

# advocacy for **inclusion**

Submission to CEDAW General Discussion on  
Access to Justice 2013

Advocacy for Inclusion

February 2013

## **About Advocacy for Inclusion**

Advocacy for Inclusion acknowledges the Ngunnawal people as the traditional owners of the land on which we work.

Advocacy for Inclusion provides individual, self and systemic advocacy services for people with disabilities. We provide information, education, and representation to effectively advocate for positive and inclusive outcomes for people with disabilities.

We act with and on behalf of individuals in a supportive manner, or assist individuals to act on their own behalf, to obtain a fair and just outcome for the individual concerned.

Advocacy for Inclusion works within a human rights framework and acknowledges the *United Nations Convention on the Rights of Persons with Disabilities*, and the *ACT Human Rights Act*.

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## Executive Summary

Advocacy for Inclusion is a not-for-profit non-government community organisation in the Australian Capital Territory, Australia. We provide individual and systemic advocacy services to people with disabilities to promote their human rights and inclusion in the community. We work with some of the most vulnerable women in the community who face multiple disadvantages and various barriers to accessing justice.

Due to their particular position of marginalisation in the Australian community, women with disabilities are often denied their right as per Article 3 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). Women with disabilities in Australia are consequently unable to claim their human rights according to the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD). We are particularly concerned that due to a lack of access to justice, women are unable to claim the following rights:

### 1. Article 16 of the CRPD: Freedom from exploitation, violence and abuse

Women with disabilities face higher rates of violence and abuse than the general community and men with disabilities. However, the types of violence experienced by women with disabilities and the contexts of these crimes are not recognised by the wider community as being forms of violence.<sup>1</sup> For example, violence between residents in disability residential care facilities. Many states and territories in Australia do not have legislative frameworks to recognise and protect women with disabilities from violence and there is a severe lack of appropriate pathways to safety for women with disabilities experiencing violence or abuse. These factors prevent many women with disabilities from being protected against violence and from having justice served.

### 2. Article 23 of the CRPD: The right to parent

Women with disabilities are generally not regarded by the community as sexual beings with reproductive and parenting rights. Mothers with disabilities are significantly overrepresented in child protection proceedings and likewise they are disproportionately subject to the removal of their children by child protection authorities. This is widely due to prejudice among statutory authorities and in the court system, including the misconception that parents with disabilities cannot learn parenting skills. Mothers with disabilities are not supported appropriately to participate effectively in child protection proceedings. Their children are removed unjustly as a result of this discrimination and due to a lack of available support for them to parent effectively.

### 3. Article 12 of the CRPD: Equal recognition before the law

Although women with disabilities experience heightened rates of abuse compared with other women, many are denied justice because they are not viewed as credible or as having legal capacity. This involves the use of guardianship practices, which directly remove the recognition of a person with disability as having legal capacity. It also involves prejudice in judicial systems, which treat women with disabilities as not being credible witnesses or not having a coherent point of view.

## 1. Access to justice for women with disabilities who are victims of violence

The [CEDAW] Committee urges the State party, in the light of its recent ratification of the *Convention on the Rights of Persons with Disabilities*, to undertake a comprehensive assessment of the situation of women with disabilities in Australia. The Committee recommends that the State party address, as a matter of priority, the abuse and violence experienced by women with disabilities living in institutions or supported accommodation.<sup>2</sup>

Advocacy for Inclusion sees violence daily as part of our work and we are deeply concerned that this recommendation made by the CEDAW Committee in 2010 has not been acted upon by Australian

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<sup>1</sup>UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Addendum : Mission to Italy*, 15 June 2012, A/HRC/20/16/Add.2, available at: <http://www.unhcr.org/refworld/docid/50080b4a2.html>

<sup>2</sup> UN Committee on the Elimination of Discrimination Against Women, 30 July 2010, *Concluding Observations*, p.8

governments. A recent audit of our advocacy cases showed that 25 per cent relate to violence in residential and institutional care (group homes)<sup>3</sup> and over 30 per cent relate to sexual violence or exploitation.

This issue faces both men and women with disabilities; however, there is a gendered aspect to it and women with disabilities are especially at risk. "Research suggests high rates of violence, abuse and neglect of women and girls with disability in institutional settings. Such violence is experienced more often than men with disability in institutions. In these circumstances, women with disability may experience violence for longer periods of time due to inadequate pathways to safety, and may be afraid to report incidents for fear of reprisal or a lack of confidence in authorities and the justice system"<sup>4</sup> Women with disabilities also experience higher rates of sexual violence.<sup>5</sup> For women with disabilities, violence may be about disability, or about gender, or both.

Furthermore, people with disabilities generally face significant economic disadvantage in Australia, but women with disabilities face even greater economic disadvantage than men with disabilities.<sup>6</sup> Women with disabilities therefore face particular vulnerabilities to being dependent on abusive partners, family members or carers for financial stability, particularly when they may rely on such people for essential disability supports. This is a major barrier to these women being able to remove themselves from a violent or abusive situation, or being able to report such incidents to police.

The types of violence experienced by women with disabilities include physical violence, sexual assault, verbal abuse, and living in fear of the threat of harm. Many live with intimidation, financial exploitation, and suffer retribution for decisions, choices or complaints they have made. Women with disabilities face different forms of violence than women without disabilities. For example, forced sterilisation and abortion,<sup>7</sup> chemical restraint, withholding of aids and equipment, having services or activities withheld, continual belittling and demeaning treatment based on the disability, and threats to remove children.

Advocacy for Inclusion sees violence in many settings: in group homes where co-tenants use physical aggression as a form of communication; in public housing complexes where women with disabilities are pimped or sexually exploited by their neighbours or "friends"; or in privately owned dwellings where ex-partners stay on as carers and become abusive.

Sadly many women with disabilities are not even aware that what is happening to them is actually violence or abuse – they have become conditioned to it or are unaware of their rights.<sup>8</sup> Many women with disabilities have not received sex education and consequently do not know how to identify the difference between consensual sex and rape or assault.<sup>9</sup> Some consumers with Advocacy for Inclusion have disclosed rape or sexual assault for the first time after learning about sexual health and human rights. With education they realised what had happened to them was rape or assault and that it was wrong. Compounding this is the fact that many forms of violence against women with disabilities are not recognised as violence by the general community.

For example, the CEDAW Committee made specific recommendations about forced sterilisation,<sup>10</sup> yet the Australian government does not recognise this as a form of violence, nor is it working to outlaw the practice, despite similar recommendations from the UPR and the CRC.<sup>11 12</sup>

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<sup>3</sup> The majority of supported accommodation for people with disabilities in the ACT is provided through group homes with between 2 and 6 residents.

<sup>4</sup> Australian Human Rights Commission, 2012, Report to the Committee on the Elimination of all forms of Discrimination against Women, [http://www2.ohchr.org/english/bodies/cedaw/docs/followup/ngos/AHRC\\_Australia.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/followup/ngos/AHRC_Australia.pdf)

<sup>5</sup> Sullen, M., & Powell, A., 2008, *Sexual assault and adults with a disability: Enabling recognition, disclosure and a just response*, Published by the Australian Institute of Family Studies.

<sup>6</sup> Australian Bureau of Statistics, 2004, Cited in the National Disability Strategy p. 43.

<sup>7</sup> Women with Disabilities Australia, 2011, *Sterilisation of Women and Girls with Disabilities - An update on the issue in Australia*, [www2.ohchr.org/english/bodies/cedaw/docs/cedaw\\_crc\\_contributions/WomenwithDisabilitiesAustralia.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/cedaw_crc_contributions/WomenwithDisabilitiesAustralia.pdf)

<sup>8</sup> Sullen, M., & Powell, A., Op. Cit.

<sup>9</sup> Ibid.

<sup>10</sup> UN Committee on the Elimination of Discrimination Against Women, Op. Cit.

<sup>11</sup> United Nations Committee on the Rights of the Child, 2005, 40th Session, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, CRC/C/15/Add.268, para: 45, 46 (e); See also United Nations Committee on the Rights of the Child 2012 concluding observations Australia.

Contrary to the requirements of Article 19 of the CRPD,<sup>13</sup> many women with disabilities are still living in situations, or with people, not of their choosing. “Many people with disability are effectively forced to live in institutions or residential care facilities in order to receive social and personal care supports”<sup>14</sup> This results in conflict between house mates and escalates to violence. Others are unable to get the level of support or care they need and are forced to rely on people who are physically or sexually abusive.

Women living in residential care facilities are at heightened risk of violence and exploitation.<sup>15</sup> Women, who experience communication barriers and subsequent behavioural difficulties, including violence, are congregated together in these facilities creating a recipe for aggression, violence and abuse among the tenants and by support workers. This establishes a “culture of violence” compounded by restrictive practices such as chemical restraint<sup>16</sup>.

Restrictive practices, such as isolating a woman in her room, preventing access to areas of her home, or chemical restraints are often administered to manage these issues of violence but would otherwise not be needed if women were not living with individuals they do not want to live with. Advocacy for Inclusion has witnessed cases where a woman’s violence has ceased when she moved away from the co-tenants she was unhappy living with.

Some call this violence a “structurally induced crime”<sup>17</sup>, created by living circumstances over which neither the victim nor the perpetrator have control. Many cases at Advocacy for Inclusion look like this. It is a serious problem with the ACT disability support system. Women with disabilities are afraid to speak up as they fear that they will upset their service provider or their carer. Others have significant communication barriers and violence is overlooked or covered up.

In these facilities violent behaviour may be dismissed because it is seen to be a symptom of the perpetrator’s disability.<sup>18</sup> <sup>19</sup> Further, disability accommodation providers do not respond to such incidents of violence or sexual assault appropriately. In our experience, service providers seek to remove the victim from their home instead of the perpetrator. Likewise, a report from the Victorian Ombudsman shows that victims of sexual assault in residential care facilities are often removed from the home instead of the perpetrator.<sup>20</sup> This means that the victim cannot access justice as they feel punished for the incident when they wanted to remain in that home.

We are shocked by the complacency towards violence in responses of disability service providers when we raise issues of violence in their facilities with them. It seems to be systemically accepted. Disability support staff seem inured to it after years of having no alternative to offer, or perhaps having succumbed to a “culture of violence”. It seems that workers and managers in the disability service system are also not trained to recognise and respond appropriately to these incidents. This means that women with disabilities can be subjected to violence and abuse in their home for years with no real path to escape.

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<sup>12</sup> UN Universal Periodic Review, 5 November 2010, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 Australia*

<sup>13</sup> UN Convention for the Rights of Persons with Disabilities, 2006, *Article 19*. “Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.”

<sup>14</sup> CRPD Civil Society, 2012, *Disability rights now: Civil Society report to the United Nations Committee on the Rights of Persons with Disabilities*.

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

<sup>16</sup> *Ibid.*

<sup>17</sup> French, P., 2007, *Disabled justice: The barriers to justice for persons with disability in Queensland*, For Queensland Advocacy Incorporated.

<sup>18</sup> Attard, M., 2007, Senior Project Officer, Sexual Assault in Disability and Aged Care Action Strategy Project. Interviewed by A. Powell, 18 December 2008. Cited in Sullen, M., & Powell, A., *Op. Cit.*

<sup>19</sup> Worth, C., 2008, Manager, South East Centre Against Sexual Assault (SECASA). Interviewed by A. Powell, 22 January 2008. Cited in Sullen, M., & Powell, A., *Op. Cit.*

<sup>20</sup> Ombudsman Victoria, 2006, *Improving responses to allegations involving sexual assault*. Melbourne: Government of Victoria.

Despite the heightened vulnerability and incidences of violence experienced by women with disabilities, there is little in the way of legislative protections, programs and resources to support them to be free from these issues. For example, women's refuges appropriate to the needs of women with disabilities scarcely exist in Australia. Some women with disabilities have specific and significant support needs that would never be catered for in a women's domestic violence shelter. Women with disabilities are less likely to receive assistance to be free from violent situations.<sup>21</sup>

There is minimal research and no standard national data collection on the type and extent of abuse and violence experienced by women with disabilities. The Australian Bureau of Statistics (ABS) is the major national data collector on the status of people with disabilities however it does not collect data on experiences of violence or abuse. The ABS Personal Safety Survey report specifically collects data on experiences of violence in the community but does disaggregate this by disability. The International Violence Against Women Survey (IVAWS) specifically excluded women with an illness or disability from the sample for the survey.<sup>22</sup>

Some states in Australia, such as New South Wales (NSW), have broader legislative definitions of 'domestic relationships', allowing the law to extend to violence in disability supported accommodation. However, in most states and territories including the ACT, legislation does not recognise disability group home residents due to a narrow definition of 'domestic relationships'.

Consequently, few disability specific environments – residential care, institutions, group houses, cluster housing, congregate care, and psychiatric institutions – are recognised under domestic violence laws, and perpetrators specific to these accommodations are not recognised as perpetrators.

Additionally, the relationships of other women with disabilities who live in the broader community may also not be covered, including those relying on paid or unpaid carers who are not family members, or those living in other group arrangements. While assault laws might cover some of these circumstances, the protections available to assault victims are not as robust as those who have experienced domestic violence.

This means that although they are more vulnerable, women with disabilities are substantially excluded from legislative protections.<sup>23</sup> Women with disabilities are not supported appropriately if at all to have the perpetrator removed or to find alternative accommodation.

It also means that disability services have a great degree of discretion in deciding how to respond to issues of violence, exploitation and abuse of women with disabilities and whether to report it to the police.<sup>24</sup> This is deeply concerning given the acceptance among service providers of these issues. Such incidents are often not reported to police and are subsequently not investigated. Incidents do not go beyond the administrative processes of the service provider,<sup>25</sup> stopping women accessing the justice system and subsequently from claiming their right to be free from abuse and violence.

The Australian NGO CRPD Shadow Report 2012 notes that police often do not regard such matters as a police matter as they assume that it will be dealt with by the disability service provider, even if the violence or abuse occurs within that facility.<sup>26</sup> This demonstrates the "acceptance" of violence and exploitation of women with disabilities among the community generally and the urgent need for legislative recognition.

Further, an Australian study on the process of women with intellectual disabilities making statements to police about sexual assault found that police commonly stereotyped women with intellectual disabilities as:

- Being promiscuous; and

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<sup>21</sup> Dillon, J., 2010, *Violence against People with Cognitive Impairments: Report from the Advocacy/Guardianship Program at the Office of the Public Advocate, Victoria*, Office of the Public Advocate

<http://www.publicadvocate.vic.gov.au/file/file/Research/Reports/Violence%20and%20disability%20report%202010.rtf>

<sup>22</sup> Sullen, M., & Powell, A., Op. Cit.

<sup>23</sup> CRPD Civil Society, 2012, Op. Cit.

<sup>24</sup> Murray, S., & Powell, A., Op. Cit.

<sup>25</sup> CRPD Civil Society, 2012, Op. Cit.

<sup>26</sup> Ibid.

- Not having a credible account.<sup>27</sup>

This study also found that police often did not proceed to prosecution because they were concerned that the woman would not be fit to proceed through the court process and that it would cause them undue trauma. They commonly felt this way because they had no confidence that the court would deliver an acceptable outcome for the victim.<sup>28</sup>

### **Summary 1**

Women with disabilities are some of the most vulnerable members of the Australian community to all forms of violence and abuse. However, women with disabilities experience more barriers than the rest of the community to accessing justice. Many are unable to realise their right to be free from violence and exploitation.<sup>29</sup> The barriers include:

- Inadequate awareness and understanding among the community of the experience of violence against women with disabilities, including a lack of research and data collection;
- Denial among the community that the types of violence experienced by women with disabilities are actually violence;
- Lack of legislative recognition and protections afforded to women with disabilities as victims of violence;
- Lack of support, programs, resources and information appropriate and accessible for women with disabilities to help them be free from violence;
- Mishandling by disability accommodation providers of incidents of violence against women with disabilities, including lack of training among staff on how to respond to such incidents;
- The particular vulnerability of women with disabilities, including their dependence on abusive care givers or partners, dependence on supports provided within a violent residential care setting, fear of consequences of reporting incidents due to this power differential, and for many a conditioning to violent treatment over a lifetime.

## **2. Access to justice for mothers with disabilities**

A large portion of our advocacy cases include mothers with disabilities involved in child protection proceedings. They have often had their children removed because of their disability.

The particular economic disadvantage faced by women with disabilities also causes women to face heightened barriers to justice as parents. For example, they are less able to resource appropriate legal representation and may also remain with abusive partners or carers who provide economic security or essential disability supports.

McConnell and Bjorg Sigurjonsdotter<sup>30</sup> explain that often a primary child protection concern in cases involving mothers with disabilities is the risk of violence or exploitation of the child by the male partner of the mother. For example, a UK study by Booth and Booth<sup>31</sup> of 30 adults who were raised by parents with intellectual disabilities found that over 50 per cent reported experiences of physical and sexual abuse, which was mostly perpetrated by their mother's partner. Australian research shows that the mother is often blamed in child protection proceedings for failing to protect the child from the perpetrator.<sup>32</sup>

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<sup>27</sup> Keilty, J., & Connelly, G., 2001, Making a statement: An exploratory study of barriers facing women with an intellectual disability when making a statement about sexual assault to police. *Disability & Society*, 16(2), 273-291.

<sup>28</sup> Ibid.

<sup>29</sup> UN Convention for the Rights of Persons with Disabilities, 2006, *Article 16*.

<sup>30</sup> McConnell, D., & Bjorg Sigurjonsdotter, H., 2010, Caught in the child protection net (Chapter 11), in G. Llewellyn, R. Traustadóttir, D. McConnell, H. Björg Sigurjónsdóttir, *Parents with intellectual disabilities: Past, present and futures*. John Wiley & Sons Ltd.

<sup>31</sup> Booth, T., & Booth, W., 1998, *Growing up with parents who have learning difficulties*, London: Routledge

<sup>32</sup> McConnell, D., Llewellyn, G., & Ferronato, L., 2002, Disability and decision-making in Australian care proceedings, *International Journal of Law Policy and the Family*, 16(2), 270-299. doi: 10.1093/lawfam/16.2.270

A study by Llewellyn, McConnell and Ferronato<sup>33</sup> at two Children's Courts in NSW Australia revealed that parents with cognitive disabilities were involved in almost one third of child protection case. Of these cases, one third involved a single mother whereas less than 1.5 per cent involved a single father. The study found a disproportionate amount of children of parents with intellectual disabilities were placed on wardship orders and outside of the family network.

The researchers concluded that the overrepresentation of parents with disabilities in child protection proceedings relate to apparent discriminatory attitudes towards parents with disabilities in the court system and among child protection agencies.<sup>34</sup> McConnell and Llewellyn found that the following barriers to justice are experienced by parents with disabilities:

- “The denial of parents' legal rights;
- The denial of appropriate supports and services to parents before their children are permanently removed;
- In the absence of clear guidelines as to what constitutes adequate care, child protection workers and courts imposing their own biases on proceedings;
- The enormous weight given to the assessment of 'experts', particularly when this rests so greatly on IQ tests. This is despite substantial findings which show IQ to be a poor predictor of parenting capacity;
- Evidence contrary to parental incompetence being disregarded; and
- Inadequate legal representation e.g., court proceedings not clearly explained, legal representatives not having an understanding of the issues faced by people with intellectual disability.”<sup>35</sup>

Our experience correlates with McConnell and Llewellyn's findings. We find child protection authorities and children's courts assume that mothers with disabilities are incompetent parents without first supporting them to develop their parenting skills as required by Article 23 of the CRPD. While these mothers often need more support to participate in court proceedings, it seems that they are provided less support to be meaningfully engaged and to have their perspective heard.

Shockingly, McConnell et al.<sup>36</sup> found that an affidavit or report had been submitted by the parent's legal representative in only one-quarter of all cases, meaning that the perspective of the parents was widely absent across the cases. It seems there is an assumption that mothers with disabilities do not have a worthwhile point of view and so are not supported to be represented before the law on an equal basis with other members of the community.

The belief that parents with intellectual disabilities cannot learn to parent well is based on prejudice against people with disabilities as it is not empirically evidenced and there is a significant amount of refuting empirical research.<sup>37 38 39</sup> Mothers with disabilities are unjustly having their children removed based on the ill-informed judgement that they cannot learn new skills.

Advocacy for Inclusion finds that child protection services take action and make recommendations based only on perceived risks rather than actual instances of abuse or neglect.

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<sup>33</sup> Llewellyn, G., McConnell, D. & Ferronato, L., 2003, Prevalence and outcomes for parents with disabilities and their children in an Australian court sample, *Child Abuse & Neglect*, 27(3), 235-251. doi: 10.1016/S0145-2134(03)00004-8

<sup>34</sup> McConnell, D., Llewellyn, G., & Ferronato, L., 2002, Op. Cit.

<sup>35</sup> McConnell, D. & Llewellyn, G., 2002, Stereotypes, Parents with Intellectual Disability and Child Protection, *Journal of Social Welfare and Family Law*, 24 (3), 297 - 317.

<sup>36</sup> McConnell, D., Llewellyn, G., & Ferronato, L., 2002, Op. Cit.

<sup>37</sup> Llewellyn, G., McConnell, D., Honey, A., Mayes, R., & Russo, D., 2003, Promoting health and home safety for children of parents with intellectual disability: A randomised controlled trial, *Research in Developmental Disabilities*, 24(6), 405-431. doi: 10.1016/j.ridd.2003.06.001

<sup>38</sup> Monsen, K., Sanders, A., Yu, F., Radosevich, D., & Geppert, J., 2011, Family home visiting outcomes for mothers with and without intellectual disabilities, *Journal of Intellectual Disability Research*, 55(5), 484-499. doi: 10.1111/j.1365-2788.2011.01402.x

<sup>39</sup> Tarleton, B., & Ward, L., 2007, “Parenting with support”: The views and experiences of parents with intellectual disabilities. *Journal of Policy and Practice in Intellectual Disabilities*, 4(3), 194-202. doi: 10.1111/j.1741-1130.2007.00118.x



“If you look at the evidence in all the cases we run before the court, in 50 per cent of them [cases involving a parent with disability] there is evidence there. In 50 per cent there isn’t . . . we don’t have the evidence” ~ Lawyer representing child protection agency.<sup>40</sup>

In 2012, Colleen Pearce, Public Advocate of Victoria, states:

I am increasingly concerned that children are being removed from parents with a disability based solely on that disability, and not because the cases meet the relevant tests... Very often their child is removed not because the parent has harmed or neglected them, but because the child is seen as being at risk of neglect. The appropriate response to this is to provide support, encouragement, help and education.<sup>41</sup>

In 2008 Legal Aid Queensland stated that “We are concerned that decisions to remove children from parents with disability are made on the basis of the disability, rather than on the parent’s capacity to parent effectively and appropriately.”<sup>42</sup>

The information existing in Australia and internationally overwhelmingly indicates that many parents with disabilities lack support to parent.<sup>43 44 45</sup> In the Australian court study, the lack of support services available often directly resulted in child removal because the parents were not considered competent without them.<sup>46</sup>

## **Summary 2**

Many mothers with disabilities experience barriers to justice and are consequently denied their right to be a parent and to access support to parent well.<sup>47</sup> The barriers include:

- Gender based violence towards mothers with disabilities, particularly by abusive male partners, which interferes with their parenting rights;
- Prejudice against mothers with disabilities among child protection authorities and in the court, including the misconception that mothers with disabilities cannot learn parenting skills;
- Lack of appropriate supports available to mothers with disabilities to parent well in their own home and to be free from violence and abuse;
- Lack of recognition of mothers with disabilities as having legal capacity or as having a worthwhile contribution to the court process;
- Reduced access to legal representation due to high rates of economic disadvantage across this population;
- Lack of training among workers in the legal system to understand and support the needs of women with disabilities to participate in judicial processes, including child protection workers, lawyers and judges.
- No “reasonable accommodation” made to support mothers with disabilities, who require extra support to understand and engage in court proceedings due to their disability and also due to a life-time of oppression faced by many mothers, which may make them reluctant to be assertive and know their rights.

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<sup>40</sup> McConnell, D., Llewellyn, G., & Ferronato, L, 2002, Op. Cit. p. 285.

<sup>41</sup> Pearce, C., 15 December 2012, Disability no bar to good parenting, *The Age*, <http://www.theage.com.au/opinion/politics/disability-no-bar-to-good-parenting-20121214-2bf75.html>

<sup>42</sup> Legal Aid Queensland, 2008, Cited in the Commonwealth’s *National Disability Strategy*, p. 38.

<sup>43</sup> Booth, T., & Booth, W., 2005, Parents with learning difficulties in the child protection system: Experiences and perspectives, *Journal of intellectual disabilities*, 9(2), 109-129

<sup>44</sup> Gore, N., 2010, Building effective support for learning disabled parents, *Community Care*, (1844), 34-35. Retrieved from [www.ebscohost.com](http://www.ebscohost.com)

<sup>45</sup> Starke, M., 2010, Encounters with professionals: views and experiences of mothers with intellectual disability, *Journal of Intellectual Disabilities*, 14(1), 9-19. doi: 10.1177/1744629510373052

<sup>46</sup> McConnell, D., Llewellyn, G., & Ferronato, L, 2002, Op. Cit.

<sup>47</sup> UN Convention for the Rights of Persons with Disabilities, 2006, *Article 23*.

### 3. Recognition of women with disabilities as equal before the law

Women with disabilities face difficulty being recognised as having legal capacity or having a credible point of view in legal matters.

Formal legislative instruments, such as guardianship law, are used to find some people with cognitive disabilities as having no legal capacity. A substitute decision maker is then assigned to assume legal capacity on that person's behalf. When a woman is under a guardianship order, recognition of her legal capacity is removed. Without recognition of her legal capacity she is silenced in judicial processes and is not supported to exercise her legal capacity, in contravention of Article 12 of the CRPD.

The legal capacity of women with disabilities is also not recognised or supported through less explicit measures in the legal system. For example, when a police officer decides not to proceed to prosecution of rape due to questions about the disabled woman's credibility, or when a lawyer does not bother to submit an affidavit for a mother with disability.

In one case at Advocacy for Inclusion, a child protection worker advised that the mother with a disability should get a guardian if required to go through court proceedings. This woman lived very successfully and independently in the community with minimal disability supports. Yet, because she had an intellectual disability, it was assumed that she could not or should not exercise her legal capacity in a court process.

Women with disabilities involved in court proceedings can also be discarded as "credible witnesses" on the basis of their disability:

There is a wide range of characteristics which may lead to a party seeking to impugn a person's competence as a witness including, for instance, age, some forms of physical or sensory disability, acquired brain injury, mental illness and intellectual or cognitive disability.<sup>48</sup>

It is not uncommon for a woman with disability who has been the victim of sexual assault in a residential care facility to be deemed not credible as a witness and therefore her perspective cannot be heard or considered. Cases are thrown out of court and perpetrators are never convicted.

In 2012, the Australian Human Rights Commission, Women with Disabilities Australia, and Women with Disabilities Victoria co-hosted a national roundtable on violence against women with disabilities. They noted police are reluctant to pursue a report of violence or abuse against women with disabilities due to the following factors:

- When perpetrators were not caught in the act;
- When there is no conclusive DNA evidence; and
- When there is not a witness viewed as more 'credible' than the victim (woman with disability);
- A low rate of convictions, including due to the belief of many judges that a woman with disability is unable to give evidence on her own behalf; and
- Inadequate support for women with disabilities seeking to navigate the legal system.<sup>49</sup>

Unfortunately, the legal system has not developed appropriate supports for women with disabilities who have intellectual or communication barriers to participate in the legal system and be recognised before the law. Further, no states in Australia legally recognise alternatives to substitute decision making practices, such as supported decision making, which support women with disabilities to make and articulate their own decisions. "Reasonable accommodation" is not made to ensure that the most vulnerable members of the community are able to be heard in court and be recognised before the law.

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<sup>48</sup> Australian Law Reform Commission, *Competence and Compellability*, <http://www.alrc.gov.au/publications/4.%20Competence%20and%20Compellability/competence>

<sup>49</sup> Australian Human Rights Commission, 2012, *Australian study tour report Visit of the UN Special Rapporteur on violence against women*, [http://humanrights.gov.au/sex\\_discrimination/publication/UNSRVAW%20report%202012/index.html#Heading467](http://humanrights.gov.au/sex_discrimination/publication/UNSRVAW%20report%202012/index.html#Heading467)

### **Summary 3**

Women with disabilities are denied justice because they are not viewed as credible or as having legal capacity. The barriers include:

- Guardianship practices which remove the recognition of a woman's legal capacity before the law;
- Prejudice in the judicial system against women with disabilities as being less credible;
  - A woman's case may be prevented from reaching the court because her case is not deemed worthwhile;
  - When a woman reaches court her credibility is questioned or denied.
- "Reasonable accommodation" is not made to support women with disabilities to be meaningfully engaged in legal proceedings using alternate communication mechanisms.

### **Conclusion**

Women with disabilities face multiple disadvantages and barriers to accessing justice. The intersection of discrimination and prejudice faced by women with disabilities in their daily lives and in judicial processes both as women and as people with disabilities creates extra barriers. Women with disabilities need greater supports to access justice outside of court and throughout court proceedings. This includes:

- Education to recognise and know their rights;
- Information, resources and support to fulfill their rights and responsibilities such as parenting and finding safety from a violent situation;
- Support and reasonable accommodations throughout legal systems and court proceedings to engage them in the process and have their perspective promoted and recognised.

These supports are not available to women with disabilities, causing the justice system in Australia to be inaccessible to them and preventing them from asserting their rights.