



THE UNIVERSITY OF
MELBOURNE

Melbourne Law School
2018

Disability Human Rights Clinic

Final Projects Collection



Melbourne Law School

Disability Human Rights Clinic

Final Projects Collection

December 2018

Subject Coordinator

Dr Anna Arstein-Kerslake

Research Assistant

Alex Callahan

Cover photo: 2018 Disability Human Rights Clinic Students with Dr Anna Arstein-Kerslake and Alex Callahan

Back row (L-R): Dr Anna Arstein-Kerslake, Alex Callahan, Anita Deutschmann, Eliza Waters, Brigette Mercaldi, Ellen Roberts and Bernadette Toohey

Middle row (L-R): Alexander Horgan, Siane Richardson and Hannah Bullock

Front row (L-R): Eunice Ghita, Emma Costa and Cole Bodell

First printed December 2018

An electronic version of this document can be obtained from law.unimelb.edu.au

Enquiries about reprinting information contained in this publication should be made through:

Public Interest Law Initiative

Melbourne Law School

185 Pelham Street

Carlton VIC 3053

Contents

Euthanasia and Assisted Suicide: International Human Rights Implications for Persons with a Disability	4
Review of the Sexual Offence Laws of the Commonwealth Nations to Determine Compliance with the Convention on the Rights of Persons with disabilities and to identify a Model for Good Practice Law Reform	6
Psychosocial Disability and the NDIS: Are CRPD Rights Being Realised?	25
The Rights of Refugees with Mental Disabilities who come into contact with the Victorian Criminal Justice System	62
Thematic Analysis of Administrative Appeals Tribunal (AAT) Decisions Involving Claiming and Reviewing the Disability Support Pension	97

GROUP 1 PROJECT

Euthanasia and Assisted Suicide: International Human Rights Implications for Persons with a Disability

Partner Organisation

The United Nations Special Rapporteur on the Rights of Persons
with Disabilities

Group Members

Cole Bodell

Alexander Horgan

Brigette Mercaldi



The documents produced by Group 1 are confidential and not suitable for release.

GROUP 2 PROJECT

Review of the Sexual Offence Laws of the Commonwealth Nations to Determine Compliance with the Convention on the Rights of Persons with disabilities and to identify a Model for Good Practice Law Reform

Partner Organisation

Equality Building

Group Members

Anita Deutschmann

Siane Richardson



REVIEW OF THE SEXUAL OFFENCE LAWS OF THE COMMONWEALTH NATIONS TO DETERMINE COMPLIANCE WITH THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND TO IDENTIFY A MODEL FOR GOOD PRACTICE LAW REFORM

I. INTRODUCTION

This report presents the findings of a project that reviewed sexual offence laws relating to people with disabilities, particularly cognitive disabilities,¹ across all the jurisdictions of the Commonwealth. Firstly, the authors establish the existence of the right to sexual autonomy for people with disabilities by way of the human rights principles enumerated in the Universal Declaration of Human Rights and the legally binding Convention on the Rights of Persons with Disabilities. Following a review of the sexual offence laws, across the five Commonwealth regions, the laws were categorised into five different categories based on levels of compliance with the Convention on the Rights of People with Disabilities. Finally, the report analyses and presents recommendations for good practice by drawing upon legislative amendments proposed in Ireland, the recommendations of Disabled People's Organisations (DPOs) and individual disability activists and the ecological model of risk minimisation.

II. CONTEXT

A. *The Current State of Affairs*

Sexual offence laws in many Commonwealth jurisdictions criminalise sex with people with cognitive disabilities. Laws that completely prohibit sex with people with cognitive disabilities are paternalistic in that they seek to 'protect' people with disabilities due to an assumption that people with disabilities are inherently vulnerable.² This assumption results in the protection of people with cognitive disabilities being prioritised over a recognition of their legal capacity and sexual autonomy. This failure to recognise sexual autonomy ignores the perspectives of people with disabilities. Disabled People's Organisations (DPOs) such as Women with Disabilities Australia (WWDA), have argued for an equal right to sexual autonomy and to protection from sexual exploitation and violence. This requires that sexual offence laws promote this essential balance. Sexual offence laws that criminalise sex with people with cognitive disabilities fail to achieve this balance, by overvaluing protection and unnecessarily restricting sexual autonomy for people with disabilities.

B. *Intersectionality*

Socio-economic disadvantage, gender and the intergenerational effects of colonisation all contribute to the discriminatory nature of sexual offence laws regarding people with disabilities. The reviewed sexual offence laws disproportionately criminalised sex for women and girls with disabilities. United Nations Special Rapporteur on Disabilities, Catalina Devandas Aguilar, reports that women face 'significant challenges' to having

¹ The focus of this research is on people with cognitive impairments specifically. This is because our research found that sexual consent laws regarding people with disabilities focused predominantly on people with cognitive impairments.

² Anna Arstein-Kerslake & Eilionoir Flynn, 'Legislating Consent: Creating an Empowering Definition of Consent to Sex That is Inclusive of People with Cognitive Disabilities' (2015) *SAGE*, 25(2), 225-248, 226.

their legal capacity recognised for decisions regarding reproductive and sexual health resulting in harmful practices such as involuntary sterilisation, involuntary abortion and involuntary contraception.³ Additionally, women and girls with disabilities are more often subjected to violence and abuse.⁴ Feminist perspectives on disability argue that women with disabilities are discriminated against more than men with disabilities because they are perceived as either asexual or promiscuous.⁵ Feminist theory recognises laws that prohibit sex with people with disabilities as yet another way to disempower, marginalise and discriminate against women.⁶ Women and girls therefore disproportionately experience the impact of such laws.

Research into the laws of the Commonwealth requires an awareness of the impact of colonial oppression and socio-economic disparity upon former colonial populations. People with disabilities living in many of the countries researched as part of this study may also experience the intergenerational impacts of colonisation including loss of culture, language, and associated socio-economic disadvantage. In low resource settings there are a greater number of people with disabilities and they experience increased barriers of access to scarce resources.⁷ These intersectional forces of gender, socioeconomic status and disability create multiple layers of discrimination that legislators must attempt to address.

III. ESTABLISHING THE EXISTENCE OF THE RIGHT TO SEXUAL AUTONOMY FOR PEOPLE WITH DISABILITIES

A. Introduction to the Convention on the Rights of Persons with Disabilities

The United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006, elaborates on the rights that have been established by the International Bill of Human Rights (the Bill). The Bill includes the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These three instruments are said to encompass the entirety of human rights and the rights included in newer instruments, such as the CRPD, are elaborations upon these existing rights. Therefore, each of the rights in the CRPD reflect and elaborate upon a right already recognised in the Bill.

The CRPD represents a departure from medical and paternalistic approaches to sexual health and the rights of persons with disabilities. Instead, it adopts a human rights approach that aims to break down societal barriers and provide people with disabilities the necessary resources and support. Specific rights related to sexual autonomy and freedom from sexual violence are enumerated in the CRPD. The CRPD provides protection for the right to legal capacity and agency (Article 12), freedom from abuse (Article 16) and respect for relationships (Article 23). Arstein-Kerslake and Flynn argue that Article 12's right to legal capacity and Article 16 and Article 23's obligation on the

³ Ibid.

⁴ United Nations General Assembly, Human Rights Council Twenty-Eighth Session, Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar' 2 February 2015, A/HRC/28/58, [29].

⁵ Lesley Chenoweth, 'Violence and Women With Disabilities' (1996) *SAGE* 2(4), 391-407, 391.

⁶ Ibid, 394.

⁷ Tony Emmett & Erna Alant, 'Women and Disability: Exploring the Interface of Multiple Disadvantage' (2006) *Development Southern Africa* 23(4), 446.

State to protect from abuse and eliminate discrimination provide the foundation for the right to sexual autonomy for people with disabilities.⁸ These articles and how they inform good practice for human rights compliant sexual offence laws are explored further in the next section.

These rights reflect and expand on the rights in the ICESCR and the ICCPR. For example, Article 12 of the ICESCR requires States Parties to take all necessary steps to recognise the highest attainable standard of physical and mental health.⁹ The Committee on the ICESCR is its monitoring body and provides authoritative interpretations of the Convention in the form of a General Comment. General Comment No 22 on Article 12 of the ICESCR states that the provision includes the requirement on States Parties to address laws, institutional arrangements and social practices that prevent individuals from effectively enjoying sexual and reproductive health rights.¹⁰ Further, the Committee describes how this Article enumerates the right to sexual and reproductive health and the right to have control over decisions concerning sexuality and reproduction without discrimination, coercion or violence, as well as the right to access sexual and reproductive health facilities and information.¹¹ Further, the Committee expressed that the right to sexual and reproductive health is also deeply affected by social determinants of health. These include inequalities in society and unequal distributions of power based on gender, ethnic origin, age, disability and other factors. These determinants often underlie laws and policies that limit the choices of individuals with disabilities regarding sexual and reproductive health. The right to sexual and reproductive health is also reflected in the CRPD.

B. Article 12 – Equal recognition before the law

1. Introduction to Article 12

Article 12 of the CRPD provides for the right of all people with disabilities to equal recognition before the law. As enumerated in Article 12, this includes the right of people with disabilities to ‘recognition everywhere as persons before the law;’¹² the right to enjoy ‘legal capacity on an equal basis with others in all aspects of life;’¹³ and States’ obligation to provide the support required to exercise legal capacity.¹⁴ Legal capacity is a State’s recognition of an individual as a legal person and a legal agent. This means that the law must recognise that a disabled person is a holder of rights and has the power to legally transact as well as to make, modify or end legal relationships.¹⁵

⁸ Arstein-Kerslake & Flynn, Above n 2, 228.

⁹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12(1).

¹⁰ Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (online) < <https://www.escr-net.org/resources/general-comment-no-22-2016-right-sexual-and-reproductive-health> > [11].

¹¹ *Ibid*, [11] - [12].

¹² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(1) (CRPD).
art 12(1)

¹³ *Ibid*, art 12(2).

¹⁴ *Ibid*, art 12(3).

¹⁵ Committee on the Rights of Persons with Disabilities, *General Comment No.1 (2014) Article 12: Equal recognition before the law*, 19 May 2014, Eleventh Session, CRPD/C/GC/1, [12].

2. Interpretation of Article 12

The recognition of an individual's ability to consent to sexual activity is a recognition of their legal agency. Legal agency is protected by the right to legal capacity on an equal basis.¹⁶ Legal capacity is often determined and restricted on the basis of an individual's cognitive capabilities. As Flynn and Arstein-Kerslake describe, cognition as a prerequisite for the 'granting or denying of legal capacity' results in exclusion of people with cognitive disabilities.¹⁷ In the past, women and African Americans were similarly excluded from legal personhood. While we now recognise that such exclusions are discriminatory, today we continue to exclude people on the basis of cognition. The Scientific obsession with rationality has meant that as a society we have prized cognition above all else to the detriment of people with cognitive disabilities. However, as argued by Flynn and Arstein-Kerslake cognition does not necessarily form the basis of sound decision-making.¹⁸ Disability scholar Amita Dhanda states that people often utilise emotive and intuitive means of decision-making.¹⁹ This demonstrates that the concept of cognition as the sole determinant of legal capacity may be inaccurate and inappropriate.²⁰ The General Comment on Article 12 also describes how legal capacity and mental capacity are discrete notions and discriminatory labels such as 'unsoundness of mind' are not valid reasons for the denial of legal capacity.²¹ There is a need for an inclusive understanding of legal capacity that does not use cognition as a precondition. Such an understanding would comply with and allow for the fulfilment of Article 12's right to legal capacity on an equal basis.

3. Application of Article 12 to sexual consent legislation

The application of Article 12 of the CRPD in relation to sexual consent requires that people with disabilities have their legal capacity to consent to sex recognised on an equal basis with others. Laws that prohibit sex with people with a disability simply based on their diagnosis (status-based offences), or laws that include a functional test that effectively excludes someone with a disability (functional test offences) or simply laws that in some way penalise sex with someone with a disability are therefore contrary to Article 12 of the CRPD.

Paragraph 3 of Article 12 requires State Parties to not only refrain from denying people with disabilities their legal capacity but also to provide the support necessary to enable them to make decisions that have legal effect. As described in the General Comment on Article 12, such support must respect the 'rights, will and preferences' of people with disabilities. While 'support' is not defined in the CRPD, Arstein-Kerslake promotes the 'support model' which envisages different levels of support depending on need provided for by a 'continuum of support'.²² Importantly, the will and preferences of the individual

¹⁶ Arstein-Kerslake & Flynn, Above n 2, 227.

¹⁷ Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: realising the right to support in exercising legal capacity' (2014) *International Journal of Law in Context* 10(1) 81-104, 81.

¹⁸ Lehrer, cited in Flynn & Arstein-Kerslake, *ibid.* 82.

¹⁹ Amada Dhanda, 'Legal capacity in the disability rights convention: stranglehold of the past or lodestar or the future' (2006) *Syracuse Journal of International Law and Commerce*, 34(2) 459-460, 429.

²⁰ *Ibid.*

²¹ *General Comment No.1 CRPD/C/GC/1*, [13].

²² Eilionoir Flynn & Anna Arstein-Kerslake, above n 17, 94

are at the 'core' of the support model.²³ In the context of sexual consent laws this requires that people with disabilities are provided with education about sex and consent as well as access to information and options regarding contraception and reproduction. An important DPO, Women With Disabilities Australia (WWDA) have called for States to provide 'accessible and appropriate' information and education about sexual and reproductive rights for women and girls with disability.²⁴ WWDA argue that this information is not just necessary for women with disability themselves, but also for the service sector, teachers, health workers, police officers, judges and the broader community as part of an awareness-raising campaign.²⁵ Article 12 provides that autonomy in sexual decision-making is an essential expression of personhood and legal capacity. A lack of recognition of an individual's right to autonomy of decision-making in relation to sexual agency – from the ability to consent, the right to access information, contraception and freedom from reproductive interference - is in direct contradiction to Article 12.

C. Article 16 and Article 23

Articles 16 and 23 of the CRPD require States to take steps to both protect people with disabilities from abuse and eliminate discrimination. These two Articles, along with the equal right to legal capacity enshrined in Article 12 provide the basis for the right to sexual autonomy for people with disabilities. Article 16 and 23 will be discussed in turn below.

1. Article 16

Article 16 of the CRPD provides for the protection of persons with disabilities from 'all forms of exploitation, violence and abuse'.²⁶ Article 16 also requires State parties to take appropriate measures to provide:

*assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse.*²⁷

Article 16 is often raised in defence of stringent laws denying the capacity of people with disabilities to consent to sex.²⁸ These laws that do not require the prosecutor to prove the absence of consent are allegedly necessary to 'protect' people with disabilities.²⁹ However, such laws perpetuate stigma and discrimination regarding the capacity of people with disabilities to make autonomous decisions and enjoy sexual relationships.³⁰

²³ Ibid.

²⁴ WWDA *Position Statement 4: Sexual and Reproductive Rights*. WWDA, September 2016, Hobart, Tasmania, 27.

²⁵ Ibid.

²⁶ CRPD, above n 12, art 16(2).

²⁷ Ibid.

²⁸ Women With Disabilities Australia (WWDA) '*WWDA Position Statement 2: The Right to Decision-Making*'. WWDA, September 2016, Hobart, Tasmania.

²⁹ Australian Law Reform Commission, 'Sexual offences against people with cognitive impairment', *Family Violence - A National Legal Response (ALRC Report 114)*.

³⁰ Anna Arstein-Kerslake and Eilionoir Flynn, above n 2, 226.

2. Article 23

Article 23 of the CRPD requires State parties to ‘take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others.’³¹ This Article calls for equality and freedom for people with disabilities to determine all matters relating to personal relationships including sexual relationships.

3. Protection vs Autonomy

Arguments in favour of laws that criminalise consensual sexual activity with people with disabilities often rely on claims that people with cognitive disabilities are less able to protect themselves.³² However, not only is autonomy an important component for overall wellbeing, it is also empowering. Empowered individuals are better able to identify risks and remove themselves from abusive situations.³³ As Arstein-Kerslake describes, discriminatory and paternalistic restraints on legal agency often leave individuals powerless to secure their own rights and are therefore at higher risk of exploitation.³⁴ For example, if an individual is denied decision-making regarding sexual relationships, this is likely to result in limited sexual education³⁵ or reduced opportunities for healthy interactions with others they may be attracted to.³⁶ Therefore, the promotion of the right to sexual and reproductive health and the right to have control over decisions concerning sexuality and reproduction without discrimination enables people with disabilities to access appropriate information, contraception and sexual and reproductive health facilities. Further, the denial of the right to decision-making has led to practices including sterilisation, denial of contraception and forced abortion.³⁷ These issues are outside of the purview of this report but are important to flag as relevant areas of concern.

4. Application of Article 16 and Article 23 to sexual consent laws

There is a fine balance which must be struck between ensuring that laws provide for the right to be free from abuse (Article 16) while respecting the right to sexual autonomy on an equal basis (Articles 12 and 23).³⁸ One way in which to do this is what Arstein-Kerslake refers to as ‘coupling’ the right to legal capacity enumerated in Article 12(2) with the State’s obligations encapsulated in Article 16 and Article 23.³⁹ Support for the exercise of legal capacity to consent may make it possible for individuals to be protected without

³¹ CRPD, above n 12, art 23(1).

³² Anna Arstein-Kerslake, *Restoring Voice To People With Cognitive Disabilities: Realizing The Right To Equal Recognition Before The Law* (Cambridge University Press, 1st ed, 2017), 60.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Anna Arstein-Kerslake, above n 32, 60; Lesley Chenoweth, ‘Violence and Women With Disabilities’, SAGE, December 1996, page 391-407, 394.

³⁶ Lesley Chenoweth, above n 35, 394.

³⁷ Women With Disabilities Australia (WWDA), ‘WWDA Submission To The Senate Inquiry Into The Involuntary Or Coerced Sterilisation Of People With Disabilities In Australia ‘Dehumanised: The Forced Sterilisation Of Women And Girls With Disabilities In Australia’ (WWDA, 2013).

³⁸ Arstein-Kerslake & Flynn, above n 2, 226.

³⁹ Anna Arstein-Kerslake, above n 32, 56.

other rights being diminished.⁴⁰ The form this support takes may be assisting with the recognition of and removal from an abusive relationship, education about how to negotiate sexual decision-making and awareness and availability of contraception and family planning.⁴¹

IV. RESEARCH RESULTS & CRITIQUE OF EXISTING SEXUAL OFFENCE LAWS IN THE COMMONWEALTH

A review was completed of the sexual offence laws that criminalise sex for people with disabilities in the 60 jurisdictions across the five Regions of the Commonwealth; Africa, Asia, Caribbean and Americas, Europe and the Pacific. This review focused on the legislation of each jurisdiction. Further research will need to be undertaken in order to identify the application of this legislation in its real-world context. Firstly, the legislation of each jurisdiction was reviewed to identify offences which completely criminalise sex for people with cognitive disabilities. Secondly, a more nuanced analysis of jurisdictions which did not have blanket prohibitions was completed and these jurisdictions were categorised into a further four categories in accordance with CRPD compliance as identified below. Thirdly, the legislation was also reviewed to identify gender specific offences which criminalised sex for women with disabilities and not men. Overall, compliance with the CRPD was very low and only Seychelles and Cameroon were technically compliant with the requirements of the CRPD. The majority of jurisdictions still completely criminalised sex for people or women with disabilities.

A. Existing Legislation

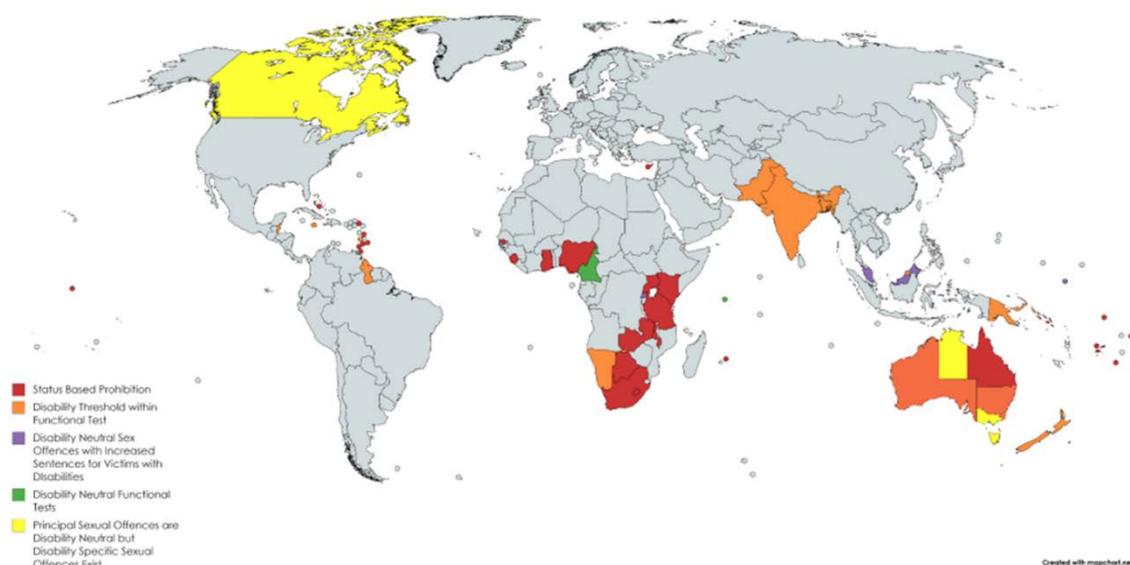
Generally, the sexual offence laws of the 60 jurisdictions restricted legal capacity to consent by prioritising the protection of people with disabilities from sexual abuse while undermining their sexual agency and autonomy. A detailed description of each jurisdiction's laws can be found in appendixes one and two. The reviewed laws generally fall under five categories:

- (1) Status-based offences: the criminalisation of any sexual activity with a person with a disability (29 jurisdictions);
- (2) Functional test with a disability threshold offences: the provision of a 'functional test' with a disability threshold to determine the level of cognitive capacity to consent (19 jurisdictions);
- (3) Functional test offences: the provision of solely a 'functional test' without a disability threshold (2 jurisdictions);
- (4) Principal sexual offences are disability neutral, but disability specific sexual offences exist (4 jurisdictions);
- (5) Disability-neutral with disability specific sentencing provisions: The relevant provisions are disability-neutral, however sentencing provisions distinguish victims with a disability and provide for longer sentences (3 jurisdictions).

⁴⁰ Ibid.

⁴¹ Vic paper on supported decision making.

B. Map Depicting Commonwealth Nations Compliance with the CRPD



C. Status Based Offences

Jurisdictions with status-based offences are denoted in red. Status-based offences are those that criminalise sexual activity solely by virtue of the ‘victim’ having a disability (often a cognitive disability). Jurisdictions that have status-based offences include the Bahamas, Kenya and the state of Queensland in Australia. Status-based offences that criminalise sex due to one or more of the participants having a disability will always be in breach of the CRPD. Status-based offences limit the legal capacity of people with disabilities regardless of their decision-making skills. This restriction occurs on an unequal basis with people without disabilities and is therefore in breach of Articles 5 and 12.2 of the CRPD. As articulated by Anna Arstein-Kerslake, status-based offences are a natural consequence of the belief that people with cognitive disabilities are fundamentally poor decision makers who are unable to make decisions in their own best interests.

Status-based offences legitimise a fascination with ‘rationality’ and reflect the underlying assumption that all people with cognitive disabilities are unable to think rationally and all those without cognitive disabilities are able to.⁴² Having a cognitive disability does not necessarily result in poor decision making skills and the idea that people with cognitive disabilities have poor decision making skills is a social construct that allows for the restriction of people with disabilities’ legal capacity.⁴³ There is also growing awareness that people who do have impaired decision making skills are often able to be supported to make their own informed decisions without the need for someone else to make the decision for them.⁴⁴ The restriction on sexual decision

⁴² Anna Arstein-Kerslake, *Restoring Voice To People With Cognitive Disabilities: Realizing The Right To Equal Recognition Before The Law* (Cambridge University Press, 1st ed, 2017), p 66.

⁴³ *Ibid*, 70-2.

⁴⁴ Shih-Ning Then et al, "Supporting Decision-Making Of Adults With Cognitive Disabilities: The Role Of Law Reform Agencies – Recommendations, Rationales And Influence" (2018) 61 *International Journal of Law and Psychiatry*, 65. The Victorian Government has created a practical guide which outlines the existence of the right of people with disabilities to make their own decisions and how cares and service

making is not only lacking in logical underpinnings but is also in breach of Articles 5 and 12.2 of the CRPD. Article 12.2 requires that people with disabilities enjoy the right to legal capacity on the same basis as people without disabilities. Therefore, removing the opportunity for people with disabilities to decide to participate in sex, by criminalising all sex in which they may participate, limits their right to legal capacity and is therefore in breach of Article 12 of the CRPD. Status-based offences are also in breach of Article 5 of the CRPD which requires that all people are treated equally before the law and that they are entitled to the equal protections and benefits of the law without discrimination. The creation of status-based offences restricts the legal capacity of people with disabilities and results in discrimination and unequal treatment before the law. Therefore, status-based offences that criminalise sex on the basis of one party having a cognitive disability will always be in contravention of the CRPD, particularly Articles 5 and 12.

D. Functional Test with Disability Threshold Offences

The second category of offences include a functional test which has a threshold requirement of disability. Countries with these sorts of offences are denoted in orange. There are two elements which must be proved for sex to be criminalised under these sorts of offences. Firstly, a disability threshold must be fulfilled whereby the 'victim' must have some form of disability (once again this is most often a cognitive disability). Secondly, the person's disability must have affected their ability to truly and freely consent to the sexual act. These provisions often refer to the idea that the person consenting must be able to understand the nature and consequences of the act that they are consenting. Some countries that have offences which include the threshold requirement of disability are the United Kingdom, Jamaica and Samoa.

These offences are also in breach the CRPD as they discriminate solely on the basis of disability and limit people with disabilities' legal capacity on an unequal basis with others. By requiring that the 'victim' has a disability before the legislation applies, disability threshold tests are in breach of Articles 5 and 12 of the CRPD. As outlined above, Article 5 requires that all laws apply to people on an equal basis regardless of ability. While, Article 12 requires that people with disabilities are allowed to exercise their legal capacity on an equal basis with others. By creating a disability specific prohibition these offences are in breach of both Articles by limiting the rights of individuals on the basis of disability in a way that is unequal with those without disabilities. Accordingly, offences which involve a disability threshold are in breach of the CRPD.

E. Functional Test Offences

The third category includes offences which contain solely a functional test which is disability neutral. These offences are denoted in green. Functional tests are theoretically CRPD compliant due to their disability neutral nature. To be disability neutral legislation must not on its face or in practice apply only to people with disabilities.⁴⁵ For legislation restricting legal capacity to be CRPD compliant it must

providers can support this decision making process: Victorian Department of Human Services, "Supporting Decision Making" (State of Victoria, 2012).

⁴⁵ Eilionóir Flynn and Anna Arstein-Kerslake, "State Intervention In The Lives Of People With Disabilities: The Case For A Disability-Neutral Framework" (2017) 13(01) *International Journal of Law in Context*

apply to all people, regardless of ability, on an equal basis. Disability rights scholars have argued that Articles 5 and 12 requires that legislation must be disability neutral to be compliant with the CRPD.⁴⁶ By looking to the skills of the individual these legislative frameworks can apply regardless of ability and are therefore more likely to be CRPD compliant. An example of this test can be found in Section 130 of Seychelles' Penal Code:

"A person does not consent to an act which if done without consent constitutes an assault under this section if... the person's understanding and knowledge are such that the person was incapable of giving consent."

This functional test refers to the alleged 'victim's' understanding and knowledge of the nature of the sexual act in which they are partaking. These tests can theoretically be applied to anyone regardless of their abilities and are therefore CRPD compliant. Of the jurisdictions reviewed as part of this research Seychelles and Cameroon are the only two which appear to be CRPD compliant. However, this compliance should not be overstated as it may be due to a lack of legislative reform generally, rather than any specific desire to protect the rights of people with disabilities.⁴⁷ Disability neutral functional tests can be used to challenge the paternalistic assumptions of the law and to prevent discrimination and stigma based on disability.⁴⁸ However, more research must be undertaken to determine the in practice application of these legislative regimes.

These functional tests may still be used to exclude people with disabilities from engaging in consensual sex if the approach taken by a jurisdiction's legal actors is that people with a cognitive disability are unable to understand the nature and consequence of a sexual act and are therefore unable to consent. The risk of this occurring appears particularly high in jurisdictions such as Victoria, Australia. Section 37A of the Crimes Act 1958 includes within the objectives of the sexual offences provisions: 'the protection of the rights of individuals to *not* engage in sex' and 'the protection from exploitation of people with cognitive impairments'. Section 37B goes further and refers to people with 'cognitive impairments' as 'vulnerable persons'. Throughout the provisions people with 'cognitive impairments' appear to be placed within a similar category as children. Legal actors within this legislative regime may internalise the belief that people with disabilities are inherently vulnerable and in need of protection and this will inform their approach to a functional test for consent. This approach

<https://eds-a-ebsohost-com.ezp.lib.unimelb.edu.au/eds/pdfviewer/pdfviewer?vid=1&sid=db04e192-cf1b-4392-88a4-8796038b1a84%40sdc-v-sessmgr02>, 43.

⁴⁶ Ibid, 40; Tina Minkowitz, "Rethinking Criminal Responsibility From A Critical Disability Perspective: The Abolition Of Insanity/Incapacity Acquittals And Unfitness To Plead, And Beyond" (2014) 23(3) *Griffith Law Review* <https://doi.org/10.1080/10383441.2014.1013177>, 445; Piers Gooding and Charles O'Mahony, "Laws On Unfitness To Stand Trial And The UN Convention On The Rights Of Persons With Disabilities: Comparing Reform In England, Wales, Northern Ireland And Australia" (2016) 44 *International Journal of Law, Crime and Justice*, 137 – 8.

⁴⁷ The last substantive reforms to the sexual offences laws of Seychelles occurred in 1996 and the Government of Seychelles did not ratify the Convention on the Rights with People with Disabilities until 2009. The Republic of Cameroon signed the Convention on the Rights of People with Disabilities in 2008 and has not ratified. The current sexual offence provisions applicable in the Republic of Cameroon are identical to those in the 1967 Penal Code.

⁴⁸ Eilionóir Flynn and Anna Arstein-Kerslake, "State Intervention In The Lives Of People With Disabilities: The Case For A Disability-Neutral Framework" (2017) 13(01) *International Journal of Law in Context* <https://eds-a-ebsohost-com.ezp.lib.unimelb.edu.au/eds/pdfviewer/pdfviewer?vid=1&sid=db04e192-cf1b-4392-88a4-8796038b1a84%40sdc-v-sessmgr02>, 40.

assumes that people with cognitive disabilities are inherently unable to understand the nature and consequences of sexual activity. If this approach is applied to functional tests for consent, then this will effectively limit people with disabilities' legal capacity to decide whether to participate in sexual acts.

F. Predominant Sexual Offence includes a Disability Neutral Functional Test However Other Disability Specific Sex Offences Exist

Jurisdictions such as Canada and Victoria, Australia have disability neutral functional tests within their main sexual offence laws allowing for people with disabilities to freely exercise their legal capacity in most sexual relationships. However, these jurisdictions also have a range of disability specific sexual offences that prevent people with disabilities from truly enjoying the right to legal capacity. Jurisdictions with these offences are depicted in yellow. These offences relate to sexual relationships that arise between a person with a disability and someone who provides that person with care or a service (generally related to their disability).⁴⁹ These offences are in breach of Article 12 of the CRPD due to their disability specific nature and the fact that the legal capacity of people with disabilities is being restricted on an unequal basis with people who do not have disabilities. Although these jurisdictions have been able to make their principal sexual offences disability neutral and therefore CRPD compliant overall their sexual offence legislative regimes will need to be amended to become compliant with the CRPD. These carer specific offences are not within the immediate purview of this research but it must be noted that these offences are also in breach of Articles 5 and 12 of the CRPD as they restrict the legal capacity of people with disabilities by limiting their ability to choose who they engage in a sexual relationship with in a way that people without disabilities are not.

G. Disability Neutral Offences with Increased Sentencing when the Offence Involves a Victim with a Disability.

Note must also be taken of jurisdictions such as Nauru and Rwanda in which sexual offence legislation does not criminalise sexual acts on the basis of disability but does provide for increased sentences when the victim of a sexual offence has a disability. Jurisdictions with these increased sentencing laws are coloured in purple. Although these offences do not limit the legal capacity of people with disabilities inherently within the offence, they may still be in breach of the CRPD. The CRPD requires that people with disabilities are treated on an equal basis with people without disabilities and by singling them out by the operation of these sentence increases, the provisions are not compliant with the requirements of the CRPD. Offences which either explicitly or implicitly legitimise the idea that sexual offences where the victim has a disability are somehow worse than those where the victim does not have a disability reinforce the stigma experienced by people with disabilities and contribute to the notion that people with disabilities are somehow more helpless, vulnerable and in need of (paternalistic) protection than people without disabilities.

The European Union Agency for Fundamental Rights has argued that the implementation of 'enhanced penalties' for offences where the 'victim' is a person with

⁴⁹ Further research will be required to identify how these prohibitions against those who provide services for people with disabilities may restrict or eliminate the provision of services by sex workers to people with disabilities.

a disability are not only compliant with the CRPD but are required to ensure access to the rights and protections offered by the Convention.⁵⁰ These ‘enhanced penalties’ act as an aggravated circumstance when determining the sentence of the offender to reflect the fact that they deliberately targeted a person with a disability. This approach has been taken in circumstances where the crime committed is *because* the person has a disability and reflects an analysis of these offences as hate crimes. Increased penalties for offences where the victim has a disability are said to be supported by the application of Article 16 of the CRPD.⁵¹ Article 16 requires States “to take all legislative... measures to protect persons with disabilities, ... , from all forms of exploitation, violence and abuse, including their gender-based aspects”. The approach taken by the Agency and many of the European Union’s Member States is that in recognition of the increased levels of violence experienced by people with disabilities more must be done in order to prevent and discourage its continuation.⁵² This approach is reflected in the United Kingdom’s section 146 of the Criminal Justice Act 2003 which provides that where an offence is motivated by hostility based on disability or perceived disability, the court must state this as an aggravating factor at the sentencing stage. The Disabled People’s Organisation, Disability Rights UK, supports the inclusion of disability as the basis for an increased penalty within the criminal justice system.⁵³

There is theoretical difficulty in applying the EU approach to sex offences as a prohibition against hate crimes only works if the crime is committed due to the offender ‘hating’ the person *because* they have a disability. People with disabilities may be targeted for sexual violence not because of feelings of ‘hate’ but due to a range of personal and social factors that increase the risk of people with disabilities experiencing sexual violence.⁵⁴ However, it may be argued that some offenders seek out people with disabilities in order to take advantage of their socially constructed or perceived ‘vulnerability’ and accordingly it may be appropriate for this behaviour to be criminalised in a similar way to hate crimes. Further research will need to be undertaken to determine the opportunistic nature of this sexual violence and the best way to combat it.

V. GOOD PRACTICE

Sexual offence laws must negotiate the inherent tension between promoting sexual autonomy and providing protection from sexual violence for people with disabilities. Good practice requires compliance with the CRPD, particularly Articles 5 and 12 which require equal recognition before the law of people with disabilities and respect for their

⁵⁰ European Union Agency for Fundamental Rights, ‘Equal Protection For All Victims Of Hate Crime: The Case Of People With Disabilities’ (European Union Agency for Fundamental Rights, 2015) <http://fra.europa.eu/en/publication/2015/equal-protection-all-victims-hate-crime-case-people-disabilities>.

⁵¹ *Ibid*, 3.

⁵² *Ibid*, 4.

⁵³ Disability Rights UK, "Hate Crime: The Case For Extending The Existing Offences" (Disability Rights UK, 2013) <https://www.disabilityrightsuk.org/sites/default/files/pdf/hatecrimelawcommssionresponse.pdf>, 3 - 5.

⁵⁴ Andrea Hollomotz, ‘Beyond ‘Vulnerability’: An Ecological Model Approach To Conceptualizing Risk Of Sexual Violence Against People With Learning Difficulties’ (2009) 39(1) *British Journal of Social Work*, 99 -100.

legal capacity.⁵⁵ Any legislative approach to sexual offences must take this as its basis. Recent attempts at law reform in Ireland preference the legal capacity of people with disabilities and are depicted here as an example of what good practice may look like. We have looked to Disabled People's Organisation, Women with Disabilities Australia, and individual disability activists in attempting to inform our good practice model. Additionally, a short analysis of the ecological model is provided in order to highlight the necessity for social reform as well as legal. The ecological model highlights the range of social and individual factors which increase the risk of people with disabilities of experiencing sexual violence. Efforts to address these risk factors would better reduce the increased levels of sexual violence experienced by people with disabilities without requiring the existence of a discriminatory legislative regime which limits their legal capacity and sexual autonomy.

A. Women with Disabilities Australia and the Voices of Individuals with Disabilities

Women with Disabilities Australia (WWDA) submitted two Position Statements to the Special Rapporteur, Catalina Devandas Aguilar, on the sexual and reproductive health and rights of women and girls with disabilities.⁵⁶ WWDA have outlined how in the Australian context, denial of the right to decision-making and participation has resulted in many women and girls with disability being deprived of fundamental rights, in particular the right to consent to sexual relationships.⁵⁷ WWDA has provided many recommendations regarding protecting the rights of women with disabilities. Two such recommendations are particularly relevant to good practice regarding the legal capacity and sexual autonomy of people with disabilities. They include:

- 1. WWDA calls on the Australian Government to establish a nationally consistent supported decision-making framework that strongly and positively promotes and supports people with disability to effectively assert and exercise their legal capacity and enshrines the primacy of supported decision-making mechanisms, including the right of women and girls with disability to make free, informed and responsible choices about their bodies, sexual health, reproductive health, intimate and emotional relationships, and parenting.⁵⁸*
- 2. WWDA calls on the Australian Government, in consultation with people with disability and their representative organisations, to develop a national strategy to improve access to, and implementation of comprehensive, equitable, accessible, and disability-inclusive sexual and reproductive health education and information, with a particular focus on improving the access to such information for women and girls with disability, regardless of the setting in which they work, live or study.*

⁵⁵ Please refer to appendix 3 for a selection of relevant Concluding Observations provided by the CRPD Committee. The comments have been selected based on their application to the issue of sexual consent legislation and demonstrate the varying levels of compliance of State Parties.

⁵⁶ WWDA, Position Statement 1: The Right to Freedom From All Forms of Violence (September 2016) and Position Statement 4: Sexual and Reproductive Rights (September 2016).

⁵⁷ WWDA, Letter to Ms Catalina Devandas Aguilar re study on the sexual and reproductive health and rights of girls with disabilities³, 19 May 2017, 3.

⁵⁸ WWDA, Position Statement 4: Sexual and *Reproductive Rights*. WWDA, September 2016, 5 [5] & [7].

The WWDA takes a human rights-based approach to the promotion of sexual autonomy and legal capacity for women and girls with disabilities. The first position statement detailed above recognises the inherent legal capacity of women with disabilities and their right to make choices regarding their own sexual health and relationships. While, the second position statement refers to the practical obligations that must be fulfilled by the state to ensure that women with disabilities can exercise their legal capacity in a fully informed and safe manner. Reference to supported decision making in the second statement is also integral to the exercise of legal capacity for those with limited decision-making skills.

Calls for the recognition and protection of the sexual and reproductive rights of women with disabilities are also found in more informal commentaries on the importance of sexual autonomy for women with disabilities. Henry effectively encapsulated the current approach to the sexual autonomy and legal capacity of people with disabilities, when she wrote:

*"Being sexual and being disabled are seen as mutually exclusive by so many, we are seen as unable to give consent. Unable to have sex. Literally unable to be sexual."*⁵⁹

Brown also highlighted how the restrictions on legal capacity and the right to make decisions regarding one's own sexual autonomy can also result in a restriction on a range of other rights such as the right to participate in relationships or to receive adequate reproductive and sexual health education:

*"We are frequently assumed incapable of having opinions or directing our own lives, treated as children even when we are adults, denied access to basic healthcare or education, deprived of accessible or meaningful sex education or even the opportunity to form romantic relationships, treated as though our opinions and ideas have no value, and discussed as though we are not present and cannot be."*⁶⁰

Stevens demanded an end to the prevention of people with disabilities living full sexual lives and issues a call to arms for people with disabilities to continue to assert their right to sexual autonomy and their right to exist as sexual beings:

*"To be clear, we are NOT to blame for stigma dehumanizing us through stripping us of sexual agency and desirability. We do not have to continue to internalize shame over sexuality issues and we CAN work together to change our reality."*⁶¹

Together, the position statements of the WWDA and the comments of disability activists begin to illustrate the desire of people with disabilities to have their sexual autonomy and legal capacity realised not only in legislation but also by the removal of social barriers that prevent the full exercise of these rights. CRPD compliant good practice will go well along the way to recognising and protecting the rights of legal capacity and sexual autonomy of people with disabilities in line with the commentary provided above.

⁵⁹ Elisa Henry, "Criplesque" in *Criptique* (Word Press, 1st ed, 2014) <https://criptiques.files.wordpress.com/2014/05/crip-final-2.pdf>, 9.

⁶⁰ Lydia Brown, "Disability in and Abelist World" in *Criptique* (Word Press, 1st ed, 2014) <https://criptiques.files.wordpress.com/2014/05/crip-final-2.pdf>, 42.

⁶¹ Bethany Stevens, "The Politics Of Presenting Cripsex" <<http://cripconfessions.com/tag/event-planning/>>.

B. Ireland's Private Members Bill

In 2014 suggested reforms to Ireland's sexual offence laws would have ensured that people with disabilities had the same freedom to consent to sexual activity as people without disabilities.⁶² The reforms respected the sexual autonomy of people with cognitive disabilities while also providing protection from sexual violence and abuse. The Bill's explanatory memorandum described the way in which these amendments should have been made in response to a 'call to action' by DPOs and with a full understanding of the principle of equal recognition before the law as contained in many international human rights treaties and specifically Article 5 of the CRPD.⁶³

The existing sexual offence criminalised sexual intercourse with someone who was 'mentally impaired'⁶⁴ and provided for a term of imprisonment not exceeding 10 years.⁶⁵ The offence was one of 'strict liability' meaning that the consent of the person with a disability was not an available defence. The provision went on to state that it is not a criminal offence if the parties are married to each other,⁶⁶ or if the disabled person is proven to be capable of living independently and protecting him or herself against abuse.⁶⁷ This law discriminates against people with disabilities who have sexual activity prior to marriage and requires proof that the same person is able to live independently, which is not a pre-requisite to the decision making skills necessary to freely consent to sex. People without cognitive disabilities were not held to this same standard.⁶⁸

The recommended replacement provision made the abuse of a position of dependence and trust for sexual purposes an offence.⁶⁹ This new offence would have been disability-neutral and was intended to provide protection against abuse for all individuals who may be in a position of dependence, including those with and without disabilities.⁷⁰ The laws intended to provide protection from abuse without stigmatising people with disabilities or limiting their legal capacity or sexual autonomy. The recommended legislation was framed as:⁷¹

5. (1) Any person who being in a position of dependence and trust –

(a) takes advantage of his or her position, or

(b) aids, abets, counsels or procures another person to take advantage of his or her position, and

(i) induces or seduces a person to have sexual intercourse with him or her, or

⁶² Criminal Law (Sexual Offences) (Amendment) Bill 2014 Explanatory Memorandum, <<https://data.oireachtas.ie/ie/oireachtas/bill/2014/41/eng/memo/b4114s-memo.pdf>>,1.

⁶³ Ibid.

⁶⁴ Criminal Law (Sexual Offences) Act, 1993, s 5(1)(b).

⁶⁵ Ibid. s 5(1)(b)(i).

⁶⁶ Ibid. s 5(1)(b).

⁶⁷ Ibid. s 5(5).

⁶⁸ Explanatory Memorandum, above n 61, 4.

⁶⁹ Ibid.

⁷⁰ Explanatory Memorandum, above n 61, 4.

⁷¹ Note Cameroon Penal Code, s 298. Having authority over the victim is categorised as an aggravating circumstance for the offence of rape (see page 4 of the appendix).

- (ii) *commits any other sexual offence involving a person, shall be guilty of an offence of abuse of position of trust and shall be liable upon conviction on indictment to imprisonment for a term of not less than ten years.*⁷²

The recommended definition of consent was ‘an agreement between the parties to engage in a specific act’⁷³ and in doing so ‘each person must be shown at that time to have understood the nature of the act’.⁷⁴ The existence of the agreement is based on communication between the parties.⁷⁵ Further, the provision states in section 5A(5)(b) that:

*in determining whether a person understood the nature of the act, the presence of a mental impairment shall not be a determinative factor.*⁷⁶

The Explanatory Memorandum describes how the Bill has intentionally provided for a definition of consent that is inclusive of persons with disabilities and recognises their sexual agency ‘on an equal basis with all other persons’.⁷⁷ It retains the element of ‘understanding’ the act and clarifies that the agreement to engage in sexual activity must be based on communication between both parties.

These law reform recommendations in the Irish context provide a good practice example of CRPD compliant sexual offence laws that do not discriminate against people with disabilities.

C. *Moving away from vulnerability: A better way to help people stay safe*

Many of the laws that effectively criminalise sex for people with disabilities were created in an attempt to keep people who are perceived as ‘vulnerable’ safe from sexual exploitation. The criminalisation of sex is an ineffective way of achieving this goal. The criminalisation of sex and stigma around people with disabilities engaging in sexual relationships results in a lack of effective sexual and reproductive education. If it is assumed that people with cognitive disabilities are not participating in sex the natural correlation is that this education and fostering of skills that allow people to participate in sexual relationships safely is not required. However, people with disabilities continue to experience higher levels of sexual violence than people without disabilities regardless of levels of criminalisation.⁷⁸ While advocating for the CRPD compliant removal of sexual offences that limit the legal capacity and sexual autonomy we also wish to identify that efforts must be taken to develop individual skills and remove social factors that currently increase the risk of people with disabilities of experiencing sexual violence.

⁷² Criminal Law Act, above n 63, s5(1).

⁷³ Ibid, s5(3).

⁷⁴ Ibid, s5(3)(b).

⁷⁵ Ibid, s5(3)(a).

⁷⁶ Ibid.

⁷⁷ Explanatory Memorandum, above n 61, 5.

⁷⁸ Department of Violence and Injury Prevention and Disability, World Health Organisation, Geneva, "Prevalence And Risk Of Violence Against Adults With Disabilities: A Systematic Review And Meta-Analysis Of Observational Studies" (World Health Organisation, 2012)
https://www.who.int/disabilities/publications/violence_children_lancet.pdf?ua=1, 8.

Hollomotz proposes an ecological model which accounts for the individual skills and social factors that increase the risk of sexual violence for people with disabilities.⁷⁹ This approach recognises that an absence of 'self-defence skills' (social awareness to detect sexual violence or the threat of, skills to communicate the occurrence of sexual violence, physical skills necessary to prevent the continuation of sexual violence)⁸⁰ and social factors (social isolation, physical dependence and a lack of sexual health and reproductive education)⁸¹ increase the risk of sexual violence towards people with disabilities. These social factors exist from the micro- to macro- level (home, community, wider-society).⁸² These individual and social risk factors are intrinsically linked with one another, for instance a lack of sexual health and reproductive education as a social factor will result in a lack of self-defence skills regarding knowledge of safe sex practices. Criminalising sex for people with disabilities is ineffective at addressing the individual and social factors that result in the increased risk of sexual violence. By providing people with disabilities with the necessary skills to safely navigate sexual situations and relationships and by addressing social factors the risk of sexual violence should decrease. The foundation of this approach to safety is the recognition of the legal capacity and sexual autonomy of people with disabilities. Articles 12 and 16 of the CRPD require recognition of the legal capacity of people with disabilities and oblige States to take all necessary measures to ensure the protection of people with disabilities from sexual violence. Accordingly, States should not only take action to recognise the legal capacity of people with disabilities by de-criminalising sex but should also take measures to actively increase the self- defence skills of people with disabilities and remove social factors which increase the risk of sexual violence.

VI. CONCLUSION

This report examined sexual offences laws across all Commonwealth jurisdictions and identified those that criminalised, or otherwise discriminated against, people with a disability participating in consensual sex. The research revealed that there were five categories of sexual conduct offences, four of which were not CRPD compliant. The report also established the existence of the right to sexual autonomy for people with disabilities by way of the human rights principles enumerated in the Universal Declaration of Human Rights and specifically in the CRPD. The report ended with an analysis of good practice in the Irish jurisdiction and provides recommendations from submissions and reports provided by Disabled People's Organisations and disability activists.

The denial of the right to decision-making and participation in sexual activity for people with disabilities has led to many, especially women and girls, being deprived of other fundamental rights including the right to marry and start a family, the right of access to contraception and information about sex and reproduction. These denials of liberty and autonomy place people with disabilities at further risk of exploitation and violence. The good practice recommendations above attempt to strike the balance between ensuring

⁷⁹ Andrea Hollomotz, "Beyond 'Vulnerability': An Ecological Model Approach To Conceptualizing Risk Of Sexual Violence Against People With Learning Difficulties" (2009) 39(1) *British Journal of Social Work*, 99-100.

⁸⁰ *Ibid*, 105.

⁸¹ *Ibid*, 106-7.

⁸² *Ibid*, 104.

sexual offences laws provide for the right to be free from violence while respecting the right to sexual agency on an equal basis.⁸³

⁸³ Arstein-Kerslake & Eilionoir Flynn, above n 2, 4.

GROUP 3 PROJECT

Psychosocial Disability and the NDIS: Are CRPD Rights Being Realised?

Partner Organisation

Victorian Legal Aid

Group Members

Hannah Bullock

Maddison McCarthy

Bernadette Toohey



PSYCHOSOCIAL DISABILITY AND THE NDIS: ARE CRPD RIGHTS BEING REALISED?

Abstract

This report explores the impact of government policy on access to the NDIS for people with an episodic or fluctuating psychosocial disability. It asks whether CRPD rights are being realised for this subgroup of the population. It provides recommendations as to how their rights can be better accommodated within the legislative and policy design of the NDIS. The central concern of this report is whether government policy issued by the NDIA conflicts with the statutory intention of the legislative framework underpinning the NDIS. It looks critically at the impact informal policies are having on the ability of the NDIS to realise CRPD rights, using arts 1, 5, 19 and 28 for in-depth analysis. The report concludes by offering a range of recommendations directed towards greater inclusion of people with psychosocial disability and episodic or fluctuating impairments in the NDIS.

I INTRODUCTION

A The NDIS and the CRPD

This report has been prepared for Victoria Legal Aid's ('VLA') civil justice program. It aims to assist VLA advocate for people with psychosocial disability who are seeking to gain access to the National Disability Insurance Scheme ('NDIS').

The NDIS is the most important disability services reform in Australia in a generation.¹ It aims to protect Australians in the event of significant disability.² As a model of social insurance, it uses a person-centred approach to enable people with disability to access support commensurate to their needs.³ This individualised approach means people with the most unmet needs receive the most support.⁴

The NDIS aims to give effect to the rights and obligations in the United Nations Convention on the Rights of Persons with Disabilities ('CRPD').⁵ It was introduced to enable people with all levels of disability to fully participate in employment, education

¹ Deborah Warr et al, 'Choice, control and the NDIS' (Report, The University of Melbourne, May 2017) 11.

² Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs' (Report Overview, October 2017) 5.

³ Ibid 3; National Disability Insurance Agency, *Operational Guidelines* <<https://www.ndis.gov.au/Operational-Guidelines>>.

⁴ National Disability Insurance Agency, above n 3.

⁵ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a). See also *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

and community activities.⁶ Under the guiding framework of the CRPD, the NDIS aims to achieve the full and effective social inclusion of people with disability.⁷

B Report Scope and Contention

The *National Disability Insurance Scheme Act 2013* (Cth) ('*NDIS Act*') contains a set of eligibility criteria that determine whether a person is eligible for individualised support.⁸ The National Disability Insurance Agency ('NDIA') apply the eligibility criteria in order to assess a person's need for support.⁹ This report focuses on one aspect of the eligibility criteria, namely that a person must experience 'substantially reduced functional capacity' as a result of their impairment.¹⁰ Paragraph 8.3.1 of the NDIS Operational Guidelines ('Paragraph 8.3.1') guides decision-makers in determining whether this threshold is satisfied.¹¹

This report is concerned with the effect Paragraph 8.3.1 may have on the eligibility threshold in the *NDIS Act*. It suggests that the operation of Paragraph 8.3.1 is an access barrier for people with episodic or fluctuating disability, particularly psychosocial disability. Paragraph 8.3.1 invites decision-makers to pay undue attention to an applicant's level of functional capacity in periods in between acute episodes. The report argues that the effect of this policy is incompatible with the NDIS legislative scheme against the background of the CRPD human rights framework. Ultimately, the report aims to provide research and analysis around how CRPD rights can be used to argue for improved access to the NDIS for people with psychosocial disability.

C Research Questions

This report will consider three key questions:

- Is Paragraph 8.3.1 consistent with the purpose of the *NDIS Act*?
- Is Paragraph 8.3.1 consistent with the CRPD?
- How, if at all, can Paragraph 8.3.1 be interpreted to achieve consistency with the CRPD?

D Report Overview

- Part II outlines the current domestic legislative and policy framework. It looks specifically at the potential impact of Paragraph 8.3.1 on access to the NDIS for persons with episodic or fluctuating impairments.

⁶ National Disability Insurance Agency, *About the NDIS* <<https://www.ndis.gov.au/about-us/what-ndis.html>>.

⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 3.

⁸ *Ibid* ss 24–5.

⁹ *Ibid* ss 20, 202(1).

¹⁰ *Ibid* s 24(1)(c).

¹¹ National Disability Insurance Agency, above n 3.

- Part III examines the compatibility of Paragraph 8.3.1 with the purpose of the *NDIS Act*. It explores the feasibility of arguments that Paragraph 8.3.1 is inconsistent with the statutory intention.
- Part IV examines the compatibility of Paragraph 8.3.1 with the *NDIS Act* through the framework of CRPD rights. It contends that the current interpretation is inconsistent with CRPD rights.
- Part V presents the key findings of the report. It offers recommendations as to how CRPD compliance may be achieved and suggests areas for further research.

II ACCESSING THE NDIS

LEGISLATIVE FRAMEWORK

A NDIS Eligibility and Substantially Reduced Functional Capacity

All Australians with disability can access general support through the NDIS, to help link or refer them to government and community services.¹² The NDIS also offers individualised support plans.¹³ Individual support plans provide mainstream, informal and funded support to people with disability.¹⁴

To be eligible for individualised support, a NDIS applicant must meet the age, residence and disability criteria.¹⁵ The focus of this report is the disability access criterion.¹⁶ Specifically, the element requiring a person to have ‘substantially reduced functional capacity’ in at least one of the following areas: communication, social interaction, learning, mobility, self-care, or self-management.¹⁷

There is widespread concern about the lack of clarity in the eligibility criteria as they relate to people with psychosocial disability.¹⁸ The *NDIS Act* does not define

¹² National Disability Insurance Agency, *Mental Health Access Snapshot Series: Snapshot 1 — General Information About How the NDIS Can Support Your Mental Health*, 1 <<https://www.ndis.gov.au/medias/documents/mha-general-information/Mental-Health-Access-General-Information.pdf>>.

¹³ *Ibid* 2.

¹⁴ *Ibid*.

¹⁵ *National Disability Insurance Scheme Act 2013* (Cth) ss 21–5.

¹⁶ *Ibid* s 24.

¹⁷ *Ibid* s 24(1)(c); *Kilgallin and National Disability Insurance Agency (General)* [2017] AATA 186 (19 January 2017) [9].

¹⁸ Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of Services Under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition* (2017) 9; Mental Health Australia, *Position Statement (Draft): Key Actions to Ensure Continued Access to Community Support for People Affected by Severe Mental Illness During NDIS Transition and Beyond* <https://mhaustralia.org/sites/default/files/docs/draft_position_paper_on_community_support_during_ndis_transition_and_beyond.pdf>.

‘substantially reduced functional capacity’, leaving the phrase abstract and unclear.¹⁹ However, two interpretive tools attempt to promote consistent application of the term.²⁰ These tools are frequently referred to by the Administrative Appeals Tribunal (‘AAT’) when reviewing NDIS access decisions on the merits.²¹

B NDIS Participant Rules

The *NDIS Act* permits rules to be made prescribing circumstances in which, or criteria to be applied in assessing whether, impairment results in ‘substantially reduced functional capacity’ or ‘psychosocial functioning’.²² These rules are legislative instruments.²³ Rule 5.8 of the *NDIS (Becoming a Participant) Rules 2016* (Cth) (‘*Participant Rules*’) helps to guide application of the phrase ‘substantially reduced functional capacity’ by broadly indicating what impaired functioning may look like.²⁴ However, r 5.8 is not an exhaustive description of ‘substantially reduced functional capacity’.²⁵

C NDIS Operational Guidelines

The Chief Executive Officer (‘CEO’) of the NDIA has issued Operational Guidelines setting out some of the NDIA’s operational information.²⁶ These are government policy and do not have the force of law.²⁷ However, NDIA staff, acting as delegates of the CEO, are compelled to follow the Operational Guidelines when making access decisions.²⁸ In addition to being used by NDIA delegates, they are applied by the AAT and the Federal Court when reviewing NDIS access decisions, unless there is good reason not to do so.²⁹

¹⁹ Office of the Public Advocate (Victoria), Submission No 7 to Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of Services Under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition*, February 2017, 5.

²⁰ *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth) r 5.8; National Disability Insurance Agency, above n 3.

²¹ See, eg, *Allen and National Disability Insurance Agency* [2018] AATA 3851 (15 October 2018) [25]–[26]; *Sheldon and National Disability Insurance Agency* [2018] AATA 2560 (30 July 2018) [58]–[59]; *Pomeroy and National Disability Insurance Agency* [2018] AATA 387 (6 March 2018) [42]–[43]; *Holmes and National Disability Insurance Agency* [2017] AATA 2750 (21 December 2017) [64], [73].

²² *National Disability Insurance Scheme Act 2013* (Cth) ss 24(1)(c), 27(b).

²³ Explanatory Memorandum, National Disability Insurance Scheme Bill 2012 (Cth) 3.

²⁴ *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth) r 5.8.

²⁵ *Mulligan v National Disability Insurance Agency* (2015) 233 FCR 201, 219 [77].

²⁶ National Disability Insurance Agency, above n 3; Australian National Audit Office, ‘Decision-Making Controls for Sustainability — National Disability Insurance Scheme Access’ (Report No 13, 2017) 25.

²⁷ See generally Garry Downes, ‘Decision-Making in the Public Sector: Getting it Right’ (Paper presented at The Law Society of New South Wales Government Solicitors’ — CLE Conference, NSW Parliament House, 15 September 2009) 8.

<<http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/DecisionMakingPublicSectorSeptember2009.pdf>>.

²⁸ Australian National Audit Office, above n 26, 25; *National Disability Insurance Scheme Act 2013* (Cth) s 202(3).

²⁹ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

Paragraph 8.3.1 is an expansion upon r 5.8 of the *Participant Rules*.³⁰ The focus of this report is the sentence in Paragraph 8.3.1 that states:

*... When considering whether a fluctuating or episodic impairment results in substantially reduced functional capacity to undertake relevant activities, the NDIA will consider the impact on the person's ability to function in the periods between acute episodes.*³¹

PSYCHOSOCIAL DISABILITY AND THE NDIS

A Psychosocial Disability

Psychosocial disability occurs when mental illness and societal barriers interact in a way that impedes a person's full and effective participation in society on an equal basis with others.³² Psychosocial disability is an internationally recognised form of disability.³³ It is encapsulated in the CRPD definition of disability.³⁴ The definition of psychosocial disability adopted by the NDIA is a person's experience of 'participation restrictions related to mental health issues such as the loss of or reduced abilities to function, think clearly, experience full physical health and manage the social and emotional aspects of their lives'.³⁵

B Interaction with the NDIS

There is limited reliable data on how many people with psychosocial disability are eligible for the NDIS.³⁶ However the below statistics suggest that people with primary psychosocial disability have lower approval rates and lower participation rates in the NDIS than other broad categories of disability.³⁷

³⁰ National Disability Insurance Agency, above n 3; *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth) r 5.8.

³¹ National Disability Insurance Agency, above n 3.

³² CRPD art 1; Mental Health Australia, *Getting the NDIS Right for People with Psychosocial Disability* (12 June 2014) <<https://mhaustralia.org/general/getting-ndis-right-people-psychosocial-disability>>; National Disability Insurance Agency, *Glossary: Key Terms for Understanding the NDIS and Psychosocial Disability* (October 2018), 3 <<https://www.ndis.gov.au/medias/documents/mental-health-glossary/Glossary-psychosocial-disability.pdf>>.

³³ CRPD art 1; Mental Health Australia, above n 32; National Disability Insurance Agency, *Glossary: Key Terms for Understanding the NDIS and Psychosocial Disability*, above n 32, 3.

³⁴ CRPD art 1.

³⁵ National Disability Insurance Agency, *Glossary: Key Terms for Understanding the NDIS and Psychosocial Disability*, above n 32, 3.

³⁶ Productivity Commission, above n 2, 24.

³⁷ Joint Standing Committee on the National Disability Insurance Scheme, above n 18, 15.

KEY STATISTICS

- *The NDIA expects 64 000 people with primary psychosocial disability to be eligible for individual support plans at full scheme.³⁸ This is 13.9% of the total number of NDIS participants expected at full scheme.³⁹*
- *Around 59.9% of Australians with psychosocial disability reported profound or severe limitations on their ability to perform core activities.⁴⁰*
- *Since the NDIS was introduced, 81.4% of people with psychosocial disability who requested access were approved. This can be compared to a 97.5% approval rate for people with an intellectual disability and 98.8% for people with autism.⁴¹*
- *People with psychosocial disability make up at least 24% of people with disability,⁴² however only 7.3% of NDIS participants list psychosocial disability as their primary disability.⁴³*

People with psychosocial disability experience some of the highest levels of marginalisation and social isolation in the community.⁴⁴ Their complex needs create additional vulnerability and barriers to inclusion in support schemes.⁴⁵ This exclusion often intersects with poverty, discrimination, unemployment and overall poor health.⁴⁶ However, most community organisations and support services do not meet the needs of people with psychosocial disability.⁴⁷ Further, there is concern that mental health services are being cut prematurely in order to fund the NDIS.⁴⁸ While there is widespread stakeholder support for inclusion of psychosocial disability in the NDIS,⁴⁹ its apparent inaccessibility to this group is concerning if there are limited supports available to them outside the NDIS.

³⁸ Productivity Commission, above n 2, 31.

³⁹ National Disability Insurance Agency, *Key Data on Psychosocial Disability and the NDIS* (31 December 2017) <<https://www.ndis.gov.au/medias/documents/key-data-nmhsrg-dec17/Key-Data-on-NDIS-and-Psychosocial-Disability-dec2017.pdf>>.

⁴⁰ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia* (31 May 2015) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4430.0Main%20Features902015?opendocument&tabname=Summary&prodno=4430.0&issue=2015&num=&view=>>>.

⁴¹ Joint Standing Committee on the National Disability Insurance Scheme, above n 18, 15.

⁴² Australian Bureau of Statistics, above n 40.

⁴³ National Disability Insurance Agency, above n 39.

⁴⁴ National Mental Health Consumer and Carer Forum 'Unravelling Psychosocial Disability, A Position Statement by the National Mental Health Consumer and Carer Forum on Psychosocial Disability Associated with Mental Health Conditions' (Position Statement, 2011) 45.

⁴⁵ People with Disability Australia, Submission to the Legislative Council, Parliament of New South Wales, *Inquiry into the Implementation of the National Disability Insurance Scheme*, 2018, 16.

⁴⁶ National Mental Health Consumer and Carer Forum, above n 44, 17.

⁴⁷ See Disabled People's Organisations Australia, Submission to the Productivity Commission, *Issues Paper: National Disability Insurance Scheme (NDIS) Costs*, March 2017; National Mental Health Consumer and Carer Forum, above n 44, 16.

⁴⁸ See Disabled People's Organisations Australia, above n 47.

⁴⁹ Productivity Commission, above n 2, 23.

C The Effect of Paragraph 8.3.1

In conjunction with r 5.8, Paragraph 8.3.1 aims to provide clarity to the meaning of substantially reduced functional capacity under the *NDIS Act*.⁵⁰ Paragraph 8.3.1 provides that when determining whether a fluctuating or episodic condition results in ‘substantially reduced functional capacity’, regard is to be had to the periods between acute episodes.⁵¹ Paragraph 8.3.1 has been quoted in full in four AAT applications.⁵² In all four, this occurred without elaboration on how it was factored into the decision-making or outcome.⁵³ Only one of these cases involved psychosocial disability and, as the applicant’s impairment did not meet the permanency criterion, there was no need to consider ‘substantially reduced functional capacity’.⁵⁴ Further, at the time of writing, a very limited number of NDIS matters had reached the Federal Court.⁵⁵ While two of these Federal Court cases mention the NDIS Operational Guidelines,⁵⁶ there are no Federal Court Cases on Paragraph 8.3.1 specifically. Therefore, while it can be deduced that the NDIS Operational Guidelines are relevant to decision-making, their influence, and the impact of Paragraph 8.3.1 in particular, is unclear.

While Paragraph 8.3.1 applies to every NDIS applicant with an episodic or fluctuating condition, it may disproportionately affect those with psychosocial disability. Psychosocial disability almost always involves some level of fluctuation during which levels of functional capacity may differ.⁵⁷ Paragraph 8.3.1 seems to operate in a way that limits access for people with psychosocial disability because of the episodic nature of their condition, even when they may demonstrate ‘substantially reduced functional capacity’ during an acute episode. People with short or medium-term conditions, those

⁵⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(c).

⁵¹ National Disability Insurance Agency, above n 3.

⁵² *Allen and National Disability Insurance Agency* [2018] AATA 3851 (15 October 2018) [26]; *Sheldon and National Disability Insurance Agency* [2018] AATA 2560 (30 July 2018) [59]; *Pomeroy and National Disability Insurance Agency* [2018] AATA 387 (6 March 2018) [43]; *Holmes and National Disability Insurance Agency* [2017] AATA 2750 (21 December 2017) [73].

⁵³ *Allen and National Disability Insurance Agency* [2018] AATA 3851 (15 October 2018); *Sheldon and National Disability Insurance Agency* [2018] AATA 2560 (30 July 2018); *Pomeroy and National Disability Insurance Agency* [2018] AATA 387 (6 March 2018); *Holmes and National Disability Insurance Agency* [2017] AATA 2750 (21 December 2017).

⁵⁴ *Holmes and National Disability Insurance Agency* [2017] AATA 2750 (21 December 2017) 13 [59]; *National Disability Insurance Scheme Act 2013* (Cth) ss 24(1)(b)–(c).

⁵⁵ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308; *National Disability Insurance Scheme v McGarrigle* [2017] FCAFC 132; *SSBV (by his litigation guardian) v National Disability Insurance Agency* [2018] FCA 1021; *Mulligan v National Disability Insurance Agency* (2015) 146 ALD 418.

⁵⁶ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308; *Mulligan v National Disability Insurance Agency* (2015) 146 ALD 418.

⁵⁷ Paul Deany, ‘Psychosocial Disability: One of the Most Misunderstood Areas of Disability’ (Speech delivered at the 9th session of the Conference of State Parties to the Convention on the Rights of Persons with Disabilities, June 15 2016).

with highly episodic conditions and those with undiagnosed yet severe conditions will likely be most affected by the eligibility criteria, and by extension, Paragraph 8.3.1.⁵⁸

This is demonstrated in the AAT matter of Kilgallin and the Disability Insurance Agency. Mr Kilgallin was diagnosed with obsessive compulsive disorder, major depressive disorder, autistic spectrum disorder and mixed personality disorder, all of which were classed as 'fluctuating'.⁵⁹ As a result of his conditions Mr Kilgallin experienced physical inhibitions such as being unable to go for walks, tend his garden, to drive a car or to engage in and maintain social relationships even when online.⁶⁰ The NDIA and the AAT both found Mr Kilgallin ineligible for support under the NDIS because his reduced functional capacity was not substantial. In their reasons, the AAT referred to Paragraph 8.3 of the Operational Guidelines. Mr Kilgallin provided strong personal and medical evidence that he experienced substantially reduced functional capacity in the area of 'social interaction'.⁶¹ The AAT agreed that Mr Kilgallin had substantially reduced functioning at times.⁶² They found at other times however that his impairments only had a 'limited effect' on his ability to socially interact.⁶³ Even though there were periods in which Mr Kilgallin required assistance due to reduced functional capacity, these periods were 'occasional' and therefore did not entitle him access to any support available under the NDIS.⁶⁴ This case illustrates that people who demonstrate substantially reduced functional capacity, but not on a day-to-day basis, are refused access.

This demonstrates how Paragraph 8.3.1 seems to invite decision-makers to consider the impact on a person's functional capacity during an acute episode as distinct and separate from the impact outside of acute periods. The NDIA has asserted that 'an episodic condition is not a barrier to accessing the NDIS'.⁶⁵ However the apparent binary interpretation is supported by NDIA policy documents beyond the Operational Guidelines. For example, a mental health fact sheet issued by the NDIA suggests to potential applicants that the NDIA focus on 'everyday functioning', requiring an applicant to have substantially reduced functioning in one area on a 'day-to-day' basis in order to qualify for the NDIS, despite their episodic needs.⁶⁶ This genre of document

⁵⁸Australian Red Cross, Submission No 15 to the Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of Services Under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition*, February 2017, 5.

⁵⁹ *Kilgallin and National Disability Insurance Agency (General)* [2017] AATA 186 (19 January 2017) [3].

⁶⁰ *Ibid* [12].

⁶¹ *Ibid* [20].

⁶² *Ibid* [21].

⁶³ *Ibid* [12].

⁶⁴ *Ibid* [25].

⁶⁵ National Disability Insurance Agency, above n 12, 4.

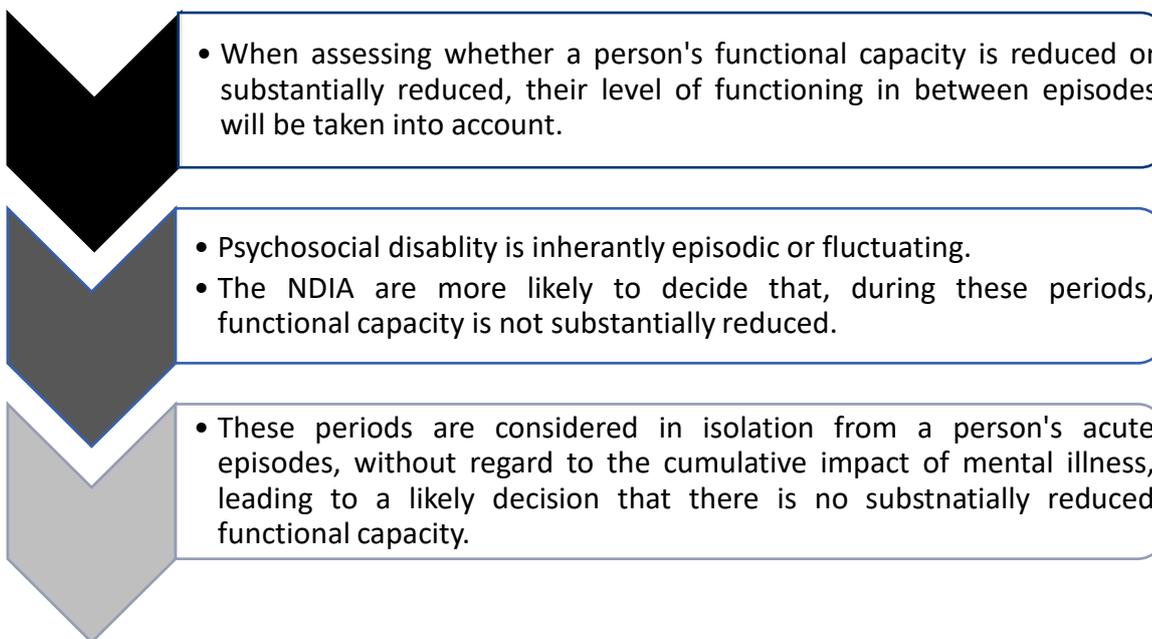
⁶⁶ National Disability Insurance Agency, *Mental Health Access Snapshot Series: Snapshot 4 — Functional Capacity and Mental Health Issues*, 3 <<https://www.everythingcarers.org.au/media/2289/mental-health-access-snapshot-4-functional-capacity.pdf>>.

is considered to be NDIA policy and the AAT will refer to them when it considers they are relevant.⁶⁷

The effect of Paragraph 8.3.1 is adverse because it denies recognition of the impact an episodic or fluctuating condition can have on a person's life even between acute periods. It provides no acknowledgment of the unpredictable nature of episodic an psychosocial disability, and fails to recognise that people with psychosocial disability may experience a degree of functional impairment even when their symptoms are not considered to be at a clinical level.⁶⁸ The operation of the guideline also fails to acknowledge that a person's episodes or periods of substantially reduced functioning may have a cumulative impact on the person's life an ability to participate as a whole in social and economic ways.⁶⁹

KEY FINDING: The Effect of Paragraph 8.3.1

To be granted access to the NDIS, applications must have 'substantially reduced functional capacity'. Meeting the eligibility criteria for people with psychosocial disability:



They are more likely to be refused access to the NDIS.

⁶⁷ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, 134 [52].

⁶⁸ Independent Advisory Council to the National Disability Insurance Agency, 'Implementing the NDIS for People with Disabilities Related to Mental Health Issues' (Issues Paper, December 2014) <<https://static1.squarespace.com/static/5898f042a5790ab2e0e2056c/t/5a94acd5c83025e189a0624b/1519693026327/Implementing+the+NDIS+for+people+with+disabilities+related+to+mental+health.pdf>>.

⁶⁹ Mind Australia Limited, Submission No 118 to Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of Services Under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition*, 10 March 2017, 7.

D Comparison with Disability Support Pension Participation Rates

The NDIS is designed to work alongside the Disability Support Pension (DSP).⁷⁰ People can apply for and receive support under both schemes at once.⁷¹ While the NDIS and DSP both determine eligibility using an assessment of functional capacity,⁷² there have been several cases in which an applicant is found ineligible for the NDIS despite receiving the DSP.⁷³ Further, people with psychosocial disability participate in the DSP at a rate of 31%, compared to 7.3% in the NDIS.⁷⁴ For example, in *Alicier and Secretary and Department of Social Services*,⁷⁵ the AAT acknowledged the requirement to consider the episodic nature of a mental health condition when assessing functional impairment.⁷⁶ It stated that evidence the condition may have been episodic did not alter their conclusion concerning the severity of functional impairment.⁷⁷

There are interesting differences in the manner the NDIA and Department of Social Services' ('DSS') materials suggest the episodic and fluctuating nature of a mental health condition should be considered. The DSP requires the decision-maker to consider the applicant's 'overall functional ability', taking into account the 'severity, duration and frequency' of episodes.⁷⁸ While the NDIS guide for mental health professionals suggests the NDIA take into account the 'severity, duration and frequency' of fluctuations, the NDIS Operational Guidelines themselves do specifically require this.⁷⁹ This shows some understanding of the multifaceted, complex nature of episodic impairments.⁸⁰ It also

⁷⁰ National Disability Insurance Agency, *Your Questions Answered — Getting NDIS Ready and Accessing the NDIS* <<https://www.ndis.gov.au/qanda/getting-ready-accessing-ndis>>.

⁷¹ *Ibid.*

⁷² Department of Social Services, *Guidelines to Table 5 — Mental Health Function* (1 July 2015) <<http://guides.dss.gov.au/guide-social-security-law/3/6/3/50>>; *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(c); National Disability Insurance Agency, above n 3; *Mulligan v National Disability Insurance Agency* (2015) 146 ALD 418, 213 [55].

⁷³ See, eg, *Sheldon and National Disability Insurance Agency* [2018] AATA 2560 (30 July 2018) [19]; *Pomeroy and National Disability Insurance Agency* [2018] AATA 387 (6 March 2018) [29]; *Holmes and National Disability Insurance Agency* [2017] AATA 2750 (21 December 2017) [41].

⁷⁴ Mental Health Australia, 'The Facts About Mental Illness and the Disability Support Pension' (Media Release, 22 May 2014) <<https://mhaustralia.org/media-releases/facts-about-mental-illness-and-disability-support-pension>>; National Disability Insurance Agency, above n 39.

⁷⁵ [2017] AATA 538.

⁷⁶ *Alicier and Secretary v Department of Social Services* [2017] AATA 538.

⁷⁷ *Ibid.*

⁷⁸ *Social Security (Tables for the Assessment of Work-Related Impairment for Disability Support Pension) Determination 2011* Act (Cth) s 11(4); Department of Social Services, *Guidelines to Table 5 — Mental Health Function* (1 July 2015) <<http://guides.dss.gov.au/guide-social-security-law/3/6/3/50>> (emphasis added).

⁷⁹ National Disability Insurance Agency, *Accessing the NDIS: A Guide for Mental Health Professionals* (August 2017) <<https://www.ndis.gov.au/medias/documents/Guide-mental-health-professionals/Guide-for-Mental-Health-Professionals.pdf>>; National Disability Insurance Agency, above n 3.

⁸⁰ Ashok Malla, Ridha Joober and Amparo Garcia, "'Mental Illness is Like Any Other Medical Illness": A Critical Examination of the Statement and its Impact on Patient Care and Society' 40(3) *Journal of Psychiatry and Neuroscience* (2015) 147, 147.

seems to appreciate that psychosocial impairment can last beyond the disappearance of clinical symptoms of mental illness.⁸¹ Further, both the DSP guidelines and the introduction to the DSP assessment table for mental health explicitly acknowledge that eligibility requirements may disadvantage people with mental health impairments.⁸²

III COMPATIBILITY OF PARAGRAPH 8.3.1 WITH THE NDIS ACT

A The Role of Policy in the NDIS Legislative Scheme

This section explores whether Paragraph 8.3.1 is consistent with the NDIS legislative scheme and, therefore, valid policy. Paragraph 8.3.1 is not itself part of the legislative scheme, as it is non-legislative policy developed by the CEO of the NDIA. Informal policy is secondary in status to a legislative provision and must be consistent with it.⁸³ Paragraph 8.3.1 cannot restrict or expand the legislative power given to NDIA delegates under s 24.⁸⁴ It can only describe the manner in which they should exercise their discretionary powers.⁸⁵

There are at least three recognised grounds for choosing not to apply a policy or to give it slight or no weight:⁸⁶

- The requirements of the policy are not in line with the law;
- Individual justice requires departure from the policy; and
- The policy is obsolete or outdated.

The aim of this section is to explore whether there are feasible arguments that either of the first two above grounds are satisfied here. That is, whether:

- Paragraph 8.3.1 is inconsistent with the *NDIS Act* and therefore should not be applied in any case.
- Paragraph 8.3.1 should not be applied because it would work an injustice in an individual case.

⁸¹ Angela Nicholas and Lennart Reifels, *Mental Health and the NDIS: A Literature Review* (August 2014) Mind Australia, 37 <<https://www.ndis.gov.au/html/sites/default/files/files/Mental-health-and-the-NDIS-Literature-Review.pdf>>.

⁸² Department of Social Services, *Guidelines to the Rules for Applying the Impairment Tables* (1 July 2015) <<http://guides.dss.gov.au/guide-social-security-law/3/6/3/05>>; *Social Security (Tables for the Assessment of Work-Related Impairment for Disability Support Pension) Determination 2011* Act (Cth) table 5.

⁸³ See *Minister for Industry and Commerce v East West Trading Co Pty Ltd* (1986) 64 ALR 466, 470; *Drake and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634; *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158.

⁸⁴ See Garry Downes, 'Decision-Making in the Public Sector: Getting it Right' (Paper presented at The Law Society of New South Wales Government Solicitors' — CLE Conference, NSW Parliament House, 15 September 2009) 9 <<http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/DecisionMakingPublicSectorSeptember2009.pdf>>.

⁸⁵ *Ibid.*

⁸⁶ *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158.

B AAT Review of NDIA Decisions on the Merits

It is first useful to provide background on the role of the AAT in reviewing NDIS access decisions. Section 103 of the *NDIS Act* gives the AAT jurisdiction to review certain decisions made by the NDIA.⁸⁷ A decision by the NDIA to deny an applicant's eligibility on the basis they do not experience 'substantially reduced functional capacity' is a reviewable decision.⁸⁸ The AAT must decide whether the correct or preferable decision was reached on the merits of the individual case.⁸⁹ This means reviewing the 'actual decision, not the reasons for it', without any need to find error in the original decision.⁹⁰ The AAT may affirm, vary or set aside a decision under review.⁹¹

In reviewing eligibility decisions under the *NDIS Act*, the AAT is essentially answering four questions:⁹²

- Did the decision-maker have the power under s 24 of the *NDIS Act* to reach the outcome?
- Is any policy governing or affecting the exercise of the decision-maker's power consistent with the *NDIS Act*?
- Is there any reason why the AAT should not apply the NDIA's policy (i) generally or (ii) in this particular case?
- On the facts and with regard to any relevant policy considerations, is the decision correct and preferable?

In order to make the correct or preferable decision on whether a person has 'substantially reduced functional capacity', the AAT will apply the relevant legislation and rules.⁹³ The AAT will also consider any policy used by the original decision-maker exercising a discretionary power.⁹⁴ This is because in reviewing the decision, the AAT must put themselves in the shoes of the original decision-maker.⁹⁵ Therefore, the AAT will consider Paragraph 8.3.1 where relevant because NDIA delegates use it to assist eligibility decision-making.⁹⁶

⁸⁷ *National Disability Insurance Scheme Act 2013* (Cth) ss 99–100, 103.

⁸⁸ *Ibid* s 99(1).

⁸⁹ Administrative Appeals Tribunal, *What We Do* (18 July 2018) <<http://www.aat.gov.au/about-the-aat/what-we-do>>.

⁹⁰ *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 327 [141]; Kerrie O'Callaghan and Michelle Howard, 'Promoting Administrative Justice: The Correct and Preferable Decision and the Role of Government Policy in the Determination' (2013) 32(1) *University of Queensland Law Journal* 169, 175.

⁹¹ *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).

⁹² *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161–2.

⁹³ See *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(c); *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth) r 5.8.

⁹⁴ See *National Disability Insurance Scheme Act 2013* (Cth) s 24; *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth); National Disability Insurance Agency, above n 3.

⁹⁵ *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 299 [40], 306 [66], 324–5 [134].

⁹⁶ See, eg, *Allen and National Disability Insurance Agency* [2018] AATA 3851 (15 October 2018) [26]; *Sheldon and National Disability Insurance Agency* [2018] AATA 2560 (30 July 2018) [59]; *Pomeroy and National Disability Insurance Agency* [2018] AATA 387 (6 March 2018) [43]; *Holmes and National Disability Insurance Agency* [2017] AATA 2750 (21 December 2017) [73]. See also National Disability Insurance Agency, above n 3.

Following administrative policy promotes consistency and integrity in decision-making by reducing discretion.⁹⁷ Administrative policies, such as Paragraph 8.3.1 are typically developed to assist in the administration of legislation, especially where an agency is required to make a high-volume of discretionary decisions.⁹⁸ However, there is no obligation for the AAT to act in accordance with Paragraph 8.3.1,⁹⁹ and the AAT will decline to apply policy if it is unlawful or there is a good reason to do so.¹⁰⁰ Further, it would be an improper exercise of power for the AAT to make an eligibility decision in accordance with Paragraph 8.3.1 without taking into account the merits of the individual case.¹⁰¹

C Inconsistency

Interpreting 'Substantially Reduced Functional Capacity'

The phrase 'substantially reduced functional capacity' is not defined in the *NDIS Act*. However, it has been at the centre of one Federal Court case.¹⁰² In *Mulligan v National Disability Insurance Agency*,¹⁰³ Mortimer J briefly noted what the legislative phrase requires:

- Section 24(1)(c) is based on a 'functional, practical assessment of what a person can and cannot do'.¹⁰⁴
- The *NDIS Act* does not place arbitrary limits on access to the NDIS.¹⁰⁵
- In determining if a person has 'substantially reduced functional capacity', a decision-maker is not looking to make a qualitative judgement that a person's impairment is serious or more serious than someone else's.¹⁰⁶
- The decision-maker also does not need to consider how common the person's reduction in functional capacity is or whether a number of other people have the same type of reduced functional capacity.¹⁰⁷
- While a person who satisfies any of ss (a), (b) or (c) of r 5.8 of the *Participant Rules* will be deemed to have 'substantially reduced functional capacity', r 5.8 is not necessarily exhaustive of the ways a person can meet the statutory requirement. Thus, beyond looking to whether someone fits the requirements of r 5.8, the statutory task is to ask whether a person has 'substantially reduced functional capacity' in any of the six listed areas.¹⁰⁸

⁹⁷ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

⁹⁸ Callaghan and Howard, above n 90, 182.

⁹⁹ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

¹⁰⁰ *Ibid.*

¹⁰¹ See *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 6(2)(f).

¹⁰² *Mulligan v National Disability Insurance Agency* (2015) 233 FCR 201, 208 [27].

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* 213 [56].

¹⁰⁵ *Ibid* 213 [56].

¹⁰⁶ *Ibid* 213 [56].

¹⁰⁷ *Ibid* 219 [75].

¹⁰⁸ *Ibid* 219 [77].

In arguing for a particular interpretation of 'substantially reduced functional capacity', the need to interpret it in the way that would best achieve the purpose or object of the *NDIS Act* should be kept in mind.¹⁰⁹ A purposive interpretation may not necessarily correspond with the literal or grammatical meaning of a legislative provision.¹¹⁰ However, every word of the legislative provision should be assumed to have work to do.¹¹¹ Thus, 'substantially reduced functional capacity' must be a higher threshold than merely 'reduced functional capacity'. Important considerations when engaging in purposive interpretation are context, the consequences of literal construction, the statute's purpose and the canons of construction.¹¹²

Objects and Principles

The *NDIS Act* is designed to require decision-makers to consider its express list of objects and principles when interpreting the NDIS eligibility criteria.¹¹³ The purposive approach to statutory interpretation means the AAT should prefer an interpretation that accords with the objects and principles of the *NDIS Act*.¹¹⁴

One object of the *NDIS Act* is to give effect in part to Australia's obligations under the CRPD.¹¹⁵ A treaty that is referred to in a statute may be considered in interpreting the legislation.¹¹⁶ Further, where legislation is enacted in contemplation of an international treaty, a construction of the statute that accords with Australia's treaty obligations should be preferred.¹¹⁷ Therefore, in interpreting the *NDIS Act*, the AAT should choose the interpretation that best furthers the object of giving effect to the CRPD.¹¹⁸ Policy guiding interpretation should not lead to an interpretation that detracts from the realisation of CRPD rights. Therefore, if Paragraph 8.3.1 encourages an interpretation of 'substantially reduced functional capacity' that is inconsistent with CRPD rights, it is inconsistent with the objects and principles underpinning the *NDIS Act*. Arguments that the operation of Paragraph 8.3.1 is inconsistent with CRPD rights merit in-depth consideration and will be the focus of Part IV of this report.

Other objects of the *NDIS Act* are centered on the social inclusion of people with disability. The common theme in s 3 of the *NDIS Act* is improving support for people with disability in a way that promotes autonomy and inclusion.¹¹⁹ For example, objects of the *NDIS Act* include:

¹⁰⁹ *Acts Interpretation Act 1901* (Cth) s 15AA.

¹¹⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78].

¹¹¹ *Commonwealth v Baume* (1905) 2 CLR 405, 414, 419; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 121.

¹¹² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78]; Justice Michael Barker, 'First You See It, Then You Don't: Harry Houdini and the Art of Interpreting Statutes' (Speech delivered at the Judicial Conference of Australia Colloquium, Fremantle, Western Australia, 5 October 2012) <www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-barker/barker-j-20121005>.

¹¹³ See, eg, *Allen and National Disability Insurance Agency* [2018] AATA 3851 (15 October 2018) 8–9 [14].

¹¹⁴ See *Acts Interpretation Act 1901* (Cth) s 15AA.

¹¹⁵ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a).

¹¹⁶ *Acts Interpretation Act 1901* (Cth) s 15AB(2)(d).

¹¹⁷ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

¹¹⁸ See Explanatory Memorandum (Statement of Compatibility with Human Rights), National Disability Insurance Scheme Bill 2012 (Cth) 4.

¹¹⁹ *Mulligan v National Disability Insurance Agency* (2015) 233 FCR 201, 205 [14].

- Supporting the independence and social and economic participation of people with disability;¹²⁰
- Providing people with disability with reasonable and necessary supports;¹²¹ and
- Enabling people with disability to exercise choice and control in their lives.¹²²

When giving effect to the objects of the *NDIS Act*, decision-makers must consider:¹²³

- The progressive implementation of the NDIS;
- The financial sustainability of the NDIS;
- The broad context of disability reform; and
- The interaction between the NDIS and other service providers.

The operation of Paragraph 8.3.1 could be argued to detract from the objects of the *NDIS Act*. It may have the effect of restricting people with episodic or fluctuating conditions from achieving independence and social participation. There is no inherent relation between an episodic condition and whether functional impairment can be said to be 'substantial'. Insofar as Paragraph 8.3.1 entices decision-makers to see fluctuating impairment as a holistic indicator that someone does not have 'substantially reduced functional capacity', they may take into account an irrelevant consideration. This is because Paragraph 8.3.1 could cause decision-makers to read a requirement of consistent impact into the statutory test that is not in fact necessary, and ignore the notion of cumulative impact, which can also be accommodated by the statutory language.

Balancing Consideration: Financial Sustainability

The Federal Court has not conclusively determined the role that considerations of the NDIS' financial sustainability should play in an individual case.¹²⁴ It appears from Paragraph 8.3.1 that the NDIS is choosing who has 'substantially reduced functional capacity' through the lens of financial sustainability. It could be argued that it is improper to use considerations of financial sustainability in this way, as the legislative test is purely focused on a person's level of functional capacity. This is because it may be arbitrarily restricting access for people with episodic conditions who merit NDIS support. Paragraph 8.3.1 is easily read as implicitly meaning the NDIA considers the functional capacity of a person with an episodic impairment as less substantially reduced than that of someone with consistent impairment. This would conflict with the need to refrain from comparing a person's functional capacity to someone else's when applying the legislative test.¹²⁵ Further, an objects clause cannot restrict the application of statutory tests.¹²⁶ There is nothing in s 24(1)(c) itself that refers to financial sustainability and therefore the test of 'substantially reduced functional capacity' should not be conditioned on the financial sustainability of the NDIS.

¹²⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(c).

¹²¹ *Ibid* s 3(1)(d).

¹²² *Ibid* s 3(1)(e).

¹²³ *Ibid* s 3(3).

¹²⁴ *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 308, 147 [117].

¹²⁵ *Mulligan v National Disability Insurance Agency* (2015) 233 FCR 201, 213 [56].

¹²⁶ *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 308, 138 [71].

Moreover, a case could also be made that Paragraph 8.3.1 will lead to outcomes that actually endanger the financial sustainability of the NDIS. The NDIS is premised on supports being available outside of it.¹²⁷ In order to fund the NDIS, mental health services are being subsumed under the NDIS.¹²⁸ At the same time, Paragraph 8.3.1 may restrict access for people with psychosocial disability. If they are ineligible for the NDIS and community supports for psychosocial disability outside of the NDIS no longer exist, the broader mental health system will be put under increased pressure.¹²⁹ Further, improving outcomes and financial sustainability are inherently intertwined. A scheme can only achieve better outcomes if it is financially sustainable. Costs need to be considered in the context of scheme outcomes.¹³⁰ This is because financial sustainability is defined by the NDIA as both success of the scheme and taxpayer willingness to pay for it.¹³¹ Therefore, if Paragraph 8.3.1 means people with episodic or fluctuating conditions are being subjected to a different threshold than people with consistent impairments, this could in fact negatively impact the NDIS' financial sustainability.

D Individual Justice

Where the application of Paragraph 8.3.1 would cause injustice in an individual case, the AAT would have a compelling reason not to follow it.¹³² The desirability of consistent treatment of people under the law needs to be balanced against the need for justice in an individual case.¹³³ Consistency should not come at the expense of justice.¹³⁴ This approach was confirmed in the context of the NDIS through the case of *McGarrigle v National Disability Insurance Agency*,¹³⁵ where the Federal Court inferred that the AAT had chosen not to follow a in light of the individual circumstances of the case under review, as required by *Drake v Minister for Immigration and Ethnic Affairs (No 2)*.¹³⁶

More broadly, in the context of the NDIS and disability, individual justice is particularly pertinent. The NDIS reflects a shift in social care towards a model of individualised funding.¹³⁷ People with disability are united only by their experience of living with disability.¹³⁸ They have their own needs, abilities, ambitions and priorities.¹³⁹ Further,

¹²⁷ Productivity Commission, above n 2, 6.

¹²⁸ Simon Tatz, *When Psychosocial Supports Go, Mental Health Needs Increase* (17 March 2017) Australian Medical Association <<https://ama.com.au/ausmed/when-psychosocial-supports-go-mental-health-needs-increase>>.

¹²⁹ *Ibid.*

¹³⁰ Productivity Commission, above n 2, 6.

¹³¹ Productivity Commission, above n 2, 7.

¹³² *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 636.

¹³³ *Ibid* 636.

¹³⁴ *Ibid* 645.

¹³⁵ (2017) 252 FCR.

¹³⁶ (1979) 2 ALD 634.

¹³⁷ Christiane Purcal, Karen R Fisher and Ariella Meltzer, 'Social Insurance for Individualised Disability Support: Implementing the Australian National Disability Insurance Scheme (NDIS)' in Menno Fenger, John Hudson and Catherine Needham (eds), *Social Policy Review 28: Analysis and Debate in Social Policy, 2016* (Policy Press, 2016) 173, 173.

¹³⁸ National People with Disabilities and Carer Council, 'Shut Out: The Experience of People with Disabilities and their Families in Australia' (Report, 2009) iv.

¹³⁹ *Ibid.*

the NDIS accords with the CRPD values of equity, self-determination and inclusion.¹⁴⁰ However, this brings to the fore an ongoing tension in administrative law between a duty to exercise unfettered discretion and the desirable goal of consistent decision-making.¹⁴¹

Additionally, the limitation to this line of argument is that there is no precedential force to a finding that Paragraph 8.3.1 should not apply to a particular individual. Such a finding does not render the policy unlawful or inoperable insofar as it is inconsistent. Therefore, people who have their applications rejected and do not apply for a review may not benefit. It would potentially be resource-intensive to continue in this way. However, a strong case is needed to convince the Federal Court to declare a policy unlawful. It appears the Federal Court will only make a declaration on whether or not a policy is lawful in a case in which it can be demonstrated that the policy materially affected or contributed to the AAT's decision on review.¹⁴² It therefore seems most profitable to bring a case arguing Paragraph 8.3.1 is inconsistent with the *NDIS Act* where it can be convincingly demonstrated that, but for Paragraph 8.3.1, a different conclusion would have been reached on whether s 24(1)(c) was satisfied.

IV COMPATIBILITY OF PARAGRAPH 8.3.1 WITH THE CRPD

KEY FINDINGS:

- *The legislative test of 'substantially reduced functional capacity' in s 24(1)(c) of the NDIS Act should be interpreted in a way that is consistent with the objects and principles of the NDIS Act;*
- *The meaning given to 'substantially reduced functional capacity' should not be conditioned on the financial sustainability of the NDIS;*
- *The current interpretation of Paragraph 8.3.1 could be argued to detract from the objects of the NDIS set out in s 3 of the NDIS Act.*
- *The strongest inconsistency argument is that Paragraph 8.3.1 operates in a way that is inconsistent with the object of implementing the CRPD. An interpretation of 'substantially reduced functional capacity' that is consistent with the CRPD should be preferred.*

This section analyses the compatibility of Paragraph 8.3.1 with the CRPD. As the *NDIS Act* was enacted in contemplation of the CRPD¹⁴³, decision makers should refer to it when interpreting the statute.¹⁴⁴ This is necessary in order to promote an interpretation that best accords with the CRPD.¹⁴⁵ AAT members and Federal Court justices often cite the CRPD but there has not been any substantive discussion about its relevance to the

¹⁴⁰ Susan Collings, Angela Dew and Leanne Dowse, 'Support Planning with People with Intellectual Disability and Complex Support Needs in the Australian National Disability Insurance Scheme' (2016) 41(3) *Journal of Intellectual and Developmental Disability* 272, 272.

¹⁴¹ Emily Johnson, 'Should 'Inconsistency' of Administrative Decisions Give Rise to Judicial Review?' (2013) 72 *Australian Institute of Administrative Law Forum* 50, 59–60.

¹⁴² *McGarrigle v National Disability Insurance Agency* 252 FCR 121, 148 [119].

¹⁴³ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a)

¹⁴⁴ *Acts Interpretation Act 1901* (Cth) s 15AB(2)(d); *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

¹⁴⁵ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

issues or individual outcomes.¹⁴⁶ If the operation of Paragraph 8.3.1 is incompatible with CRPD rights, these arguments can be used to argue that it is inconsistent with the objects of the *NDIS Act*.

A The CRPD

The CRPD is the first binding international human rights instrument relating specifically to people with disability.¹⁴⁷ Rather than enumerating new rights, it affirms the application of existing human rights within the International Bill of Rights to people with disability.¹⁴⁸ As Australia has signed and ratified the CRPD and its Optional Protocol,¹⁴⁹ it is bound by these instruments under international law.¹⁵⁰

The CRPD has been hailed as a ground-breaking shift away from the medical model of disability towards the social and human rights models.¹⁵¹ The medical model of disability sees impairment as the source of disability and regards a person's body as something needing to be 'fixed'.¹⁵² The social model, by contrast, emphasises that the source of disability is the socially constructed barriers people face as a result of their impairments.¹⁵³ While the CRPD is based on the social model of disability, it also brings

¹⁴⁶ Lisa Waddington and Anna Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of the Courts* (Oxford University Press May 2018); see also *Mulligan v National Disability Insurance Agency* (2015) 233 FCR 201; *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 121.

¹⁴⁷ Hasheem Mannam et al, 'Core Concepts of Human Rights and Inclusion of Vulnerable Groups in the United Nations Convention on the Rights of Persons with Disabilities' (2012) 6 *European Journal of Disability Research* 159, 160.

¹⁴⁸ Rosemary Kayess and Phillip French 'Out of Darkness into Light? Introducing the Convention on the Rights on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 4, 20; see *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd ses, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('UDHR'); *International Covenant on Civil and Political rights*, opened for signature 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

¹⁴⁹ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2518 UNTS 283 (entered into force 3 May 2008).

¹⁵⁰ CRPD; United Nations, *Status of Treaties: Convention on the Rights of Persons with Disabilities* (5 May 2018) United Nations Treaty Collection
<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec> archived at <<https://perma.cc/P769-U6Z4>>.

¹⁵¹ Kayess and French, above n 146, 20; see generally Mike Oliver, *Understanding Disability: From Theory to Practice* (Hampshire: MacMillan, 1996).

¹⁵² Theresia Degener, 'Disability in a Human Rights Context' 5(35) *Laws* 1, 2.

¹⁵³ Mike Oliver, 'The Social Model of Disability; Thirty Years On', 28(7) *Disability & Society*, 1025-26; Arlene Kanter. *The Development of Disability Rights Under International Law: From Charity to Human Rights*, Routledge (2015).

about a paradigm shift whereby people with disability are understood as inherent rights holders and subjects of human rights.¹⁵⁴

Paragraph 8.3.1 currently appears to be interpreted by the NDIA inconsistently with several CRPD articles.¹⁵⁵ This report focuses specifically on four articles through which strong incompatibility arguments can be made. However, as an innovation of the CRPD is the degree of interrelation between rights, this analysis should not be considered exhaustive of potential conflict between the CRPD and the inferred effect of Paragraph 8.3.1.¹⁵⁶

B Article 1 — Purpose

Article 1 outlines the purpose of the CRPD and defines people with disability.¹⁵⁷

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

People with mental impairments are included in the CRPD definition of people with disability, which encompasses people with psychosocial disability.¹⁵⁸ People with episodic or fluctuating psychosocial disability are merely a subset of this group, meaning they are entitled to the full and equal enjoyment of all human rights provided for by the CRPD.¹⁵⁹ Paragraph 8.3.1 appears to prevent people with psychosocial disability from enjoying rights on an equal basis with others. This is because it may screen out people with psychosocial disability who are clearly in need and objectively have reduced functional capacity.¹⁶⁰ In such cases, Paragraph 8.3.1 would restrict the realisation of human rights rather than promoting it.

Article 1 defines people with disability through the social model, referring to impairments ‘which in interaction with various barriers may hinder their full and

¹⁵⁴ Kayess and French, above n 148, 3; Degener, above n 152, 1; IDA: International Disability Alliance, Position Paper on the Convention on the Rights of Persons with Disabilities (CRPD) and Other Instruments, (report 25 April 2008).

¹⁵⁵ See, eg, CRPD arts 9, 25, 30.

¹⁵⁶ Kayess and French, above n 148, 33; Committee on the Rights of Persons with Disabilities, *General Comment No 6 (2018) on Equality and Non-Discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018), Para 9 (*‘General Comment No 6’*).

¹⁵⁷ CRPD art 1.

¹⁵⁸ CRPD art 1; see World Network of Users and Survivors of Psychiatry, Submission to the Office of the United Nations High Commissioner for Human Rights, *Thematic Study to Enhance Awareness and Understanding of the CRPD*, August 15 2008.

¹⁵⁹ Deany, above n 57; CRPD art 1.

¹⁶⁰ See generally Mental Health Australia, above n 18.

effective participation in society on an equal basis with others'.¹⁶¹ Paragraph 8.3.1 promotes an understanding of 'impact' that focuses on a person's diagnosis and level of impairment rather than their interaction with societal barriers.¹⁶² Not only is this effect inconsistent with the human rights model of disability,¹⁶³ it is inconsistent with the definition of disability and the purpose of the CRPD in art 1.¹⁶⁴

KEY FINDINGS:

The operation of Paragraph 8.3.1 is inconsistent with art 1 because:

- *It limits access to the rights and freedoms the NDIS facilitates by not providing equal access to all people with disability; and*
- *It perpetuates a medical model by focusing on level of impairment rather than the interaction of impairments with societal barriers.*

C Article 5 — Equality and Non-Discrimination

Equality and non-discrimination are core principles of international human rights law.¹⁶⁵ Freedom from discrimination is itself a civil and political right, meaning States are under an immediate, as opposed to progressive, obligation to realise it.¹⁶⁶ Article 2 defines discrimination as 'any distinction, exclusion or restriction on the basis of disability'.¹⁶⁷ Article 5 provides:¹⁶⁸

1. *States parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.*
2. *States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*
3. *In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.*
4. *Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.*

¹⁶¹ CRPD art 1.

¹⁶² See Children and Young People with Disability Australia, *Submission to the Committee on the Rights of Persons with Disabilities*, Draft General Comment on the Right of Persons with Disabilities to Enjoy Equality and Non-Discrimination (Article 5) November 2017, 7 [34]–[35].

¹⁶³ All Means All, 'Draft General Comment No.6 on Article 5 (Equality and Non-Discrimination) of the Convention on the Rights of Persons with Disabilities (CRPD)' (Submission to the *UN Committee on the Rights of People with Disabilities* 30 November 2017) 2.

¹⁶⁴ See CRPD art 1.

¹⁶⁵ *General Comment No 6*, UN Doc CRPD/C/GC/6 (26 April 2018) para 5.

¹⁶⁶ *General Comment No 6*, UN Doc CRPD/C/GC/6 (26 April 2018) paras 12–13.

¹⁶⁷ CRPD art 2.

¹⁶⁸ CRPD art 5.

In its sixth General Comment on the CRPD, the UN Committee on the Rights of Persons with Disabilities (the Committee) made clear that art 5 aims to create substantive rather than formal equality.¹⁶⁹ It addresses all forms of discrimination against people with disability, including indirect discrimination.¹⁷⁰ The UN considers any policy that discriminates in any way against people with disability inconsistent with art 5.¹⁷¹ The General Comment is an authoritative legal interpretation of art 5 in international law.¹⁷² Article 5 prohibits discrimination on the basis of disability generally, but on the basis of disability type or membership of a subgroup.¹⁷³ Article 5 acknowledges that achieving equality involves both ignoring and acknowledging differences among human beings.¹⁷⁴ Law and policy relating to people with disability must take their diversity into account.¹⁷⁵ Paragraph 8.3.1 appears to fail to take the diversity of people with disability and the diversity of people with psychosocial disability into account.

The eligibility criteria in the *NDIS Act* are not themselves discriminatory, as they are suited to giving access to those with the 'most unmet need'.¹⁷⁶ The Operational Guidelines are also designed to facilitate this purpose.¹⁷⁷ However the current effect of Paragraph 8.3.1 is to give a meaning to the phrase 'substantially reduced functional capacity' that is indirectly discriminatory. The interpretation and effect of Paragraph 8.3.1 may make it more difficult for people with episodic or fluctuating conditions to satisfy the criterion of 'substantial reduced functional capacity'. There is also concern that policies based on the medical model of disability perpetuate inequality and discrimination by reinforcing barriers to inclusion and substantive equality.¹⁷⁸ The refusal of access on the basis of an assumption that the episodic nature of a condition makes it inherently less likely to result in 'substantially reduced functional capacity' is arbitrary and discriminatory. Paragraph 8.3.1 may promote people to make decisions based on such an assumption. This would render Paragraph 8.3.1 indirectly discriminatory in its operation and inconsistent with art 5.

KEY FINDINGS:

The operation of Paragraph 8.3.1 is inconsistent with art 5 because:

- *It indirectly discriminates against people with psychosocial disability by promoting the determination of access decisions on the basis that the impact of*

¹⁶⁹ *General Comment No 6*, UN Doc CRPD/C/GC/6 (26 April 2018) para 10.

¹⁷⁰ *Ibid* para 10.

¹⁷¹ *Ibid* para 30.

¹⁷² See generally Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2nd ed, 2000) 265.

¹⁷³ Committee on the Rights of Persons with Disabilities, *General Comment No 3 (2016) on Women and Girls with Disabilities*, UN Doc CRPD/C/GC/3 (25 November 2016) para 9 ('*General Comment No 3*').

¹⁷⁴ *General Comment No 6*, UN Doc CRPD/C/GC/6 (26 April 2018) para 10.

¹⁷⁵ *Ibid* para 9.

¹⁷⁶ National Disability Insurance Agency, above n 3.

¹⁷⁷ *Ibid*.

¹⁷⁸ All Means All, above n 163, 2.

an episodic impairment is inherently less substantial than a consistent impairment

It promotes a medical model understanding of psychosocial disability which perpetuates barriers to inclusion and discriminatory attitudes.

Under art 5, State Parties must repeal or refrain from enacting legislation or policies that deny, restrict or limit the rights of people with disability on the basis of their disability.¹⁷⁹ If NDIS eligibility criteria are given a discriminatory interpretation, the NDIS is necessarily discriminatory in how it implements all its other aims. On this basis, Paragraph 8.3.1 would implicate all other CRPD rights and freedoms that the *NDIS Act* seeks to implement. To demonstrate this idea, the following two sections explore the realisation of the right to full inclusion in the community and the right to an adequate standard of living and social protection under the NDIS.¹⁸⁰

D Article 19 — Living Independently and Being Included in the Community

Article 19 relevantly provides:¹⁸¹

State Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) 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;*
- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;*
- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.*

While art 19 is most often discussed in the context of deinstitutionalisation,¹⁸² the focus of this report is the right to full inclusion and participation in the community and the

¹⁷⁹ *General Comment No 6*, UN Doc CRPD/C/GC/6 (26 April 2018) para 14; Children and Young People with Disability Australia, above n 162, 3 [13], 7[33].

¹⁸⁰ CRPD arts 19, 28.

¹⁸¹ CRPD art 19.

¹⁸² See, eg, Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of the Russian Federation, 391st sess, of UN Doc CRPD/C/RUS/CO/1 (9 April 2018) paras 40–41; Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Latvia, 354th sess, UN Doc CRPD/C/LVA/CO/1 (10 October 2017) paras 30–31; Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Canada, 328th sess, UN Doc CRPD/C/CAN/CO/1 (8 May 2017) paras 37–38.

right to access supports that facilitate this.¹⁸³ These rights are classed as economic, social and cultural rights, meaning they can be progressively implemented by States under international law.¹⁸⁴ The right to full participation and inclusion in the community extends to the right to services facilitating participation in cultural life, leisure interests, activities and recreation.¹⁸⁵

In its fifth General Comment on the CRPD, the Committee emphasised that art 19 obliges State Parties to:¹⁸⁶

- Repeal and refrain from enacting laws, policies and structures that maintain and create barriers in access to support services, as well as to general facilities and services;
- Define eligibility criteria and procedures for accessing support services in an objective and non-discriminatory way, focused on the requirements of the person rather than the impairment, following a human rights compliant approach; and
- Ensure that social protection programmes meet the requirements of the diverse range of persons with disabilities on an equal basis with others.

The implementation of art 19 forms part of the statutory intention of the *NDIS Act*.¹⁸⁷ An object of the scheme is to 'promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the mainstream community'.¹⁸⁸ One of its stated legislative aims is to 'support people with disability to live independently and to be included in the community as fully participating citizens'.¹⁸⁹

By being refused access to the NDIS people with episodic or fluctuating psychosocial disability may be denied the individualised supports they require to participate fully in their communities and avoid becoming isolated or segregated.¹⁹⁰ Paragraph 8.3.1 means that people with episodic conditions who have reduced functional capacity in their ability to communicate, interact socially or care for themselves may be refused on the basis that this capacity is not substantially reduced outside of acute periods. Because of their 'reduced functional capacity', which is only at times 'substantial',¹⁹¹ they may

¹⁸³ CRPD art 19; International Disability Alliance, above n 154, 7.

¹⁸⁴ Committee on the Rights of Persons with Disabilities, *General Comment No 5 (2017) on Living Independently and Being Included in the Community*, UN Doc CRPD/C/GC/5 (27 October 2017) para 7 ('General Comment No 5'); See Committee on Economic, Social and Cultural Rights, *General Comment No 3 (1990) on the Nature of States Parties' Obligations*, UN Doc E/1991/23 (14 December 1990) paras 1–2.

¹⁸⁵ *General Comment No 5*, UN Doc CRPD/C/GC/5, para 16.

¹⁸⁶ *General Comment No 5*, UN Doc CRPD/C/GC/5, para 97.

¹⁸⁷ *National Disability Insurance Scheme Act* (Cth) ss 3(1)(a), (g); EY, 'Independent review of the NDIS Act' (Report, 18 December 2015) 24; See Explanatory Memorandum (Statement of Compatibility with Human Rights), *National Disability Insurance Scheme Bill 2012* (Cth) 4.

¹⁸⁸ *National Disability Insurance Scheme Act* (Cth) s 3(1)(g).

¹⁸⁹ *Ibid* s 4(11)(a).

¹⁹⁰ Deany, above n 57.

¹⁹¹ *National Disability Insurance Scheme Act* (Cth) s 24(1)(c).

be unable to participate in or be included in the activities or aspects of community living they desire.

For example, in the case of *Kilgallin and National Disability Insurance Agency*, at times Mr Kilgallin required support to be able to leave his home and to maintain relationships with others in his community.¹⁹² His inability to drive a car, water his garden and make friends can be seen as obstacles to his ability to live fully as an independent and integrated member of his community.¹⁹³ If he is unable to access services to enable him to do these things outside NDIS funding, his rights under art 19 of the CRPD are not realised by the NDIS.

Paragraph 8.3.1 creates a barrier to receiving support for people with episodic or fluctuating impairments. It promotes an interpretation of the NDIS eligibility criteria that renders access to desired supports disproportionately difficult. In focusing on the impact between episodes, it ignores the fact that the effect of acute episodes may be consistent or cumulative. In this way, the legislative effect of Paragraph 8.3.1 is inconsistent with Australia's obligations under art 19.

KEY FINDINGS:

The operation of Paragraph 8.3.1 is inconsistent with art 19 because:

- *It may prevent people with psychosocial disability from getting access to the supports they need in order to participate in activities they wish to, or that are necessary for their inclusion in society*
- *It therefore does not promote full participation in the community or full social integration in line with the CRPD. It leaves those with psychosocial disability vulnerable to exclusion and segregation.*

E Article 28 — Adequate Standard of Living and Social Protection

Article 28 is closely related to art 19, demonstrating the interrelatedness of all CRPD rights.¹⁹⁴ Article 28 provides the right to individualised support services and social protection which are preconditions to the ability for people with disability to live fully and participate in the community.¹⁹⁵

Article 28 relevantly provides:¹⁹⁶

1. *State Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right*

¹⁹² *Kilgallin and National Disability Insurance Agency (General)* [2017] AATA 186 (19 January 2017) [12].

¹⁹³ *Ibid.*

¹⁹⁴ *General Comment No 5*, UN Doc CRPD/C/GC/5, para 92; see generally Kayess and French, above n 148, 33.

¹⁹⁵ *General Comment No 5*, UN Doc CRPD/C/GC/5, para 92.

¹⁹⁶ *CRPD* art 28.

without discrimination on the basis of disability.

2. *State Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:*
 - (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;*
 - (b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;*
 - (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;*
 - (d) To ensure access by persons with disabilities to public housing programmes;*
 - (e) To ensure access by persons with disabilities to retirement benefits and programmes.*

The Special Rapporteur on the Rights of Persons with Disabilities ('Special Rapporteur') has noted that the right to social protection broadly means the right to interventions designed to guarantee income security and access to essential services.¹⁹⁷ The ultimate goal of such interventions is active citizenship, social inclusion and community participation.¹⁹⁸ While the right to social security is enshrined in other human rights instruments,¹⁹⁹ art 28 of the CRPD tailors the right to people with disability, necessitating a shift towards the particular social risks they face.²⁰⁰ State Parties are obliged to consider these risks and the needs of the individual during the development and administration of social protection systems, like the NDIS.²⁰¹

The right to social protection is preliminary to the right to an adequate standard of living.²⁰² Under art 28(1), State Parties have a positive obligation to safeguard and promote the realisation of the right to an adequate standard of living, with a view to continuous improvement of living conditions.²⁰³ State Parties are also required to take

¹⁹⁷ Catalina Devandas-Aguilar, Special Rapporteur on the Rights of Persons with Disabilities, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc A/70/297 (7 August 2015) 2, 4. UN General Assembly note by the secretary general (special rapporteur)1[4].

¹⁹⁸ Catalina Devandas-Aguilar, Special Rapporteur on the Rights of Persons with Disabilities, above n 197, 1 [2], [4].

¹⁹⁹ See, eg, *UDHR* art 22; *ICESCR* art 9.

²⁰⁰ See Catalina Devandas-Aguilar, Special Rapporteur on the Rights of Persons with Disabilities, above n 197, [4].

²⁰¹ *Ibid* [15]–[16],

²⁰² Catalina Devandas-Aguilar, Special Rapporteur on the Rights of Persons with Disabilities, above n 197, 15 [19].

²⁰³ *Ibid* [19].

positive steps to protect people with disability from poverty on an equal basis with others.²⁰⁴

People with disability are disproportionately affected by poverty.²⁰⁵ They are more likely to require income support and less likely to participate in the workforce.²⁰⁶ When they do, they are likely to be paid less for the same work.²⁰⁷ This has been attributed to a lack of education, physical and attitudinal barriers, unequal opportunities, discrimination and stigma.²⁰⁸ Despite this, people with disability often spend more on healthcare, transportation, assistive technology and devices, personal assistance and home modifications.²⁰⁹ These costs can deplete up to 50% of an individual's income.²¹⁰ The basic cost of living is increasing for Australians with disability, which is likely to increase the disadvantage they already face.²¹¹

To ensure equal protection to all individuals under art 28(1), State Parties must allocate resources to the protection of people with disability. They must take appropriate measures to ensure people with disability are not excluded from mainstream support services, while still being able to access disability-specific programmes and services.²¹² Social support is necessary to ensure people with disability are supported with their higher day-to-day living expenses and able to realise the right to an adequate standard of living, free from poverty.²¹³

The design of the NDIS has the potential to enable the realisation of art 28 rights for all people with disability, including psychosocial disability. It is designed to provide individualised funding to people with disability with significant and persistent needs. However, the inferred operation of Paragraph of 8.3.1 may limit access to funded support for people with psychosocial disability and other episodic or fluctuating impairments.

The asserted operation of Paragraph 8.3.1 is inconsistent with the purpose of art 28 and the rights under it. The arbitrary and indirectly discriminatory effect of Paragraph 8.3.1

²⁰⁴ See *General Comment No 5*, UN Doc CRPD/C/GC/5, para 5.

²⁰⁵ Catalina Devandas-Aguilar, Special Rapporteur on the Rights of Persons with Disabilities, above n 197, 5 [9].

²⁰⁶ *Ibid* [52].

²⁰⁷ *Ibid*.

²⁰⁸ *Ibid* [27].

²⁰⁹ *Ibid* [29]; *General Comment No 6*, UN Doc CRPD/C/GC/6 (26 April 2018) para 92.

²¹⁰ Catalina Devandas-Aguilar, Special Rapporteur on the Rights of Persons with Disabilities, above n 197, 11 [33].

²¹¹ Disability Advocacy Network Australia, 'Safeguarding and Promoting Articles 27 and 28 of the CRPD: The Human Rights of Australians with Disability to Work and an Adequate Standard of Living' (Submission to the Reference Group on Welfare Reform) 4.

²¹² Catalina Devandas-Aguilar, Special Rapporteur on the Rights of Persons with Disabilities, above n 197, [20.]

²¹³ See Committee on Economic, Social and Cultural Rights, *General Comment No 5 (1994) on Persons with Disabilities*, UN Doc E/1995/22 (1 December 1995).

means that people with episodic psychosocial disability are denied access to the social supports under the NDIS despite potentially demonstrating substantially reduced functional capacity. People who demonstrate substantially reduced functional capacity during an episode, with flow on and cumulative impacts may be refused solely because the periods in between their episodes are considered in isolation.

The NDIS justifies the eligibility criteria on the basis that it aims to support those with the most unmet needs, meaning those with the most severe impairment.²¹⁴ This in itself is not inconsistent with the CRPD, as the UN has stated that the minimum obligation conferred on Australia by art 28 is an obligation to provide those living in extreme poverty with adequate food, clothing and housing, therefore failure to provide access to community support programs does not breach this minimum obligation.²¹⁵ Further, the explanatory memorandum to the NDIS justifies differential treatment between substantial and non-substantial disability because it is aimed at achieving a legitimate purpose, namely only providing support for those with the most unmet need.²¹⁶

Excluding people with particular disability from NDIS support has flow on effects to an adequate standard of living. People with psychosocial disability who are refused access on the basis of Paragraph 8.3.1 may be unable to access supports they need in order to achieve or maintain an adequate standard of living. They may therefore be excluded from the mechanisms available which diminish the risk of poverty. This is inconsistent with art 28 because the right to an adequate standard of living requires Australia to support people with disability in meeting these additional expenses.

KEY FINDINGS:

The operation of Paragraph 8.3.1 is inconsistent with art 28 because:

- *It restricts access to the social support mechanisms people with disability often require in order to achieve an adequate standard of living*
- *This perpetuates the vulnerability of people with disability to disadvantage and poverty.*

V RECOMMENDATIONS AND SUGGESTIONS FOR FURTHER RESEARCH

A Summary of Key Findings

1. In comparison to other disability types, NDIS access requests for people with a primary psychosocial disability are more frequently rejected.
2. Paragraph 8.3.1 appears to limit access to the NDIS for people with conditions with episodic or fluctuating symptoms, including people with psychosocial disability. It appears to be applied by the NDIA and the AAT in a way that renders it more difficult for people with psychosocial disability to satisfy the eligibility criteria by nature of their episodic condition.

²¹⁴ National Disability Insurance Agency, above n, 3.

²¹⁵ Catalina Devandas-Aguilar, Special Rapporteur on the Rights of Persons with Disabilities, above n 197, [9], [19].

²¹⁶ Explanatory Memorandum, National Disability Insurance Scheme Bill 2012 (Cth) 9.

3. The legislative test of ‘substantially reduced functional capacity’ in s 24(1)(c) of the *NDIS Act* should be interpreted in a way that is consistent with the objects and principles of the *NDIS Act*. The current interpretation given to Paragraph 8.3.1 does not appear to be consistent with these objects and principles. The strongest inconsistency appears to be the detraction from CRPD rights.
4. Paragraph 8.3.1 may be operating to indirectly discriminate against people with psychosocial disability. It may also perpetuate discrimination by approaching people’s disability according to the medical model.
5. Paragraph 8.3.1 appears to limit access to NDIS support on an unequal basis. It is therefore inconsistent with the right to social protection. The lack of access to support is a barrier to the realisation of the right to an adequate standard of living, social inclusion and full participation in the community.

B Recommendations

Paragraph 8.3.1 requires the NDIA to consider the ‘impact’ on a person’s ability to function in between acute episodes. As discussed, this may encourage decision makers to focus on the lack of impact that a person’s condition has on their functionality between acute periods. However, interpreting ‘consider the impact’ to mean ‘consider the *ongoing* impact’ may encourage decision makers to consider the episodic nature of a condition in a more appropriate way and for a more appropriate purpose. Considering the ongoing impact of a person’s impairment on their ability to function reflects a more holistic approach to assessing a person’s experience of impairment. This also discourages the incorporation of a ‘day-to-day’ analysis of impairment, which reflects a lack of understanding of the cumulative effects of mental health conditions and psychosocial disability. Considering impact as ongoing implicitly acknowledges that the person continues to experience impairment. Further, it better acknowledges that acute episodes of severe functional impairment may continue to affect a person’s life in significant ways. This interpretation also implicitly encourages consideration of the severity, frequency and duration of acute episodes and discourages decision makers from looking at periods in between acute episodes in isolation.

This interpretation would bring the meaning of ‘substantially reduced functional capacity’ as it applies to people with psychosocial disability more in line with the CRPD.²¹⁷ It would no longer arbitrarily discriminate but instead promote a holistic determination of a person’s psychosocial disability on an equal basis with others.²¹⁸ It would also approach psychosocial disability in a way that more closely resembles the social model, rather than the medical model, of disability by acknowledging disability continues even when the symptoms of impairment are not as severe. It is the author’s view that considering the ‘ongoing impact’ between acute periods would give people with psychosocial disability the opportunity to gain access to the NDIS on an equal basis with others.

²¹⁷ See, eg, *CRPD* arts 1, 5, 19, 28.

²¹⁸ See *CRPD* art 5.

This report makes the following further recommendations:

1. The NDIA has already published a resource for medical professionals suggesting that NDIA delegates will consider the ‘severity, duration and frequency’ of episodes when determining functional impairment.²¹⁹ This terminology should be included in all NDIA documents available to prospective participations for consistency and transparency.
2. The NDIA should acknowledge and explicitly refer to psychosocial disability more frequently in its policy, factsheets and guidelines. This would lead to greater recognition, acknowledgment and inclusion of psychosocial disability in the NDIS.
3. The NDIA should educate, train and support its delegates to understand the nature of episodic psychosocial disability and mental illness. This would promote an understanding of psychosocial disability that enables them to be included on an equal basis with others.
4. Assessment of ‘functional capacity’ should focus on what the person can and cannot do rather than diagnosis or level of impairment. This might involve the introduction of a detailed and comprehensive assessment criteria as to how this should be assessed in relation to mental illness and psychosocial disability.
5. As the test of ‘substantially reduced functional capacity’ in s 24(1)(c) has only once been considered by the Federal Court, it does not yet have settled meaning. Attention should be paid to advocating for an interpretation of ‘substantial’ that accommodates both consistent and cumulative symptoms.
6. While the AAT and the Federal Court refer to the CRPD, it has an almost complete lack of impact on their decisions.²²⁰ However, when it is referred to, it is considered a relevant NDIS object.²²¹ The authors of this report recommend advocating for closer consideration of the CRPD in NDIS access matters so that it has substantive impact on decisions, as opposed to being referenced without due consideration.

C Suggestions for Further Research

The following may be useful subjects for further research:

1. A comparative study looking into whether people with primary episodic psychosocial disability are able to gain access to the NDIS more easily through the early intervention pathway under s 25 of the *NDIS Act*, as compared to the s 24 disability access requirements. This would help to inform advocacy decisions.
2. A review of access decisions to determine whether people with primary psychosocial disability are more likely to fail at the ‘permanent’ impairment criterion under s 24(1)(b) of the *NDIS Act* than the ‘substantially reduced functional capacity’ threshold under s 24(1)(c). However, accurate data in this area may be difficult to gather given that the criteria are generally treated as

²¹⁹ National Disability Insurance Agency, *Accessing the NDIS: A Guide for Mental Health Professionals* (August 2017) 5 <https://www.ndis.gov.au/medias/documents/Guide-mental-health-professionals/Guide-for-Mental-Health-Professionals.pdf?fbclid=IwAR2JI8y4CQkeJibhOBJV2_IHB_3cMmlzXDzFczA_cFa9P7qZYI4N5hD2ybw>.

²²⁰ Waddington and Lawson, above n 146, 3.

²²¹ See, eg, *Mulligan v National Disability Insurance Agency* (2015) 233 FCR 201; *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 121.

cumulative and consecutively ordered. This means there is frequently no determination as to whether someone is substantially functionally impaired when they fail to meet the permanent disability criteria.

3. A comparative study of NDIS access outcomes for episodic psychosocial disability and episodic disability of a non-psychosocial nature.
4. A review of the impact the newly announced 'psychosocial disability stream' is having for people with psychosocial disability in gaining access to the NDIS, once it has been implemented and in operation. The new stream may address or counteract some of the disadvantage experienced by people with psychosocial disability under the NDIS.

Finally, the authors of this report acknowledge the importance of including the voices of people with disability in research on disability matters. While this report has referred to the voices of international Disabled People's Organisations ('DPOs'), there is limited voice from Australian DPOs. If given the time, the opportunity to discuss the issue with Australians with psychosocial disability would have added great value to the findings and recommendations of this report.

BIBLIOGRAPHY

A *Articles/Books/Reports*

Australian National Audit Office, 'Decision-Making Controls for Sustainability — National Disability Insurance Scheme Access' (Report No 13, 2017)

Collings, Susan, Dew, Angela and Dowse, Leanne 'Support Planning with People with Intellectual Disability and Complex Support Needs in the Australian National Disability Insurance Scheme' (2016) 41(3) *Journal of Intellectual and Developmental Disability* 272

Degener, Theresia 'Disability in a Human Rights Context' 5(35) *Laws*

Downes, Garry 'Decision-Making in the Public Sector: Getting it Right' (Paper presented at The Law Society of New South Wales Government Solicitors' — CLE Conference, NSW Parliament House, 15 September 2009)
<[http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/Decision MakingPublicSectorSeptember2009.pdf](http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/Decision%20MakingPublicSectorSeptember2009.pdf)>

EY, 'Independent review of the NDIS Act' (Report, 18 December 2015)

IDA: International Disability Alliance, Position Paper on the Convention on the Rights of Persons with Disabilities (CRPD) and Other Instruments, (report 25 April 2008)

Independent Advisory Council to the National Disability Insurance Agency, 'Implementing the NDIS for People with Disabilities Related to Mental Health Issues' (Issues Paper, December 2014)
<<https://static1.squarespace.com/static/5898f042a5790ab2e0e2056c/t/5a94acd5c83025e189a0624b/1519693026327/Implementing+the+NDIS+for+people+with+disabilities+related+to+mental+health.pdf>>

Johnson, Emily 'Should 'Inconsistency' of Administrative Decisions Give Rise to Judicial Review?' (2013) 72 *Australian Institute of Administrative Law Forum* 50

Kanter, Arlene 'The Development of Disability Rights Under International Law: From Charity to Human Rights, Routledge (2015).

Kayess, Rosemary and French, Phillip 'Out of Darkness into Light? Introducing the Convention on the Rights on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 4

Malla, Ashok, Joober, Ridha and Garcia, Amparo "'Mental Illness is Like Any Other Medical Illness": A Critical Examination of the Statement and its Impact on Patient Care and Society' 40(3) *Journal of Psychiatry and Neuroscience* (2015)

Mannam, Hasheem et al, 'Core Concepts of Human Rights and Inclusion of Vulnerable Groups in the United Nations Convention on the Rights of Persons with Disabilities' (2012) 6 *European Journal of Disability Research* 159

National Mental Health Consumer and Carer Forum 'Unravelling Psychosocial Disability, A Position Statement by the National Mental Health Consumer and Carer Forum on Psychosocial Disability Associated with Mental Health Conditions' (Position Statement, 2011)

National People with Disabilities and Carer Council, 'Shut Out: The Experience of People with Disabilities and their Families in Australia' (Report, 2009)

Nicholas, Angela and Reifels, Lennart *Mental Health and the NDIS: A Literature Review* (August 2014) Mind Australia, 37
<<https://www.ndis.gov.au/html/sites/default/files/files/Mental-health-and-the-NDIS-Literature-Review.pdf>>

O'Callaghan, Kerrie and Howard, Michelle 'Promoting Administrative Justice: The Correct and Preferable Decision and the Role of Government Policy in the Determination' (2013) 32(1) *University of Queensland Law Journal* 169

Oliver, Mike 'The Social Model of Disability; Thirty Years On', 28(7) *Disability & Society*, 1025-26;

Oliver, Mike *Understanding Disability: From Theory to Practice* (Hampshire: MacMillan, 1996)

Productivity Commission, 'National Disability Insurance Scheme (NDIS) Costs' (Report Overview, October 2017)

Purcal, Christiane, Fisher, Karen R and Meltzer, Ariella 'Social Insurance for Individualised Disability Support: Implementing the Australian National Disability Insurance Scheme (NDIS)' in Menno Fenger, John Hudson and Catherine Needham (eds), *Social Policy Review 28: Analysis and Debate in Social Policy, 2016'* (Policy Press, 2016)

Steiner, Henry J and Alston, Philip *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2nd ed, 2000)

Tatz, Simon *When Psychosocial Supports Go, Mental Health Needs Increase* (17 March 2017) Australian Medical Association <<https://ama.com.au/ausmed/when-psychosocial-supports-go-mental-health-needs-increase>>.

Waddington, Lisa and Lawson, Anna *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of the Courts* (Oxford University Press May 2018)

Warr, Deborah et al, 'Choice, control and the NDIS' (Report, The University of Melbourne, May 2017)

B Cases

Alicier and Secretary v Department of Social Services [2017] AATA 538.

Allen and National Disability Insurance Agency [2018] AATA 3851 (15 October 2018)

Commonwealth v Baume (1905) 2 CLR 405

Drake and Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60

Holmes and National Disability Insurance Agency [2017] AATA 2750 (21 December 2017)

Kilgallin and National Disability Insurance Agency (General) [2017] AATA 186 (19 January 2017)

McGarrigle v National Disability Insurance Agency [2017] FCA 308

Minister for Industry and Commerce v East West Trading Co Pty Ltd (1986) 64 ALR 466

Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

Mulligan v National Disability Insurance Agency (2015) 233 FCR 201, 219

National Disability Insurance Scheme v McGarrigle [2017] FCAFC 132

Plaintiff M47/2012 v Director-General of Security (2012) 251 CLR 1

Pomeroy and National Disability Insurance Agency [2018] AATA 387 (6 March 2018)

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158

Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634

Sheldon and National Disability Insurance Agency [2018] AATA 2560 (30 July 2018)

Shi v Migration Agents Registration Authority (2008) 235 CLR 286, 327

C Legislation

Acts Interpretation Act 1901 (Cth)

National Disability Insurance Scheme (Becoming a Participant) Rules 2016 (Cth)

National Disability Insurance Scheme Act 2013 (Cth)

Social Security (Tables for the Assessment of Work-Related Impairment for Disability Support Pension) Determination 2011) Act (Cth)

D Treaties

Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008)

International Covenant on Civil and Political rights, opened for signature 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

Optional Protocol to the Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2518 UNTS 283 (entered into force 3 May 2008)

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd ses, 183rd plen mtg, UN Doc A/810 (10 December 1948)

E UN Documents

Catalina Devandas-Aguilar, Special Rapporteur on the Rights of Persons with Disabilities, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc A/70/297 (7 August 2015) 2, 4. UN General Assembly note by the secretary general

Committee on Economic, Social and Cultural Rights, *General Comment No 3 (1990) on the Nature of States Parties' Obligations*, UN Doc E/1991/23 (14 December 1990)

Committee on Economic, Social and Cultural Rights, *General Comment No 5 (1994) on Persons with Disabilities*, UN Doc E/1995/22 (1 December 1995).

Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of the Russian Federation, 391st sess, of UN Doc CRPD/C/RUS/CO/1 (9 April 2018)

Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Latvia, 354th sess, UN Doc CRPD/C/LVA/CO/1 (10 October 2017)

Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Canada, 328th sess, UN Doc CRPD/C/CAN/CO/1 (8 May 2017)

Committee on the Rights of Persons with Disabilities, *General Comment No 6 (2018) on Equality and Non-Discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018)

Committee on the Rights of Persons with Disabilities, *General Comment No 3 (2016) on Women and Girls with Disabilities*, UN Doc CRPD/C/GC/3 (25 November 2016)

Committee on the Rights of Persons with Disabilities, *General Comment No 5 (2017) on Living Independently and Being Included in the Community*, UN Doc CRPD/C/GC/5 (27 October 2017)

CRPD; United Nations, *Status of Treaties: Convention on the Rights of Persons with Disabilities* (5 May 2018) United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec> archived at <<https://perma.cc/P769-U6Z4>>

F Other

Administrative Appeals Tribunal, *What We Do* (18 July 2018) <<http://www.aat.gov.au/about-the-aat/what-we-do>>

All Means All, 'Draft General Comment No.6 on Article 5 (Equality and Non-Discrimination) of the Convention on the Rights of Persons with Disabilities (CRPD)' (Submission to the *UN Committee on the Rights of People with Disabilities* 30 November 2017)

Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia* (31 May 2015) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4430.0Main%20Features902015?opendocument&tabname=Summary&prodno=4430.0&issue=2015&num=&view=>>>.

Australian Red Cross, Submission No 15 to the Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of Services Under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition*, February 2017

Children and Young People with Disability Australia, *Submission to the Committee on the Rights of Persons with Disabilities*, Draft General Comment on the Right of Persons with Disabilities to Enjoy Equality and Non-Discrimination (Article 5) November 2017)

Department of Social Services, *Guidelines to Table 5 — Mental Health Function* (1 July 2015) <<http://guides.dss.gov.au/guide-social-security-law/3/6/3/50>>

Department of Social Services, *Guidelines to the Rules for Applying the Impairment Tables* (1 July 2015) <<http://guides.dss.gov.au/guide-social-security-law/3/6/3/05>>

Disability Advocacy Network Australia, 'Safeguarding and Promoting Articles 27 and 28 of the CRPD: The Human Rights of Australians with Disability to Work and an Adequate Standard of Living' (Submission to the Reference Group on Welfare Reform)

Disabled People's Organisations Australia, Submission to the Productivity Commission, *Issues Paper: National Disability Insurance Scheme (NDIS) Costs*, March 2017

Explanatory Memorandum (Statement of Compatibility with Human Rights), National Disability Insurance Scheme Bill 2012 (Cth)

Downes, Garry 'Decision-Making in the Public Sector: Getting it Right' (Paper presented at

The Law Society of New South Wales Government Solicitors' — CLE Conference, NSW Parliament House, 15 September 2009) <[http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/Decision MakingPublicSectorSeptember2009.pdf](http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/DecisionMakingPublicSectorSeptember2009.pdf)>

Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of Services Under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition* (2017)

Justice Michael Barker, 'First You See It, Then You Don't: Harry Houdini and the Art of Interpreting Statutes' (Speech delivered at the Judicial Conference of Australia Colloquium, Fremantle, Western Australia, 5 October 2012) <www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-barker/barker-j-20121005>.

Mental Health Australia, 'The Facts About Mental Illness and the Disability Support Pension' (Media Release, 22 May 2014) <<https://mhaustralia.org/media-releases/facts-about-mental-illness-and-disability-support-pension>>

Mental Health Australia, *Getting the NDIS Right for People with Psychosocial Disability* (12 June 2014) <<https://mhaustralia.org/general/getting-ndis-right-people-psychosocial-disability>>

Mental Health Australia, *Position Statement (Draft): Key Actions to Ensure Continued Access to Community Support for People Affected by Severe Mental Illness During NDIS Transition and Beyond* <https://mhaustralia.org/sites/default/files/docs/draft_position_paper_on_community_support_during_ndis_transition_and_beyond.pdf>.

Mind Australia Limited, Submission No 118 to Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of Services Under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition*, 10 March 2017

National Disability Insurance Agency, *About the NDIS* <<https://www.ndis.gov.au/about-us/what-ndis.html>>

National Disability Insurance Agency, *Accessing the NDIS: A Guide for Mental Health Professionals* (August 2017) 5 <<https://www.ndis.gov.au/medias/documents/Guide-mental-health-professionals/Guide-for-Mental-Health->

Professionals.pdf?fbclid=IwAR2JI8y4CQkeJibhOBjV2_IHB_3cMmlzXDzFczA_cFa9P7qZYI4N5hD2ybw>.

National Disability Insurance Agency, *Glossary: Key Terms for Understanding the NDIS and Psychosocial Disability* (October 2018) <<https://www.ndis.gov.au/medias/documents/mental-health-glossary/Glossary-psychosocial-disability.pdf>>.

National Disability Insurance Agency, *Key Data on Psychosocial Disability and the NDIS* (31 December 2017) <<https://www.ndis.gov.au/medias/documents/key-data-nmhsrg-dec17/Key-Data-on-NDIS-and-Psychosocial-Disability-dec2017.pdf>>.

National Disability Insurance Agency, *Mental Health Access Snapshot Series: Snapshot 1 – General Information About How the NDIS Can Support Your Mental Health* <<https://www.ndis.gov.au/medias/documents/mha-general-information/Mental-Health-Access-General-Information.pdf>>

National Disability Insurance Agency, *Mental Health Access Snapshot Series: Snapshot 4 – Functional Capacity and Mental Health Issues*, 3 <<https://www.everythingcarers.org.au/media/2289/mental-health-access-snapshot-4-functional-capacity.pdf>>

National Disability Insurance Agency, *Operational Guidelines* <<https://www.ndis.gov.au/Operational-Guidelines>>

National Disability Insurance Agency, *Your Questions Answered – Getting NDIS Ready and Accessing the NDIS* <<https://www.ndis.gov.au/qanda/getting-ready-accessing-ndis>>

Office of the Public Advocate (Victoria), Submission No 7 to Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of Services Under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition*, February 2017

Deany, Paul 'Psychosocial Disability: One of the Most Misunderstood Areas of Disability' (Speech delivered at the 9th session of the Conference of State Parties to the Convention on the Rights of Persons with Disabilities, June 15 2016).

People with Disability Australia, Submission to the Legislative Council, Parliament of New South Wales, *Inquiry into the Implementation of the National Disability Insurance Scheme*, 2018

World Network of Users and Survivors of Psychiatry, Submission to the Office of the United Nations High Commissioner for Human Rights, *Thematic Study to Enhance Awareness and Understanding of the CRPD*, August 15 20

GROUP 4 PROJECT

The Rights of Refugees with Mental Disabilities who come into contact with the Victorian Criminal Justice System

Partner Organisation

Supreme Court of Victoria

Group Members

Emma Costa

Sassy MacKenzie

Ellen Roberts



THE RIGHTS OF REFUGEES WITH MENTAL DISABILITIES WHO COME INTO CONTACT WITH THE VICTORIAN CRIMINAL JUSTICE SYSTEM

EXECUTIVE SUMMARY

The key findings of this report are:

- A. The intersectional disadvantage experienced by refugees with mental disabilities in accessing health and support services puts them at a greater risk of coming into contact with the criminal justice system.¹ Processes for identifying refugees with mental disability and ensuring their access to services are essential to preventing this.²
- B. Refugees with mental disabilities who come into contact with the criminal justice system are exposed to the possibility of either the discretionary or mandatory cancellation of their visa on character grounds.³ If their visas are cancelled, they face indefinite detention as a consequence of the dual operation of Australia's non-refoulement obligations⁴ and regime of mandatory detention.⁵
- C. The recent increase in the cancellation of visas on character-grounds has transformed immigration detention into a more 'prison-like' environment.⁶ This makes the conditions of detention significantly more unsuitable for refugees with mental disabilities.
- D. Administrative decision-makers are required to apply the principles of the *Convention on the Rights of Persons with Disabilities* ('CRPD')⁷ when considering the cancellation of a mentally disabled refugee's visa.⁸
- E. The 'character grounds' for visa cancellation include provisions which directly and indirectly discriminate against refugees with mental disabilities.⁹ These provisions violate the CRPD by including grounds for visa cancellation that only apply to persons with mental disabilities, and by disproportionately affecting refugees with mental disabilities.

¹ Foundation House, *Resettling in Victoria - advice from people from refugee backgrounds living with disabilities and their carers*, October 2018.

² *Convention on the Rights of Persons with Disabilities* ('CRPD'), opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008), art 13.

³ *Migration Act 1958* (Cth) ('*Migration Act*') s 501.

⁴ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention Against Torture*') art 3(1); *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*') art 33; International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') art 6, 7.

⁵ *Migration Act* s 189.

⁶ Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) Vol. 70(12) *Social Science and Medicine* 2070.

⁷ CRPD.

⁸ *Ah Hin Teoh v Minister of State for Immigration and Ethnic Affairs* [1994] FCA.

⁹ *Migration Act* ss 501(7)(e), 501(7)(f), and 501(9).

- F. The sentencing remarks of judges for a criminal conviction can be significant in evidencing compelling considerations in favour of revoking the visa cancellation of a refugee with mental disabilities. For example, where a judge finds reduced moral culpability as mitigated by the existence of a mental disability, or a low risk of harm to the community, this should be explicit in sentencing remarks.
- G. Mental disability is a crucial consideration in assessing the arbitrariness of detention in accordance with international human rights law.¹⁰ Arbitrary deprivation of liberty arises in a distinct way when refugees with disabilities are indefinitely detained.¹¹
- H. Australia violates its obligations under the CRPD in failing to reasonably accommodate the needs of refugees with mental disabilities in immigration detention.¹² This violation is particularly grave as immigration detention significantly deteriorates the mental wellbeing of detainees.¹³
- I. The *Migration Amendment (Strengthening the Character Test) Bill 2018* ('Migration Amendment') proposes to broaden the grounds of visa cancellations through the introduction of 'designated offences'.¹⁴ This would increase the risk of refugees with disabilities failing the 'character test' as a consequence of low-level offending.

INTRODUCTION

This report concerns the issue of refugees with mental disabilities who come into contact with the criminal justice system in Victoria and subsequently have their visa cancelled for failure to satisfy the 'character test' under section 501 of the *Migration Act*.¹⁵ The status as a refugee means that the effective result of a visa cancellation is most likely indefinite or prolonged detention. In such conditions, mental disability can be exacerbated and access to services for mental disability are inadequate.¹⁶ Existing research surrounding this intersectional issue is limited and, as Antonio Guterres- the former UN High Commissioner for Refugees- identified, refugees with disabilities are often 'invisible' and 'forgotten.'¹⁷ In order to foster strong legal arguments and justifications for reform of the visa cancellation process, the following analysis is anchored in the human rights framework and identifies the CRPD rights that are implicated in the dual, yet discordant, operation of the State criminal justice system and Federal immigration law.

¹⁰ CRPD, art 14.

¹¹ Marlon James Noble v Australia; *The Legal Protection of Refugees with disabilities: Forgotten and invisible?* : Mary Crock et al , 2017, Elgar, pg 170.

¹² CRPD, art 14(2).

¹³ Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) Vol. 70(12) *Social Science and Medicine* 2070.

¹⁴ Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth)cl 501(6)(aaa).

¹⁵ *Migration Act* s 501.

¹⁶ See Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) Vol. 70(12) *Social Science and Medicine* 2070.

¹⁷ Women's Refugee Commission, 'Disabilities Among Refugee and Conflict- Affected Populations' (2008) New York: Women's Refugee Commission, foreword.

The CRPD broadly identifies people with disabilities as those “who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on equal basis with others.”¹⁸ For the purposes of this report, the following analysis focuses on refugees with mental disabilities (inclusive of cognitive, intellectual and psychosocial impairments). Part One analyses the intersectional factors which increase the likelihood that refugees with mental disabilities come into contact with the criminal justice system. Part Two considers this implications of this; that is, how the character grounds for cancelling a visa under section 501 of the *Migration Act* have a discriminatory effect on refugees with mental disabilities in violation of Article 5(2) of the CRPD.¹⁹ Critiquing section 501 from another angle, Part Three then interrogates the expedited decision-making process for cancelling a visa which has a disproportionate effect on refugees with mental disabilities. Three key problems are identified: the ‘effective double-punishment’ that occurs as a result of the mandatory cancellation provision; the lack of merits review of decisions made by the Minister personally; and the unaccounted interplay between the State criminal justice system and federal immigration law. Following on, Part Four identifies the violations against Article 14 of the CRPD that arise in the context of mandatory indefinite immigration detention.²⁰ This Part highlights the unique manifestation of ‘arbitrariness’ when considered through the lens of mental disability, and the current failings in meeting the CRPD threshold of reasonable accommodation for refugees with mental disabilities. Finally, Part Five considers the effect of the Migration Amendment (Strengthening the Character Test) Bill 2018,²¹ submitting that the amendments would further expose refugees with mental disabilities to the escalating ramifications of receiving a criminal conviction.

A The Human Rights Framework

Refugees with mental disabilities stand at the intersection of two major legal instruments. The first is the *Convention Relating to the Status of Refugees* (‘Refugee Convention’) which predates all major international human rights instruments.²² It has been interpreted as requiring states to assist refugees with disabilities and treat them as equals to their nationals.²³ The second is the CRPD, which entered into force in May 2008 and represents a significant paradigm shift in the understanding of persons with disabilities as rights bearers.²⁴

¹⁸ CRPD, art 1.

¹⁹ CRPD, art 5(2).

²⁰ CRPD, art 14.

²¹ Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth).

²² *Refugee Convention*.

²³ Refugee Convention, art 23 and 24.

²⁴ Committee on the Rights of Persons with Disabilities, *General Comment No 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) 1[1]; Mary Crock et al, ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’ (2013) Vol. 24(4) *International Journal of Refugee Law* 735, 736-7.

The CRPD is an instrument that applies to every person in the territory of a State Party, including refugees and other non-citizens.²⁵ Australia, as a signatory to the CRPD, agrees to develop and carry out policies, laws and administrative measures for the effective realization of the rights of disabled persons and to abolish laws, customs and practices that constitute discrimination.²⁶ The CRPD marks a departure from the ‘medical model’ of disability which objectifies people with disability as something to be ‘corrected’.²⁷ In its place, the CRPD embraces the ‘social model’ which posits that disability is located externally and is created by societies that do not accommodate the needs of disabled people.²⁸ Furthermore, it extends the social model by placing disability within the human rights framework. A pivotal feature of this model of disability is the conceptual distinction between impairment and disability: one does not necessarily imply the other, rather disability arises from the interaction between impairment and various societal barriers.²⁹

The CRPD is comprised of two documents: the Convention which contains the main human rights provisions stated as a series of articles, and the Optional Protocol which sets up procedures for hearing individual complaints.³⁰ The rights contained within the CRPD are derived from the parent rights established in the International Bill of Human Rights.³¹ This includes the Universal Declaration of Human Rights;³² the International Covenant on Civil and Political Rights (‘ICCPR’);³³ and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’).³⁴ In this respect, the CRPD does not ‘create’ new rights; rather, it builds on existing rights by explicitly extending their application to persons with a disability and specifying what is needed for their full and effective enjoyment of these rights.

Additionally, the CRPD establishes the Committee on the Rights of Persons with Disabilities (‘the Committee’).³⁵ Its members include people with disabilities and independent experts who together receive periodic reports from State Parties on their progress in implementing the CRPD. The complaints mechanism in the Optional

²⁵ Mary Crock et al, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (Elgar 2007) 26.

²⁶ CRPD, art 4.

²⁷ Theresia Degener, *Disability in a Human Rights Context* (Laws, 5(3), 2016) 35.

²⁸ Ibid.

²⁹ World Health Organization and World Bank, *World Report on Disability* (WHO Press, 2011) 4.

³⁰ UN General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106.

³¹ UN General Assembly, *International Bill of Human Rights*, 10 December 1948, A/RES/217(III)A-E.

³² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³³ ICCPR.

³⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200.

³⁵ CRPD, art 34.

Protocol³⁶ allows individuals and groups to submit communications to the Committee, asking them to provide a view on their alleged rights violations under the Convention when domestic avenues have been exhausted.³⁷ The Committee, in response, produces a General Comment on the matter which is an authoritative statement of international law.

B Relevance of the Victorian Charter of Human Rights

This report will predominantly focus on the rights contained in the CRPD, however, Victorian domestic law also acknowledges certain rights in the *Victorian Charter of Human Rights and Responsibilities Act 2006*.³⁸ This Act requires public authorities such as the Victorian government, public servants, and Victoria Police to act consistently with the rights enshrined in the Charter.³⁹ From an advocacy perspective, the Charter allows a person to attach human rights arguments to existing legal proceedings. The Judicial College of Victoria in collaboration with the Supreme Court has so far gathered over 100 published decisions on Charter issues up until August 2018⁴⁰.

In addition to a range of rights specific to criminal law and procedure, the Victorian Charter contains some rights analogous to those in the CRPD, which include:

- Section 21 - Liberty and security of person.
- Section 25 - Rights in criminal proceedings, including the right to an interpreter and the right to have the time to prepare a defence and communicate with a lawyer.

Additionally, section 26 provides for the right not to be tried and punished more than once. This is relevant to the report's discussion of 'effective double punishment' arising by implication of the discordant operation of the State criminal justice system and federal immigration law (see Part 3).

Immigration law operating at the Federal level is not subject to complaints based on the State Charter. Therefore, the Charter rights will not be addressed in the remainder of the report. However, it is important to recognise that the Charter highlights the value and importance Victoria places on human rights, many of which are parallel to those in the CRPD and other international human rights conventions.⁴¹ They are therefore important to keep in mind in the context of Victorian legal decision making and advocacy.

³⁶ CRPD, art 1.

³⁷ CRPD, art 2(d).

³⁸ *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).

³⁹ *Ibid* s 1(c).

⁴⁰ Victorian Human Rights Charter Case Collection (August 2018), Judicial College of Victoria.

⁴¹ ICCPR, *Refugee Convention*, ICESR.

PART 1: INTERSECTIONALITY

A Disability, Refugee Status and the Criminal Justice System

Recent approaches to international human rights law increasingly recognise the need to understand intersectionality.⁴² Intersectionality can be defined as the way social categories such as race, class, gender and sexuality interact and create overlapping and interdependent systems of discrimination or disadvantage.⁴³ The General Comment (an authoritative explication of a treaty provision made by the relevant treaty body) on Article 5 of the CRPD also elaborates on what intersectionality means in relation to disability. According to the CRPD Committee's Comment, intersectional discrimination occurs when a person with a disability experiences discrimination of any form on the basis of disability as well on the basis of skin colour, sex, language, religion, ethnicity, gender or other status. When several forms of discrimination interact they compound disadvantage.⁴⁴ Some disability scholars such as Dossa (2009) have highlighted that disabled people with overlapping identities have an increased likelihood of experiencing discrimination and exclusion, especially when their identity is layered with minority characteristics such as disability, gender, minority religious status and migration.⁴⁵

The research, or lack thereof, on refugees with disabilities highlights that they are one of the most invisible and therefore unprotected groups in the world. The lack of substantive qualitative accounts from disabled refugees and asylum seekers also reinforces their invisibility. The lack of these accounts makes advocacy difficult because there are few personal accounts to draw upon.⁴⁶ Though some domestic and international bodies and NGOs have attempted to gather information on disabled refugees, the amount of data remains scarce. Data is often not collected or differences in the definitions of disabilities may inhibit accurate indications of the number of refugees with disabilities and the type of disabilities they have. The estimates that do exist however tend to show that the number is probably high. An attempt at reaching a figure by combining World Health Organisation ('WHO') estimates of the number of people worldwide living with disability with the United Nations Human Rights Council ('UNHRC') statistics on refugees, estimate that at least 1.9 million displaced persons would have severe disabilities and a further 8.1 million would have moderate long-term disabilities.⁴⁷ In the domestic context, Foundation House, a Victorian foundation for refugees who have experienced torture and other trauma, states that 27% of their clients over eighteen years of age have a disability, and 17% under the age of eighteen.⁴⁸

⁴² Mary Crock et al, above n 25, 39-40; Committee on the Rights of Persons with Disabilities, General Comment No.6 (2018) on equality and non discrimination, pg 5, V (C)(19).

⁴³ *Oxford English Dictionary* (online ed at 4 December 2018) 'intersectionality'.

⁴⁴ Committee on the Rights of Persons with Disabilities, above n 42, 5.

⁴⁵ Dossa (2009) cited in Soldatic et al, 'Nowhere to be found' disabled refugees and asylum seekers within the Australian resettlement landscape' (2015) 2 (1) *Disability and the Global South* 501, 514.

⁴⁶ Soldatic et al, above n 45, 504.

⁴⁷ Above n 25, 4.

⁴⁸ 'Foundation House Annual Report 2017-2018' (Report, Foundation House, 2018) 9.

The research is similarly lacking in relation to refugees with mental disabilities. The available research indicates that refugees are more likely to experience poor mental health than general populations, including higher rates of depression, Post Traumatic Stress Disorder (PTSD) and other anxiety disorders.⁴⁹ Increased susceptibility to mental health disorders can be linked to both pre-migration experiences such as trauma and exposure to war zones, and post-migration conditions including detention and separation from family⁵⁰.

Studies conducted about people held within Australian immigration detention show staggeringly poor mental health levels. One study estimated that the rates of suicidal behaviours in men and women were approximately 41 and 26 times the national average respectively.⁵¹ Steel et al. assessed parents and children who had been held in Australian immigration detention centres for approximately two years, identifying 26 disorders among 14 adults, and 52 disorders among 20 children.⁵² PTSD and MDD (major depressive disorder) have been associated with significant psychosocial disability.⁵³ The presence of psychological disorders such as PTSD has also been linked to poorer cognitive functioning among adult refugees.⁵⁴ While it is not clear if these conditions were caused by pre or post-migration trauma, these numbers indicate that many refugees who arrive in Australia after being processed offshore likely suffer from a mental disability. Estimates on intellectual disability worldwide place the number at 1-3% of the population or as many as 200 million people⁵⁵, with intellectual disability being significantly more common in low-income countries.⁵⁶ This suggests refugees may be statistically more likely to have intellectual disabilities as many come from low-income countries.

Though more statistics are needed to fully understand the extent of the issue, the estimates available indicate that the likely number of refugees with a mental disability is significant. This emphasises the importance of this topic due to the number of people it affects. As statistics are not consistently or uniformly collected, it is possible that these figures are underestimates.

1 Diagnosis and support

Refugees with diagnosed and undiagnosed disabilities face challenges from the moment they arrive in Australia. Prior to obtaining refugee status, asylum seekers kept in

⁴⁹ Fazel, M, Wheeler J & Danesh J (2005) and Tempany, M. (2009) cited in Edwards et al, 'Fundamental Facts About Mental Health 2016' (Report, Mental Health Foundation: London, 2016) 43.

⁵⁰ Steel et al (2009) and Porter and Haslam (2005) cited in Edwards et al, above n 49, 43.

⁵¹ Dudley (2003) cited in Kate E Murray, Graham R Davidson and Robert D Schweitzer, 'Psychological Wellbeing of Refugees Resettling in Australia: A literature review prepared for the Australian Psychological Society' (Literature Review, 2008) 10.

⁵² Steel et al (2004) cited in Murray, Davidson and Schweitzer, above n 51, 10-11.

⁵³ Silove et al (2006) cited in Murray, Davidson and Schweitzer, above n 51, 11.

⁵⁴ Kivling-Boden and Sundbom (2003) cited in Murray, Davidson and Schweitzer, above n 51, 15.

⁵⁵ Pallab K Maulik et al, 'Prevalence of intellectual disability: a meta-analysis of population-based studies' (2011) 32 *Research in Developmental Disabilities* 419.

⁵⁶ Ibid.

immigration detention are often subjected to conditions incompatible with appropriate disability support. Evidence about the conditions of offshore detention suggests that the asylum seekers there do not receive adequate diagnosis, early intervention or treatment for disabilities.⁵⁷ This neglect of treatment can exacerbate existing disability or even produce it.

Obtaining refugee status and a protection visa which allows residence in Australia does not necessarily mean the needs of refugees with disabilities are met once they are removed from processing detention. In order to access support for a disability, the disability needs to be recognised and accepted. There are multiple factors which make identifying disability particularly difficult for refugees. Firstly, certain beliefs and misconceptions about disability from people of refugee backgrounds can prevent disability being recognised. In some cultures disability is heavily stigmatised.⁵⁸ People who have grown up in these cultures may hold the belief that disability is due to bad karma or is contagious and so hide the disabled person away so that they do not receive needed external support.⁵⁹ Other times a culture may not even have a words for the particular disability.⁶⁰

Furthermore, English language skills and familiarity with Australian health and social service systems is often essential to being able to access services to diagnose disability and navigate the available funding systems.⁶¹ Navigating these services is extremely challenging for those experiencing the intersectional disadvantage of being a refugee with a disability which often entails numerous barriers to accessing services.⁶² Applications for disability funding under the NDIS often require documentation and evidence refugees do not necessarily keep with them in fleeing persecution.⁶³ Other times, diagnoses may not transfer between countries and therefore refugees are expected to go through the evidence gathering process again.⁶⁴ Refugees often cannot afford private health services and therefore face long wait times in the public system for

⁵⁷Jane Flanagan, 'The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned' (Report, National Ethnic Disability Ethnic Alliance, 2015).

⁵⁸ See 'Service Responses for People with Disabilities from Refugee Backgrounds in Northern Melbourne' (Report, Victorian Foundation for Survivors of Torture, 2018) 41; Lauren Quayle, '*Improving access to disability support for refugees and humanitarian entrants*' (17 February 2017), Refugee Council of Australia, <<https://www.refugeecouncil.org.au/resources/publications-external/diversitat-disability-support/>> ; Julie King et al, 'Restrictive practices on refugees in Australia with intellectual disability and challenging behaviours, A family's story (2016) 10(4) *Advances in Mental Health and Intellectual Disabilities* 222, 7-8.

⁵⁹ 'FutureAbility Project Report 2016' (Report, Settlement Services International, 2017) 13.

⁶⁰ Blankenship and Madson (2007) cited in H Barry Waldman, Stephen P Perlman and Matthew Cooke, 'Are refugees with disabilities overlooked in the general multitude of displaced persons?' (December 2017) *Exceptional Parent Magazine* 12.

⁶¹ 'Submission into the Implementation of the National Disability Insurance Scheme and the Provision of Disability Services in New South Wales (Refugee Council of Australia, 2018).

⁶² Soldatic et al (2012) cited in Soldatic et al, above n 45, 508.

⁶³ Victorian Foundation for Survivors of Torture, above n 58; Ethnic Community Services Cooperative, Submission No 24 to the Joint Standing Committee on the NDIS, *The provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition*, 24 February 2017.

⁶⁴ Above n 61, 7.

appointments with health professionals to obtain the necessary evidence for support applications.⁶⁵ This can lead to the person abandoning their pursuit of the support they are entitled to.⁶⁶ Achieving diagnosis for mental disabilities such as autism is particularly complicated and so families sometimes do not pursue diagnosis at all.⁶⁷

In addition, the literature suggests that health care professionals and NDIS services are not well equipped to accommodate the unique situation of disabled refugees. Health care professionals may not be able to diagnose disability in people who have trouble with memory or enunciating their feelings due to trauma experiences.⁶⁸ Though translators are technically available, they are often spread thinly due to demand or not used due to time constraints and so their services may not be available even where it is essential to mutual doctor-patient understanding.⁶⁹ Much of the NDIS application process requires English literacy that newly arrived refugees do not have which further prolongs their time without support.⁷⁰

Support services or ways of managing disability are often also not sensitive to the diverse cultural backgrounds of refugees. A literature review by the Australian Psychological Society draws attention to the debate which questions the applicability of western concepts and current measures to treating non-Western populations.⁷¹ Other practices may traumatise disabled refugees in particular. One report describes the horror of a refugee family at the restrictive practices (practices which restrict freedom of movement to prevent harm to a person with a disability or others) used on their relative who had been exposed to torture.⁷² Though restrictive practices are not unusual in Australia, they can be extremely traumatic to refugees who have experienced restraint in the torture context.

In summary, the evidence suggests that refugees with disabilities in Australia and their families may not be able to access the support they need to diagnose and manage disability. The intersection between disability and refugee has the effect of compounded disadvantage and discrimination. Although the NDIS system in Australia is designed to promote choice and autonomy in line with the principles of the CRPD, this can disadvantage disabled refugees because it assumes knowledge of Australian systems and neglects to adequately accommodate language, cultural and social barriers.⁷³

⁶⁵ Ibid, 5.

⁶⁶ Victorian Foundation for Survivors of Torture, above n 58, 39.

⁶⁷ Ibid.

⁶⁸ *Learn about Torture and Trauma*, NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, <<http://www.startts.org.au/resources/refugees-asylum-seekers-and-trauma/learn-about-torture-and-trauma/>>.

⁶⁹ Refugee Council of Australia, above n 61, 10; Victorian Foundation for Survivors of Torture, above n 58, 40.

⁷⁰ Refugee Council of Australia, above n 61.

⁷¹ Murray, Davidson and Schweitzer, above n 51, 15.

⁷² King et al, above n 58.

⁷³ Refugee Council of Australia, above n 61, 4.

2 Disability and the criminal justice system

There is very little to no evidence on the specific intersection between refugees, mental disability and the criminal justice system. This research is necessary in order to properly understand this intersection. However, drawing together evidence related to the overrepresentation of mental disabilities in the criminal justice system and the lack of support received by refugees with these conditions, it can be deduced that disabled refugees may be at a much greater risk of contact with the criminal justice system than people who only satisfy either the category of refugee or disabled.

There is general consensus in the literature that people with a mental disability are overrepresented in the criminal justice system.⁷⁴ This could be due to the tendency for individuals with some disabilities to act in an anti-social or impulsive way.⁷⁵ People with some mental disabilities may be more easily led by people in authority or by those who would use them to commit crimes. This can lead to individuals with a mental disability committing crimes or confessing to acts they did not commit or did not understand.⁷⁶ Law enforcement officials are often not properly trained to recognise mental disability and thus it is overlooked placing mentally disabled individuals in a position of further disadvantage.⁷⁷ Mental disability has also been linked to other factors such as drug taking, unemployment and homelessness which also increase the likelihood of contact with the criminal justice system.⁷⁸ There is also research indicating people from culturally and linguistically diverse backgrounds are more likely to come into contact with the criminal justice due to factors such as police targeting and lack of knowledge of the law.⁷⁹ Bringing these two bodies of research together would seem to indicate that mentally disabled refugees are more likely to come into contact with the criminal justice system.

3 The right to health

Article 25 of the CRPD on the right to health recognises that people with a disability must be provided with the same range, quality and standard of free or affordable health care as other people.⁸⁰ There is also the requirement to provide health services needed by

⁷⁴ Eileen Baldry et al, 'Reducing vulnerability to harm in adults with cognitive disabilities in the Australian criminal justice system' (2013) 10(3) *Journal of Policy and Practice in Intellectual Disabilities* 222;

Law Reform Committee, Parliament of Victoria, *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their facilities and carers*, Parliamentary Paper No 216 (2013) ;

Victoria Legal Aid, Submission to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, January 2014.

⁷⁵ Law Reform Committee, Parliament of Victoria, above n 74, 26.

⁷⁶ Ibid.

⁷⁷ Mark Brennan and Roslin Brennan, 'Cleartalk: Police Responding to Intellectual Disability' (Report, Criminology Research Council, 1994).

⁷⁸ Law Reform Committee, Parliament of Victoria, above n 74, 23-24.

⁷⁹ Lorana Bartels, 'Crime Prevention Programs for Culturally and Linguistically Diverse Communities in Australia' (Report No 18, Australian Institute of Criminology, 2011) 3.

⁸⁰ CRPD, Art 25(a).

disabled people specifically because of their disability. This includes early identification and intervention when appropriate and services designed to minimise and prevent further disabilities.⁸¹

A fact sheet on the right to health created by the *Office of the High Commissioner for Human Rights* (OHCHR) and the WHO states that in order to fulfil this right, health care services must exist at a sufficient quantity to meet demand, be accessible both financially and physically, including for disabled persons, and health care should be medically and culturally appropriate.⁸² It also acknowledges that the impact of discrimination will be compounded when an individual suffers multiple discrimination, such as discrimination on the basis of gender, race, age or ethnicity.⁸³

Based on the information previously presented about the experiences of disabled refugees with Australian health and disability services, it seems that enough may not be being done to achieve the fulfilment of the right to health. A person is owed protection under the CRPD if they are within a state's territory or jurisdiction. There is no citizenship requirement.⁸⁴ The information gathered suggests that health care for refugees in general and also care for their specific disabilities is not being provided because Australia's systems have not been equipped with the resources and training to manage the unique situation of refugees with a mental disability. In particular this entails 'culturally appropriate' services and recognising the multiple discrimination that can occur when multiple forms of disadvantage come together such as refugee status and disability.

In line with the social model view of disability adopted by the CRPD, disability is generated when societies do not accommodate for people's conditions. This locates disability externally and places the responsibility on governments and private enterprises to make services and locations accessible for people with a disability, at their request or otherwise. Therefore this means that the difficulties faced by refugees with mental disabilities in accessing support in Australia or under Australian care come from a lack of accommodation in the support, not from their own deficiencies in comprehension due to disability or lack of English or cultural awareness of disability. Under the CRPD, the responsibility is on Australian health, social and disability services and the Australian governments who fund and direct them to make sure they are accessible to refugees with a mental disability so that Australia is acting in accordance with its obligations as a signatory to the CRPD.

In summary, though evidence is not plentiful, what is available suggests that mental disability may be more common amongst people from a refugee background. This disadvantage is increased by the difficulties refugees face in accessing diagnoses and support for their disability due to factors associated with being a refugee such as poor English skills and trauma which are not accommodated by those services. It can be

⁸¹ CRPD, Art 25(b).

⁸² Office of the United Nations High Commissioner for Human Rights and the World Health Organisation, 'The Right to Health' (Fact Sheet No 31, 2008) 4.

⁸³ Ibid 7.

⁸⁴ Mary Crock et al, above n 42, 26.

deduced then that this lack of support, combined with the existing overrepresentation of people with mental disabilities in the criminal justice system increases the likelihood of disabled refugees being convicted of a crime. However, unlike other people with disabilities in the criminal justice system, a criminal conviction has serious implications for the visas of refugees.

PART 2: VISA CANCELLATION ON CHARACTER GROUNDS

A Introduction to Migration Act

Australia's system for assessing the right of person's to enter and remain in Australia is very complex. At the heart of the powers provided by the *Migration Act* is the delicate balancing of rights, including respect for the inherent dignity of all⁸⁵ and the public interest of the Australian community.⁸⁶ While it is reasonable for the community to expect that visa holders abide by Australia's criminal laws, the decision to cancel a person's visa on the basis of criminal conduct must be proportionate and informed by international human rights.⁸⁷ This includes recent advancements in the international human rights regime, culminating with the CRPD, to which Australia became a signatory on the 30th March 2007.⁸⁸

Under section 189 of the Act it is mandatory to detain 'unlawful non-citizens',⁸⁹ (persons without a valid visa), regardless of their individual circumstances.⁹⁰ Once detained, unlawful non-citizens must remain in detention until they are either granted a visa or removed from Australia.⁹¹ Section 501 was introduced in 1998, allowing the Minister to cancel a person's visa upon satisfaction they did not pass the 'character test', which considers an individual's past or present criminal conduct, as well as their conduct generally (refer to Annex 2).⁹² A person whose visa is cancelled under section 501 is ineligible to apply for a bridging visa and must therefore either remain in immigration detention until a decision is finalised or they leave the country. Following the final decision to cancel the visa, officers are required to remove the 'unlawful non-citizen' as

⁸⁵ Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A; Visa Cancellations Working Group, Submission No. 33 to Department of Home Affairs, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds: Submission to the Inquiry by the Joint Standing Committee*, 11 May 2018, 5[4]-[5].

⁸⁶ Department for Immigration and Border Protection, Migration Act 1958, *Direction 65 given under section 499 Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* ('Direction 65') Preamble 6.1.

⁸⁷ UN Human Rights Committee, *Views: Communication No. 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/ 2011 (26 July 2013), [9.3] ('*FKAG v Australia*').

⁸⁸ United Nations Treaty Collection, *Human Rights: Convention on the Rights of Persons with Disabilities* (6 December 2018) *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>.

⁸⁹ *Migration Act*, s 14.

⁹⁰ *Ibid*, s 189.

⁹¹ *Ibid*, s 196.

⁹² *Ibid*, s 501.

soon as reasonably practicable.⁹³ However, Australia is bound by non-refoulement obligations in accordance with the *Convention Against Torture*, which prohibits the return of a non-citizen to their country of origin where they face persecution.⁹⁴ Article 33(1) of the *Refugee Convention*, to which Australia is also a signatory, specifies non-refoulement obligations are owed towards refugees.⁹⁵ Furthermore, an implied non-refoulement obligation is imposed by Articles 6 and 7 of the *ICCPR*, relating to the right to life, and to be free from torture or cruel, inhuman or degrading treatment or punishment. As will be explored in greater detail in Part Four with respect to immigration detention, the mandatory detention of refugees with mental disabilities without consideration of their individual circumstances contravenes the CRPD.⁹⁶

The Migration Amendment (Character Test and Visa Cancellation) Bill 2014 was assented to on 10 December 2014.⁹⁷ The Amendment expanded the powers of the government to cancel visas, including through the introduction of mandatory visa cancellation without notice in certain circumstances, and the strengthening of ministerial decision-making powers. This includes that the minister can make personal decisions that are not subject to merits review. As canvassed in Part One, the intersectional disadvantage of mental disability and refugee status means that this group are disproportionately at risk of being captured by the grounds for visa cancellation. Therefore, it is of unquestionable importance that review mechanisms and human rights protections are entrenched in the operation of the *Migration Act*.⁹⁸

B Statistics of visa cancellations on character grounds

The following information was collected from the Department of Home Affairs and shows the number of individuals whose visas (not limited to protection visas) have been cancelled on character grounds:⁹⁹

⁹³ Ibid ss 5, 198 and 199.

⁹⁴ *Convention against Torture*, art 3(1).

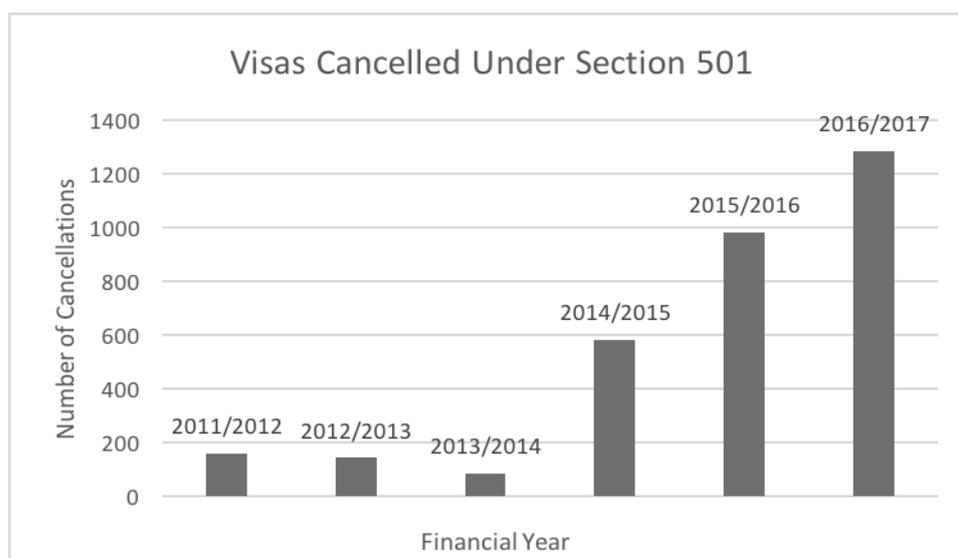
⁹⁵ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, vol. 189 (entered into force 22 April 1954), art 33.

⁹⁶ CRPD, art 14(1)(b) and (2).

⁹⁷ *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

⁹⁸ Visa Cancellations Working Group, Submission No. 33 to Department of Home Affairs, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds: Submission to the Inquiry by the Joint Standing Committee*, 11 May 2018, 1.

⁹⁹ Department of Home Affairs, *Visa Statistics*, (2 December 2018) Australian Government, <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>>.



As shown above, the enactment of the provisions in 2014 has seen a sharp increase in the number of visas cancelled on character grounds. The Refugee Council of Australia noted that people on protection or refugee visas have been seriously affected by the increase in visa cancellations on character grounds.¹⁰⁰ While fewer than five people on protection or refugee visas had their visas cancelled under section 501 prior to 2014-2015, 189 holders have had their visas cancelled since July 2015.¹⁰¹ As of September 2018, 424 of the 1305 people in immigration detention were detained as a result of section 501 visa cancellations, surpassing the number of people in immigration as a result of their illegal maritime arrival.¹⁰²

C Provisions of the Character Test and the Right to Non-Discrimination

Article 5(2) of the CRPD prohibits discrimination on the basis of disability, and obliges State Parties to protect persons with disabilities from discrimination.¹⁰³ According to the General Comment on Article 5, non-discrimination is amongst the most fundamental rights of international human rights law.¹⁰⁴ This is apparent throughout the CRPD in the frequent use of the phrase, “on an equal basis with others.”¹⁰⁵ ‘Discrimination on the basis of disability’ is broadly defined as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other

¹⁰⁰ Visa Cancellations Working Group, Submission No. 33 to Department of Home Affairs, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds: Submission to the Inquiry by the Joint Standing Committee*, 11 May 2018, 7[16].

¹⁰¹ *Ibid.*

¹⁰² Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, (30 September 2018) 4.

¹⁰³ *Ibid.*

¹⁰⁴ Committee on the Rights of Persons with Disabilities, *General Comment No 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) [4].

¹⁰⁵ *Ibid* [7].

field.”¹⁰⁶ The ‘character test’ in section 501 of the *Migration Act* disproportionately disadvantages refugees with disabilities, both directly and indirectly in violation of Article 5(2). Furthermore, this discrimination is intersectional, arising as a combined consequence of an individual’s dual status as a non-citizen and as a disabled person.¹⁰⁷

1 Direct Discrimination

Direct discrimination occurs where persons with disabilities are treated less favourably than persons without disabilities in similar situations.¹⁰⁸ The *Migration Act* directly discriminates against persons with disabilities, by creating mechanisms for visa cancellation that only apply to persons with mental disabilities.¹⁰⁹ Section 501(7)(e) of the *Migration Act* extends the ‘substantial criminal record’ character ground to circumstances where non-citizens have been acquitted of an offence on the grounds of unsoundness of mind or insanity, and are consequently institutionalised.¹¹⁰ This is to be contrasted with the twelve-month imprisonment threshold usually necessary in order to cancel a visa on the basis of a having a ‘substantial criminal record’.¹¹¹ Justification for the power likely rests on the assumption that persons who are held to be unsound of mind or insane and are institutionalised, pose a threat to the Australian community.¹¹² In addition to the perpetuation of stereotypes about the criminality of persons with mental disabilities,¹¹³ this reflects the medical model approach to disability rejected by the CRPD,¹¹⁴ and amounts to discrimination. Section 501(7)(e) raises further issues in relation to the presumption of innocence, given that persons who have their visas cancelled under the section now face indefinite detention despite having not been convicted. The Australian Government have claimed section 501(7)(e) does not threaten the presumption of innocence given it only operates where guilt has not been absolved, only pardoned or relieved.¹¹⁵ However, the fact remains that the section differentiates between acquittals of person with a mental disability and acquittals of those without, only recognizing the legitimacy of the latter.

Similarly, section 501(7)(f) renders those held unfit to plead for an offence the court has found them to have committed on the evidence available, and who are subsequently

¹⁰⁶ CRPD, art 2.

¹⁰⁷ CRPD Committee, *General Comment No 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) [19].

¹⁰⁸ Committee on the Rights of Persons with Disabilities, *General Comment No 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) [18(a)].

¹⁰⁹ *Migration Act 1958* (Cth) ss 501(7)(e), 501(7)(f), and 501(9).

¹¹⁰ *Ibid* ss 501(1), 501(2), 501(3), 501(6)(a) and 501(7)(e).

¹¹¹ *Ibid* 501(7)(a)-(d).

¹¹² Ministerial Direction No. 65, pg 5.

¹¹³ Dean Burnett, ‘Stop blaming mental illness for violent crimes’, *The Guardian* (online), 12 June 2016 <<https://www.theguardian.com/science/brain-flapping/2016/jun/21/stop-blaming-mental-illness-for-violent-crimes>>.

¹¹⁴ Theresia Degener, ‘Disability in a Human Rights Context’ (2016) 5(3), 35 *Laws*, pg 2.

¹¹⁵ Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A, 10.

detained in a facility or institution, liable to have their visa cancelled.¹¹⁶ ‘Unfitness to plead’ refers to the legal process of exempting a person from trial on the assumption they are unable to comprehend the proceedings at the time.¹¹⁷ As was found in *Marlon James Noble v Australia*, the ‘unfit to plea’ standing exemption is itself a form of discrimination, denying the agency of persons with mental disabilities and justifying their indefinite institutionalisation.¹¹⁸ Section 501(7)(f) deepens the discriminatory effect of holding a person unfit to plea by warranting visa cancellation in absence of conviction or sentence, and upon a lower standard of evidence than would justify a criminal conviction of a person held fit to plea.¹¹⁹

Finally, section 501(9) extends the meaning of a ‘sentence of imprisonment’ to include orders to participate in a residential drug rehabilitation scheme, or a residential program for the mentally ill.¹²⁰ The equation of rehabilitation and mental health services with punitive imprisonment is highly discriminatory. While the criminal justice system recognises, to an extent, the complexity of factors relevant to persons with mental disabilities which makes imprisonment an inappropriate response to their offending,¹²¹ 501(9) treats mental disability as warranting the serious decision to cancel a visa, leading to their immigration detention.¹²² The Refugee Advice and Casework Service (‘RACS’) has submitted that, as people from refugee backgrounds often face mental health issues, this provision may disproportionately affect refugees with mental disabilities.¹²³ Furthermore, it contradicts the rehabilitation obligations enshrined in the CRPD by taking persons from a residential program designed to meet their needs and placing them in the prison-like conditions of immigration detention and where their rehabilitation is not a paramount concern.¹²⁴

2 Indirect Discrimination

¹¹⁶ *Migration Act 1958* (Cth) ss 501(1), 501(2), 501(3), 501(6)(a) and 501(7)(f).

¹¹⁷ Victorian Law Reform Commission, *Unfitness to Stand Trial* (12 November 2018) *Victorian Law Reform Commission* <<https://www.lawreform.vic.gov.au/content/4-unfitness-stand-trial>>.

¹¹⁸ Committee on the Rights of Persons with Disabilities, *Decision: Communication No. 7/2012*, 16th sess, UN Doc CRPD/C/16/D/7/2012 (10 October 2016) [8.4] (*‘Marlon James Noble v Australia’*); Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities*, 14th sess, UN Doc (September 2015) [16].

¹¹⁹ *Migration Act 1958* (Cth) s 501(7)(f).

¹²⁰ *Ibid* s 501(9).

¹²¹ *See unfitness to plead, residential drug rehabilitation schemes, residential program for the mentally ill, etc.*

¹²² *Migration Act 1958* (Cth) s 501(7)(a)-(d).

¹²³ Refugee Advice and Casework Service, Submission 2 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*, 17 October 2017, 4 (*‘RACS’*).

¹²⁴ CRPD, art 26; Guy Coffey et al, ‘The meaning and mental health consequences of long-term immigration detention for people seeking asylum’ (2010) Vol. 70(12) *Social Science and Medicine* 2070.

Indirect discrimination refers to formally ‘neutral’ laws, politics, or practices, which in operation, disproportionately and negatively impact persons with disabilities.¹²⁵ As highlighted in Part One of this report, the lack of appropriate support and education in Australia’s disability and health systems greatly increases the likelihood of refugees with disabilities encountering the criminal justice system as their conditions are not being recognised or addressed.¹²⁶ Consequently, whilst visa cancellations for criminal offending appears neutral at face value, it disproportionately affects refugees with mental disabilities, particularly in capturing low-level offending.¹²⁷ For example, in *MLQP and Minister for Home Affairs*, a man seeking asylum in Australia who had become drug-dependent following a series of traumatic events, including being the victim of a violent crime,¹²⁸ homelessness,¹²⁹ and feeling financially burdened when his mother fell ill,¹³⁰ had his visa cancelled.¹³¹ The basis of the cancellation, under section 501(6)(d)(i) of the *Migration Act* – risk of committing a serious offence, – was a verbal altercation in which he threatened two men with a knife. The low sentence (fine of \$5000 and no custodial sentence, though the offence carried a maximum sentence of two years imprisonment) imposed by the Court was, “strongly suggestive of a belief by the Magistrate that the offending was towards the lower end of the scale”.¹³² Irrespective of the fact he was drug-dependent and the minimal seriousness of his offending, his visa was cancelled.¹³³ This case, and many others,¹³⁴ highlight the way in which section 501 of the *Migration Act* indirectly authorises discrimination against refugees with mental disabilities.

PART 3: THE DECISION TO CANCEL AND RESPONDING TO CANCELLATION

As depicted in Annex 1, a visa may be cancelled in one of three ways: a decision of the department under s501(2); a decision of the Minister personally under s501(3)(b); or by operation of the mandatory cancellation provision under s501(3A).

¹²⁵ Committee on the Rights of Persons with Disabilities, *General Comment No 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) [18(b)].

¹²⁶ Jane Flanagan, 'The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned' (Report, National Ethnic Disability Ethnic Alliance, 2015); 'Service Responses for People with Disabilities from Refugee Backgrounds in Northern Melbourne' (Report, Victorian Foundation for Survivors of Torture, 2018); Lauren Quayle, 'Improving access to disability support for refugees and humanitarian entrants' (17 February 2017), Refugee Council of Australia, <<https://www.refugeecouncil.org.au/resources/publications-external/diversitat-disability-support/>>.

¹²⁷ *Migration Act 1958* (Cth) s 501(7)(a)-(d).

¹²⁸ *MLQP and Minister for Home Affairs (Migration)* [2018] AATA 4123 [13].

¹²⁹ *Ibid* [15].

¹³⁰ *Ibid* [14].

¹³¹ *Ibid* [24].

¹³² *Ibid* [39].

¹³³ *Ibid* [39].

¹³⁴ *YTZR and Minister for Home Affairs (Migration)* [2018] AATA 3924; *Zaburoni v Minister for Immigration and Border Protection* [2017] FCAFC 205; *ZAFQ v Minister for Immigration and Border Protection* [2016] FCAFC 105.

International human rights jurisprudence finds that there is a presumption against the detention of persons with mental disabilities: “[a]s a general rule, asylum seekers with long-term physical, mental, intellectual and sensory impairments should not be detained.”¹³⁵ This is underpinned by two concerns: the unsuitability of detention for meeting the needs of persons with mental disabilities, and the impact of mental disability on the fairness of immigration procedures whilst in detention.¹³⁶

A Human Rights Principles must Inform Administrative Decision-Making

1 Consideration of CRPD

The rights of mentally disabled refugees must taking in account in deciding whether cancel their visa. Equality and non-discrimination are among the most fundamental principles and rights of international human rights law. Because they are interconnected with human dignity, they are the cornerstones of all human rights.¹³⁷ Relevantly, the Victoria Federal Court case of *Teoh* is the authority for the proposition that administrative decision-makers are required to apply the principles of the international law in the course of exercising their powers.¹³⁸ The rationale behind this is that signing an International Convention, in this case the CRPD, sets a legitimate expectation for affected persons that Australia will comply with the principles contained therein.

At a procedural level, UNHCR recommends that a ‘swift and systematic identification and registration’ of refugees with mental disabilities is necessary to avoid non-compliance with the CRPD.¹³⁹ To the contrary, the Immigration Department has failed to adopt a practice of identifying detainees who have a mental disability. A spokesperson for disability peak bodies has commented on this saying: “To be unable to identify the number of people with disability in offshore and onshore detention is deeply concerning and no doubt means there are people with disability being detained who are not receiving necessary care.”¹⁴⁰ This failure arises out of, and reflects more broadly, issues regarding the organisation of visa cancellation power under the *Migration Act* which does not allow for adequate consideration of CRPD rights in the decision-making process of administrators: (a) prohibits adequate consideration of individual circumstances (mandatory cancellation power); and (b) does not ensure, through adequate processes of review, that the correct and preferable decisions with regard to individual circumstances (personal Ministerial decision-making power).

¹³⁵ UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Geneva: UNHCR, 2012), guideline 9.5 (*‘Detention Guidelines’*); see also Mary Crock et al, *The legal protection of Refugees with Disabilities*, (Elgar Studies in Human Rights, 2017) 158-184.

¹³⁶ Mary Crock et al, *The legal protection of Refugees with Disabilities*, (Elgar Studies in Human Rights, 2017) 173.

¹³⁷ CRPD Committee, *General Comment No 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) 1[4].

¹³⁸ *Ah Hin Teoh v Minister of State for Immigration and Ethnic Affairs* [1994] FCA 1017.

¹³⁹ *Detention Guidelines*, guideline 9.1.

¹⁴⁰ Lina Caneva, ‘Govt Denies Data on Refugees With Disabilities,’ (December, 2016) Pro Bono Australia <<https://probonoaustralia.com.au/news/2016/12/govt-denies-data-refugees-disabilities/>>

2 *Mandatory cancellation*

Under the Migration Act, the effect of cancellation is tantamount to imprisonment because an unlawful non-citizen is required to be detained.¹⁴¹ Mandatory cancellation under s5013A, by virtue of its mandatory operation, does involve an assessment of the visa-holders individual circumstances. As outlined in Annex 1, there are two main steps involved in the mandatory cancellation of a visa:

1. *The Department is notified that a person has a substantial criminal record (while the person is in prison).*
2. *The Department will give or send the person a letter cancelling their visa, called a 'Notice of Visa Cancellation'.*

The letter notifies the person that they can apply to revoke the Department's decision. While waiting for the Department to consider revocation, the person will continue to be detained, either in prison or immigration detention. This is intended to protect against the presumed risk the person poses to the community during this time.¹⁴² In the interest of equal access to justice, as required by Article 13 of the CRPD, it is not adequate to conclude that there is a risk to the community above and beyond the term of imprisonment set by the sentencing judge without further consideration of the individual circumstances of the person. In the case of a mentally disabled refugee, there are a number of important factors to be considered and weigh against the cancellation of their visa (which would result in mandatory detention). These include: right to health on an equal basis;¹⁴³ prohibition against refoulement;¹⁴⁴ and, where judicial findings state such, reduced moral culpability of offending on the basis of mental disability.

i. Effective double-punishment

While the department aims to cancel visas well before someone's estimated date of release from prison so that any revocation process can be finalised while in prison, to date this has rarely occurred.¹⁴⁵ The implication of this is that a refugee with a mental disability who has their visa cancelled for failure to satisfy the character test, is detained by the Immigration Department immediately after completing their custodial term. The inefficiency of this process highlights the severe disjoint between the goals of the State criminal justice system and the operation of Federal immigration laws. The goals of the former are to determine the moral culpability of offenders within a principled framework that reflects the ideals of deterrence and rehabilitation,¹⁴⁶

¹⁴¹ *Migration Act*, s 198.

¹⁴² Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014, [34].

¹⁴³ Art 25; Office of the United Nations High Commissioner for Human Rights and the World Health Organisation, 'The Right to Health' (Fact Sheet No 31, 2008) 4.

¹⁴⁴ *Convention Against Torture*, art 3(1); *Refugee Convention*, art 33.

¹⁴⁵ Commonwealth Ombudsman, Report No 8, *The Department of Immigration and Border Protection: The Administration of Section 501 of the Migration Act 1958*, December 2016, 1.

¹⁴⁶ Kathleen Daly and Rick Sarre, 'Criminal Justice System: Aims and Processes,' Chapter 15, 12 in Darren Palmer et al (eds.) (2017), *Crime and Justice: A Guide to Criminology*, 5th edition. Sydney: Lawbook Co.

whereas the operation of Federal immigration law effectively substitutes the carefully balanced judicial sentencing determination for indefinite or prolonged mandatory detention.

Section 501 effectively exposes a visa-holder who has committed an offence to an additional penalty through its immigration detention implications. Australian Courts have rejected the 'double-punishment' characterisation, distinguishing between the punitive objectives of criminal law and the administrative objectives of migration law.¹⁴⁷ However, the detention of refugees who have had their visas cancelled on offence-related character grounds is in effect punitive. In *Fardon v Australia*, the Human Rights Committee ('HRC'; the treaty body of the ICCPR) noted that administrative detention did 'amount...in substance, to a fresh term of imprisonment'.¹⁴⁸ In that case, Fardon was administratively detained for an indefinite period following the completion of his criminal sentence on the basis he posed a danger to the community. This justification is analogous to the mandatory visa cancellation on character grounds, which likewise results in a second term of detention. Therefore, when immigration detention flows as a direct result of criminal offending, without the due process of a fresh judicial sentence,¹⁴⁹ detention cannot be analytically separated from the criminal punishment.¹⁵⁰ The ANU Migration Program has recognised this mandatory cancellation and detention process as blurring the boundaries between criminal law and migration law, such that the mandatory cancellation process may be judicially interpreted as creating a form of a double punishment.¹⁵¹

In interviews with refugees who had been detained for two years or more, participants describe the prison-like qualities of immigration detention, such as inflexible institutional routines and practices, and the architecture features of the centres including high fences with razor wire, and the pervasiveness of security cameras.¹⁵² The punitive experience of refugees reinforced, as highlighted in Part 2, by the fact that in recent years the number of 501 visa cancellations has surpassed the number of people in immigration as a result of their illegal maritime arrival.¹⁵³ Therefore, in addition to the design and regulation of detention centres, the increase in the number of criminal offenders has the effect of transforming immigration detention into a more prison-like environment.

¹⁴⁷ David Prince and Joanne Kinslor, 'Not only punishment to fear: When criminal and immigration law intersect' (2012) 50(11) *Law Society Journal* 60.

¹⁴⁸ *Fardon v Australia*, [7.4](1).

¹⁴⁹ *Ibid*, [7.4](3).

¹⁵⁰ This point has been made on numerous occasion in a research interviews with lawyers and service providers working in this space.

¹⁵¹ ANU College of Law, Submission No. 6 to Department of Home Affairs, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds*, 11 May 2018, 1, 10. See also Liberty Victoria, Submission 10, 1; Refugee & Immigration Legal Centre, Submission 13, 2 and 19.

¹⁵² Sarah Turnbull, 'Immigration Detention and Punishment' (2017) *Oxford Research Encyclopedia, Criminology and Criminal Justice*, 9.

¹⁵³ Department of Home Affairs, *Immigration Detention and Community Statistics Summary*, (30 September 2018) 4.

The most striking concern noted by the interviewees noted was the double punishment of being detained after they had already served their sentence. Some spoke of the emotional and psychological effect of finding this out, after having planned for their release from prison. Others told the Ombudsman they did not understand the process because of literacy problems.¹⁵⁴ While the effect of this can be devastating for any person, the disproportionate impact this has on refugees with mental disabilities is particularly concerning. Where the criminal justice system has denied or limited their culpability,¹⁵⁵ the immigration system exposes them to indefinite detention. The principle of criminal justice reflects public morale. It is thus of public interest that persons who have done their time- their 'just desserts'- are not subject to additional penalties. This public interest should heavily weigh in favour of the discretion not to cancel a person's visa.¹⁵⁶

ii. Reversal of onus of proof

The mandatory cancellation process effectively results in a reversal of the onus of proof, as it requires an affected person to justify why their visa should not be cancelled.¹⁵⁷ This is particularly burdensome given that whilst in custody or detention, they are not referred to a registered migration agent for advice on their legal rights.¹⁵⁸ Conversely, the Minister is represented by a solicitor or trained officer of the Department of Immigration throughout the process. The unrepresented applicant is greatly disadvantaged as he or she cannot effectively participate in this process.¹⁵⁹ In the case of refugees with mental disabilities, this added burden further disadvantages them in their capacity to avoid the cancellation of their visa.

Frances Gibson has argued that access to justice, as required by Article 13 of the CRPD, would be meaningless without the right to free legal aid, and that this is even more important for refugees with mental disabilities.¹⁶⁰ She references the 1975 Declaration on the Rights of Disabled Persons,¹⁶¹ which articulates the indispensability of a right to legal aid: "Disabled persons shall be able to avail themselves of qualified legal aid when

¹⁵⁴ Above n 152.

¹⁵⁵ For example, being held unfit to plead or acquitted on the grounds of unsoundness of mind or insanity

¹⁵⁶ ICJ, *Committee Hansard*, 28 September 2005, p. 45.

¹⁵⁷ Southern Communities Advocacy Legal and Education Services, Submission No. 7 to Department of Home Affairs, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds*, 11 May 2018, 13; Australian Human Rights Commission, Submission 8, Advocacy Legal and Education Services, Submission No. 7 to Department of Home Affairs, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds*, 11 May 2018, 12.

¹⁵⁸ Visa Cancellations Working Group, Submission No. 33 to Department of Home Affairs, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds: Submission to the Inquiry by the Joint Standing Committee*, 11 May 2018, 8[25].

¹⁵⁹ *Ibid.*

¹⁶⁰ Frances Gibson, 2010, *Article 13 of the Convention on the Rights of Persons with Disabilities- A Right to Legal Aid?*, 15 *Australian Journal of Human Rights* 123, 131.

¹⁶¹ UN General Assembly, *Declaration on the Rights of Disabled Persons*, 9 December 1975, A/RES/3447 (XXX).

such aid proves indispensable for the protection of their person... If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account."¹⁶²

3 Review of administrative decision-making

Judicial and merits review processes are crucial for ensuring executive decision-making is within power, and, as concerns person's who are adversely affected, is exercised in accordance with human rights. While decisions under section 501 are generally merits reviewable, is subject to personal intervention by the Minister (which is unreviewable, and not subject to independent scrutiny or the rules of procedural fairness). The Minister may also overrule decisions of a delegate or the Administrative Appeals Tribunal ('AAT') to revoke a cancellation if satisfied that it is in the national interest.¹⁶³

The merits review process for decisions to refuse or cancel visas on character grounds is an 'expedited' process. This process provides fewer rights for applicants than the ordinary merits review process and entrenches the discriminatory treatment of refugees with a mental disability.¹⁶⁴ For example, it involves: less detailed statements of reasons for decision; a short and inflexible period for review applications to be made (28 days if notice is made in person and 35 days if by post- time cannot be extended); and a prohibition on review applicants raising relevant material during a hearing (whether orally or in writing) unless this has been provided to the Minister in writing two days in advance.¹⁶⁵

This personal Ministerial power does not comply with the rights under the CRPD. Article 13(1) of the CRPD provides that states must ensure "access to justice for persons with disabilities on an equal basis with others."¹⁶⁶ UNHCR Guidelines emphasise that 'immigration proceedings need to be accessible to persons with disabilities'¹⁶⁷ This involves having the opportunity to provide reasons against visa cancellation; for an example, that the consequent mandatory detention will be contrary to their rights as protected under CRPD such as Article 14(1)(b) (right not to be arbitrarily detained). Initial and periodic assessments of mental health status are recommended by the UNHCR Guidelines given that detention can inflict psychological and physical effects.¹⁶⁸ Detention may become arbitrary, contrary to Article 14(1)(b), if the decision to detain a person is not open review, including periodic review so as to enable the grounds for

¹⁶² Above n 160.

¹⁶³ *Migration Act*, Section 501 A and B

¹⁶⁴ Consultation Paper 16-17, citing the Law Institute of Victoria, Department of Justice and Regulation Access to Justice Review: Submission to the Department of Justice and Regulation (1 March 2016) 138, available at <<https://www.liv.asn.au/getattachment/f5562281-ba7f-44f1-a615-3efe79b56c3a/submission-to-the-department-of-justice-and-regula.aspx>>

¹⁶⁵ Commonwealth Ombudsman, 'The Department of Immigration and Border Protection: The Administration of Section 501 of the Migration Act 1958' (2016) Report No. 8 ('*Ombudsman Report*').

¹⁶⁶ *CRPD*, art 13(1).

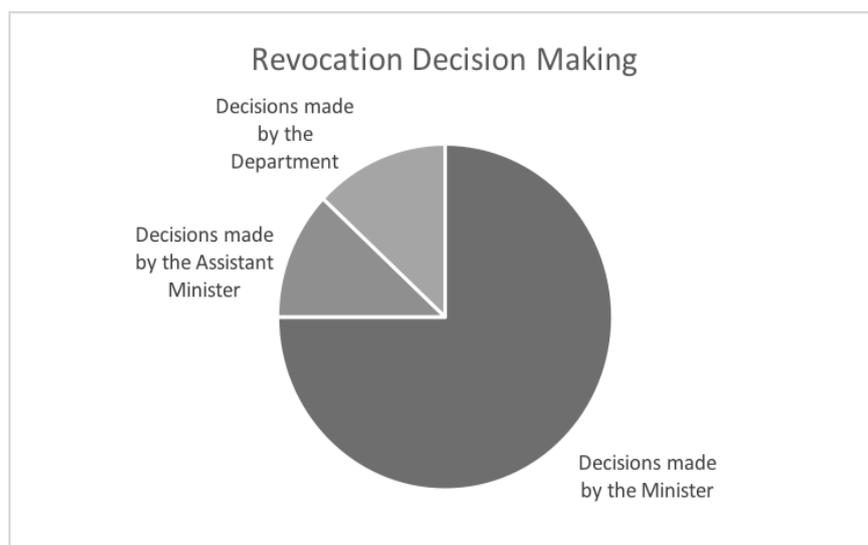
¹⁶⁷ *Detention Guidelines*, guideline 9.5.

¹⁶⁸ *Detention Guidelines*, guideline 9.1.

detention to be assessed.¹⁶⁹ A fundamental aspect of review process is that an independent, authoritative avenue for review. Therefore, contrary to the Minister's virtually unrestrained decision-making power, judicial and merits review proceedings must be accessible to refugees with mental disabilities. For persons with mental impairment, a close assessment of their circumstances is necessary to ensure decisions are made in accordance with their rights under the CRPD.

ii. Delays in Department decision-making

The Ombudsman has found that the Minister personally makes all decisions to revoke cancellations, as well as most cancellations. At 27 April 2016, the Minister had 492 requests for revocation before him, which was 75% of the total. The Ombudsman considered that at least some of the cases could be delegated to reduce delays.¹⁷⁰



It was also found that of those people who have requested revocation for a decision to cancel their visa, the average time they have been waiting in detention was 150 days between 1 January 2014 and 31 December 2015, increasing to 153 days by 29 February 2016.¹⁷¹ By 1 March 2015, there were:

- 158 people who had been in detention waiting for six months or more, and
- 21 people had been in detention for a year or more.¹⁷²

¹⁶⁹ *FKAG v Australia* [9.4].

¹⁷⁰ Commonwealth Ombudsman, Report No 8, *The Department of Immigration and Border Protection: The Administration of Section 501 of the Migration Act 1958*, December 2016, 11 ('*Ombudsman Report*').

¹⁷¹ *Ombudsman Report*, 6.

¹⁷² *Ibid.*

Efficient decision-making and review processes are of critical importance for a refugee with a mental disability in order to protect against detention that amounts to arbitrary detention and neglect of their needs (as explained further in Part 4).

4 Importance of sentencing remarks at the conviction stage

Given the barriers to accessing justice that is inherent in the visa cancellation procedures prescribed by the Migration Act, there are certain situations in which the sentencing remarks of judges at the conviction stage can amount to the strongest, if not only, opportunity for a refugee with a mental disability to have their individual circumstances known to the decision-maker considering the cancellation of their visa. In the case of *Minister for Immigration and Cultural Affairs v SRT*, it was held that administrative decision-makers cannot go behind the findings of the court.¹⁷³ On the basis of this authoritative proposition, it would be outside the power of an administrative decision-maker to make a finding of fact, for an example, that a refugee's mental disability was not a relevant factor in their offending. On this basis, there is the possibility of a fresh ground for judicial review which is significant with respect to decisions made by the ministers personally which are open to judicial review only.

In the context of mandatory visa cancellation, a person whose visa has been cancelled has no opportunity to orally submit a case in their favour. In such instances, upon applying for revocation of the mandatory cancellation, the remarks of a sentencing judge who identifies mental impairment as a factor which mitigates the moral culpability of the applicant provides compelling consideration in the applicant's favour. Furthermore, where the judge articulates a finding that the applicant, whilst convicted of a criminal offence, is not at risk of further endangering the community, the administrative decision-maker would be induced to place significant weight on this consideration which, in the absence of fresh evidence to the contrary, would compel a decision to revoke the visa cancellation.¹⁷⁴ If judges, through education and training about the implications of s501 for refugees with a mental disability, were to adopt a practice of explicitly referencing relevant factors such as these, their sentencing remarks would be a furtherance towards the goal of securing the CRPD right of individuals who come into contact with the criminal justice system.

PART FOUR: MANDATORY IMMIGRATION DETENTION

The dual operation of the mandatory detention provisions in the *Migration Act*¹⁷⁵ and Australia's non-refoulement obligations¹⁷⁶ have the alarming consequence of placing refugees who have had their visas cancelled in mandatory detention indefinitely.¹⁷⁷ The

¹⁷³ *Minister for Immigration & Multicultural Affairs v SRT* [1999] FCA 1197; 91 FCR 234; 56.

¹⁷⁴ See the significant considerations outlined in Part A of Department for Immigration and Border Protection, Migration Act 1958, *Direction 65 given under section 499 Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*.

¹⁷⁵ *Migration Act*, s 189.

¹⁷⁶ *Convention Against Torture*, art 3(1); *Refugee Convention*, art 33.

¹⁷⁷ *Migration Act*, s 189.

HRC has repeatedly characterized this practice as a violation of international law.¹⁷⁸ Further violations are apparent when specifically considering the rights of refugees with disabilities.

A Arbitrary Detention

The immigration detention of refugees with mental disabilities arising on character grounds, as a manifestation of the 'deprivation of liberty',¹⁷⁹ has in practice, violated the prohibition against arbitrary detention. Article 14(1)(b) of the CRPD prohibits unlawful or arbitrary deprivations of liberty against persons with disabilities.¹⁸⁰ It further obliges States to ensure that any deprivation of liberty is in conformity with the law, and not justified by the existence of a disability.¹⁸¹ In *Al-Kateb v Godwin*, the majority of the High Court of Australia held that the indefinite immigration detention of the plaintiff, a stateless asylum seeker whose protection visa application was refused, was not unlawful under Australian law.¹⁸² However, international law has held that detention may be simultaneously lawful and arbitrary.¹⁸³ As a starting point, the meaning of 'arbitrary' can be gleaned from the General Comment and international human rights jurisprudence concerning Article 9(1) of the ICCPR, as the parent right of Article 14(1)(b).¹⁸⁴ Article 9(1) states, inter alia, '[n]o one shall be subject to arbitrary arrest or detention'.¹⁸⁵ According to General Comment 35 on Article 9 of the ICCPR, 'arbitrariness' encompasses considerations of 'inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality' to be determined on an individual, case-by-case basis.¹⁸⁶ The consideration of an individual's personal circumstances is particularly important in relation to refugees with disabilities. More specifically, international human rights jurisprudence has highlighted

¹⁷⁸ Human Rights Committee, *Decision: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) ('A v Australia'); Human Rights Committee, *Decision: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('C v Australia'); Human Rights Committee, *Decision: Communication No. 1050/2002*, 87th sess, UN Doc CCPR/C/87/D/1050/2002 (9 August 2002) ('D and E v Australia'); Human Rights Committee, *Decision: Communication No. 2233/2013*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 (22 March 2016) ('F.J. et al v Australia'); Human Rights Committee, *Decision: Communication No. 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (26 July 2013) ('F.K.A.G et al v Australia'); Human Rights Committee, *Decision: Communication No. 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) ('Shafiq v Australia').

¹⁷⁹ Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities*, 14th sess, UN Doc (September 2015) [5].

¹⁸⁰ CRPD, art 14(1)(b).

¹⁸¹ *Ibid.*

¹⁸² *Al-Kateb v Godwin* (2004) 219 CLR 562.

¹⁸³ Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities*, 14th sess, UN Doc (September 2015) [12].

¹⁸⁴ ICCPR, art 9(1).

¹⁸⁵ *Ibid.*

¹⁸⁶ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [12] and [18].

the obligation to ensure persons with disabilities are not arbitrarily deprived of their liberty requires periodic review of detention¹⁸⁷ and that detention should not continue beyond the period for which a State can provide appropriate justification in order to avoid arbitrariness.¹⁸⁸

It is not inherently arbitrary to detain individuals requesting asylum or those who have a disability,¹⁸⁹ though detention on the basis of disability is unjustifiable.¹⁹⁰ Asylum seekers who enter a State unlawfully may be briefly detained for administrative purposes, however, further detention would be arbitrary in absence of ‘particular reasons specific to the individual’.¹⁹¹ In applying the ICCPR definition of ‘arbitrariness’, the HRC has repeatedly observed Australia’s practice of indefinite immigration detention violates of Article 9(1) of the ICCPR.¹⁹² In *F.K.A.G et al. v Australia*, the HRC observed that the detention of the group of authors (‘complainants’) was arbitrary on the basis Australia had not demonstrated the need for their continued detention,¹⁹³ or that less intrusive options were unavailable.¹⁹⁴ Similarly, in *Shafiq v Australia* the HRC observed that the seven-year detention of the complainant was arbitrary because it was not necessary or proportionate when considering the authors individual circumstances.¹⁹⁵ In that case, the HRC observed that the State’s concern that generally asylum seekers abscond if not in custody was inconsistent with the complainants individual circumstances in which he did not abscond from his committal to a mental institution in Adelaide, even though it would have been easy for him to do so.¹⁹⁶ Relevant to the indefinite detention of refugees following a visa cancellation, the HRC in *FJ et al. v Australia* further observe, ‘[t]he inability of a State party to carry out the expulsion of an individual does not justify indefinite detention’.¹⁹⁷ It is evidently well established that Australia’s regime of mandatory, indefinite detention of refugees is arbitrary.

¹⁸⁷ Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities*, 14th sess, UN Doc (September 2015) [24]; Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [12] and [18]; *Shafiq v Australia* [7.2]-[7.3]; *A v Australia* [9.4].

¹⁸⁸ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [13]; *A v Australia* [9.4]; *C v Australia* [8.2]; *D and E v Australia* [7.2]; *Shafiq v Australia* [7.2].

¹⁸⁹ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [18].

¹⁹⁰ CRPD, art 14(1)(b).

¹⁹¹ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [18].

¹⁹² *A v Australia*; *C v Australia*; *D and E v Australia*; *F.J. et al v Australia*; *F.K.A.G et al v Australia*; *Shafiq v Australia*.

¹⁹³ *F.K.A.G et al v Australia* [9.4].

¹⁹⁴ *Ibid.*

¹⁹⁵ *Shafiq v Australia* [7.2]-[7.3].

¹⁹⁶ *Ibid* [7.3].

¹⁹⁷ *F.K.A.G. v Australia* [9.3].

Disability adds an additional dimension to the meaning of 'arbitrariness'.¹⁹⁸ Article 14(1)(b) of the CRPD states that State Parties shall ensure persons with disabilities are not deprived of their liberty, 'on an equal basis with others'.¹⁹⁹ Therefore, it is not the case that refugees with disabilities have an inherent right to freedom that refugees without disabilities do not have.²⁰⁰ Disability is however, a crucial consideration for determining whether detention would be arbitrary in the individual circumstances.²⁰¹ This recognition that substantive equality requires recognition of the inequalities that disable a person's effective and equal participation in society is one of the great achievements of the CRPD.²⁰² As such, the HRC has observed that 'the mental health condition of those detained' must be considered when determining whether to detain a person.²⁰³ The obligation of Australia to ensure persons are not arbitrarily detained thus entails a different standard with respect to refugees with disabilities. The significance of this obligation should not be understated, given the high representation of people with disabilities in detention.²⁰⁴ For example, as of 30 September 2014, 268 people living in onshore immigration detention had disabilities.²⁰⁵ Given the deficiencies surrounding identification of less visible disabilities,²⁰⁶ the lack of education or cultural stigma inhibiting self-identification of disability,²⁰⁷ and the evidence suggesting that the detention environment in many cases produces disability,²⁰⁸ it is likely that this number is much larger.²⁰⁹

¹⁹⁸ Marlon James Noble v Australia; *The Legal Protection of Refugees with disabilities: Forgotten and invisible?* : Mary Crock et al , 2017, Elgar, pg 170.

¹⁹⁹ CRPD, art 14(1)(b).

²⁰⁰ *The Legal Protection of Refugees with disabilities: Forgotten and invisible?* : Mary Crock et al , 2017, Elgar, pg 167.

²⁰¹ *Ibid* 170.

²⁰² CRPD, art 5.

²⁰³ *F.K.A.G. et al. v Australia* [9.3].

²⁰⁴ Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) Vol. 70(12) *Social Science and Medicine* 2070.

²⁰⁵ National Ethnic Disability Alliance, *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (2015) pg 18.

²⁰⁶ *Ibid* pg 18.

²⁰⁷ 'Service Responses for People with Disabilities from Refugee Backgrounds in Northern Melbourne' (Report, Victorian Foundation for Survivors of Torture, 2018); Lauren Quayle, 'Improving access to disability support for refugees and humanitarian entrants' (17 February 2017), Refugee Council of Australia, <<https://www.refugeecouncil.org.au/resources/publications-external/diversitat-disability-support/>>. ; Julie King et al, 'Restrictive practices on refugees in Australia with intellectual disability and challenging behaviours, A family's story' (2016) 10(4) *Advances in Mental Health and Intellectual Disabilities* 222.

²⁰⁸ Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) Vol. 70(12) *Social Science and Medicine* 2070; National Ethnic Disability Alliance, *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (2015); Australian Cross Disability Alliance, *Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [70].

²⁰⁹ National Ethnic Disability Alliance, *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (2015) pg 18.

The deprivation of liberty based on “the perceived risk or danger of persons with disabilities, or their alleged need for care or treatment”,²¹⁰ is a clear violation of Article 14(1)(b) of the CRPD.²¹¹ Article 14(1)(b) expressly prohibits the deprivation of liberty justified by the existence of a disability, and there are no exceptions to this prohibition.²¹² As submitted in Part Two, the immigration detention of refugees with mental disabilities that results from their institutionalisation when acquitted for unsoundness of mind or insanity, or held unfit to plead,²¹³ arises from the assumption refugees with a mental disability pose a ‘danger’ to the community. Immigration detention justified by sections 501(e) and (f) character grounds thus violates the obligation not to deprive a person of their liberty on the basis of disability.²¹⁴

Marlon James Noble v Australia, is the only Article 14(1)(b) communication from the CRPD Committee, and highlights the above point, that detention is arbitrary when justified by the existence of a disability.²¹⁵ In *Marlon*, complainant Marlon James Noble, an Aboriginal man with mental and intellectual disability was detained for a total of 10 years and 3 months in an institution, having been held unfit to plead against charges carrying a penalty of 20 and 7 years respectively.²¹⁶ Had he been deemed fit to plead, Marlon was unlikely to have been convicted. If he were convicted, it was determined unlikely that he would receive a sentence equivalent or close to the time he was mandatorily detained. He submitted that his detention was arbitrary on four bases; it was discretionary, unjust in that he had not been convicted for the charges, it was disproportionate, and it was punitive.²¹⁷ The CRPD Committee noted it was arbitrary to detain Marlon without a conviction and in consideration of the potential consequences of his intellectual disability.²¹⁸ Furthermore, it reaffirmed that persons with intellectual and psychosocial disabilities in particular, are entitled to liberty under Article 14 of the CRPD.²¹⁹ Whilst Marlon concerns an institutional setting, there are clear parallels between Marlon’s experience and immigration detention arising from visa-cancellation on offence-related character grounds, such as that detention is authorized irrespective of a conviction, the duration of detention may surpass the likely sentence to be imposed for the offence, is it punitive, and may be ‘justified’ on the basis of disability. Therefore, applying Marlon reasoning, it is apparent that detaining refugees with disabilities who have committed offences on the basis of the potential consequence of their intellectual

²¹⁰ Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities, 14th sess, UN Doc (September 2015) [13].

²¹¹ CRPD, art 14(1)(b).

²¹² Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities, 14th sess, UN Doc (September 2015) [7].

²¹³ Migration Act 1958 (Cth) ss 501(7)(e) and 501(7)(f).

²¹⁴ *Ibid.*

²¹⁵ *Marlon James Noble v Australia*.

²¹⁶ *Ibid* [2.4].

²¹⁷ *Ibid* [5.4]

²¹⁸ *Ibid* [8.4].

²¹⁹ *Ibid* [8.3].

and psychosocial disabilities, without a conviction, equates their disability with the cause of their detention and is thus a violation of Article 14(1)(b).²²⁰

The different approaches to ‘reasonableness, necessity, and proportionality’ necessary when assessing whether deprivations of liberty are arbitrary in a disability context have been recognized in international human rights jurisprudence, such as the heightened obligation to conduct prompt and regular reviews.²²¹ In *C v Australia*, the HRC further observed that Australia was obliged to demonstrate a less invasive means of achieving their objectives, ‘for example, the imposition of reporting obligations, sureties or other conditions *which would take account of the author’s deteriorating condition* [the development of delusional disorder, psychosis and depression in immigration detention]’.²²² General Comment 35 of Article 9 of the ICCPR adds that ‘[s]tate parties should make available adequate community based or alternative social-care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement’,²²³ implying a state’s burden in justifying detention is increased where the person has a mental disability.

B Reasonable Accommodation

Article 14(2) of the CRPD ensures that if persons with disabilities are deprived of their liberty, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights and shall be treated in compliance with the objectives and principles of the present Convention, *including by provision of reasonable accommodation*’.²²⁴ Reasonable accommodation duties are a type of accessibility duty, obliging States Parties to address individual accessibility issues from the moment persons with disabilities request access to an environment non-accessible to them.²²⁵ Here ‘access’ does not simply refer to physical access, but the ability to engage in an environment.²²⁶ An example of reasonable accommodation in an immigration detention centre, might include the provision of formal support services to refugees with mental disabilities, in a way tailored to their individual needs, or access to an interpreter.²²⁷ It is distinguished from accessibility more generally, whereby states undertake to adjust

²²⁰ CRPD, art 14(1)(b).

²²¹ Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities*, 14th sess, UN Doc (September 2015) [24]; Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [18]; Shafiq v Australia [7.2]-[7.3]; D and E v Australia [9.4].

²²² *C v Australia* [2.6] and [8.2].

²²³ *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [19].

²²⁴ CRPD, art 14(2).

²²⁵ CRPD, art 2; Committee on the Rights of Persons with Disabilities, *Decision: Communication No. 1/2010*, 9th sess, UN Doc CRPD/C/9/D/1/2010 (21 June 2013) (‘Nyusti and Takacs v Hungary’).

²²⁶ CRPD, art 9.

²²⁷ National Ethnic Disability Alliance, *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (2015) pg 24 and 26.

environments so that they are broadly accommodating to all people.²²⁸ Australian immigration facilities have failed to make detention accessible to refugees with mental disabilities in this broad sense.²²⁹ Both reasonable accommodation and accessibility are necessary for the realisation of the CRPD.

The obligation to provide reasonable accommodation is qualified by a limitation that it is not disproportionate, or does not unduly burden the duty bearer.²³⁰ The language of 'burden' is problematic, in that it implies persons with disabilities are an inconvenience, reflecting medical-model-type attitudes, despite the rejection of the medical model in the CRPD.²³¹ In effect the limitation excuses duty bearers where accommodation is considered too costly or resource-demanding.²³² In an immigration detention setting, State Parties have chosen to deprive persons of their liberty and have significant control or power over detainees, likely raising the 'burden' threshold.²³³

The CRPD Committee has largely provided guidance as to the interpretation of 'reasonable accommodation' in relation to Article 5(3) of the CRPD, which states reasonable accommodation is necessary for non-discrimination.²³⁴ The General Comment on Article 5 specifically recognize that State Parties who receive high numbers of asylum seekers, refugees, or migrants should ensure immigration facilities are accessible to persons with disabilities, particularly, persons with psychosocial and intellectual disabilities.²³⁵ Australia is such a State Party.²³⁶ Furthermore, the General Comment states that asylum seekers, refugees, and migrants with disabilities should be provided psychosocial and legal services in a way that is sensitive to their disabilities, age, gender and culture.²³⁷ In light of the wide recognition that mandatory, indefinite immigration detention in Australia drastically deteriorates the mental health of

²²⁸ CRPD, art 9.

²²⁹ F.K.A.G. et al. v Australia [3.13]; F.J. et al. v Australia [3.15]; National Ethnic Disability Alliance, *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (2015) 16; Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) Vol. 70(12) *Social Science and Medicine* 2070.

²³⁰ CRPD, art 2.

²³¹ Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3), 35 *Laws*, pg 2.

²³² Nyusti and Takacs v Hungary [9.5]-[9.6].

²³³ Committee on the Rights of Persons with Disabilities, *Decision: Communication No 8/2012*, sess 11, UN Doc CRPD/C/11/D/8/2012 (18 June 2014) [8.9] ('X v Argentina').

²³⁴ CRPD, art 5(3).

²³⁵ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [73(p)].

²³⁶ Asylum Seeker Resource Centre, *Detention and Refugee Statistics, Asylum Seeker Resource Centre*, <<https://www.asrc.org.au/resources/statistics/detention-and-refugee-statistics/>>.

²³⁷ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [73(p)].

detainees,²³⁸ and has the capacity to cause irreparable damage,²³⁹ the duty to provide reasonable accommodation is especially important.

Data relating to refugees living with disabilities in Australian immigration detention is 'practically non-existent'.²⁴⁰ However, a general impression of the unaccommodating conditions of immigration detention is elucidated from the personal accounts of refugees with disabilities. In a complaint to the Australia Human Rights Commission, Mr AM, a national of Sri Lanka seeking asylum in Australia, describes the inadequacy of mental health services in meeting his needs:

*"I haven't been able to see mental health specialists for ongoing help such as a counsellor, psychologist and/or psychiatrist. Due to this lack of consistent support and the length of my detention, my mental health has been greatly deteriorating."*²⁴¹

The lack of mental health services available to Mr AM is consistent with research findings from interviews with asylum seekers who each expressed their frustration at the lack of health care available to them.²⁴² In particular, one participant who had been treated for severe depression shared that on occasion he felt punished, rather than cared for.²⁴³ Per *X v Argentina*, the only admissible Article 14(2) communication, in order to satisfy their reasonable accommodation obligations, Australia must make accommodations to ensure individual refugees with disabilities can access facilities and services on an equal basis with others, live independently and participate fully in all aspects of life in their place of detention, and enjoy access to facilities and services in detention.²⁴⁴

PART 5: CONSIDERATION OF PROPOSED AMENDMENTS TO THE MIGRATION ACT

The Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth) ('Strengthening the Character Test Bill') was tabled in Parliament on the 22nd of November 2018.²⁴⁵ The amendment inserts new paragraph 501(6)(aaa) into the *Migration Act* which provides that a non-citizen will not pass the character test if they

²³⁸ Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) Vol. 70(12) *Social Science and Medicine* 2070; National Ethnic Disability Alliance, *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (2015); Australian Cross Disability Alliance, *Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [70].

²³⁹ *F.K.A.G. et al. v Australia* [1.2].

²⁴⁰ National Ethnic Disability Alliance, *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned* (2015) 17.

²⁴¹ Australian Human Rights Commission, *AM v Commonwealth of Australia (Department of Home Affairs): Report into Arbitrary Detention* (2018) [106].

²⁴² Guy Coffey et al, 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) Vol. 70(12) *Social Science and Medicine* 2073.

²⁴³ *Ibid.*

²⁴⁴ *X v Argentina* [9(b)(ii)].

²⁴⁵ Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth).

are convicted of a 'designated offence'.²⁴⁶ The effect of the amendment is to render greater numbers of people liable for visa cancellation on character grounds by capturing non-citizens convicted of an offence punishable by two years imprisonment, even if their sentence was less than two years.²⁴⁷

The implications of the amendments on refugees with mental disabilities are significant. Non-citizens²⁴⁸ would be exposed to visa cancellation for lower-level offending. 'Designated offences' includes a range of low-level offences involving, inter alia, the breach of a court order for the protection of another or possession of a weapon.²⁴⁹ For example, the breach of an intervention order, even when caused by the protected person, or possession of a knife, whether to injure, for self-defence, or to peel an apple, places a refugee with a disability at risk of visa cancellation.²⁵⁰

Furthermore, the power to cancel the visa arises regardless of the severity of the offending. As distinguished from the *Migration Act* as it currently operates, a power to cancel a visa under the proposed section 501(6)(aaa) does not require the person to have been sentenced to a term of 12 months of imprisonment or more, but arises simply upon conviction of an offence punishable by more than two years imprisonment.²⁵¹ This lacks consideration of the severity of the offending or moral culpability which are fundamental principles of sentencing. By effectively overriding these important considerations made by the sentencing judge, the Strengthening the Character Test Bill increases the likelihood of adverse outcomes for refugees with mental disabilities as the individual circumstances of refugees with mental disabilities who commit an offence, as reflected in sentencing, becomes irrelevant, at least until the decision review process. As outlined in Part Two, the difficulties in challenging the cancellation of a visa²⁵² mean that any 501(6)(aaa) cancellation will likely remain in force, and ultimately, that refugees with mental disabilities will be at greater risk of indefinite detention.

CONCLUSION

This report has provided an analysis of the CRPD rights implicated when refugees with mental disabilities have their visas cancelled for failure to satisfy the 'character test' under section 501 of the *Migration Act*, on the basis of criminal conviction. It has demonstrated that the operation of the 'character test', and the broader inconsistency of the *Migration Act* with State criminal law, violates the rights of refugees with mental disabilities.

²⁴⁶ Ibid, cl 501(6)(aaa).

²⁴⁷ Mosiqi Acharya, 'New visa rules toughening character test introduced in Australian parliament', *SBS* (online) 25 October 2018 <https://www.sbs.com.au/yourlanguage/hindi/en/article/2018/10/25/new-visa-rules-toughening-character-test-introduced-australian-parliament?fbclid=IwAR3A7C3cxCZyExqhRzMmdcomuddJ9AjmZKROKwqFw0_6hLcT0Z3AQaBkyRw>.

²⁴⁸ *Migration Act* 1958 (Cth) s 13.

²⁴⁹ Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth) cl 501(7AB)

²⁵⁰ *Family Violence Protection Act 2008* (Vic) pt 4; *Control of Weapons Act 1990* (Cth) s 5AA.

²⁵¹ Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth) cl 501(7AA)(b).

²⁵² *Migration Act* 1958 (Cth) ss 500, 501A, 501B and 501CA.

The preliminary overview of the intersection between refugee status, mental disability, and the criminal justice system in Part One found that barriers to accessing support services for disabled refugees coupled with the overrepresentation of persons with mental disabilities in prison, means that refugees with mental disabilities are more likely to encounter the criminal justice system. Issues accessing health and support services indicates violations of the right to health under the CRPD where it discriminatorily prevents persons with mental disability from achieving their “highest attainable standard of health”.²⁵³ Within this context of intersectionality, Part Two analysed section 501 of the *Migration Act* in relation to visa cancellations on character grounds, submitting that the character test directly and indirectly discriminates against refugees with mental disabilities in violation of Article 5(2) of the CRPD. Moreover, turning to the the decision-making powers for cancelling a visa, including the processes for reviewing decisions, a number of violations of the CRPD right to access to justice were identified.²⁵⁴ These included effective double punishment; the unavailability of merits review when a decision is made by the Minister personally; and the inconsistency between State criminal law and Federal immigration law in relation to the treatment of refugees with disabilities who have committed criminal offences. Upon visa cancellation, refugees with mental disabilities face mandatory indefinite detention. Part Four of this report submitted that this amounts to arbitrary detention, and that the needs of refugees with mental disability are not being reasonably accommodated. Finally, this report briefly examined the implications of the recently introduced ‘Strengthening the Character Test’ Bill,²⁵⁵ finding the its enactment would greater expose refugees with mental disabilities to visa cancellation for potentially very low-level offending.²⁵⁶

On the basis of these findings, it is recommended that there be:

- Further research into the interactions between refugees with mental disability and the criminal justice system to address this intersectional form of discrimination;
- Development of procedures for efficiently diagnosing and supporting individuals with mental disability in the refugee population, ensuring that such procedures accommodate the diversity of their cultural and linguistic backgrounds, and experiences of trauma;
- Development of procedures for ensuring that criminal law practitioners are aware of the visa implications of criminal offending for refugees with a mental disability. Through building this awareness, judges should be encouraged to include disability-specific findings into their sentencing remarks where relevant (i.e. reduced moral culpability on the basis of mental disability or low-risk of harm to the community);
- Further research into the needs of refugees with mental disabilities in the context of immigration detention in order to advocate against arbitrary detention and for the right to reasonable accommodation;
- Further research into the implications of the ‘Strengthening the Character Test’

²⁵³ CRPD, art 25.

²⁵⁴ *Ibid*, art 13.

²⁵⁵ Migration Amendment (Strengthening the Character Test) Bill 2018 (Cth).

²⁵⁶ *Ibid* cl 501(6)(aaa).

Bill- particularly with respect to 'designated offence'- on refugees with mental disabilities.

GROUP 5 PROJECT

Thematic Analysis of Administrative Appeals Tribunal (AAT) Decisions Involving Claiming and Reviewing the Disability Support Pension

Partner Organisation

Australian Federation of Disability Organisations

Group Members

Eunice Ghita

Eliza Waters



THEMATIC ANALYSIS OF ADMINISTRATIVE APPEALS TRIBUNAL (AAT) DECISIONS INVOLVING CLAIMING AND REVIEWING THE DISABILITY SUPPORT PENSION

I Introduction

The Disability Support Pension (DSP) is a form of financial support available to people who are deemed to be unable to support themselves through paid work due to the impact of their impairment.¹ This report's aim is to assess the extent to which the DSP eligibility criteria, particularly as they are applied by the Administrative Appeals Tribunal when reviewing Centrelink decisions, raise issues or concerns regarding the provisions of the *Convention on the Rights of Persons with Disabilities (CRPD)*.

Recent evidence has indicated that changes to the eligibility criteria have led to an increasing number of people with disabilities being denied access to the DSP.² The Australian Federation of Disability Organisations (AFDO) was concerned about the decreasing number of people with disabilities being found eligible for the DSP. AFDO also had concerns regarding people with disabilities' access to the process of seeking review by the Administrative Appeals Tribunal (ATT) of DSP-related Centrelink decisions. Consequently, AFDO requested that the Disability Human Rights Clinic prepare a report summarising the legal issues that arise before the Australian Administrative Tribunal in DSP-related decisions. Additionally, AFDO asked us to research the characteristics and experiences of applicants who appeal Centrelink decisions to the AAT. Finally, AFDO requested that we analyse the AAT decisions in order to identify whether the Commonwealth policy regarding eligibility – and its application by the AAT – raises human rights issues under the *CRPD*. We undertook to analyse Victorian AAT decisions relating to the DSP in the timeframe November 2017 to present a 'case study' of the issues arising in AAT appeals over the last 12 months.

This report will firstly outline the eligibility criteria for the DSP and the law regarding the appeals process for review of decisions to deny or discontinue an individual's access to the DSP. Then it will identify and analyse key themes in recent Victorian AAT decisions and explain their implications for Australia's obligations under the *CRPD*. Finally, it will provide some recommendations for the future.

This report will argue that there are indications that the eligibility requirements for the DSP are inconsistent with the right to social protection and an adequate standard of living guaranteed under article 28 of the *CRPD*. Further, it will contend that there is a need for further steps to ensure that the right of people with disabilities to access to justice guaranteed under article 13 of the *CRPD* is upheld in relation to the review of DSP-related Centrelink decisions by the AAT. Ultimately, we recommend that the DSP

¹ Department of Human Services, *Disability Support Pension* (22 October 2018) <<https://www.humanservices.gov.au/individuals/services/centrelink/disability-support-pension>>.

² Michelle Fitts and Karen Soldatic 'Disability Income Reform and Service Innovation: Countering Racial and Regional Discrimination' (2018) 12 (1) *Global Media Journal Australian Edition* 1, 2, 10; Parliamentary Budget Office, *Disability Support Pension – Historical and projected trends*, Report No 01 (2018) vi, 10.

eligibility criteria and the AAT review process be re-evaluated in order to ensure compliance with Australia's obligations under the *CRPD*.

II Outline of Relevant Commonwealth Law

A Eligibility criteria for the Disability Support Pension (DSP)

A series of legislative changes in recent years have tightened the eligibility requirements for the DSP, making fewer people with disabilities eligible.³ Eligibility depends on an applicant proving they have impairments which limit functional capacity (that is, the ability to do certain everyday activities), demonstrating a continuing inability to work, and satisfying residency and age requirements.⁴ Two requirements under the current law were often determinative in the analysed AAT decisions. These were: the requirement that an applicant has functional impairment(s) and the requirement that they have a continuing inability to work.

1 Impairment

Under s 94(1)(a) of the *Social Security Act 1991*, a person must have 'a physical, intellectual or psychiatric impairment' in order to be qualified to receive the disability support pension.⁵

(a) 20 points

Further, for someone to be eligible, their impairment(s) must be 'of 20 points or more under the Impairment Tables'.⁶ The Impairment Tables are found in a legislative instrument – the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*. Their purpose is to enable decision-makers to assign an 'impairment rating'.⁷ This is expressed in terms of a number of 'points' – based on the extent of 'functional impact' arising from a medical condition.⁸

(b) Permanency of impairment – a precondition for assigning points

Under s 6(3) of the *Impairment Tables*, an impairment rating can only be assigned if the condition which causes an impairment is 'permanent'.⁹ In order to be considered permanent, the condition must have been 'fully diagnosed' by 'an appropriately

³ Michelle Fitts and Karen Soldatic 'Disability Income Reform and Service Innovation: Countering Racial and Regional Discrimination' (2018) 12 (1) *Global Media Journal Australian Edition* 1, 2, 10.

⁴ *Social Security Act 1991* (Cth) s 94 ('*Social Security Act*').

⁵ Different eligibility requirements apply to people with permanent blindness. See *Social Security Act 1991* (Cth) s 95.

⁶ *Social Security Act 1991* (Cth) s 94(1)(b).

⁷ *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (Cth) s 11 ('*Impairment Tables*').

⁸ *Ibid* s 11(1)-(2).

⁹ *Ibid* s 6(3).

qualified medical practitioner', 'fully treated', and 'fully stabilised' and be likely to persist for 2 years.¹⁰

Whether a condition is fully stabilised can depend on whether the individual has 'undertaken reasonable treatment' and whether further treatment is 'unlikely to result in significant functional improvement' to the extent that they would be able to work within two years.¹¹ Alternatively, it could be proved that the person would not experience 'functional improvement' allowing them to work within two years or that 'there is a medical or other compelling reason' which prevented the person pursuing 'reasonable treatment'.¹² The cost, location, risks, reliability, and availability of treatment are relevant to determining whether it was 'reasonable'.¹³

(c) Functional impairment: the basis for assigning points:

The Impairment Tables draw attention to 'what the person can, or could do', that is, their 'functional capacity'.¹⁴ Each Impairment Table relates to a specific kind of function [See Box 1].¹⁵ Under each Table, an impairment can be assessed to cause:

- 'no functional impact', leading to 0 points being assigned.
- 'mild functional impact', leading to 5 points being assigned.
- 'moderate functional impact', leading to 10 points being assigned.
- 'severe functional impact', leading to 20 points being assigned.
- 'extreme functional impact', leading to 30 points being assigned.

The level of functional impairment is assessed by reference to particular examples of activities or tasks which a person can or cannot perform.¹⁶

Box 1: List of Impairment Tables:
<ul style="list-style-type: none">● Table 1 - Functions requiring Physical Exertion and Stamina● Table 2 – Upper Limb Function● Table 3 – Lower Limb Function● Table 4 – Spinal Function

¹⁰ Ibid s 6(4).

¹¹ Ibid s 6(6)(a).

¹² Ibid s 6(6)(b).

¹³ Ibid s 7.

¹⁴ Ibid s 6(1).

¹⁵ Ibid.

¹⁶ Ibid.

- Table 5 – Mental Health Function
- Table 6 – Functioning related to Alcohol, Drug and Other Substance Use
- Table 7 – Brain Function
- Table 8 – Communication Function
- Table 9 – Intellectual Function
- Table 10 – Digestive and Reproductive Function
- Table 11 – Hearing and other Functions of the Ear
- Table 12 – Visual Function
- Table 13 – Contenance Function
- Table 14 – Functions of the Skin
- Table 15 - Functions of Consciousness

2 Continuing inability to work

Under s 94(1)(c) of the *Social Security Act 1991*, in addition to proving an impairment that can be assigned 20 or more points, the applicant for the DSP must show that they have ‘a continuing inability to work’ for 15 or more hours per week.¹⁷ Previously, people could be eligible if they were unable to work for 30 or more hours per week.¹⁸

Under s 94(2)(a)-(b), a ‘continuing inability to work’ can be proven if ‘the impairment is of itself sufficient to prevent the person from doing any work independently of a program of support’ and either the impairment would ‘of itself’ prevent participation in a training activity or the impairment would mean that a training activity would be unlikely to facilitate independent work outside of a program of support.¹⁹ This is assessed by looking at the predicted impact of the impairment within the next two years.²⁰

However, if the person’s impairment does not satisfy s 94(2)(a)-(b), and cannot be assigned 20 points under a single Impairment Table,²¹ then a ‘continuing inability to work’ can only be proven if the person has ‘actively participated’ in a Commonwealth-funded program of support.²² That is, a program ‘designed to assist persons to prepare

¹⁷*Social Security Act* s 94 (definition of ‘work’). Alternatively, they can show that they are participating in the Commonwealth ‘supported wage system’.

¹⁸ Fitts and Soldatic, above n 3, 2.

¹⁹ *Social Security Act* s 94(2)(a)-(b).

²⁰ *Ibid* s 94(2)(a)-(b).

²¹ *Ibid* s 94(2)(aa); s 94(3B).

²² *Ibid* s 94(2)(aa).

for, find or maintain work'.²³ More specifically, a program of support is administered by a 'designated provider'²⁴ such as a Disability Employment Services provider and can involve activities such as education, training and work experience.²⁵ Under the relevant legislative instrument, active participation in a program for at least 18 months could be required.²⁶

In assessing someone's inability to work, the decision-maker must *not* consider the availability of training activities nor 'the availability to the person of work in the person's locally accessible labour market.'²⁷

3 Other requirements

Other requirements include age and Australian residency. The person must be between 16 and the age at which they would become entitled to the age pension.²⁸

The applicant must have been an Australian resident for at least 10 years, unless they are granted an exemption or are the dependent child of an Australian resident.²⁹

B Review of decisions to deny or cancel an individual's access to the DSP

If someone's access to the DSP is denied or cancelled, they can challenge that decision.

1 Internal review

Firstly, someone whose DSP application was rejected or whose DSP was cancelled can seek a review of that decision within Centrelink.³⁰ An Authorised Review Officer³¹ (ARO) will then review the decision and decide whether to affirm, vary, or set aside that decision.³²

²³ *Social Security Act* s 94(5) (definition of 'program of support').

²⁴ Department of Social Services, *Participation in a Programme of Support Fact Sheet* (12 September 2015) <https://www.dss.gov.au/sites/default/files/documents/08_2015/d15_459748_des_-_programme_of_support_fact_sheet_aa_to_ef_19_aug.pdf>.

²⁵ Department of Social Services, above n 24, Victoria Legal Aid, *What is a program of support?* (25 January 2018) <<https://www.legalaid.vic.gov.au/find-legal-answers/centrelink/disability-support-pension/what-is-program-of-support>>.

²⁶ *Social Security (Active Participation for Disability Support Pension) Determination 2014* (Cth) s 7(2).

²⁷ *Social Security Act* s 94(3).

²⁸ *Social Security Act* s 94(1)(d). See also Department of Human Services, *Disability Support Pension Eligibility* (20 August 2018) <<https://www.humanservices.gov.au/individuals/services/centrelink/disability-support-pension/eligibility>>.

²⁹ *Social Security Act* s 94(1)(e).

³⁰ *Social Security (Administration) Act 1999* (Cth) s 129(1) (*Administration Act*).

³¹ The Secretary or CEO of Centrelink also has the power to affirm, vary or set aside decision. *Administration Act* s 135(1).

³² *Ibid* s 135(1)(b).

If the ARO affirms the original decision, finding the person ineligible for the DSP, the person can then apply to the AAT for a review.³³

2 AAT first review

If the affected person is unsatisfied with the outcome of internal review, they can apply to have a Centrelink ARO's decision reviewed by the AAT.³⁴ Applications can be submitted to the AAT online, by phone, or in person at an AAT registry³⁵ and there are no associated fees.³⁶ Further steps in the review process include the provision of documents by Centrelink, informal conferences in which Tribunal staff meet with the parties to discuss the case, collect more information, and discuss whether the parties can agree to a resolution without progressing to a hearing.³⁷ If no agreement is reached, the case will proceed to a first review hearing before one or more Tribunal Members.³⁸ First review hearings regarding the DSP take place in the Social Services and Child Support Division of the AAT³⁹ and are heard in private.⁴⁰ At any stage, applicants can opt to have a lawyer represent them, or they can choose to be represented by a family member, disability advocate, or another person.⁴¹ Alternatively, they can represent themselves.⁴²

The Tribunal conducts an independent, external merits review – it applies the law to the facts to assess whether Centrelink's original decision was correct.⁴³ The Tribunal makes the decision as if it was 'in the shoes' of the original decision-maker.⁴⁴ If the Tribunal decides the original decision to deny or cancel the DSP was incorrect, that finding will override Centrelink's decision.⁴⁵

³³ Ibid s 139, s 142. See also Administrative Appeals Tribunal, *Guide to the Social Services and Related Jurisdiction* (2015) <<http://www.aat.gov.au/social-services-child-support-division/steps-in-a-review-of-a-decision-made-by-centrelink/guide-to-the-social-services-and-related-jurisdiction>>.

³⁴ *Administration Act* s 142.

³⁵ Administrative Appeals Tribunal, *How to apply: First review of a Centrelink or child support decision* (23 January 2018) <<http://www.aat.gov.au/social-services-child-support-division/applying-for-a-review/how-to-apply>>.

³⁶ Administrative Appeals Tribunal, *Apply Online* (20 April 2018) <<http://www.aat.gov.au/social-services-child-support-division/applying-for-a-review/apply-online>>.

³⁷ Administrative Appeals Tribunal, *Overview of the review process* (15 January 2018) <<http://www.aat.gov.au/steps-in-a-review/overview-of-the-review-process>>.

³⁸ Ibid.

³⁹ Welfare Rights & Advocacy Service, *Disability Support Pension* (2016) <<http://www.wraswa.org.au/wp-content/uploads/2016/05/DSP-FACTSHEET-Update-02.05.16-v2.pdf>>.

⁴⁰ *Administration Act* s 168(1).

⁴¹ Administrative Appeals Tribunal, *Overview of the review process*, above n 37.

⁴² Ibid.

⁴³ Michael Asimow and Jeffrey S Lubbers, 'The Merits of "Merits Review": A Comparative Look at the Australian Administrative Appeals Tribunal' 67 *Australian Institute of Administrative Law Forum* 58, 59.

⁴⁴ Smithers, J. in *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 31 ALR 666, 671, cited in Asimow and Lubbers, above n 43, 59.

⁴⁵ Asimow and Lubbers, above n 43, 59.

3 Second AAT review

Next, the individual whose DSP claim was rejected or whose DSP was cancelled can apply for a second review by the AAT, if the first AAT review did not lead to a favourable outcome.⁴⁶ A second review could lead to the result of the first review being set aside and substituted with a finding that the person was eligible for the DSP. Alternatively, if the Social Services and Child Support Division found that the person was eligible for the DSP, the Department of Social Services can seek a second review to have that finding overturned.⁴⁷ Second review hearings are heard in the General Division of the AAT.⁴⁸

4 Appeal to Federal Court

If the person affected by refusal or cancellation of the DSP is held not to be eligible at the second review stage, they may be able to appeal that decision to the Federal Court of Australia. The Federal Court has the power to set aside second-tier decisions of the AAT.⁴⁹ However, the appeal must relate to a 'question of law' rather than a question of fact.⁵⁰

III Introduction to the CRPD

The Convention on the Rights of Persons with Disabilities (*CRPD*) is an international human rights treaty which enunciates the rights of people with disabilities.⁵¹ It serves to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'⁵² Australia has signed and ratified the *CRPD*, which means it has accepted the obligations that it sets out.⁵³ It must therefore uphold the rights of people with disabilities as enshrined in the *CRPD*.⁵⁴

⁴⁶ *Administration Act* s 139, s 179(1).

⁴⁷ See, eg, *Flenley; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 2872 (2 August 2018); *Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018).

⁴⁸ Welfare Rights & Advocacy Service, above n 39.

⁴⁹ *Administrative Appeals Tribunal Act 1975* (Cth) s 44(5) ('AAT Act').

⁵⁰ *Ibid* s 44(1).

⁵¹ United Nations Department of Economic and Social Affairs, *Convention on the Rights of Persons with Disabilities* (no date) <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#Fulltext>>.

⁵² *CRPD* art 1.

⁵³ United Nations Treaty Collection, *Convention on the Rights of Persons with Disabilities: Signatories* (5 December 2018) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>.

⁵⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 4.

A The social model of disability

The social model of disability, which emerged in the 1970s, posits that disability arises from social factors such as discrimination and marginalisation.⁵⁵ That is, as Mike Oliver writes, the social model emphasises that people are disabled by ‘disabling barriers’ which exist in society, rather than by their impairments.⁵⁶ It highlights the need for society to change the way that it views disability.⁵⁷

The activists and theorists who developed the social model also identified and critiqued dominant ideas around disability.⁵⁸ They argued that these ideas constituted a ‘medical model’ of disability. The medical model focuses on a person’s condition as something that needs to be fixed.⁵⁹ As a result, the medical model pursues the treatment or cure of impairment⁶⁰ and ignores the possibility of social change which could facilitate the participation and empowerment of people with disabilities.⁶¹

The social model of disability is adopted by the *CRPD*, which emphasises that disability arises from impairments which ‘in interaction with various barriers may hinder...full and effective participation in society on an equal basis with others.’⁶² In the *CRPD*, the social model forms the foundation for a new human rights model of disability, which not only recognises that social barriers contribute to disability, but emphasises that people with disabilities are the subjects of human rights.⁶³ Therefore, the social model informs the obligations set out in the *CRPD*. The social model of disability should be reflected in policies which affect the lives of people with disabilities.⁶⁴

B Article 28

Article 28 of the *CRPD* stipulates that people with disabilities have the rights to ‘an adequate standard of living’ and to ‘social protection’.⁶⁵

⁵⁵ Mike Oliver, ‘The Social Model of Disability: thirty years on’ (2013) 28(7) *Disability & Society* 1024, 1024.

⁵⁶ *Ibid.*

⁵⁷ Justin Anthony Haegele and Samuel Hodge, ‘Disability Discourse: Overview and Critiques of the Medical and Social Models (2016) 68(2) *Quest* 193, 194.

⁵⁸ Tom Shakespeare, ‘The Social Model of Disability’ in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge, 4th ed, 2013) 214, 215.

⁵⁹ Haegele and Hodge, above n 57, 194.

⁶⁰ Theresia Degener, ‘Disability in a Human Rights Context’ 5 (35) *Laws* 1, 3; Shakespeare, above n 58, 216.

⁶¹ Vic Finkelstein, *The social model repossessed* (2001) The Disability Studies Archive UK, Centre for Disability Studies, University of Leeds <www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm>.

⁶² *CRPD*, art 1.

⁶³ Degener, above n 60, 26.

⁶⁴ Committee on the Rights of Persons with Disabilities, *General comment No. 4*, UN Doc CRPD/C/GC/4 (2 September 2016). See also People with Disability Australia, *Social Model of Disability* (2018) <<https://pwd.org.au/resources/social-model-of-disability/>>.

⁶⁵ *CRPD* art 28(1)-(2).

Under article 28, state parties to the *CRPD* – including Australia – must ‘take appropriate steps to safeguard and promote the realization’ of these rights.⁶⁶ This imposes the obligation to take positive steps to implement these rights, by providing services to people with disabilities. Notably, countries must ‘ensure access by persons with disabilities...to social protection programs’⁶⁷ and ensure access to people with disabilities who are living in poverty to ‘assistance from the State with disability-related expenses’.⁶⁸ According to Rosemary Kayess and Phillip French, these aspects of article 28 make the right to social protection ‘significantly broader than the traditional right to social security’.⁶⁹

Countries must progressively implement measures which ensure that individuals’ rights to an adequate standard of living and to social protection are upheld.⁷⁰ However, article 28 also emphasises that these rights must be protected and promoted ‘without discrimination on the basis of disability’.⁷¹ The requirement that countries do not discriminate in providing access to social protection and to an adequate standard of living must be immediately enforced.⁷² That is, in international law, Australia does not merely have to progress towards non-discrimination but was obliged to refrain from discrimination as soon as the *CRPD* came into force.⁷³

Article 28(2) is relevant to the DSP, because the DSP is a program which forms part of the Commonwealth-administered social security system. The broader Commonwealth social security system includes other forms of government assistance, such as Newstart unemployment benefits and the age pension.⁷⁴ Further, article 28(1) is also implicated, as the DSP may be essential to ensure an adequate standard of living for people with disabilities who are not receiving sufficient income through paid employment.

C Article 13

Article 13 of the *CRPD* is also relevant to the access and review processes surrounding the DSP. Access to justice is a human right.⁷⁵ It is a comprehensive concept that includes people’s access to the administration of justice systems, procedures, information and

⁶⁶ Ibid art 28(1)-(2).

⁶⁷ Ibid art 28(2)(b).

⁶⁸ Ibid art 28(2)(c).

⁶⁹ Rosemary Kayess and Phillip French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) *Human Rights Law Review* 1, 30.

⁷⁰ Gerard Quinn, ‘A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities’ (2009) 1 *European Yearbook of Disability Law* 89, p. 111.

⁷¹ *CRPD* art 28(1)-(2)

⁷² Quinn, above n 70, 111.

⁷³ Ibid 111.

⁷⁴ See Department of Human Services, *A guide to Australian Government payments* (24 October 2018) <<https://www.humanservices.gov.au/organisations/about-us/publications-and-resources/guide-australian-government-payments>>.

⁷⁵ Eilionoir Flynn, *Disabled Justice?: Access to justice and the UN Convention on the Rights of Persons with Disabilities* (London; New York: Routledge, 2016).

locations.⁷⁶ A person cannot be fully integrated in society if they are not socially and legally included.⁷⁷

Access to justice contributes to the realisation of other human rights and determines whether the person can enjoy their other rights.⁷⁸ Article 13 is closely linked to article 12, which provides for an equal recognition before the law.⁷⁹ For example if a person is discriminated against in the workplace, but does not have access to justice, they cannot enforce their right to equality and non-discrimination. In the context of applying for the DSP, a person who could not appeal the decision to reject their application would not have access to justice. In turn, this may have implications for the right to social protection under article 28.

The social model of disability that underpins the *CRPD* holds that societies must change to include persons with disabilities, including in terms of ensuring equal access to justice.⁸⁰

Hence, the *CRPD* creates a positive obligation on the part of states to provide access to justice. Reasonable adjustments may be necessary so that everyone can access the same services.

IV Analysis of Recent Victorian AAT Decisions: Key Themes and Issues

A Scope of the analysis of AAT cases

In this study, we analysed 45 AAT second review decisions in Victoria. The written reasons for these decisions were located by conducting a search of the AustLII legal database⁸¹ for Administrative Appeals Tribunal decisions between the 1 November 2017 and 20 November 2018, cross-referenced against a search of another legal database, Jade. The search was limited to written reasons which included the phrase 'disability support pension'. We limited the analysis to Victorian decisions, in order to provide a 'case study' that could guide further, more in-depth national research in the future. Consequently, only written reasons for hearings in the Melbourne registry were analysed. Further, the analysis was confined to reasons regarding decisions to refuse or cancel access to the DSP. Cases involving other issues related to DSP claims were excluded.

⁷⁶ Stephanie Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and The Legal System' (2011) 17(2) *ILSA Journal of International & Comparative Law* 281, 284.

⁷⁷ Penelope Weller, 'Legal Capacity and Access to Justice: The Right to Participation in the *CRPD*' (2016) 5(1) *Laws* 1, 3.

⁷⁸ Anna Arstein-Kerslake, Yvette Maker, Maree Ireland, Rikki Mawad, 'Research needs in access to justice for people with disability in Australia and New Zealand' (Scoping Paper, Disability Access to Justice Research Consortium, February 2018) 3
<<https://socialequity.unimelb.edu.au/news/latest/disability-access-to-justice-research-consortium-scoping-paper>>; Ortoleva, above n 76, 285.

⁷⁹ Rosemary Kayess and Phillip French, above n 69, 28-29.

⁸⁰ Weller, above n 77, 3.

⁸¹ The AAT website states that 'AAT decisions with written reasons are published on the AustLII website'. Administrative Appeals Tribunal, *Decisions* (12 October 2018) <<http://www.aat.gov.au/decisions>>.

It must be noted that this report is limited in the scope of its analysis. In 2017-18, Australia-wide, there were 3,610 lodgements for first review of DSP-related Centrelink decisions,⁸² whereas there were 911 second reviews relating to the DSP.⁸³ Written reasons for first reviews by the AAT Social Services & Child Support Division are not available to the public. Hence, this report only analyses the results of the published second review decisions from Victoria that were publicly available. Case examples are included to illustrate some important points.

In the analysis, we identified key demographic data about the applicant and the broad themes and issues arising in the reasons for decision. We assessed the AAT process and the application of the DSP eligibility requirements in light of the provisions of the *CRPD* outlined above.

B Access of different social groups to AAT appeals process

An analysis of the demographic characteristics of the applicants in the 45 cases was conducted, where such information was stated in the Tribunal's written reasons. Charts representing the results of this analysis can be found in Appendix 1. This analysis indicates the need for further research regarding the access of certain social groups to the appeals process. There were few young people or people with intellectual or sensory disabilities among the applicants in the cases. It is unclear whether this is due to barriers to access or whether there are alternative explanations – for example, it is possible that Centrelink more readily accepts the claims of people with certain types of disabilities. Further, the small number of cases under review means it is not possible to generalise, indicating that further statistical research and analysis is needed. At AFDO's request, our predominant focus in the analysis was exploring the involvement of Aboriginal and Torres Strait Islander applicants in the AAT appeal process.

1 Aboriginal or Torres Strait Islander applicants

In the written reasons of the 45 analysed cases, no applicants were identified as Aboriginal or Torres Strait Islander. A search of all cases heard in the Administrative Appeals Tribunal regarding the DSP was therefore conducted, broadening out the search to hearings held in other states and territories from 1 November 2017 to 28 November 2018. This did not uncover any written reasons in which the applicant was identified as Aboriginal or Torres Strait Islander.⁸⁴ This does not rule out the possibility that

⁸² Administrative Appeals Tribunal, *Annual Report 2017-18* (2018)

<<http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201718/AAT-Annual-Report-2017-18.pdf>>, 39.

⁸³ Statistical Report provided by Administrative Appeals Tribunal Caseload Reporting and Performance, 4 December 2018.

⁸⁴ The following searches were conducted:

-AustLii search: 'Disability support pension' AND 'Indigenous' in AAT database. This generated 109 results. Ctrl+f within each result revealed that in no case was the applicant identified as Indigenous, but rather, all references were to past cases in which the Secretary, Department of Families, Housing, Community Services and Indigenous Affairs had been a party, except one reference which was to an applicant having studied Indigenous Studies at university (*ZSYJ and Secretary, Department of Social Services (Social services second review) [2018] AATA 3969 (22 October 2018)*).

applicants who appealed to the General Division of the AAT – either in Victoria or other states and territories – were in fact Aboriginal or Torres Strait Islander.

The AAT amended its application form in 2014-15, in order to enable applicants to identify as Aboriginal and/or Torres Strait Islander.⁸⁵ The collected information does not seem to be publicly available. However, on request, the AAT provided statistical information regarding the number of applicants to the AAT who identify as 'Indigenous'.⁸⁶ Data regarding the number of applicants who proceed to the second review stage was not available, but the AAT provided statistics regarding applications for first review of a DSP-related decision by the Social Services and Child Support Division. These statistics relate to all applications across Australia. In 2017-18, 91 people who lodged applications for first review of decisions regarding entitlement to the DSP identified as Indigenous.⁸⁷ There were a total of 3,610 lodgements in relation to the DSP in 2017-18.⁸⁸ Applicants who identified as Indigenous therefore represented 2.5% of people seeking review by the Social Services & Child Support Division of DSP-related Centrelink decisions.⁸⁹ Aboriginal and Torres Strait Islander people comprise an estimated 3% of Australia's total population.⁹⁰ However, the prevalence of disability among Aboriginal and Torres Strait Islander people has been estimated to be twice as high as other Australians.⁹¹ This data therefore points to the possibility that Aboriginal and Torres Strait Islander people are under-represented among applicants who seek AAT review of DSP-related Centrelink decisions. However, further research is needed to explore this.

- AustLii search 'Disability support pension' AND 'First nations' in AAT database. This generated 0 results.

- AustLii search: 'Disability support pension' AND 'Aboriginal' in AAT database. This generated 0 results

- AustLii search 'Disability support pension' AND 'Torres Strait' in AAT database. This generated 0 results.

⁸⁵ Administrative Appeals Tribunal, *Our users and our relationships* (26 October 2015)

<<http://www.aat.gov.au/chapter-04-our-users-and-our-relationships>>.

⁸⁶ Statistical report provided by Administrative Appeals Tribunal Caseload Reporting and Performance, 4 December 2018.

⁸⁷ Ibid.

⁸⁸ Administrative Appeals Tribunal, *Annual Report 2017-18*, above n 82, 39.

⁸⁹ Statistical report provided by Administrative Appeals Tribunal Caseload Reporting and Performance, 5 December 2018.

⁹⁰ Australian Institute of Health and Welfare, *Australia's welfare 2017: in brief* (19 October 2017)

<<https://www.aihw.gov.au/reports/australias-welfare/australias-welfare-2017-in-brief/contents/indigenous-australians>>.

⁹¹ Scott Avery, *Culture is Inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability: Executive Summary of research findings* (2018) First Peoples Disability Network Australia <https://fpdn.org.au/wp-content/uploads/2018/07/Culture-is-Inclusion-exec-summary-_2.pdf>. . See also Australian Institute of Health and Welfare *Australia's Health 2018*, Australia's Health Series Report no 16 (2018) 313 citing ABS (Australian Bureau of Statistics), *National Aboriginal and Torres Strait Islander Social Survey, 2014–15*, ABS cat. no. 4714.0 (2016), which states that 'In 2014–15, an estimated 45% of Indigenous Australians...had disability or a long-term health condition that restricted their everyday activities, at 1.7 times the rate of non-Indigenous Australians.'

2 Secondary research that may explain this finding

When a person belongs to more than one marginalised social group, they may experience multiple, intersecting forms of discrimination.⁹² Aboriginal and Torres Strait Islander people with disabilities are subject to numerous forms of exclusion,⁹³ based on disability, race and other factors such as rurality.⁹⁴ This leads to ‘double disadvantage’.⁹⁵ There are indications, emerging from academic and legal research, that Aboriginal and Torres Strait Islander people with disabilities may be disproportionately excluded from access to the DSP due to intersecting social barriers.⁹⁶ Indeed, Karen Soldatic argues that legislative changes which have restricted the availability of the DSP have ‘uniquely affected’ Indigenous Australians.⁹⁷

(a) Barriers to access to the DSP

(i) Remoteness

The Commonwealth Ombudsman examined the accessibility of the DSP to Indigenous Australians with disabilities who live in remote areas.⁹⁸ The Ombudsman identified that remote Indigenous Australians face barriers when it comes to obtaining the medical evidence required to successfully apply for the DSP.⁹⁹ Particular barriers to accessing the DSP emerge from the lack of services in remote communities.¹⁰⁰ Health services;¹⁰¹ disability support services;¹⁰² and Centrelink offices at which aspects of the DSP

⁹² Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 42(6) *Stanford Law Review* 1241, 1244; Nirmala Erevelles and Andrea Minea, ‘Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality’ in Lennard J Davis (ed), *The Disability Studies Reader* (Brill, 5th ed, 2016) 381, 382.

⁹³ Scott Avery, *Culture is Inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability: Executive Summary of research findings* (2018) First Peoples Disability Network Australia <https://fpdn.org.au/wp-content/uploads/2018/07/Culture-is-Inclusion-exec-summary-_2.pdf>. ; See also King, Brough and Knox, above n 108, 739; National People with Disabilities and Carer Council, *Shut Out: The Experience of People with Disabilities and their Families in Australia*, Australian Government National Disability Strategy Consultation Report (2009), 58.

⁹⁴ Karen Soldatic, ‘Neoliberalising disability income reform’ in Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (eds), *The Neoliberal State, Recognition and Indigenous Rights* (ANU Press, 2018) 131, 133.

⁹⁵ Sara Irvine, *Vale Uncle Lester Bostock OAM*, First Peoples Disability Network <<https://fpdn.org.au/vale-uncle-lester-bostock-oam/>>, citing Lester Bostock, ‘Access and equity for people with a double disadvantage’ 2 *Australian Disability Review* 1.

⁹⁶ Karen Soldatic, ‘Neoliberalising disability income reform’, above n 94, 132.

⁹⁷ Karen Soldatic (2018) ‘Policy Mobilities of Exclusion: Implications of Australian Disability Pension Retraction for Indigenous Australians’ (2018) 17(1) *Social Policy & Society* 151, 158.

⁹⁸ Commonwealth Ombudsman, *Department of Human Services: Accessibility of Disability Support Pension for remote Indigenous Australians*, Report No 5 (2016).

⁹⁹ *Ibid* 4.

¹⁰⁰ Soldatic, ‘Neoliberalising disability income reform’ above n 94, 137.

¹⁰¹ *Ibid* 137.

¹⁰² Commonwealth Ombudsman, above n 98, 4.

application process (such as Job Capacity Assessments) can be conducted in person¹⁰³ may not be geographically accessible.¹⁰⁴

(ii) Language and cultural barriers

The Commonwealth Ombudsman highlights that ‘language and cultural barriers’ may impede Aboriginal and Torres Strait Islander Australians from communicating to medical professionals regarding the functional effects of their health conditions.¹⁰⁵ This may mean that medical reports do not convey the information required under the DSP eligibility requirements.¹⁰⁶ This is arguably consistent with a broader lack of ‘culturally sensitive or appropriate’ disability services.¹⁰⁷

(iii) Colonisation, racism and oppression

Racism in the provision of medical services and the dispensation of social security may impede access to the DSP.¹⁰⁸ Fitts and Soldatic note that instances of discrimination and racism in healthcare ‘can prevent Aboriginal and Torres Strait Islander Australians seeking medical advice and treatment, a process that is central to building a body of evidence for a DSP application’.¹⁰⁹ Indeed, Scott Avery has highlighted that individual Aboriginal and Torres Strait Islander people with disability can come to have ‘a rational expectation of discrimination’, leading to avoidance of situations in which further discrimination could occur.¹¹⁰

More broadly, David Hollinsworth notes that the fact that the ‘administrative location for disability services’ is commonly within ‘welfare agencies’ can elicit aversion among Aboriginal and Torres Strait Islander people with disabilities.¹¹¹ This is due to Australia’s violent history of colonisation and racism, including the forced separation of Aboriginal and Torres Strait Islander children from their parents.¹¹² Given that the DSP is administered by the Commonwealth government agency Centrelink, this could deter applications to the DSP.

¹⁰³ Ibid 31.

¹⁰⁴ Commonwealth Ombudsman, above n 98, 4; Soldatic, ‘Neoliberalising disability income reform’, above n 94, 137.

¹⁰⁵ Commonwealth Ombudsman, above n 98, 31.

¹⁰⁶ Ibid 31.

¹⁰⁷ National People with Disabilities and Carer Council, *Shut Out: The Experience of People with Disabilities and their Families in Australia*, Australian Government National Disability Strategy Consultation Report (2009), 58.

¹⁰⁸ See JA King, M Brough and M Knox, ‘Negotiating disability and colonisation: the lived experience of Indigenous Australians with a disability’ (2014) 29(5) *Disability & Society* 738, 747.

¹⁰⁹ Michelle Fitts and Karen Soldatic, above n 3, 10.

¹¹⁰ Scott Avery, *Culture is Inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability: Executive Summary of research findings* (2018) First Peoples Disability Network Australia <https://fpdn.org.au/wp-content/uploads/2018/07/Culture-is-Inclusion-exec-summary-_2.pdf>.

¹¹¹ David Hollinsworth, ‘Decolonizing Indigenous disability in Australia’ (2013) 28(5) *Disability & Society* 601, 609.

¹¹² Ibid 607.

3 Potential barriers to access to the appeals process

It is possible that many of the same factors which inhibit access to the DSP in the first instance also prevent Indigenous Australians with disabilities from appealing claims which were rejected by Centrelink. That is, the barriers posed by remoteness, linguistic and cultural inaccessibility, racism and discrimination may constitute hurdles to appealing the rejection or cancellation of the DSP. Even if rejected applicants apply for internal review by an ARO, it is possible that they may not have access to the further steps of applying for review of the decision by AAT1 or, if unsuccessful in their first AAT hearing, appealing to AAT2. Further research is needed to investigate whether Indigenous Australians with disabilities face barriers to appealing Centrelink decisions to the AAT.

4 Human rights implications

The *CRPD* recognises the concept of intersectionality,¹¹³ acknowledging that people experience discrimination not only in relation to disability but in relation to other identities such as gender and race.¹¹⁴ However, while article 6 is a 'binding intersectionality clause' foregrounding women with disabilities,¹¹⁵ the intersection between race and disability is only highlighted in the *CRPD*'s preamble¹¹⁶ and is not binding. Nevertheless, addressing intersecting discrimination is integral to the transformative equality approach adopted by the *CRPD*¹¹⁷ and can be seen as part of the purpose of the Convention.¹¹⁸ Transformative equality seeks 'to overcome structural, institutional, as well as direct and indirect discrimination by introducing positive duties to transform society'.¹¹⁹

Having the DSP refused or retracted may deny Aboriginal and Torres Strait Islander people the right to social protection under article 28 of the *CRPD*,¹²⁰ as other social benefits may be inadequate to cover disability-related costs.¹²¹ Disability-inclusive social protection systems must account for 'multiple and aggravated forms of discrimination'¹²² The evidence that Aboriginal and Torres Strait Islander people –

¹¹³ Wiebke Ringel, 'Non-discrimination, Accommodation, and Intersectionality under the SPRD: New Trends and Challenges for the UN Human Rights System' (2017) 20(1) *Max Planck Yearbook of United Nations Law Online* 98, 98; Ben Saul, 'Waiting for Dignity in Australia: Migrant Rights to Social Security and Disability Support under International Human Rights Law' (2010) 3 *UCL Human Rights Review* 72, 81 .

¹¹⁴ *CRPD* preamble, art 6; Degener, above n 60, 10.

¹¹⁵ Degener, above n 60, 19.

¹¹⁶ *Ibid* 10.

¹¹⁷ *Ibid* 18.

¹¹⁸ Saul, above n 113, 81.

¹¹⁹ Degener, above n 60, 19.

¹²⁰ Soldatic, 'Policy Mobilities of Exclusion', above n 97, 153, 156.

¹²¹ *Ibid* 154.

¹²² Catalina Devandas Aguilar, 'Social Protection and Persons with Disabilities' 70(4) *International Social Security Review* 45, 53.

especially those who live in remote areas – face barriers to accessing the DSP¹²³ suggests that Australia’s social protection system is failing to address intersectional discrimination.

Further, there is a possibility that the right of Aboriginal or Torres Strait Islander people with disabilities to have access to justice – under article 13 of the *CRPD* – is not being upheld. The apparent under-representation of Indigenous Australians among applicants to the AAT may indicate that intersectional discrimination experienced by Indigenous Australians with disabilities precludes access to review by the AAT. Overall, there is a need for further research into how the AAT appeals process can be made more responsive to intersectional discrimination.

C Reasons for decisions and key evidence

1 Key evidence

Types of evidence which were commonly relied on in the cases include:

- ‘T documents’ - that is, material documents lodged under s 37 of the *Administrative Appeals Tribunal Act 1975*. These documents are lodged by Centrelink¹²⁴ and include its reasons for the decision to refuse or cancel the DSP, factual findings on which that decision was based, and evidence for those findings.¹²⁵
- Centrelink Job Capacity Assessment reports. These are reports based on an assessment by a Centrelink-employed health professional.¹²⁶ The assessment can be based on evidence including medical records, employment records,¹²⁷ and an interview with the applicant.¹²⁸
- Medical evidence, including reports and letters from doctors and other health professionals, hospital records, and reports from tests and scans.
- Oral or written evidence from the applicant.

2 Key reasons for decisions in cases involving rejected applications for the DSP

In cases which related to the rejection of someone’s claim for the DSP, the reasoning often turned on whether the person’s impairments could be assigned 20 points under

¹²³ Commonwealth Ombudsman, above n 98, 4.

¹²⁴ Administrative Appeals Tribunal, *Practice Direction: Lodgement of Documents under Sections 37 and 38AA of the AAT* (30 June 2015) <<http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Lodgement-of-Documents-under-sections-37-and-38AA-of-the-AAT-Act.pdf>> Point 1.1.

¹²⁵ Ibid Point 2.9.

¹²⁶ Department of Human Services, *Job Capacity Assessments for Disability Support Pension* (16 August 2018) <<https://www.humanservices.gov.au/individuals/enablers/job-capacity-assessments-disability-support-pension/29931>>.

¹²⁷ Australian Government, *Social Security Guide*, version 1.250 (at 5 November 2018) [1.1.J.20] <<http://guides.dss.gov.au/guide-social-security-law/1/1/j/10>>.

¹²⁸ Department of Human Services, *Job Capacity Assessments for Disability Support Pension*, above n 125.

the Impairment Tables.¹²⁹ Often, the preliminary requirement that the condition be permanent¹³⁰ - that is, fully diagnosed, treated, stabilised, and likely to last for at least 2 years¹³¹ - was a decisive issue.¹³² In many cases, the Tribunal did not assign any points in relation to a condition because the applicant had not shown that it was permanent.¹³³ For example, in one case, an applicant who had fled war in Iraq and Syria before migrating to Australia¹³⁴ was diagnosed with mental health conditions including post-traumatic stress disorder. However, the applicant had not proven that her mental health conditions had been fully treated and stabilised,¹³⁵ which would have been necessary in order for the Tribunal to find that they were permanent.¹³⁶

When one or more conditions were proven to be permanent, the result often turned on whether those conditions could, together, be assigned at least 20 points, based on the assessment of the person's functional capacity.

The Tribunal must only look to evidence regarding the applicant's conditions during the 'qualifying period' (a period starting from the date the person made their claim). This means that any 'subsequent changes in health' or later diagnoses are irrelevant.¹³⁷ This requirement influenced the outcome of many hearings, with the Tribunal sometimes noting that they must not consider evidence of a decline in functional capacity that occurred after the qualifying period.¹³⁸

In some cases, the applicant successfully argued that their conditions warranted a total of 20 points, but the Tribunal did not assign them a 'severe' rating under a single impairment table. This meant that the person had satisfied the requirement of showing they had impairment(s) which warranted at least 20 points across all the Impairment

¹²⁹ See, eg, *Krol and Secretary, Department of Social Services (Social services second review)* [2018] AATA 646 (23 March 2018); *Hutchinson and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1842 (25 June 2018); *Loh and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2598 (3 August 2018).

¹³⁰ *Impairment Tables* s 6(3).

¹³¹ *Ibid* s 6(4).

¹³² See, eg, *Gjorsevska; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 1109 (3 May 2018); *Hughson and Secretary, Department of Social Services (Social services second review)* [2018] AATA 89 (30 January 2018); *Shehata and Secretary, Department of Social Services (Social services second review)* [2018] AATA 747 (4 April 2018), [66], [98].

¹³³ See, eg, *Nguyen and Secretary, Department of Social Services (Social services second review)* [2018] AATA 12 (12 January 2018), [36]; *Yonan and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1856 (26 June 2018), [66].

¹³⁴ *Yonan and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1856 (26 June 2018), [5].

¹³⁵ *Ibid* [58].

¹³⁶ *Ibid* [14]-[15].

¹³⁷ *Harris and Secretary, Department of Employment and Workplace Relations* [2007] 158 FCR 252, 252, quoted in *Petrovic and Secretary, Department of Social Services (Social services second review)* [2018] AATA 748 (4 April 2018) [18].

¹³⁸ See, eg, *Dunn and Secretary, Department of Social Services (Social Services and second review)* [2018] AATA 3777 (12 October 2018), [6]; *McMahon and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1081, [42]; *Shehata and Secretary, Department of Social Services (Social services second review)* [2018] AATA 747 (4 April 2018), [101].

Tables. However, in the absence of 'severe impairment', the further requirement of demonstrating a continuing inability to work is harder to satisfy.¹³⁹ Therefore, in such cases, a major issue was whether the applicant could be found to have 'a continuing inability to work'.¹⁴⁰ This often depended on whether the applicant had undertaken a program of support.¹⁴¹ The Tribunal emphasised that it must 'strictly enforce' the requirement to participate in a program of support,¹⁴² whether or not the applicant was aware of it.¹⁴³

In a small number of cases, other issues, such as whether the applicant had met the residency requirements, were determinative of the outcome.¹⁴⁴

3 Key reasons in cases involving cancellation of the DSP:

In seven cases, Centrelink had reviewed or reassessed the person's eligibility and deemed them to no longer be qualified for the DSP.¹⁴⁵ As in cases of rejected applications, the Tribunal looked to whether the person had fully diagnosed, treated and stabilised condition(s) which could be assigned at least 20 points. Also, the Tribunal was limited to looking at whether the person qualified on the date their DSP was cancelled, rather than at the time of the hearing. In certain cases, it was found that the person was no longer eligible because their conditions could not be assigned enough points.

¹³⁹ See *Social Security Act* s 94(2)(a). In cases where 20 points were assigned under a single table, the Tribunal noted it was unnecessary to have participated in a program of support. See, eg, *ZSYJ and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3969 (22 October 2018) [122]. In one case, it was found that the impairment was 'of itself sufficient to prevent [the applicant] from doing any work independently of a program of support or undertaking any training activity during the next two years' - *Mongta and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2092 (4 July 2018), [59].

¹⁴⁰ See, eg, *Bertucci and Secretary, Department of Social Services (Social services second review)* [2018] AATA 745 (4 April 2018); *De Silva Wijeyeratne and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2443 (24 July 2018).

¹⁴¹ See, eg, *Bertucci and Secretary, Department of Social Services (Social services second review)* [2018] AATA 745 (4 April 2018); *De Silva Wijeyeratne and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2443 (24 July 2018).

¹⁴² *McMahon and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1081, [43].

¹⁴³ *McDonald and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2282 (20 November 2017), [47].

¹⁴⁴ See, eg, *Mowbray and Secretary, Department of Social Services (Social services second review)* [2017] AATA 3053 (8 December 2017).

¹⁴⁵ *Collins and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2277 (17 November 2017); *Eyit and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2091 (4 July 2018); *Ilievska and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1308 (18 May 2018); *Lisi and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2308 (19 July 2018); *Obaidi and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2968 (17 August 2018); *Petrovic and Secretary, Department of Social Services (Social services second review)* [2018] AATA 748 (4 April 2018); *TDQN and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1850 (7 June 2018).

In two cases, the decision to cancel someone's DSP was upheld by the AAT because they had moved to another country and were therefore no longer eligible.¹⁴⁶

D The decisions reflect the medical model and neglect the social model

The analysis of AAT decisions revealed that the reasoning of the Tribunal, and the underlying law, strongly reflect the medical model of disability. In contrast, the experiences of discrimination and marginalisation emphasised by the social model – which underpins the human rights model adopted by the *CRPD* – are largely irrelevant to the eligibility requirements for the DSP, and therefore received comparatively little attention.

1 Reliance on medical evidence regarding the impacts of conditions/impairments

One element of the eligibility provisions which was often determinative in the analysed AAT decisions was the requirement that the applicant's condition(s) had been fully diagnosed, treated and stabilised. This indicated the high degree of reliance on medical evidence and hence, the influence that the medical model has in this area. If an individual's disability is not diagnosed and treated by a qualified medical professional, then the individual will not be awarded any impairment points.¹⁴⁷ Therefore, applicants must ensure that they provide the relevant medical evidence to prove that they have a disability that was fully diagnosed, treated and stabilised.

Self-reporting of experiences is not sufficient even if the effect that the condition has on the individual is evident.¹⁴⁸ In *McMahon*, the Tribunal asserted that although Mr McMahon's functioning was affected by his mental health issues, they could not consider them, as they had not been diagnosed by a clinical psychologist or psychiatrist at the time of his claim.¹⁴⁹

The emphasis that is placed on diagnosis may impact upon applicants, as they are required to think of, and describe, themselves in terms of the disease they have. In *Ghattas and Secretary*, Mr Ghattas described himself as 'a crippled mess unable to cope with life'.¹⁵⁰ The medical model's emphasis on fixing or stabilising a disease might have a disempowering effect upon some individuals with disability as it requires applicants to characterise themselves as having a problem that needs to be fixed. Further, the focus on individual diagnosis and treatment arguably reflects an assumption that it is the responsibility of individuals to manage disability and, only if they cannot, for the state to provide financial support. Paradoxically, a failure to manage disability by obtaining

¹⁴⁶ *Manjunath and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1077 (27 April 2018); *Sudak and Secretary, Department of Social Services (Social services second review)* [2018] AATA 4248 (14 September 2018).

¹⁴⁷ *Impairment Tables*, s 6(4).

¹⁴⁸ *Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018) [42].

¹⁴⁹ *McMahon and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1081 (30 April 2018)

¹⁵⁰ *Ghattas and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3937 (19 October 2018) [75].

'reasonable treatment' may itself be grounds for refusing access to the DSP, as we further explore in the next section.

The way in which eligible recipients of social protection are identified must be made consistent with the *CRPD*.¹⁵¹ Otherwise, eligibility requirements can reinforce medical models of disability through a 'narrow medical focus'.¹⁵² As discussed in detail above, the DSP eligibility requirements do not uphold the social model, which is the foundation for the human rights model of disability that emerges from the *CRPD*.¹⁵³ To uphold the social model (and by extension, the human rights model), eligibility requirements must account for the 'contextual factors in which individuals with disabilities live and work'.¹⁵⁴ As outlined above, the analysis of AAT decisions revealed a heavy reliance on medical evidence in legal determinations of eligibility, and a lack of attention to social barriers to employment. 'Work capacity' assessment – which is the assessment model for the DSP¹⁵⁵ – is tied to medical definitions of disability.¹⁵⁶ Overall, the Australian approach to eligibility for the DSP does not conform to 'a rights-based definition of persons with disabilities'.¹⁵⁷ This points to a failure to implement a disability-inclusive social protection system in line with Australia's obligations under the *CRPD*.

2 Implications for choice in treatments

By hinging access to the AAT on proof that an individual has sought 'reasonable treatment'¹⁵⁸ for their condition – in order to reduce or eliminate the functional effects of their impairment – the DSP eligibility requirements adhere to the medical model assumption that disability can and must be 'treated, cured, fixed or at least rehabilitated'.¹⁵⁹ This raises questions around applicants' autonomy in choosing – or refusing – treatments. In some cases, the Tribunal found that a condition had not been fully treated or stabilised on the basis that reasonable treatment had not been pursued.¹⁶⁰ For instance, in *Ritskos*, the applicant's PTSD and depression/anxiety were found not to have been fully treated and stabilised.¹⁶¹ The Tribunal noted that she had not followed the advice of a psychiatrist to increase dosage of antidepressants or to have

¹⁵¹ Devandas Aguilar, above n 122, 56.

¹⁵² *Ibid* 56.

¹⁵³ Degener, above n 60, 3.

¹⁵⁴ Louise Humpage, 'Models of Disability, Work and Welfare in Australia' (2007) 41(3) *Social Policy & Administration* 215, 224.

¹⁵⁵ McAllister, Ashley, 'Understanding the Australian approach to assessing capacity: A detailed case study of the Disability Support Pension' (2016) 26(1) *European Journal of Public Health* 172, 172.

¹⁵⁶ Devandas Aguilar, above n 122, 56.

¹⁵⁷ *Report of the Special Rapporteur on the Rights of Persons with Disabilities* (Theme: The rights of persons with disabilities to social protection), UN Doc A/70/297 (7 August 2015), 18 [57].

¹⁵⁸ *Impairment Tables* s 6(6)(a).

¹⁵⁹ Degener, above n 60, 2.

¹⁶⁰ See, eg, *Kontossis and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1846 (21 June 2018); *Ritskos and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2580 (13 July 2018).

¹⁶¹ *Ritskos and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2580 (13 July 2018), [32], [34].

follow-up consultations: ‘Neither of these recommendations were followed. This program of treatment seems rational and logical and *regrettably it was not undertaken.*’¹⁶² Similarly, in *Nguyen*, non-compliance with prescribed medications informed a finding that a condition had not been proven to be fully diagnosed, treated and stabilised.¹⁶³ In this way, the eligibility requirements – and their application by the AAT – arguably make treatment an imperative.

Factors such as risks involved in treatment can be considered in assessing reasonableness.¹⁶⁴ A nuanced approach is perhaps evident in *ZSYJ and Secretary* – the Tribunal rejected the Department’s argument that the applicant should have used medication to manage her mental health conditions, as there was evidence she had received other treatment.¹⁶⁵ Nevertheless, the case still illustrates that the law calls for an assessment of whether a person’s treatment of their condition – or choice not to pursue treatment – was ‘reasonable’.¹⁶⁶ Therefore, an individual’s concerns around side-effects or costs of treatment may be second-guessed by the decision-maker in assessing eligibility for the DSP.¹⁶⁷ Louise Humpage states that to ‘use medical professionals as “gatekeepers” to resources and subject people with disabilities to systems of surveillance, compliance and coercion’ perpetuates the medical model.¹⁶⁸ The fact that people with disabilities are expected to comply with ‘reasonable treatment’ recommendations or potentially deal with the economic consequences of being found ineligible for the DSP, can be seen as a manifestation of a coercive medical model.

Case Example regarding the need for ‘reasonable treatment’:

***Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018)**

Christopher Perkins lodged a claim for the DSP, as he was experiencing physical disability in relation to a spinal condition and mental health disability. According to Mr Perkins (as paraphrased by the Tribunal) he was living in a caravan at the time he

¹⁶² Ibid [32] (emphasis added).

¹⁶³ *Nguyen and Secretary, Department of Social Services (Social services second review)* [2018] AATA 12 (12 January 2018), [36].

¹⁶⁴ *Impairment Tables*, s 7.

¹⁶⁵ *ZSYJ and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3969 (22 October 2018), [87].

¹⁶⁶ *Impairment Tables*, s 6(6).

¹⁶⁷ See, eg, *GFHF and Secretary, Department of Social Services (Social services second review)* [2018] AATA 675 (28 March 2018) [13]; *Kontossis and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1846 (21 June 2018), [37].

¹⁶⁸ Louise Humpage, above n 154, 216.

applied for the DSP. He reported that he was experiencing difficulties in self-care and would even go three to four days without eating.¹⁶⁹

Centrelink rejected his claim, with this decision being upheld on internal review by an ARO.¹⁷⁰ Mr Perkins appealed the decision to AAT1. AAT1 accepted that he was eligible for the DSP.¹⁷¹ However, the Secretary of the Department of Social Services sought a review of the AAT1 decision.¹⁷²

At the second-tier level, AAT2 found that Mr Perkins' spinal condition could not be considered permanent¹⁷³ as it had not been 'fully stabilised' as required under s 6(6) of the *Impairment Tables*.¹⁷⁴ The issue of whether Mr Perkins had obtained 'reasonable treatment' was determinative – the Tribunal concluded that he had not pursued reasonable treatment for his spinal condition, meaning that the condition could not be found to have been stabilised.¹⁷⁵ Evidence that Mr Perkins had not received 'reasonable treatment' included evidence that he had apparently failed to attend orthopaedic appointments;¹⁷⁶ 'had not continued with physiotherapy sessions and had not engaged in pain management as recommended'; and used 'alcohol and non-prescription drugs' in order to manage his pain.¹⁷⁷ As the condition was not proven to be stabilised – and therefore, could not be found to be permanent – no points were allocated.

In regards to his mental health conditions, the Tribunal once again considered the issue of 'reasonable treatment' in order to assess whether the conditions had been fully stabilised.¹⁷⁸ There was evidence that Mr Perkins had not attended some psychological appointments and the Secretary submitted that he did not comply with certain treatments.¹⁷⁹ However, the Tribunal ultimately held that treatment had been reasonable,¹⁸⁰ noting that under s 6(7), the local availability, accessibility and cost of treatment and its associated risks must be considered in assessing what constitutes reasonable treatment.¹⁸¹

¹⁶⁹ *Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018), [41].

¹⁷⁰ *Ibid* [2].

¹⁷¹ *Ibid* [2].

¹⁷² *Ibid* [3].

¹⁷³ *Impairment Tables* s 6(4).

¹⁷⁴ *Perkins; Secretary, Department of Social Services and (Social services second review)* [2018] AATA 3578 (21 September 2018), [24]-[25].

¹⁷⁵ *Ibid* [25].

¹⁷⁶ *Ibid* [20].

¹⁷⁷ *Ibid* [24].

¹⁷⁸ *Ibid* [37].

¹⁷⁹ *Ibid* [28]-[29].

¹⁸⁰ *Ibid* [39].

¹⁸¹ *Ibid* [37].

Nevertheless, Mr Perkins' arguments were ultimately unsuccessful. Even though he provided evidence of the extensive impacts of his mental health condition, the Tribunal emphasised that under Table 5 (Mental Health Function), 'self-report of symptoms alone is insufficient and there must be corroborating evidence of a person's impairment'.¹⁸² The functional impact was therefore assessed to be moderate rather than severe, leading to the allocation of 10 points.

As Mr Perkins was only allocated 10 points in relation to his mental health conditions – and no points in relation to his spinal condition – he did not meet the 20-point threshold in s 94(1)(b) of the *Social Security Act*. Consequently, he was found to have been ineligible for the DSP in the qualifying period.¹⁸³ This case illustrates that an applicant's failure or refusal to undergo certain treatments can, if assessed not to be reasonable, be a hurdle to being found eligible for the DSP.

3 Lack of attention to social exclusion, marginalisation and discrimination

Whereas the impacts of applicants' impairments were at the centre of the Tribunal's application of the relevant law, social aspects of disability were largely unmentioned. This reflects the silence of the regulatory framework on the social causes of disability. Indeed, as the *Impairment Tables* exclusively direct attention to the tasks and activities an individual is able to perform, evidence relating to the way in which social structures disable people with impairments is largely irrelevant. Evidence of marginalisation or discrimination is not the basis for the 'award'¹⁸⁴ of points under the Impairment Tables.

However, the application of the Impairment Tables sometimes revealed that the effects of impairment cannot be neatly separated from the consequences of societal barriers. That is, as Tom Shakespeare writes, 'it is the interaction of individual bodies and social environments which produces disability'.¹⁸⁵ For instance, in arguing that they met the eligibility requirements, one applicant noted a lack of public transport in their area,¹⁸⁶ while another stated that not only was there limited public transport available but she was unable to access buses while using a mobility scooter.¹⁸⁷ Such examples illustrate that the accessibility of public transport can influence the ability of people with disability to be mobile and, by extension, to access employment.¹⁸⁸ The Impairment Table relating to the functional impairment of the lower limbs, which was applied in *McMahon*, directs

¹⁸² Ibid [42].

¹⁸³ Ibid [47].

¹⁸⁴ This term was used in certain cases. See, eg, *McDonald and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2282 (20 November 2017), [41], [46]; *Taylor and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3632 (25 September 2018) [7].

¹⁸⁵ Shakespeare, above n 58, 219.

¹⁸⁶ *McMahon and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1081, [34].

¹⁸⁷ *Dunn and Secretary, Department of Social Services (Social Services and second review)* [2018] AATA 3777 (12 October 2018), [21].

¹⁸⁸ See National People with Disabilities and Carer Council, above n 107, 45.

attention to whether a person ‘requires assistance to use public transport’.¹⁸⁹ The Table implies that the inability to use public transport without assistance arises from ‘a permanent condition resulting in functional impairment when performing activities requiring the use of legs or feet’¹⁹⁰. However, from the perspective of the social model, a person’s inability to use public transport can be attributed to a societal failure to provide accessible transport and to recognise that the use of public transport does not necessarily require ‘the use of legs or feet’.

The thematic analysis revealed a lack of attention to the discrimination and ableism which Australians with disabilities commonly experience in the workplace.¹⁹¹ In a case in which the Tribunal observed that the applicant had emphasised exclusion from the workplace, this did not underpin the legal reasoning or influence the Tribunal’s ultimate decision [see case study below].¹⁹² This reflects the fact that being excluded from employment – as opposed to being deemed to be physically, intellectually or psychologically incapable of undertaking employment – is not relevant under the current eligibility requirements.

However, research which is guided by the social model and therefore foregrounds ‘the lived experience of people with disability’¹⁹³ indicates that that discrimination is a major barrier to employment.¹⁹⁴ Indeed, submissions by people with disabilities to the National People with Disabilities and Carer Council indicated that discriminatory attitudes among employers prevent some people with disabilities from obtaining work.¹⁹⁵ As a result, people with disabilities may require government assistance in the form of income replacement,¹⁹⁶ despite their efforts to obtain employment.¹⁹⁷

Overall, the analysis of AAT decisions revealed that evidence of discrimination and marginalisation is absent or given little attention. This lack of attention to social exclusion flows from the eligibility requirements. Indeed, the provisions governing eligibility do not refer to negative attitudes to disability or societal barriers to participation. Further, s 94(3) of the *Social Security Act* stipulates that the local availability and accessibility of work must not be considered in assessing capacity to work. Ultimately, the eligibility requirements construe disability as ‘an individual

¹⁸⁹ *Impairment Tables*, Table 3.

¹⁹⁰ *Ibid.*

¹⁹¹ Australian Human Rights Commission (2016), p. 169; Simon Darcy, Tracy Taylor and Jenny Green, ‘“But I can do the job”: Examining disability employment practice through human rights complaint cases’ (2016) 31(9) *Disability & Society* 1242, 1260; Penelope S Scott, ‘Addressing Ableism in Workplace Policies and Practices: The Case for Disability Standards in Employment’ (2016) 18 *Flinders Law Journal* 121, 126.

¹⁹² *Plant and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3860 (15 October 2018)

¹⁹³ Simon Darcy, Tracy Taylor and Jenny Green, ‘“But I can do the job”: Examining disability employment practice through human rights complaint cases’ (2016) 31(9) *Disability & Society* 1242, 1245.

¹⁹⁴ *Ibid.*, 1260.

¹⁹⁵ National People with Disabilities and Carer Council, above n 107, 38.

¹⁹⁶ *Ibid.*, 41.

¹⁹⁷ Alan Morris, ‘Pain and mythology: Disability support pension recipients and work’ (2006) 7(1) *Australian Review of Public Affairs* 41, 45.

problem’,¹⁹⁸ focusing on people’s impairments rather than their social context. Therefore, the social model is not adequately reflected in the law nor in the AAT decisions which apply the law.

Case Example illustrating that evidence of social exclusion is irrelevant to eligibility:

Plant and Secretary, Department of Social Services (Social services second review) [2018] AATA 3860 (15 October 2018)

Maurice Plant, a 65-year-old man,¹⁹⁹ applied for the DSP.²⁰⁰ His claim was rejected by Centrelink.²⁰¹ One of his conditions was deemed by Centrelink to warrant 10 points, indicating moderate impairment to lower limb function under Table 3 of the *Impairment Tables*. Mr Plant was found to be ineligible because his conditions did not meet the minimum threshold of 20 points.

Centrelink’s decision was affirmed by the ARO on internal review²⁰² and upheld by AAT1.²⁰³ On appeal, AAT2 agreed with Centrelink that his lower limb condition gave rise to a moderate functional impact which could be accorded 10 points.²⁰⁴ Further, his other conditions were all deemed to have no proven functional impacts.²⁰⁵ Therefore, Centrelink’s original decision that Mr Plant could not be assigned 20 points and was therefore ineligible for the DSP was affirmed.²⁰⁶

During the hearing, Mr Plant gave evidence regarding the impact of his disabilities.²⁰⁷ Mr Plant’s evidence included descriptions of functional impairment, as required under the *Impairment Tables*. However, his submissions also extended to issues of social exclusion and marginalisation. Mr Plant stressed that he did not think that his former employer ‘*wanted a person who could not walk or stand properly*’.²⁰⁸ He also informed the Tribunal that he had been ‘*ostracised*’ from friends and family.²⁰⁹ Mr Plant’s submissions were noted by the Tribunal. However, they did not inform the Tribunal’s legal reasoning.

¹⁹⁸ Degener, above n 60, 3.

¹⁹⁹ *Plant and Secretary, Department of Social Services (Social services second review) [2018] AATA 3860 (15 October 2018)*, [1].

²⁰⁰ *Ibid* [1].

²⁰¹ *Ibid* [1].

²⁰² *Ibid* [8].

²⁰³ *Ibid* [9].

²⁰⁴ *Ibid* [101].

²⁰⁵ *Ibid* [103], [107], [109]-[110].

²⁰⁶ *Ibid* [10]; [112].

²⁰⁷ *Ibid* [93].

²⁰⁸ *Ibid* [56].

²⁰⁹ *Ibid* [61].

Mr Plant also stated, as paraphrased by the Tribunal, that ‘he was generally dissatisfied with the whole process’,²¹⁰ illustrating the frustration among applicants which was evident in multiple cases, as discussed below. Finally, Mr Plant affirmed that he had ‘never shirked work’,²¹¹ perhaps indicating that having had his application for the DSP rejected had caused him to feel stigmatised.

E Decisions indicate that DSP does not afford disability-inclusive social protection

The AAT decisions under review, and the eligibility criteria that they addressed, also raise concerns about the extent to which DSP affords social protection and an adequate standard of living as required under article 28 of the *CRPD*. Key features of disability-inclusive social protection systems – under article 28 and other international legal instruments – were identified by the United Nations Special Rapporteur on the Rights of Persons with Disabilities,²¹² Catalina Devandas Aguilar, in her 2015 report to the General Assembly.²¹³ In this section, the eligibility requirements for the DSP, and how they are understood and applied in the reviewed AAT decisions, are assessed by reference to some of these key features.

1 The focus on functional impact and discrimination

Devandas Aguilar emphasises that social protection programs and benefits must be implemented in line with the principle of non-discrimination.²¹⁴ The principle of non-discrimination does not simply require people with disabilities to be provided social protection on an equal basis with others. Rather, it also requires social protection systems to acknowledge and address people with disabilities’ lived experiences of discrimination.²¹⁵ She explains that: ‘Systems must address the structural barriers that persons with disabilities face to participate in society, including lack of accessibility.’²¹⁶

As illustrated above, the analysis of AAT written reasons reveals that the eligibility requirements for the DSP largely focus on the ‘functional impact’ of individual health conditions and impairments. Evidence of exclusion and disadvantage as a result of structural barriers cannot be used to prove eligibility, even if it is those barriers which prevent a person accessing sufficient paid employment. While Australia prohibits

²¹⁰ Ibid [61].

²¹¹ Ibid [61].

²¹² A Special Rapporteur is an independent expert nominated by the United Nations Human Rights Council (UNHRC). Their role is to investigate and report to the UNHRC on issues relating to human rights. United Nations Human Rights, *Ms Catalina Devandas Aguilar, Special Rapporteur on the rights of persons with disabilities* (2018) <<https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/CatalinaDevandas.aspx>>.

²¹³ Catalina Devandas Aguilar, above n 122; *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, above n 157.

²¹⁴ Catalina Devandas Aguilar, above n 122, 59.

²¹⁵ Ibid 59.

²¹⁶ Ibid 59.

discrimination on the basis of disability in employment,²¹⁷ the DSP eligibility requirements do not recognise and account for discrimination on the basis of disability.

2 Failure to encourage inclusion and participation in employment

To be disability-inclusive, disability benefits must not reinforce the idea that people with disabilities are incapable of participating in employment²¹⁸ nor promote the idea that all people with disabilities require welfare.²¹⁹ Rather, they must encourage 'inclusion and active participation' in the workforce.²²⁰

Devandas Aguilar notes that if eligibility hinges on incapacity to work, this plays into stereotypes and 'perpetuates...dependency on the benefits by eliminating any expectation' that people will become employed.²²¹ The eligibility requirements for the DSP do not completely eliminate the expectation of participation in employment. While 'continuing inability to work' due to an impairment is an eligibility requirement,²²² work is defined to mean work 'for at least 15 hours per week'.²²³ However, if a current DSP recipient works for more than 30 hours per week, their DSP may be stopped,²²⁴ and reduction in the amount of their DSP will occur if they earn over \$172 per fortnight.²²⁵

Further, participation in a program of support – such as training – is necessary for many people with disabilities to be found eligible for the DSP. This arguably indicates an expectation that people with disabilities should enter the workforce and promotes participation in employment. However, focusing on 'individual skills or behaviour at the expense of structural issues' may imply that people with disabilities who apply for welfare do not want to work or lack necessary skills.²²⁶ A program of support may help to overcome 'barriers to employment' which might have arisen from lack of access to education, training or prior work experience.²²⁷ Nevertheless, the requirement to complete a program of support arguably reflects an assumption that it is people with disabilities who must change. It ignores the need for societal transformation, such as the elimination of workplace disability discrimination and the provision of adequate

²¹⁷ *Disability Discrimination Act 1992* (Cth) s 15.

²¹⁸ Devandas Aguilar, above n 122, 55.

²¹⁹ Michael Palmer, 'Social Protection and Disability: A Call for Action' (2013) 41(2) *Oxford Development Studies* 139, 146.

²²⁰ Devandas Aguilar, above n 122, 55.

²²¹ *Ibid* 56.

²²² *Social Security Acts 94*(1)(c)

²²³ *Ibid* s 94 (definition of 'work').

²²⁴ *Ibid* s 96(6); Department of Human Services, *Hours you can work when you get Disability Support Pension* (12 May 2018) <<https://www.humanservices.gov.au/individuals/enablers/hours-you-can-work-when-you-get-disability-support-pension/39896>>.

²²⁵ Department of Human Services, *Income test for pensions* (8 October 2018) <<https://www.humanservices.gov.au/individuals/enablers/income-test-pensions/30406>>.

²²⁶ Humpage, above n 154, 222.

²²⁷ Australian National Audit Office, *Qualifying for the Disability Support Pension*, Report No 18 of 2015-16 (2016) 1.12.

accessibility and reasonable accommodations to make employment accessible.²²⁸ Indeed, Rose Galvin argues that the Commonwealth has narrowed the eligibility requirements for the DSP without adequately addressing ‘actual conditions of exclusion’.²²⁹ Ultimately, the DSP eligibility requirements fail to acknowledge that the cause of unemployment or underemployment of many people with disabilities may be disabling barriers in society.

Further, a failure to participate in a program of support can inform a finding that someone is ineligible for the DSP – as it did in several of the analysed AAT cases.²³⁰ This points to a risk that eligibility requirements which purport to encourage participation in the workforce²³¹ – by requiring participation in a program of support – may in fact lead to a denial of the right to social protection.

3 Findings of ineligibility and the risk of poverty

The outcomes in the analysed AAT decisions indicate that many people with disabilities are deemed ineligible for DSP payments because, for instance, they do not meet the minimum of 20 points under the Impairment Tables or because their condition is not fully diagnosed, treated and stabilized. In fact, 80 percent of applicants in the analysed cases were found to have been ineligible during the qualifying period after their application or at the date Centrelink cancelled their payment. This raises the possibility that Australia’s social protection system is failing to ameliorate extra costs and address poverty among those people with disabilities who are deemed ineligible for the DSP.

Devandas Aguilar explains that a disability-inclusive social protection system must address poverty among people with disabilities.²³² Poverty can disproportionately affect people with disability,²³³ due to factors such as exclusion from employment and discrimination.²³⁴ Further, Devandas Aguilar emphasises that social protection programs must cover ‘disability-related extra costs’ such as costs associated with accessing health care, mobility aids, and specialised devices.²³⁵ They must also be sufficient to allow people with disabilities to exercise their other economic, social and cultural rights.²³⁶ The DSP is intended to be a substitute for income among unemployed and under-employed people with disabilities and can enable access to funding to cover

²²⁸ Morris, above n 197, 42.

²²⁹ Rose Galvin, ‘Can welfare reform make disability disappear?’ (2004) 39(3) *Australian Journal of Social Issues* 343, 344.

²³⁰ See, eg, *Bertucci and Secretary, Department of Social Services (Social services second review)* [2018] AATA 745 (4 April 2018); *De Silva Wijeyeratne and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2443 (24 July 2018); *McDonald and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2282 (20 November 2017) [47].

²³¹ Alan Morris, Shaun Wilson and Karen Soldatic, ‘Doing the “hard yakka”: implications of Australia’s workfare policies for disabled people’ in Chris Grover and Linda Piggot (eds), *Disabled people, work and welfare: is employment really the answer?* (Policy Press, 2015) 46, 59.

²³² Devandas Aguilar, above n 122, 49.

²³³ Devandas Aguilar, above n 122, 49; Degener, above n 60, 12.

²³⁴ Devandas Aguilar, above n 122, 49

²³⁵ *Ibid* 50.

²³⁶ *Ibid* 58.

extra costs stemming from disability.²³⁷ It is beyond the scope of this report to discuss whether the amount of financial support provided under the DSP is adequate to uphold these goals.²³⁸ However, Soldatic explains that when people with disabilities are moved off the DSP and onto other sources of government assistance such as the Newstart unemployment benefit, they may lose access to funding to cover extra costs associated with disability.²³⁹ She specifies that pension benefits available to DSP recipients include ‘highly subsidised pharmaceuticals’ and ‘rental assistance’, and that being a recipient of the DSP may be necessary to access ‘state/territory-funded disability support services such as in-home support, disability counselling, aids and equipment, subsidised taxi scheme and companion card’.²⁴⁰ Newstart recipients cannot access these additional sources of support,²⁴¹ must comply with requirements including ‘actively looking for work’ and reporting to Centrelink every two weeks, and receive a much lower rate of payment.²⁴²

Devandas Aguilar suggests that countries should ‘unbundle income security and disability-specific assistance’ in order to promote inclusion in employment.²⁴³ To an extent, another Commonwealth initiative, the National Disability Insurance Scheme (NDIS) conforms to this recommendation, by providing funding and support to some people with permanent impairments which ‘result in substantially reduced functional capacity’.²⁴⁴ Eligibility to access the NDIS does not depend on an inability to work.²⁴⁵ However, to participate in the NDIS, a person with disability must prove their impairment is permanent (or is likely to be) and that it results in ‘substantially reduced functional capacity’.²⁴⁶ This means that the NDIS is not accessible to all people with disabilities. In fact, it is predicted that only approximately ten percent of people with disabilities will access disability support packages under the NDIS.²⁴⁷

²³⁷ Soldatic, above n 97, 155.

²³⁸ People with disabilities such as activist Jax Jacki Brown have identified that the DSP can amount to a ‘poverty trap’. Jax Jacki Brown ‘The price of love for people with disability on the poverty line’, *Daily Life* (online), 16 June 2017 <<http://www.dailylife.com.au/life-and-love/love-sex-and-relationships/the-price-of-love-for-people-with-disability-on-the-poverty-line-20150615-ghoe6z.html>>.

²³⁹ Soldatic, ‘Neoliberalising disability income reform’, above n 94, 135; Soldatic, ‘Policy Mobilities of Exclusion’, above n 97, 154.

²⁴⁰ Soldatic, ‘Policy Mobilities of Exclusion’, above n 97, 155.

²⁴¹ *Ibid.*

²⁴² Department of Human Services, *Newstart Allowance: What your commitments are* (30 October 2018) <<https://www.humanservices.gov.au/individuals/services/centrelink/newstart-allowance/what-your-commitments-are>>.

²⁴³ Devandas Aguilar, above n 122, 56.

²⁴⁴ *National Disability Insurance Scheme Act 2013* (Cth) s 24.

²⁴⁵ Although there is a general requirement that ‘the impairment or impairments affect the person’s capacity for social and economic participation’ under *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(d).

²⁴⁶ *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(b)-(c).

²⁴⁷ Karen R Fisher, ‘Understanding the NDIS: many eligible people with disabilities are likely to miss out’, *The Conversation* (online), 7 July 2016 <<https://theconversation.com/understanding-the-ndis-many-eligible-people-with-disabilities-are-likely-to-miss-out-61016>>.

Ultimately, people with disabilities who are denied access to the DSP are likely to be at a greater risk of poverty, especially if they are subject to numerous forms of disadvantage.²⁴⁸ The fact that some people with disabilities cannot access the DSP nor other sources of support that account for disability-related costs, such as the NDIS, potentially indicates that their right under article 28 to social protection is not being upheld.²⁴⁹ This suggests that the Australian social protection system cannot be considered fully disability-inclusive.

F Decisions indicate access to justice issues in the application, review and appeal process

Difficulties in the application, review and appeals process were apparent in a number of the cases reviewed. These included problems with confusing and inaccessible processes and evidence requirements, lack of legal representation and the long duration of the process, all of which raise concerns under article 13 of the *CRPD*.

1 The process is confusing and inaccessible

An individual can only be successful in their DSP claim if they meet all the strict requirements that the law imposes. Hence, it is crucial that the applicants understand the process and do not make any mistakes. Unfortunately, the AAT decisions under analysis suggested that there might be a lack of access to information, because some applicants did not know what to expect about the process.²⁵⁰ This was linked to expressions of frustration and anxiety in certain cases. In *TDQN*, the applicant and her daughter were distressed because they did not know what was required to qualify for a DSP.²⁵¹ In *Ritskos*, the applicant said that she believed that she did everything that was required of her, but her claim was rejected.²⁵² She said that she had been 'left in a ditch'.²⁵³

While it is unclear why some applicants lacked understanding about the process, it might be because their access to information was limited. They might not have known how to request the needed information or they might not even have known of its availability.²⁵⁴ As there is evidence that some applicants may struggle financially, poverty might be an impediment in accessing information.²⁵⁵ Some applicants might live in a remote

²⁴⁸ Soldatic, 'Policy Mobilities of Exclusion', above n 97, 154.

²⁴⁹ *Ibid*, 153.

²⁵⁰ *Ritskos and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2580 (13 July 2018) [8]; *TDQN and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1850 (7 June 2018).

²⁵¹ *TDQN and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1850 (7 June 2018).

²⁵² *Ritskos and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2580 (13 July 2018).

²⁵³ *Ritskos and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2580 (13 July 2018) [8].

²⁵⁴ Flynn, above n 75, 53.

²⁵⁵ Jill Toohey, 'New challenges in merits review decision-making' (2015) 80 *AIAL forum* 20, 23;

Kontossis and Secretary, Department of Social Services (Social Services second review) [2018] AATA 1846 (21 June 2018) [37].

location where there is no legal centre nearby to seek advice. This might be especially an issue for Aboriginal and Torres Strait Islander applicants.²⁵⁶

A lack of access to the internet or skills to use it would limit the information available to applicants with disabilities and also the means by which they can communicate and seek assistance. In *Jorj*, the applicant did not have access to email facilities and this made communication with the person more difficult.²⁵⁷ The Australian Digital Inclusion Index states that DSP recipients are the most digitally excluded group.²⁵⁸ Additionally, the information itself might not be in an accessible format for persons with certain disabilities.²⁵⁹

It is arguably even harder for some people with cognitive disability to understand the process. One applicant in the AAT cases reviewed, who had a mild neurocognitive disorder, did not realise that his claim for DSP could be rejected as a result of the interview he had.²⁶⁰ Some individuals with psychosocial disabilities testified as having trouble concentrating and remembering important information.²⁶¹ This indicates that the standard appeal process may be inaccessible or exclusionary for some applicants with disabilities.

As a result of not understanding the requirements, applicants may not have a clear understanding of why their application was refused or cancelled nor understand what evidence they need to present to the AAT. Unfortunately, even if the Tribunal believes them and sympathises with their situation, it must apply the strict legal requirements.²⁶² It may be confusing to applicants that medical evidence obtained after the qualification period cannot be considered by the Tribunal,²⁶³ even if that same evidence may mean they could now be found eligible if they submitted a new DSP claim to Centrelink.

The application process is difficult not just because of difficulties in understanding the requirements, but also because of its duration and demands. It must be noted that certain applicants reported being in considerable pain around the time of their hearing.

²⁵⁶ Esme Grant and Rhonda Neuhaus, 'Liberty and Justice for all: The Convention on the Rights of Persons with Disabilities' (2013) 19(2) *ILSA Journal of International & Comparative Law* 348, 373.

²⁵⁷ *Jorj and Secretary, Department of Social Services (Social services second review)* [2018] AATA 304 (19 February 2018).

²⁵⁸ Roy Morgan Research & RMIT University of Technology & Centre for Social Impact & Telstra Corporation, *Measuring Australia's digital divide: the Australian Digital Inclusion Index 2018* <<https://digitalinclusionindex.org.au/wp-content/uploads/2018/08/Australian-digital-inclusion-index-2018.pdf>>.

²⁵⁹ Flynn, above n 75, 53.

²⁶⁰ *McDonald and Secretary, Department of Social Services (Social services second review)* [2017] AATA 2282 (20 November 2017) [44].

²⁶¹ *Krol and Secretary, Department of Social Services (Social services second review)* [2018] AATA 646 (23 March 2018); *Lisi and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2308 (19 July 2018) [27].

²⁶² *Hutchinson and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1842 (25 June 2018) [2].

²⁶³ *Harris and Secretary, Department of Employment and Workplace Relations* [2007] 158 FCR 252, 252, quoted in *Petrovic and Secretary, Department of Social Services (Social services second review)* [2018] AATA 748 (4 April 2018) [18].

Mr McMahon gave evidence that he was ‘coping to an extent on pain killers’.²⁶⁴ Other individuals may not experience physical pain, but may have difficulties concentrating and remembering important information because of a psychosocial disability. In *Krol and Secretary*, the applicant became angry at the hearing because she was frustrated with the questioning process.²⁶⁵ Another applicant found the questioning process challenging, as he had difficulty concentrating and remembering the treatments he had received.²⁶⁶ Some applicants could not attend their hearing and had to give evidence over the phone.²⁶⁷ In *Mowbray*, the applicant was too anxious about the process and hence the hearing had to be cancelled.²⁶⁸ It took place at a later date but without his presence.²⁶⁹ The fact that applicants expressed their dissatisfaction and frustration with the hearing process, and were sometimes excluded from it altogether, may point to a failure to provide appropriate accommodations to people with disabilities, in order to make the review process accessible.²⁷⁰ This suggests a lack of access to justice.

Appropriate accommodation is necessary, inclusive policies and actions are not sufficient in establishing equality.²⁷¹ The term ‘reasonable accommodation’ involves a recognition that certain individuals might not be able to perform particular activities.²⁷² It also imposes an obligation that adjustments are made, so that they can benefit from services.²⁷³ This ensures equality, as everyone would be able to have the same opportunities and services.²⁷⁴

While it can be argued that the justice system already considers the person’s individualised needs by allowing evidence to be given via the phone, providing individuals with interpreters and not requiring the person to be physically present at the hearing, the analysis of AAT decisions above indicates that this may not be sufficient for

²⁶⁴ *McMahon and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1081 (30 April 2018) [34].

²⁶⁵ *Krol and Secretary, Department of Social Services (Social services second review)* [2018] AATA 646 (23 March 2018) [28].

²⁶⁶ *Lisi and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2308 (19 July 2018) [27].

²⁶⁷ *Dunn and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3777 (12 October 2018) [20]; *Hughson and Secretary, Department of Social Services (Social services second review)* [2018] AATA 89 (30 January 2018); *Krol and Secretary, Department of Social Services (Social services second review)* [2018] AATA 646 (23 March 2018) [2]; *Lisi and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2308 (19 July 2018) [24].

²⁶⁸ *Mowbray and Secretary, Department of Social Services (Social services second review)* [2017] AATA 3053 (8 December 2017) [7].

²⁶⁹ *Ibid* [7], [39].

²⁷⁰ *Plant and Secretary, Department of Social Services (Social services second review)*[2018] AATA 3860 (15 October 2018)[61].

²⁷¹ Grant and Neuhaus, above n 256, 352.

²⁷² Flynn, above n 75, 54.

²⁷³ *Ibid*.

²⁷⁴ *Ibid*.

all applicants.²⁷⁵ Certain applicants in the decisions we analysed had English as their second language and hence it is important that information is provided in simple English.²⁷⁶ The tribunal recognised that language barriers can present another difficulty for the applicant.²⁷⁷ The AAT has made a video which features plain-language information about the AAT, however the video does not specifically explain how to apply for review of DSP-related Centrelink decisions.²⁷⁸ Brochures written in plain English are also provided to applicants to explain the initial stages of the process.²⁷⁹ Nevertheless, the experiences of certain applicants in the analysed cases point to a potential need for further initiatives. In one case, even though a foreign language interpreter was provided, the Tribunal still noted that language was a barrier.²⁸⁰ Some applicants also seemed to encounter difficulties with the questioning process.²⁸¹ The questioning process should be individualised to the person's specific needs.²⁸² While there is evidence that AAT staff have received disability awareness training,²⁸³ the potential need for further training should be explored.

Additionally, in order to avoid discriminating against applicants or other participants with disabilities access to the building of the Tribunal must be available for all people regardless of disability.²⁸⁴ In important steps, which are consistent with the *CRPD*, 'all AAT premises' have been made wheelchair accessible and hearing loop systems made available at all AAT registries, as of 2017-18.²⁸⁵

Vasilios Kontossis' case, described below, illustrates how frustrating the process can be to someone who has multiple disabilities.

²⁷⁵ *Dunn and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3777 (12 October 2018).

²⁷⁶ *Jorj and Secretary, Department of Social Services (Social services second review)* [2018] AATA 304 (19 February 2018).

²⁷⁷ *Ibid.*

²⁷⁸ Administrative Appeals Tribunal, *Accessible information about the AAT* (3 July 2018) <<http://www.aat.gov.au/resources/information-videos/accessible-information-about-the-aat>>.

²⁷⁹ Justice Garry Downes, 'Practice, Procedure and Evidence in the Administrative Appeals Tribunal', (Speech delivered at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011) <<http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/PracticeProcedureEvidenceMay2011.pdf>> 7.

²⁸⁰ *Jorj and Secretary, Department of Social Services (Social services second review)* [2018] AATA 304 (19 February 2018).

²⁸¹ *Krol and Secretary, Department of Social Services (Social services second review)*[2018] AATA 646 (23 March 2018); *Lisi and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2308 (19 July 2018) [27].

²⁸² Juan Bornman, 'Preventing Abuse and Providing Access to Justice for Individuals with Complex Communication Needs: The Role of Augmentative and Alternative Communication' (2017) 38(4) *Seminars in Speech and Language* 321.

²⁸³ See, eg, Administrative Appeals Tribunal, *2013-14 Annual Report* (2014) <<http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR1314-Chapter-4.pdf>> 40.

²⁸⁴ Ortoleva, above n 76, 305.

²⁸⁵ Administrative Appeals Tribunal, above n Annual report 2017-18, 47.

Case example:

Kontossis and Secretary, Department of Social Services (Social Services second review) [2018] AATA 1846 (21 June 2018):

Vasilios Kontossis is 57 years old and experiences physical, psychosocial and sensory impairments. He is divorced and lives with his parents. He described himself as 'damaged goods and simply burnt out'. He went to numerous doctors, but none were able to cure him. He could not have physiotherapy anymore, as WorkCover was not meeting his medical expenses anymore and he could not afford it. He was wary of treatment in general, as he was afraid that it might damage his shoulders and arms more. He applied to Centrelink for a Disability Support Pension, but Centrelink wrote to him on 31 May 2017 to inform him that his DSP claim was refused. Both ARO and AAT1 affirmed Centrelink's decision on 2 August 2017 and 1 December 2017 respectively. Unhappy about this outcome, Mr Kontossis sought review of the AAT1 decision on 20 December 2017. The date of the AAT2 hearing was 4 May 2018. Mr Kontossis found the entire process frustrating. He said that he 'was completely fed up with having to explain his situation yet again', but at the same time he was determined to even go to the Federal Court of Australia if he did not receive what he thought he ought to. Mr Kontossis satisfied the eligibility requirements under section 94 of the *Social Security Act*. The Tribunal found that he had completed a program of support, that his conditions accumulated 20 impairment points and he had a continuing inability to work. Therefore, the Tribunal set aside the prior decision and asserted that he was qualified to receive disability support pension. The Tribunal's decision indicated that it was not necessary for the applicant to go through the appeal process, as he was eligible from the beginning, had all the necessary documents and had participated in a program of support.

2 Lack of legal representation

As the application process is relatively complex and can be stressful, applicants may benefit from having legal representation. There might be a correlation between legal representation and favourable outcomes for lay persons, as they do not necessarily have the legal knowledge and expertise that a lawyer has and therefore, might be at a disadvantage.²⁸⁶ They might also feel intimidated.²⁸⁷ Other factors, such as medication, may affect a person's ability to represent themselves.²⁸⁸

Applicants can receive support from a family member, friend or another non-lawyer, but having the applicant receive such assistance may not remedy the power imbalance. Assy (2015) asserts that lay assistance cannot replace legal representation and that it might

²⁸⁶ Colleen FS Hanahan, Anna E Carpenter and Alyx Mark, 'Lawyers, Power and Strategic Expertise' (2016) 93(2) *Denver Law Review* 469, 506.

²⁸⁷ Flynn, above n 75, 50.

²⁸⁸ Jake Buckingham, 'A Critical Analysis of Legal Representation in Queensland's Mental Health Review Tribunal' (2018) 6(1) *Griffith Journal of Law & Human Dignity* 133, 149.

only be useful in 'subject-specific proceedings with narrowly defined legal and factual aspects'.²⁸⁹ A lay person might not have the required knowledge and expertise to guide the applicant. For example, in one of AAT cases reviewed, *GFHF and Secretary*, although the applicant was assisted by her WorkCover claims manager in completing the application form, she still incorrectly ticked a box, as she said that she did not understand it or misinterpreted it.²⁹⁰

Out of the total of 45 cases analysed, only 8 applicants were legally represented. In contrast, the Department of Social Services - which is responsible for arguing that Centrelink's decisions are correct - always had legal representation. Unfortunately, the Tribunal said that it 'not uncommon' for self-represented applicants to not understand the eligibility requirements and the role of the Tribunal.²⁹¹ Some applicants have disabilities that may affect their concentration or memory or have English as their second language.²⁹² In one case this led to the postponement of a hearing date, as the applicant failed to provide sufficient evidence.²⁹³ Additionally, applicants might not only make mistakes in complying with the requirements of the law. They might also present their evidence in a way that does not favour them. In *Manjunath*, the Tribunal noted that the applicant was giving lengthy answers to the questions posed and this did not assist his case.²⁹⁴

As the way evidence is provided and presented is important, it is possible that some applicants could have secured the outcome they were seeking if they had legal assistance. In *Kroll*, the Tribunal advised Ms Kroll to seek her GP's assistance and consult with a member of a community legal centre if she wanted to reapply.²⁹⁵

However, even though there are benefits to having legal representation, it cannot be imposed upon anyone. Self-representation is a right that everyone has, as all people with disability are equal before the law and must have their legal capacity respected.²⁹⁶ Tests assessing a person's mental capacity cannot be used to deny legal capacity.²⁹⁷ This would amount to an indirect discrimination against persons with cognitive

²⁸⁹ Rabeea Assy, *Injustice in person: the right to self-representation* (Oxford: Oxford University Press, 2015).

²⁹⁰ *GFHF and Secretary, Department of Social Services (Social services second review)* [2018] AATA 675 (28 March 2018).

²⁹¹ *TDQN and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1850 (7 June 2018) [79].

²⁹² *Jorj and Secretary, Department of Social Services (Social services second review)* [2018] AATA 304 (19 February 2018); *Lisi and Secretary, Department of Social Services (Social services second review)* [2018] AATA 2308 (19 July 2018).

²⁹³ *Ibid.*

²⁹⁴ *Manjunath and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1077 (27 April 2018) [2].

²⁹⁵ *Krol and Secretary, Department of Social Services (Social services second review)* [2018] AATA 646 (23 March 2018) [67].

²⁹⁶ Flynn, above n 75, 63, 64.

²⁹⁷ Weller, above n 77, 4-5.

impairments.²⁹⁸ Hence, the AAT is correct in not denying applicants their right to self-representation.

It must also be noted that not all applicants who lack legal representation are unsuccessful in their claim.²⁹⁹ Unfortunately, having strong arguments is not necessarily enough to win a case. In *VQFV*, the applicant and her husband ‘argued strenuously’ against the Department’s argument that she could avoid a response to an unidentified allergen by refraining from eating out.³⁰⁰ Although they persuaded the Tribunal that this imposition was unreasonable, the Tribunal still found that the condition did not warrant the award of any impairment points.³⁰¹

The AAT contacts self-represented individuals to provide them with additional information about how they may be able to access assistance.³⁰² It is intended that the AAT staff member who reaches out to the self-represented applicant has the ‘opportunity to identify whether...the person has any particular needs because of a disability.’³⁰³ However, the finding that the majority of applicants in the 45 analysed cases were self-represented - and that self-representation seemed, in certain cases, to be associated with applicants experiencing difficulties with the process - indicates a need for further attention to the issue of legal representation. The above evidence indicates that legal representation may be beneficial. However, obtaining legal advice can be expensive and the applicants may not have the financial resources to afford legal representation.³⁰⁴

Unfortunately, there is also the concern that lawyers might not have the skills or training to adequately serve clients with a disability.³⁰⁵ Article 13(2) states that personnel must be properly equipped to know how to interact with all clients. Lawyers must also be aware of the fact that a person with disability might have different experiences, needs and legal problems than a person who does not have a disability.³⁰⁶ Larson argues that training advocates might be more effective in providing access to justice than drafting new laws and regulations.³⁰⁷ Lawyers would then be able to effectively assist clients with disabilities and address their concerns.

²⁹⁸ Ibid.

²⁹⁹ *Kontossis and Secretary, Department of Social Services (Social Services second review)* [2018] AATA 1846 (21 June 2018).

³⁰⁰ *VQFV and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3152 (31 August 2018) [48].

³⁰¹ Ibid [50].

³⁰² Administrative Appeals Tribunal, *Overview of the review process*, above n 37.

³⁰³ Downes, above n 279, 7.

³⁰⁴ Ortoleva, above n 214, 300.

³⁰⁵ Ibid, 300, 314.

³⁰⁶ Ibid, 300.

³⁰⁷ David Allen Larson, ‘Access to Justice for Persons with Disabilities: An Emerging Strategy’ (2014) 3(2) *Laws* 220.

Real change and inclusion can happen only when people with disabilities are involved in the decisions that are about them.³⁰⁸ The individuals who understand difficulties and concerns of people with disabilities the best are those who have disabilities themselves. Unfortunately, persons with disabilities also face significant barriers to becoming lawyers, jurors, administrators and adjudicators.³⁰⁹

3 Duration of the process

For the analysed cases, we calculated that the average time from the DSP application until the AAT2 hearing was 658 days and the average time from the DSP application until the publication of the reasons for the decision was 761 days. This evidences that the process can be long and arduous.³¹⁰ It also creates serious practical difficulties for applicants who may not have any source of income during this time. According to data provided by the AAT, 11 appeals of second review decisions regarding entitlement to the DSP to the Federal Court were lodged in 2017-18.³¹¹ For applicants who appeal to the Federal Court, the process would continue over an even longer period of time.

The Tribunal can only determine whether the person was eligible at the time of the application and cannot look to the applicant's current circumstances. Therefore, if their circumstances change, the person must reapply, meaning that they need to begin the long process again. There were certain cases in which the applicants' condition deteriorated since their application and the Tribunal encouraged the applicant to make a new application.³¹²

Lina Jorj's case emphasises the difficulties that the application process can entail. It shows how not providing sufficient medical evidence and not complying with all the requirements can prolong the duration of the process. The fact that the applicant was possibly not eligible during the qualification process meant that she would have to make another application, which would also be time-consuming.

³⁰⁸ Weller, above n 77, 3.

³⁰⁹ Grant and Neuhaus, above n 256, 372.

³¹⁰ The AAT Annual Report 2017-18 states that the median time to finalise Centrelink first review cases in 2017-18 was 10 weeks (70 days), while the median time to finalise Centrelink second review cases was 22 weeks (154 days). Administrative Appeals Tribunal, *Annual Report 2017-18*, above n 82, 28, 38.

³¹¹ Statistical report provided by Administrative Appeals Tribunal Caseload Reporting and Performance, 4 December 2018.

³¹² *Hughson and Secretary, Department of Social Services (Social services second review)* [2018] AATA 89 (30 January 2018) [29]; *Jorj and Secretary, Department of Social Services (Social services second review)* [2018] AATA 304 (19 February 2018) [50]; *Shehata and Secretary, Department of Social Services (Social services second review)* [2018] AATA 747 (4 April 2018) [10]; *VQFV and Secretary, Department of Social Services (Social services second review)* [2018] AATA 3152 (31 August 2018) [61]-[62].

Case example:

Jorj and Secretary, Department of Social Services (Social Services second review) [2018] AATA 304 (19 February 2018):

Lina Jorj was born on 4 March 1983. She moved to Australia in 2006 from Iraq and became an Australian citizen in 2011. Her diagnosed conditions were ankylosing spondylitis, fibromyalgia and contact dermatitis. In 2015 she had a car accident that worsened the pain in her knees, right hip, neck and back. She applied for the disability support pension on 9 May 2016, but Centrelink rejected her application on 7 July 2016. The ARO affirmed this decision on 13 October 2016. On 25 October 2016, Ms Jorj sought review of this decision. AAT1 affirmed Centrelink's decision on 9 February 2017. On 8 March 2017, she applied to the AAT2 for review, which heard her case on 1 February 2018. Initially, the hearing was set for 8 September 2017, but unfortunately there was not enough medical evidence. At the time of her application she had five children under the age of 8 years old. Although she studied IT at university in Iraq and held a Certificate III in childcare, she could not speak nor write English. She also did not have email facilities. The reason the Tribunal determined that she was not qualified to receive DSP was because her condition was not fully diagnosed, treated and stabilised during the qualification period. However, the Tribunal recognizes that her current condition was much worse than it was when she applied and it encouraged her to re-apply and obtain a letter of confirmation from her rheumatologist that biological treatment would not be an option as it would have too many side effects. The Tribunal acknowledged that she might have been successful in her application if she had been able to prove that the treatment was too risky. The legislative requirement for treatment and stabilisation, which was strictly applied by the Tribunal, reflects the influence of a medical model approach. This precluded Ms Jorj from being found eligible for the DSP. Her other personal circumstances were completely ignored. In particular, the fact that she had to stop or limit treatment due to her pregnancies was not considered.

Beverly Dunn's case also emphasises the difficulties that a reapplication would entail.

Case example:

Dunn and Secretary, Department of Social Services (Social Services and second review)[2018] AATA 3777 (12 October 2018):

Beverly Dunn was sexually abused as a child and began taking antidepressants for her depression since she was 11 years old. When she was 15 years old, she was diagnosed with arthritis and had been receiving treatment since that time. She applied to receive Disability Support Pension on 16 October 2016, but her application was refused on the basis that she could not be assigned an impairment rating of at least 20 points for her conditions. Her case was heard by the AAT2 on 2 August 2018. In addition to her

arthritis, depression and social phobia, Ms Dunn gave evidence that she had fibromyalgia, chronic fatigue, sleep apnoea and incontinence. However, the Tribunal found that there was not enough evidence to demonstrate that these conditions were fully diagnosed, treated and stabilized within the qualification period. The Job Capacity Assessment Report concluded that she was able to work. However, her medical evidence indicated otherwise. Ms Dunn stated that she could not use a keyboard because of her arthritis and hence she would not be able to have an office job or any job that would require typing. It would be extremely difficult for her to get to the workplace, as she uses a mobility scooter. She would not be able to catch a bus, as she would be unable to get up the steps of the bus. Additionally, she would only be able to drive a car if someone is with her in the car, as she found it difficult to hold the steering wheel and to turn her head from left to right. The Tribunal recognized her serious medical conditions and her honesty. However, as she did not satisfy the requirements of section 94(1)(b), as no impairment points could be awarded under the Impairment Tables. The Tribunal said it had no choice but to affirm the decision. The only option that Ms Dunn has was to reapply for DSP and go through that long process again. At the hearing, Ms Dunn gave her evidence by telephone. She consulted two general practitioners. Dr Yapa stated that her condition was likely to keep deteriorating, and Dr Singh said that her disability had a functional impact on activities requiring exertion. This suggests a number of barriers to future DSP applications.

Overall, the potentially long and arduous process involved in obtaining AAT review of DSP-related decisions might undermine the right to access to justice under article 13, as it might deter applicants from contesting Centrelink decisions.³¹³

V CONCLUSION AND RECOMMENDATIONS

This report included an analysis of the demographic characteristics of applicants seeking review of DSP-related Centrelink decisions by the AAT, and an analysis of the reasoning in Victorian second review decisions regarding the refusal or cancellation of the DSP. These analyses led to the identification of ways in which Australia may not be upholding the rights of people with disabilities to social protection and to access to justice. That is, this report has argued that articles 28 and 13 of the *CRPD* are implicated by the eligibility requirements for the DSP and the application of those requirements by the AAT. Ultimately, this report has raised concerns that further steps may be necessary to ensure that Australia fulfils its obligations under the *CRPD*. Therefore, while we emphasise the need for further research, we make the following preliminary recommendations.

A Recommendations to ensure that intersectional discrimination is addressed

- Intersecting barriers which impede the access of Aboriginal and Torres Strait Islander people with disabilities to the DSP - such as poor service provision in remote areas, lack of cultural and linguistic accessibility, and discrimination³¹⁴ - must be addressed.

³¹³ *CRPD* art 13. See Kim Economides, Alfred A Haug and Joe McIntyre, 'Toward Timeliness in Civil Justice' 41(2) *Monash University Law Review* 414, 415.

³¹⁴ Commonwealth Ombudsman, above n 98, 9.

- Further research is needed to examine whether Aboriginal and Torres Strait Islander people with disabilities are under-represented among applicants who seek AAT review of Centrelink decisions regarding the DSP.
- Data regarding the number of Indigenous applicants who seek AAT review of DSP-related Centrelink decisions – including at the second review stage – should be published. This would be consistent with Australia’s obligation under article 31 of the *CRPD* to not only collect statistical data in order to be able to devise policies to give effect to the Convention,³¹⁵ but also to disseminate disaggregated data and ensure it can be accessed by people with disabilities.³¹⁶

B Recommendations to ensure the right to social protection under article 28 is upheld

- The eligibility criteria for the DSP must be reassessed in line with Australia’s human rights obligations under article 28 of the *CRPD* - as elaborated by the Special Rapporteur on Disability³¹⁷ - in order to ensure that the people with disabilities’ right to social protection is upheld.
- In line with article 3(4) of the *CRPD*, a review of the current eligibility requirements must involve consultation with and the active involvement of people with disabilities, including Aboriginal and Torres Strait Islander people with disabilities.
- The eligibility criteria for the DSP must be brought into line with the social model of disability, which is adopted by the *CRPD*. That is, the criteria must account for disabling barriers in society, not merely medical assessments of the impact of impairments on functional capacity.
- The recommendation of the Special Rapporteur on Disability that financial support for the extra costs associated with disability should be uncoupled from unemployment benefits - in order to encourage participation in employment without withholding necessary social protection³¹⁸ - should be explored. While the NDIS moves some way towards this approach, Australia’s social protection system should ensure that all people with disabilities can access government assistance for disability-related costs.
- Further awareness-raising may be needed to ensure applicants are aware of the eligibility requirements for the DSP, including the potential requirement of participation in a program of support.

C Recommendations to ensure the right to access to justice under article 13 is upheld

- The AAT’s policies in regards to assisting self-represented applicants with disabilities should be reviewed, in order to ensure that all applicants are able to access justice on an equal basis.
- Further consultation with people with disabilities regarding the AAT review process should occur. The application process for review of a DSP-related Centrelink decision may better reflect the applicants’ needs if persons with disabilities are consulted about the way information and support should be provided.

³¹⁵ *CRPD* art 31(1).

³¹⁶ *CRPD* art 31(2)-(3).

³¹⁷ Report of the Special Rapporteur on the Rights of Persons with Disabilities, above n 157.

³¹⁸ Devandas Aguilar, above n 122, 56.

- The possibility that lawyers, AAT staff, and Tribunal Members may benefit from further training in regard to how they can effectively assist persons with disabilities should be explored.
- In general, the participation of people with disabilities in the legal system - including in the roles of lawyers and members of the judiciary - should be further encouraged and facilitated.³¹⁹

BIBLIOGRAPHY

A AAT Decisions Examined for Thematic Analysis

Bertucci and Secretary, Department of Social Services (Social services second review)
[2018] AATA 745 (4 April 2018)

Collins and Secretary, Department of Social Services (Social services second review)
[2017] AATA 2277 (17 November 2017)

De Silva Wijeyeratne and Secretary, Department of Social Services (Social services second review) [2018] AATA 2443 (24 July 2018)

Dunn and Secretary, Department of Social Services (Social services second review)
[2018] AATA 3777 (12 October 2018)

Eyit and Secretary, Department of Social Services (Social services second review) [2018] AATA 2091 (4 July 2018)

Flenley; Secretary, Department of Social Services and (Social services second review)
[2018] AATA 2872 (2 August 2018)

GFHF and Secretary, Department of Social Services (Social services second review)
[2018] AATA 675 (28 March 2018)

Ghattas and Secretary, Department of Social Services (Social services second review)
[2018] AATA 3937 (19 October 2018)

Gjorsevska; Secretary, Department of Social Services and (Social services second review) [2018] AATA 1109 (3 May 2018)

Hughson and Secretary, Department of Social Services (Social services second review)
[2018] AATA 89 (30 January 2018)

Hutchinson and Secretary, Department of Social Services (Social services second review)
[2018] AATA 1842 (25 June 2018)

Ilievska and Secretary, Department of Social Services (Social services second review)
[2018] AATA 1308 (18 May 2018)

Incorvaia and Secretary, Department of Social Services (Social services second review)
[2018] AATA 1830 (19 June 2018)

³¹⁹ Ortoleva, above n 76, 315.

Jorj and Secretary, Department of Social Services (Social services second review) [2018] AATA 304 (19 February 2018)

JZPC and Secretary, Department of Social Services (Social services second review) [2018] AATA 1268 (11 May 2018)

Katovic and Secretary, Department of Social Services (Social services second review) [2018] AATA 2600 (3 August 2018)

Kontossis and Secretary, Department of Social Services (Social services second review) [2018] AATA 1846 (21 June 2018)

Kostidis and Secretary, Department of Social Services (Social services second review) [2018] AATA 3934 (3 September 2018)

Kosturski and Secretary, Department of Social Services (Social services second review) [2018] AATA 3684 (3 October 2018)

Kovacic; Secretary, Department of Social Services and (Social services second review) [2017] AATA 2035 (2 November 2017)

Krol and Secretary, Department of Social Services (Social services second review) [2018] AATA 646 (23 March 2018)

Lisi and Secretary, Department of Social Services (Social services second review) [2018] AATA 2308 (19 July 2018)

Loh and Secretary, Department of Social Services (Social services second review) [2018] AATA 2598 (3 August 2018)

Manjunath and Secretary, Department of Social Services (Social services second review) [2018] AATA 1077 (27 April 2018)

McDonald and Secretary, Department of Social Services (Social services second review) [2017] AATA 2282 (20 November 2017)

McMahon and Secretary, Department of Social Services (Social services second review) [2018] AATA 1081 (30 April 2018)

Mongta and Secretary, Department of Social Services (Social services second review) [2018] AATA 2092 (4 July 2018)

Morales and Secretary, Department of Social Services (Social services second review) [2017] AATA 2825 (1 December 2017)

Mowbray and Secretary, Department of Social Services (Social services second review) [2017] AATA 3053 (8 December 2017)

Nguyen and Secretary, Department of Social Services (Social services second review) [2018] AATA 12 (12 January 2018)

Obaidi and Secretary, Department of Social Services (Social services second review)
[2018] AATA 2968 (17 August 2018)

Perkins; Secretary, Department of Social Services and (Social services second review)
[2018] AATA 3578 (21 September 2018)

Petrovic and Secretary, Department of Social Services (Social services second review)
[2018] AATA 748 (4 April 2018)

Plant and Secretary, Department of Social Services (Social services second review)
[2018] AATA 3860 (15 October 2018)

Richards and Secretary, Department of Social Services (Social services second review)
[2018] AATA 2896 (16 August 2018)

Ritskos and Secretary, Department of Social Services (Social services second review)
[2018] AATA 2580 (13 July 2018)

Shehata and Secretary, Department of Social Services (Social services second review)
[2018] AATA 747 (4 April 2018)

Spaleta and Secretary, Department of Social Services (Social services second review)
[2018] AATA 2581 (18 May 2018)

Spurrell and Secretary, Department of Social Services (Social services second review)
[2018] AATA 2148 (6 July 2018)

Sudak and Secretary, Department of Social Services (Social services second review)
[2018] AATA 4248 (14 September 2018)

Taylor and Secretary, Department of Social Services (Social services second review)
[2018] AATA 3632 (25 September 2018)

TDQN and Secretary, Department of Social Services (Social services second review)
[2018] AATA 1850 (7 June 2018)

VQFV and Secretary, Department of Social Services (Social services second review)
[2018] AATA 3152 (31 August 2018)

Yonan and Secretary, Department of Social Services (Social services second review)
[2018] AATA 1856 (26 June 2018)

ZSYJ and Secretary, Department of Social Services (Social services second review) [2018]
AATA 3969 (22 October 2018)

B Articles/Books/Reports

Arstein-Kerslake, Anna, Yvette Maker, Maree Ireland, Rikki Mawad, 'Research needs in access to justice for people with disability in Australia and New Zealand' (Scoping Paper, Disability Access to Justice Research Consortium, February 2018)

Asimow, Michael and Jeffrey S Lubbers, 'The Merits of "Merits Review": A Comparative Look at the Australian Administrative Appeals Tribunal' 67 *Australian Institute of Administrative Law Forum* 5

Assy, Rabeea, *Injustice in person: the right to self-representation* (Oxford: Oxford University Press, 2015)

Australian Institute of Health and Welfare (2018) *Australia's Health 2018*, Australia's Health Series Report no 16 (2018)

Australian National Audit Office, *Qualifying for the Disability Support Pension*, Report No 18 of 2015-16 (2016)

Bornman, Juan, 'Preventing Abuse and Providing Access to Justice for Individuals with Complex Communication Needs: The Role of Augmentative and Alternative Communication' (2017) 38(4) *Seminars in Speech and Language* 321

Bostock, Lester, 'Access and equity for people with a double disadvantage' 2 *Australian Disability Review* 1

Buckingham, Jake, 'A Critical Analysis of Legal Representation in Queensland's Mental Health Review Tribunal' (2018) 6(1) *Griffith Journal of Law & Human Dignity* 133

Crenshaw, Kimberlé, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 42(6) *Stanford Law Review* 1241

Committee on the Rights of Persons with Disabilities, *General comment No. 4*, UN Doc CRPD/C/GC/4 (2 September 2016)

Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities: Initial reports submitted by States parties under article 35 of the Convention: Australia*, UN Doc CRPD/C/AUS/1 (3 December 2010)

Commonwealth Ombudsman, *Department of Human Services: Accessibility of Disability Support Pension for remote Indigenous Australians*, Report No 5 (2016)

Darcy, Simon, Tracy Taylor and Jenny Green, "'But I can do the job": Examining disability employment practice through human rights complaint cases' (2016) 31(9) *Disability & Society* 1242

Degener, Theresia, 'Disability in a Human Rights Context.' 5(35) *Laws* 1

Devandas Aguilar, Catalina, 'Social Protection and Persons with Disabilities' 70(4) *International Social Security Review* 45

Economides, Kim, Alfred A Haug And Joe McIntyre, 'Toward Timeliness in Civil Justice' 41(2) *Monash University Law Review* 414

Erevelles, Nirmala and Andrea Minea, 'Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality' in Lennard J Davis (ed), *The Disability Studies Reader* (Brill, 5th ed, 2016) 381

- Fitts, Michelle and Karen Soldatic, 'Disability Income Reform and Service Innovation: Countering Racial and Regional Discrimination' (2018) 12(1) *Global Media Journal Australian Edition* 1
- Flynn, Eilionoir, *Disabled Justice?: Access to justice and the UN Convention on the Rights of Persons with Disabilities* (London; New York: Routledge, 2016) 53
- Galvin, Rose 'Can welfare reform make disability disappear?' (2004) 39(3) *Australian Journal of Social Issues* 343
- Grant, Esme and Rhonda Neuhaus, 'Liberty and Justice for all: The Convention on the Rights of Persons with Disabilities' (2013) 19(2) *ILSA Journal of International & Comparative Law* 348
- Haegele, Justin Anthony and Samuel Hodge, 'Disability Discourse: Overview and Critiques of the Medical and Social Models' (2016) 68(2) *Quest* 193
- Hanahan, Colleen FS, Anna E. Carpenter and Alyx Mark, 'Lawyers, Power and Strategic Expertise' (2016) 93(2) *Denver Law Review* 469
- Hollinsworth, David, 'Decolonizing Indigenous disability in Australia' (2013) 28(5) *Disability & Society* 601
- Humpage, Louise, 'Models of Disability, Work and Welfare in Australia.' (2007) 41(3) *Social Policy & Administration* 215
- Kayess, Rosemary and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1
- King, JA, M Brough and M Knox, 'Negotiating disability and colonisation: the lived experience of Indigenous Australians with a disability' (2014) 29(5) *Disability & Society* 738
- Larson, David Allen, 'Access to Justice for Persons with Disabilities: An Emerging Strategy' (2014) 3(2) *Laws* 220
- Mays, Jennifer, 'Australia's disabling income support system: tracing the history of the disability pension from 1908 to today' (2016) 50(3) *Australian Journal of Social Issues* 253
- McAllister, Ashley, 'Understanding the Australian approach to assessing capacity: A detailed case study of the Disability Support Pension' (2016) 26(1) *European Journal of Public Health* 172
- Morris, Alan, 'Pain and mythology: Disability support pension recipients and work' (2006) 7(1) *Australian Review of Public Affairs* 41
- Morris, Alan, Shaun Wilson and Karen Soldatic, 'Doing the "hard yakka": implications of Australia's workfare policies for disabled people' in Chris Grover and Linda Piggot (eds), *Disabled people, work and welfare: is employment really the answer?* (Policy Press, 2015) 46

National People with Disabilities and Carer Council, *Shut Out: The Experience of People with Disabilities and their Families in Australia*, Australian Government National Disability Strategy Consultation Report (2009)

Oliver, Mike, 'The Social Model of Disability: thirty years on.' (2013) 28(7) *Disability & Society* 1024

Ortoleva, Stephanie, 'Inaccessible Justice: Human Rights, Persons with Disabilities and The Legal System' (2011) 17(2) *ILSA Journal of International & Comparative Law* 281

Palmer, Michael, 'Social Protection and Disability: A Call for Action' (2013) 41(2) *Oxford Development Studies* 139

Parliamentary Budget Office, *Disability Support Pension – Historical and projected trends*, Report No 01 (2018)

<https://www.aph.gov.au/About_Parliament/%20%20Parliamentary_Departments/Parliamentary_Budget_Office/Publications/%20%20Research_reports/Disability_support_pension_Historical_and_projected_trends>

Quinn, Gerald, 'A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities.' (2009) 1 *European Yearbook of Disability Law* 89

Report of the Special Rapporteur on the Rights of Persons with Disabilities (Theme: The rights of persons with disabilities to social protection), UN Doc A/70/297 (7 August 2015)

Ringel, Wiebke, 'Non-discrimination, Accommodation, and Intersectionality under the SPRD: New Trends and Challenges for the UN Human Rights System.' (2017) 20(1) *Max Planck Yearbook of United Nations Law Online* 98

Saul, Ben, 'Waiting for Dignity in Australia: Migrant Rights to Social Security and Disability Support under International Human Rights Law' (2010) 3 *UCL Human Rights Review* 72

Scott, Penelope S, 'Addressing Ableism in Workplace Policies and Practices: The Case for Disability Standards in Employment' (2016) 18 *Flinders Law Journal* 121

Shakespeare, Tom, 'The Social Model of Disability' in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge, 4th ed, 2013) 214

Soldatic, Karen, 'Neoliberalising disability income reform' in Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (eds), *The Neoliberal State, Recognition and Indigenous Rights* (ANU Press, 2018) 131

Soldatic, Karen (2018) 'Policy Mobilities of Exclusion: Implications of Australian Disability Pension Retraction for Indigenous Australians' (2018) 17(1) *Social Policy & Society* 151

Penelope Weller, 'Legal Capacity and Access to Justice: The Right to Participation in the CRPD' (2016) 5(1) *Laws* 1

Toohy, Jill, 'New challenges in merits review decision-making' (2015) 80 *AIAL forum* 20

Weller, Penelope, 'Legal Capacity and Access to Justice: The Right to Participation in the CRPD' (2016) 5(1) *Laws* 1

C Court cases

Harris v Secretary, Department of Employment and Workplace Relations [2007] 158 FCR 252

Minister for Immigration & Ethnic Affairs v Pochi (1980) 31 ALR 666

D Legislation

Administrative Appeals Tribunal Act 1975 (Cth)

Disability Discrimination Act 1992 (Cth)

National Disability Insurance Scheme Act 2013 (Cth)

Social Security Act 1991 (Cth)

Social Security (Active Participation for Disability Support Pension) Determination 2014 (Cth)

Social Security (Administration) Act 1999 (Cth)

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011 (Cth)

E Treaties

Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008)

F Other

Administrative Appeals Tribunal, *2013-14 Annual Report* (2014)
<<http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR1314-Chapter-4.pdf>>

Administrative Appeals Tribunal, *Accessible information about the AAT* (3 July 2018)
<<http://www.aat.gov.au/resources/information-videos/accessible-information-about-the-aat>>

Administrative Appeals Tribunal, *Annual Report 2017-18* (2018)
<<http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201718/AAT-Annual-Report-2017-18.pdf>>

Administrative Appeals Tribunal, *Apply Online* (20 April 2018)
<<http://www.aat.gov.au/social-services-child-support-division/applying-for-a-review/apply-online>>

Administrative Appeals Tribunal, *Decisions* (12 October 2018)
<<http://www.aat.gov.au/decisions>>

Administrative Appeals Tribunal, *How to apply: First review of a Centrelink or child support decision* (23 January 2018) <<http://www.aat.gov.au/social-services-child-support-division/applying-for-a-review/how-to-apply>>

Administrative Appeals Tribunal, *Overview of the review process* (15 January 2018)
<<http://www.aat.gov.au/steps-in-a-review/overview-of-the-review-process>>

Administrative Appeals Tribunal, *Practice Direction: Lodgement of Documents under Sections 37 and 38AA of the AAT* (30 June 2015)
<<http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Lodgement-of-Documents-under-sections-37-and-38AA-of-the-AAT-Act.pdf>>

Administrative Appeals Tribunal, *Representation* (25 September 2015)
<<http://www.aat.gov.au/steps-in-a-review/overview-of-the-review-process/representation>>

Avery, Scott, *Culture is Inclusion: A narrative of Aboriginal and Torres Strait Islander people with disability: Executive Summary of research findings* (2018) First Peoples Disability Network Australia <https://fpdn.org.au/wp-content/uploads/2018/07/Culture-is-Inclusion-exec-summary-_2.pdf>

Australian Government, *Social Security Guide*, version 1.250 (at 5 November 2018) [1.1.J.20] <<http://guides.dss.gov.au/guide-social-security-law/1/1/j/10>>

Australian Institute of Health and Welfare, *Australia's welfare 2017: in brief* (19 October 2017) <<https://www.aihw.gov.au/reports/australias-welfare/australias-welfare-2017-in-brief/contents/indigenous-australians>>

Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (2016)
<https://www.humanrights.gov.au/sites/default/files/document/publication/WTW_2016_Full_Report_AHRC_ac.pdf>

Brown, Jax Jacki, 'The price of love for people with disability on the poverty line', *Daily Life* (online), 16 June 2017 <<http://www.dailylife.com.au/life-and-love/love-sex-and-relationships/the-price-of-love-for-people-with-disability-on-the-poverty-line-20150615-ghoe6z.html>>

Department of Human Services, *A guide to Australian Government payments* (24 October 2018) <<https://www.humanservices.gov.au/organisations/about-us/publications-and-resources/guide-australian-government-payments>>

Department of Human Services, *Disability Support Pension* (22 October 2018)
<<https://www.humanservices.gov.au/individuals/services/centrelink/disability-support-pension>>

Department of Human Services, *Disability Support Pension Eligibility* (20 August 2018)
<<https://www.humanservices.gov.au/individuals/services/centrelink/disability-support-pension/eligibility>>

Department of Human Services, *Hours you can work when you get Disability Support Pension* (12 May 2018)
<<https://www.humanservices.gov.au/individuals/enablers/hours-you-can-work-when-you-get-disability-support-pension/39896>>

Department of Human Services, *Income test for pensions* (8 October 2018)
<<https://www.humanservices.gov.au/individuals/enablers/income-test-pensions/30406>>

Department of Human Services, *Job Capacity Assessments for Disability Support Pension* (16 August 2018)
<<https://www.humanservices.gov.au/individuals/enablers/job-capacity-assessments-disability-support-pension/29931>>

Department of Human Services, *Newstart Allowance: What your commitments are* (30 October 2018)
<<https://www.humanservices.gov.au/individuals/services/centrelink/newstart-allowance/what-your-commitments-are>>

Department of Social Services, *Participation in a Programme of Support Fact Sheet* (12 September 2015)
<https://www.dss.gov.au/sites/default/files/documents/08_2015/d15_459748_des_-_programme_of_support_fact_sheet_aa_to_ef_19_aug.pdf>

Downes, 'Practice, Procedure and Evidence in the Administrative Appeals Tribunal', (Speech delivered at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011)
<<http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/PracticeProcedureEvidenceMay2011.pdf>>

Finkelstein, Vic, Finkelstein, *The social model repossessed* (2001) The Disability Studies Archive UK, Centre for Disability Studies, University of Leeds
<www.leeds.ac.uk/disability-studies/archiveuk/archframe.htm>

First Peoples Disability Network Australia, *Strategic Directions 2015–2020*
<<https://fpdn.org.au/wp-content/uploads/2017/09/FPDNStrategicDirections2015-2020-hiqual.pdf>>

Fisher, Karen R, 'Understanding the NDIS: many eligible people with disabilities are likely to miss out', *The Conversation* (online), 7 July 2016
<<https://theconversation.com/understanding-the-ndis-many-eligible-people-with-disabilities-are-likely-to-miss-out-61016>>

Irvine, Sara, *Vale Uncle Lester Bostock OAM*, First Peoples Disability Network
<<https://fpdn.org.au/vale-uncle-lester-bostock-oam/>>

People with Disability Australia, *Social Model of Disability* (2018)
<<https://pwd.org.au/resources/social-model-of-disability/>>

Roy Morgan Research & RMIT University of Technology & Centre for Social Impact & Telstra Corporation, *Measuring Australia's digital divide: the Australian Digital Inclusion Index 2018* <<https://digitalinclusionindex.org.au/wp-content/uploads/2018/08/Australian-digital-inclusion-index-2018.pdf>>

Statistical reports provided by Administrative Appeals Tribunal Caseload Reporting and Performance, 4-5 December 2018

United Nations Department of Economic and Social Affairs, *Convention on the Rights of Persons with Disabilities* (no date)
<<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#Fulltext>>

United Nations Human Rights, *Ms Catalina Devandas Aguilar, Special Rapporteur on the rights of persons with disabilities* (2018)
<<https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/CatalinaDevandas.aspx>>

United Nations Treaty Collection, *Convention on the Rights of Persons with Disabilities: Signatories* (5 December 2018)
<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>

Victoria Legal Aid, *What is a program of support?* (25 January 2018)
<<https://www.legalaid.vic.gov.au/find-legal-answers/centrelink/disability-support-pension/what-is-program-of-support>>

Welfare Rights & Advocacy Service, *Disability Support Pension* (2016)
<<http://www.wraswa.org.au/wp-content/uploads/2016/05/DSP-FACTSHEET-Update-02.05.16-v2.pdf>>

