [the sounds and movements made by the client] it was distracting for the courts. And the magistrate didn't understand what the person was trying to communicate [through his sounds and movement], you know, just didn't understand that it was distressing for the person ... to enable him [client] to make his point known, but it was disregarded ... the magistrate didn't allow that. He didn't want to hear (Interview transcript – advocates).

The matters involving sexual assault allegations made by [Callum, John and Reece] are also examples of where the justice system, in the first instance police find particularly challenging and create challenges through which police find it difficult to navigate. The reports made by the three victims and their families were, according to the analysis, dealt with differently and inconsistently. The common denominator in all three cases is the use of ACC.

The final case, also involving allegations of sexual assault is that of [Brendan]. [Brendan] is a teenager, with little or no functional communication. Allegations of sexual assault were made against [Brendan]. The allegations were made during a time when his supports at school were disrupted. According to [Liz, Brendan's] mother,

...he has grabbed, but he has only really done that since he has been at school and been very highly anxious and agitated. (Interview transcript – Liz)

[Liz] also recounts her experience of her first becoming aware that allegations had been made against her son, police were already involved and she had not been advised by the school or received an incident report.

We were back term two. We'd been back two and half weeks and it just went absolutely foul. And so it was about August, 'cause the school keep actually asking me at that particular meeting had the police contacted you. I had to go, "the police, why are the police contacting me?" She said, "Well, we've contacted the police." I said, "Sorry, no, the police haven't contacted me. Should they be?" I had no idea how this whole process was working. I found it was very, very secretive. When I asked [for] any information, they [the school] wouldn't give me any information. When I asked for an incident report, I even did it under FOI. Couldn't get it – still can't get it. They told us that the whole lot would be redacted, it would be unreadable. (Interview transcript – Liz)

According to [Liz] this case was very challenging for the police to work through. Even though her son was not charged, a psychological assessment was required and the police of course were required to follow regulations.

### Need for support

A strong theme to emerge was that of the 'need for support', including when reporting to police, providing a statement, attending court and post hearing. In their narratives, participants spoke of moments of uncertainty.

The following narrative, describes [Noah] after making a victim statement to police, feeling very uncertain about his responses to questions. As [Noah] was not a suspect or a victim of sexual assault, he was not eligible for an Independent Third Person (ITP) to be present during the interview. The role of an ITP is to ensure the person being interviewed understands why they are being interviewed and that questions are asked in a way that can be comprehended by the person. In the following extract, [Noah's] mother indicates that they were left feeling uncertain about whether his response to questions were sufficient:

Of course, we were ushered out and [Noah] was left with that interview by himself, to go through that interview process. He was very unsure about a lot of his answers when he came out of that interview (Interview transcript – Vicki).

Family members, or carers for that matter, are not encouraged to be present when the victim is providing their statement to police. This is to ensure that the statements made are not influenced or that there can be no allegation of influence made by the defence. Families or long-term carers are used for communicating with the person with CCN; they will adjust their communication, for example by rephrasing a question or asking questions which elicit a yes or no response. In [Noah's] case, the language used, and how questions are framed, will have a significant impact on [Noah's] ability to respond fully to the questions.

... they did say they felt like the interview was a bit poor. And they weren't sure whether they'd get any sort of conviction with it (Interview transcript – Vicki).

Referring to a second interview, [Noah's] parent indicated that in this interview both she and her husband were allowed to sit in on the interview.

Umm ... we didn't say anything and we weren't asked to say anything. But, there was a couple of occasions I interrupted and I put it in another way, 'cause he said, I don't understand. I said, well, [Noah], what she's trying to ask you is such and such. And I would say, I would put it this way (Interview transcript — Vicki).

Despite being advised, by the police officer, not to attend court, [Irene] did attend, as she wanted to hear the outcome of the Intervention Order application. The application was made by police on behalf of [Irene's] daughter [Grace]. It appears that in this case, [Irene] required explanations about the magistrates' decision and why, according to [Irene], no evidence was provided to support the IO application, as the legal representative for the other resident had provided a persuasive argument as to why an IO, in this instance, was not appropriate.

I stood up in front of the court not knowing what to do, not knowing what to say and after the judge dismissed the case, I thought, no something's gotta be said here. Something has to be said. So I got up in front of the court and I said exactly what's happening in that house and her mother, they just sat there with Claire, because Claire can at least be taken out, Renee can't you know, so she ... anyway so umm, and I felt humiliated because I was shaking and it was embarrassing and I didn't know what I was saying and I didn't know if what I was saying I should've been saying and there was no one to help me, no one to advise me (Interview transcript – Irene).

In [John's] case, the experience (emotional and physical) of writing the statement, was so difficult that going through a similar experience was not possible, at that time.

I want to stop him but I don't know if I can write another statement (Typed response – John)



[Noah's] parent is commenting on the decision to have the matter heard in the Magistrates' Court rather than have to give evidence in front of a jury at the County Court. Arguably, the availability of a support person may have made a difference to [Noah's] level of anxiety and potentially strengthened his ability to present his best evidence.

My view was that I thought that he possibly could, but on the other hand I knew that with [Noah's] levels of apprehension and anxiety, that it would be an extremely difficult thing for him to do (Interview transcript – Vicki).

## Impact on participants

The various experiences described below have had a lasting impact on participants. For [John], the frustration was due to a lack of understanding of how difficult and slow using a communication device can be. For [John], describing intimate details about the assault in the presence of a communication partner was very embarrassing.

I hated having to give my statement at [police station] with a communication partner. I was so embarrassed about what had happened to me. She was kind but I got damn upset and my behaviour was terrible. I was upset about the assaults and embarrassed to have to talk about them with her in the room. When I got upset, we had to stop. That was especially embarrassing because everyone was waiting on me. I was writing so slowly because I was so upset and detective didn't understand how physically difficult writing is for me. I had difficulty explaining what the assailant had done because I was so upset and the detective had to ask a lot of questions. He didn't understand how utterly difficult writing is (Typed response – John).

The absolute worst aspect of my experience with the police was their refusal to take a statement after the first assaults were reported. This has felt utterly hurtful and continues to hurt (Typed response – John).

After [Reece's] mode of communication was not accepted by the police, the advocacy worker was seeking instruction from [Reece] as to whether he wanted to return to the police to make a statement. What follows is the interaction between the advocate and [Reece]. [Reece] is supported by a communication partner.

[Reece] stated utilising an alphabet board:

I'm not sure seems like such a long time ago. I should keep on but I don't really want to do any more with the police, not nice thinking about it.

[Advocate] clarified with [Reece]

What do you want me to do from here?

[Reece] replied saying

It is time to move on

[Advocate] confirmed that [Reece] does not want [advocate] to pursue anything from here and that you [Reece] don't want to pursue a statement with police at this stage

[Reece] replied 'yes' and laid down on the floor (File notes — Reece).

My parents did. People senior to the detective who worked with me decided that I would have to have my intelligence and communication tested before my case could go to court (Typed response – John).

In the end, the experience was too difficult for [John] to repeat.

I want to stop him but I don't know if I can write another statement (Typed response – John).

In [Callum's] case, the experience of not being heard and indeed ignored was particularly difficult and left him wondering what to expect when the family requested a review of the first decision.

And [Callum's] just sighed a sigh of relief. The first time he went to VCAT he said, "Yes, I want my day in court, I will let them know, I will tell them." Of course, he was absolutely shattered with what happened. So this time he was a little bit dubious about it all (Interview transcript – Sarah).

Sometimes waiting to tell his story to the police was frustrating and there was an apparent confusion of timing between when [Callum] was ready to give his statement and when police were ready to take it. Delays due to assessments of [Callum's] intelligence and communication added to the delay, which was then compounded by Christmas leave.

Then the police officer wanted to do a full statement with [Callum] and that was, you know, that was after Christmas. So, once he got into the police station, he wouldn't communicate properly. He pretty well freaked out and he didn't...he wasn't communicating at all well (Interview transcript – Sarah).

So, he sort of threw his arms up and said, "Well, I can't do this." You know. It had a terrible effect on [Callum]. He was depressed for at least two weeks after that (Interview transcript – Sarah).

In an email communication from [Sarah], sent at the conclusion of the disability service investigation into allegations of sexual assault against an employee of the disability agency providing care for her son.

I thought you might like to know the outcome of [disability service] investigation .... It has been so stressful for [Callum] and us. [The disability service] have not assured us that this man will not be out of [Callum's] care in [disability service] other than his house (File notes – Sarah).

In [Noah's] case multiple delays due to the lost brief of evidence, and being required to give his statement to police on three separate occasions, meant that his anxiety increased over several months leading up to the day of the hearing.

[Noah] was full of anxiety and unfortunately, when [Noah] becomes anxious he becomes a little bit paranoid with it all. And it becomes a daily, sort of, I don't know what I'm gonna do, I don't know what I'm gonna say, you know, I'm so worried about this and ... And you try and reassure him and try say, look we're all going to be there, we're gonna be there for you. Everything's gonna be alright. No-one's going to put you in a bad position. This would go on, you know, for months basically. It went on for months and it got worse as the day ... (Interview transcript - Vicki).

I wasn't getting much feedback from police [station], from [police officer]. And [police officer] wasn't full-time, so it was very hard to get hold of her sometimes, to find out what was happening (Interview transcript – Vicki).

In [Irene's] case, the magistrate's decision to not grant an Intervention Order without hearing her daughter's experience was so difficult that she simply stood up at the end of the hearing and told the court what her daughter was experiencing on a regular basis.

I stood up in front of the court not knowing what to do, not knowing what to say and after the judge dismissed the case, I thought, no something's gotta be said here. Something has to be said. So I got up in front of the court and I said exactly what's happening in that house ... I felt humiliated because I was shaking and it was embarrassing and I didn't know what I was saying and I didn't know if what I was saying I should've been saying and there was no one to help me, no one to advise me (Interview transcript - Irene).

## What would make a difference?

Participants were asked to reflect on their experience and identify anything that would make a difference in their interaction with the justice system. The highlighted text is added by the researcher to draw out the specific ideas.

In [John's] case, greater understanding of his impairments and how they impact on him.

I think the most important thing is for police to **understand that communication impairment doesn't mean intellectual impairment** and **how slow writing is** (Typed response – John).

There are numerous suggestions in the next quote from [John]. These include the value of advocacy, not simply a communication partner. The advocate not only provided assistance to [John] and his family, they also explained the legal process, although more information would have also been of value. The advocate also assisted police to understand communication impairments through the development of communication protocols.

I think a communication advocate like [name of advocacy agency] was utterly perfect. My parents and **I didn't know anything about the law and the police didn't know anything about communication impairment**. The advocate developed two protocols with police. The protocols were agreed on. **One allowed me more time to write my statement** at home over a week or so and then be formally questioned on it. The other allowed me to **have a communication partner whom I knew. I would have been too scared to write with someone new**. Also, **I would have liked more information about the process**. If I had understood it better, I might have controlled my anger and not used irony. **Someone who understands how slow writing is and how terrified I was would have been good** (Typed response – John).

For [Jack] and [Janice] a more practical approach would assist. [Jack's] mobility is limited to short distances.

Police coming to your home rather than asking you to go to them. It's hard when you have mobility problems (Interview transcript – Jack).

For [Janice] who was subjected to abuse within a context of Family Violence, calling 000 in an emergency was not possible. Using TTY was also not an option for her.

There needs to be a generic email that will be checked on a regular basis which is not dependent on a specific officer (Interview transcript - Janice).

The advocates identify the inconsistent response, but also the difficulty of achieving consistency. Their suggestion was to have support available to police when required.

Initially I think **we're not going to get police skilled up and operating on a consistent level across the system. So, they need to be able to access specialist groups, to support them to be able to help them with the process and have an understanding of how best to communicate and potential pitfalls** (Interview transcript – advocates).

## Discussion

The emergent themes from this research tell a story of frustration, disappointment, caution, a lack of understanding and knowledge about the communication of persons with CCN, negative assumptions and, at times, rejection. This report acknowledges that inaccessible justice is not symptomatic of one aspect of the justice system but rather a combination of “... structures, processes and attitudes ... “ (Edwards et al, 2015), which combine to reduce, or in some cases, impede access to justice.

### Attitudes and assumptions

Negative societal attitudes and system responses towards people with disabilities are generally accepted as a major contributor to a disabling environment which creates and perpetuates disability (Harpur & Douglas, 2014). Historically, people with cognitive impairments and those who have CCN have been locked inside institutions and segregated from society. A practice which continued until as recently as the mid-1970s in Australia (Wiesel & Bigby, 2015). Our inherently conservative systems were developed with the ‘able’ as central, informing decisions of ‘who is credible’ and ‘who has capacity’ (Jones & Brasser-Marks, 1999).

Over time, various inclusive adjustments to assist communication and facilitate participation using a person’s primary mode of communication, have been made to the justice system. These include, the use of interpreters for people whose first language is not English (Evidence Act, 2008, Section 30), and also for witnesses who are hard of hearing, deaf or mute (Evidence Act, 2008, Section 31). The latter specifically allows for the use of appropriate means to assist communication, in circumstances where the witness does not use speech to communicate. Despite these adjustments, caution and suspicion about the use of AAC remain (VEOHRC, 2014; Barmak, 2011)

The following file extract supports this view

[Advocate] also explained that [police officer] was cautious of [Reece's] method of communication with the information that is out there discrediting it, which [advocate] explained and ensured she understood that it was [Reece's] right to freedom of expression. [Police officer] just wants to ensure that whatever [Reece] has to say isn't able to be dismissible in court should he be cross examined or his method disproven (File note - Reece).

According to participants, the response to the use of AAC was inconsistent, with some participants reporting that their primary mode of communication was not accepted. Others reported that while their mode of communication was accepted, there was a lack of understanding about difficulties encountered by the users of AAC, in that it was often very tiring or that on occasions, questions needed to be reframed in order to reduce the physical

toll on the user. For these participants, the combination of multiple impairments and the use of AAC appeared to be sufficient rationale to request an assessment of both communication and intelligence. Such assessments would invariably create further delays in statements being provided to the police. Of further concern is the assumption, made by police, that the person lacked intelligence because they were non-verbal.

Two participants who have a cognitive impairment required other adjustments to be made in order to fully comprehend the questions being asked by police or to facilitate their participation in the justice process. One participant was anxious that he did not provide his best evidence. This concern was also reflected in police comments about the quality of the interview. The other participant requiring adjustment to procedures had made a request to VCAT that the hearing be conducted in such a way that only one person spoke at any time and that those participating spoke slowly.

Recently in Victoria, there have been various initiatives to improve the response of the justice system to persons with CCN. Most recently, the state government in Victoria announced an Intermediary Pilot Program (State Government, 2017). In part, the program is based on the Intermediary Program in the United Kingdom. The pilot, which commenced on 1 July 2018 and concludes on 30 June 2020, is based across four sites and will focus on sexual assault and homicide cases involving adult witnesses with cognitive impairments, and children. Briefly, the role of the Intermediary includes assessing the communication needs of victims; providing advice to police, court prosecution and defence about how questions should be framed; and advising other accommodations to be made to assist the person to provide their best evidence (Plotnikoff & Wolfson, 2015).

The use of intermediaries has been supported with recent legislative changes to the *Criminal Procedure Act 2009* (Vic) Part 8.2A. Other state jurisdictions in Australia, for example: South Australia, New South Wales, Western Australia and Tasmania, have implemented or are considering the use of Intermediaries or Communication Partners assisting in matters relating to either adults (witnesses and or defendants) with cognitive impairments and children (Tasmanian Law Reform Institute, 2016).

While the introduction of intermediaries may alleviate some of the issues raised in this report, it is important to acknowledge that intermediaries will not be available, at least not in the short term, in all matters involving adults with cognitive impairments. Indeed, the use of intermediaries in matters involving persons with CCN is not part of the Victorian pilot, hence it is also uncertain if or at what point this cohort will have access to an intermediary.

Other key points to consider include:

- The program will still rely on police identifying the need for an intermediary. While this need may be obvious in some instances, it may be more difficult to determine need in cases involving some forms of cognitive impairments.

- Not all persons with CCN will need the assistance of an intermediary. Persons with CCN are often the experts on what accommodations they require in order to participate and be heard.
- The introduction of the intermediary program may greatly increase the understanding of judicial officers and police about the needs of persons with CCN, however the program should not be seen as a substitute for training justice system staff to increase awareness, leading to attitudinal shifts in how persons with CCN are perceived.
- It is not known if or when the intermediary program in Victoria will be expanded beyond its use in sexual assault and homicide matters.
- It is uncertain if intermediaries will be made widely available across the state.

### Inconsistent responses

This research makes salient a number of responses, sometimes to the same participant, which were inconsistent. The inconsistencies described were evident at various points of the justice system process including response from police, magistrates' court and VCAT. The inconsistencies appeared to reflect assumptions about capacity and intelligence, a lack of understanding of the use of AAC and the impact of using AAC on users.

[Callum's] experience at VCAT described previously by [Sarah] also demonstrates that despite provision within Section 102 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) which states that "[t]he Tribunal must allow a party a reasonable opportunity to ... give evidence and ... to make submissions to the tribunal", ([Callum] nor his family were offered the opportunity to provide evidence.

The relatively recent initiative emerging from the VEOHRC (2014) report was the Disability Access Bench Book previously mentioned. The Bench Book initiative provides guidance to judicial officers on how they

...can make adjustments – including adjustments to communication and in directing hearings – where people with a disability are complainants, defendants, witnesses or otherwise participating in hearings (Judicial College of Victoria, 2016).

Further, the Bench Book provides information about the human rights of people with disability to equal justice; considerations pre, during and post hearing; and information about the experiences of people with disability in the justice system. It is perhaps too early to identify the impact of the Disability Access Bench Book to effect attitudinal and procedural change or indeed result in the use of an increase in accommodations being made pre, during and post hearings.



Inconsistent police responses were also evident across many of the cases. While the matters did span a broad timeframe (2010 to 2017), the research did include eight examples from between 2013 – 2017. While this research does not purport to be representative of the experience of all people with CCN or cognitive impairment, the cases do highlight inconsistent responses. As mentioned earlier in this report, the Victoria Police have developed the *Accessibility Action Plan 2014-2017*. Similarly, it is too early at this point to ascertain the effectiveness and, in particular, the influence of the plan to effect systemic change.

## Advocacy

It is evident when examining the files relating to these participants (those for whom files were available), that advocacy played a pivotal role in ensuring that the matters were taken seriously and acted on. In the majority (9 of 11), of cases, participants in this research were supported by an advocacy service or advocacy solely from a family member. Often, the support was sought after participants or their family had tried unsuccessfully to advocate for themselves. In several cases, in particular for sexual assault matters, the advocacy service provided information to police about the types of communication, resources and the human rights of the person interviewed. Further, the advocacy service also assisted in developing communication protocols, which in some instances ensured that their client could provide a statement.

What was striking about the experiences of many participants, was the effort required at various steps in the process to either: have the report taken seriously; provide a statement that was considered credible or acceptable; and to stop the violence being perpetrated against their family member. In some instances the matters did reach a resolution. However, in six matters relating to four participants there was no resolution.

When advocacy is provided to an individual, that's where all of these processes are a challenge for it to occur. But you have to push for it to occur. Equality, without advocacy: the individual hasn't received that (Interview transcript – advocates).

Achieving attitudinal change will not occur consistently across the justice system. This research and others (Goodfellow & Camilleri, 2003; Camilleri, 2008, 2010; Flynn, 2013; VEOPHRC, 2014) stress the importance of advocacy, beginning from point of report to police, for increasing the likelihood of access to justice. Further, the reports by the Victorian Ombudsman (2015) and the Family and Community Development Committee Inquiry into Abuse in Disability Services (2016) both acknowledged the important role of advocacy agencies. Further, the reports highlight the inadequate funding such agencies receive and the need for increased funding.

While intermediaries will no doubt play an important role, they are not advocates, indeed they are required to be independent officers of the court.

## Co-resident perpetrated violence in disability residential services – who’s responsible?

There were two instances in this research of alleged co-resident violence occurring in disability residential services. There are similarities in both cases, but there are also some clear distinctions in terms of outcomes and collaborations between family, advocates and services. According to the participants interviewed, who in both cases were the parent of the alleged victim, the violence was perpetrated by another resident. In both cases the alleged offenders have, according to the case files and interview transcripts, been incorrectly housed. The implication is that the accommodation did not suit the alleged perpetrators’ behavioural needs. In both cases, the magistrates involved were reluctant to grant an intervention order (IO). However, in one matter an interim IO was granted.

While service provision in residential care is not the focus of this research, the response by the service provider to allegations of violence can have a direct impact on families seeking legal remedies through the justice system. As the following examples suggest, there is uncertainty and indeed reluctance within the justice system (from both police and magistrates) to respond similarly to persons living in disability residential services as they would to violence occurring in the broader community.

While both cases presented below have been described earlier in this report, a comparison and closer analysis provides opportunities to identify the differences and similarities.

According to the case file, the first case presented, is a “DHHS operated service”, and the second, a community-based provider with funding from DHHS.

Case 1: The case file indicates that for one family whose son was being physically assaulted the matter was resolved, from the time when the advocacy agency was consulted to when the offending resident was moved to ‘more appropriate accommodation’. The file notes indicate the motivation and cooperation of the government disability residential service to address the issue quickly in order to stop the abuse occurring. In an attempt to hasten a resolution, the advocacy agency and alleged victim’s parent applied for an interim intervention order. However, the order was withdrawn by the applicant, as the matter had been resolved by rehousing the offending resident. In this case, the magistrate was reluctant to issue the order specifically because the result would mean the rehousing of the offending resident. Nevertheless, the order was granted based on the evidence provided.

Case 2: In contrast, the second case took over two years from when the abuse commenced. In this instance the police officer suggested the application for an Intervention Order was an appropriate course of action. Unlike the first case, the non-government disability accommodation service agency was not cooperative, resulting in the parent and advocacy agency applying for files through Freedom of Information (FOI). However, much of the information contained in the files was redacted. According to [Irene], the door to [Grace’s] room was often locked, in an effort to keep her ‘safe’. For reasons which are not clear, the

police officer recommended that the parent and the advocate not attend the court. According to the case file and interview transcript, the family of the other (allegedly abusive) resident had arranged for legal representation. The outcome of this case was that an Intervention Order was not granted. On this occasion, the magistrate indicated that “... there is nothing the court can do in these cases [involving violence between residents] and that it is up to the service to resolve the issue” (Interview transcript - Irene).

Despite the various attempts for assistance, including lodging a complaint with the Disability Services Commissioner, at the time of conducting the interview with [Irene], her daughter [Grace] continues to be subjected to episodes of violence or is in fear of violence. [Irene] is hoping that [Grace] may be eligible for support from the NDIS, however, at the point of interview, [Irene] understood that it would be a further 12 months before an application can be lodged. [Irene] would like nothing better than to care for [Grace] at home, however she would require support in the form of equipment, to do so.

Both cases present similar scenarios in terms of the violence experienced by individuals in disability residential services. The response from the providers appears to be at either end of the continuum, and in both cases, the magistrates articulated similar sentiments in terms of their reluctance to grant an Intervention Order in cases involving violence perpetrated by a co-resident. In [Irene’s] words “this is still assault, why is it not treated as assault?” (Interview transcript - Irene). Granting an Intervention Order in circumstances where another resident allegedly perpetrates the violence is viewed as an extremely “complex and multifaceted issue” (AHRC, 2018, p. 51). However, as [Irene] articulated, her daughter remains in a situation where she is being subjected to assaults of varying levels of seriousness. One of the ‘strategies’ being used by the service provider is to lock [Grace] in her room overnight. The only other option for [Irene], is to find another residential service for her daughter. Such an option is undesirable, as according to [Irene], the process of relocation will take many months for [Grace] to settle into her new accommodation, leading to distress over an extended duration.

While [Irene] understands that alleged offenders residing in disability residential services may not necessarily comprehend or understand the implications of their actions, diminished responsibility does not negate the physical and mental consequences to the victim. While the first case was resolved at least to the satisfaction of [Brendan’s] parent and presumably to [Brendan], in that the violence was stopped, such cases should not be solely dependent on the willingness of the provider to resolve the issue.

The report ‘Inquiry into abuse in disability services’ by the Family and Community Development Committee (2016) found that “... abuse is widespread, and that for too long the experiences of people with disability have been ignored or doubted” (p. 2). In the absence of a single reliable data source, the Committee heard evidence of the extent of physical assaults within government and non-government disability residential services. In

response to the violence perpetrated within these services, either by co-residents, or staff, the Commission recommended that

5.5 The Victorian Government amend the Family Violence Protection Act 2008 (Vic) to ensure that people with disability living in supported residential accommodation are covered by the legal definition of family violence and can access the Act's protection mechanisms (p. xxxiii).

A review of the government response to the recommendations of the Parliamentary Committee indicates that there is no direct response to this specific recommendation.

Currently, the Family Violence Protection Act 2008 (Vic) makes no explicit mention of the relationship between co-residents as being a "family like" relationship. Advice received suggests that 'the current legislation does not ordinarily extend to co-residents in disability residential services, unless co-residents were in an intimate relationship' (email communication).

## Conclusion

Over the last decade, access to justice for persons with disability has been the subject of particular focus. Increasingly, the previously invisible experiences of persons with disability, in particular persons with cognitive impairment and to a lesser extent persons with CCN, are gaining prominence. However, the experiences of participants' suggest that continued momentum and monitoring is required.

This research provides numerous examples of where, at best, the justice system has responded sensitively, empathetically and equitably, resulting in a positive experience for participants, irrespective of case outcome. In contrast, the experiences of the majority of participants have been negative, some more so than others. For some, the effects of which have been long lasting. Factors informing these responses have included:

- a lack of knowledge on behalf of justice agencies about the communication needs of people with CCN, and the impact of the impairment for persons with CCN and the level of effort required to use various forms of communication;
- a disconnect between the time and volume based measures of success and the need for additional time to conduct interviews and hear matters involving persons with CCN; while the Disability Access Bench provides information about the need to allow additional time or accommodations for taking breaks, the lack of time or the timing of interviews were raised by several participants.
- insufficient staff resources, including at rural police stations;
- procedural or legislative ambiguity, in particular with regard to the relationship between people residing in disability accommodation services and clarification of the use of AAC as legitimate and credible forms of communication;
- assumptions that the input from professionals has greater weight than the views of the person with CCN;
- the input of disability services to provide information to police about the legitimacy of using AAC, in circumstances where allegations have been made against an employee of the same disability service; and
- generalised assumptions about persons with CCN as lacking credibility, capacity and intelligence.

Participants did not speak of 'bad' people but rather negative attitudes, systems and processes which have failed to respond to their needs. While the experiences of participants' in this research cannot be generalised to reflect the experiences of the broader population, nor of ATSI or other cultural or linguistically diverse populations. The diverse experiences described herein are consistent with findings documented in other reports and inquiries described previously.

The following recommendations are drawn from the experiences of research participants and seek to further inform the justice system response to persons with CCN.

## Recommendations

1. That further research be conducted to better understand the nuanced experiences with the justice system of ATSI and other culturally and linguistically diverse populations who have CCN. Such research is particularly important as it would provide specific insight into the added cultural dimensions not considered in this research.
2. That the important role of advocacy agencies be acknowledged through the provision of appropriate levels of funding to ensure advocates and the agencies who employ them are able to meet the needs of persons with disability who seek assistance.
3. That recommendation 5.5 included in the Family and Community Development Committee Inquiry into Abuse in Disability Services (2016, p. xxxiii) be implemented, and that the recommendations from previous reports (as mentioned on pages 4-8 of this report) be implemented.

‘The Victorian Government amend the Family Violence Protection Act 2008 (Vic) to ensure that people with disability living in supported residential accommodation are covered by the legal definition of family violence and can access the Act’s protection mechanisms’

4. That Office of the Public Advocate and Victoria Police consider measures to monitor the efficacy and use of the Ready Reckoner among the front line police officers.
5. That Victoria Police develop training about:
  - the use of AAC;
  - the impact on persons’ who use AAC, and;
  - the admissibility of AAC in court;
  - obligations under the CRPD and other Human Rights frameworks in regards to access to justice, the right to communicate and freedom of expression.
6. That judicial officers receive training:
  - to enhance their understanding of the use of AAC;
  - the impact on persons’ who uses AAC, and;
  - obligations under the CRPD and other Human Rights frameworks in regards to the right to communicate and freedom of expression. Such information currently provided through the Access to Justice Bench Book be enhanced.

7. That consideration be given to measuring the efficacy and use of the Disability Access Bench Book by judicial officers and other users as outlined in the Disability Access Bench Book;
8. That Victoria Police and emergency services consider establishing a generic contact email for the use of persons with CCN who use a computer to communicate via email and for whom the use of TTY may not be an option.
9. Increase time allocated to matters (across the justice system) involving persons with CCN.
10. That Section 31 of the *Evidence Act 2008* (Vic) be expanded to clarify the use of AAC in court proceedings and the range of accommodations to assist a witness while giving evidence.
11. That consideration be given to expand the scope of the *Victims' Charter Act 2006* (Vic) to include victims' of some property crimes, so as to ensure that such victims' adversely affected by these crimes are eligible for services to assist their recovery.

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The background is a deep blue gradient with several glowing, ethereal waveforms and particle trails. The waves are primarily horizontal, with some vertical and diagonal elements, creating a sense of movement and energy. The colors range from light cyan to dark navy blue. The overall aesthetic is futuristic and digital.

# HEAR US

The experiences of persons with  
Complex Communication Needs  
in accessing justice