This collection includes the research outcomes of the projects undertaken during the Disability Human Rights Clinic that was run for the first time in Semester 2, 2015.

The clinic is co-ordinated by Dr Anna Arstein-Kerslake and is one of the subjects in the Melbourne Law School’s Public Interest Law Initiative which offers experiential learning to Juris Doctor students.

Students in the clinic learn to apply a human rights framework to legal analysis on projects that target issues concerning rights violations experienced by persons with a disability.
Foreword

Social justice is a difficult area to work in. It is fraught with emotionally charged issues and requires complex theoretical analysis. Disability Human Rights epitomizes these challenges. In order to be effective in advocating for social change to realize the rights of persons with disabilities, we must have knowledge of black-letter law, we must understand theories of marginalization, and we must understand the lived experience of disability.

I dreamt up the Disability Human Rights Clinic to engage students in tackling these issues. I also saw a gap in the field – Non-Governmental Organizations (NGOs) and Disabled People’s Organizations (DPOs) often don’t have the resources to do in-depth legal analysis and traditional academics are doing interesting theoretical work, but it often doesn’t resemble advocacy work and often doesn’t reach the disability community or the actors that can instigate change. I envisioned a clinic that could do both of these things.

The students in the inaugural semester of the Disability Human Rights Clinic met and exceeded my expectations. During lectures, they engaged enthusiastically with complex legal and social theory. In their clinical projects they applied their newly gained knowledge bravely and thoroughly. I was not only impressed with their intellectual and practical skills, I am also very proud of the honest and respectful way they dealt with challenging subjects such as eugenics, discrimination, queer theory, and marginalization.

The following is a collection of the work that we have done this semester. Each project was accompanied by at least one oral presentation. We hope that this work is valuable to our partner organizations as well as others!

Sincerely,

Dr Anna Arstein-Kerslake
Director, Disability Human Rights Clinic
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Voting Rights and Guardianship Project

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Equality before the Law: Incorporating international human rights obligations into Victoria’s guardianship laws.
Information for OPA Workshop 23 November 2015

The Guardianship and Administration Act 1986 (Vic) in its current form is not compliant with the UN Convention on the Rights of Persons with Disabilities. Australia is a signatory to the Convention and proceeded to ratify it in 2008 and the Optional Protocol in 2009. Whilst there is need for substantial reform of the Act for it to comply with the Convention this is beyond the scope of this paper. This paper is written for the purpose of informing Victorian Tribunal Members and guardians about how to incorporate the Convention, specifically Article 12, into their interpretation and use of the Act. Article 12 establishes that all people, including people with disabilities, have the right to equal recognition under the law. This is problematic under the current Guardianship and Administration Act as it can limit and remove a person’s legal capacity based on a decision making ability assessment. This is discussed further below, as well as ideology shifts that have informed changes to the international perception of disability and their practical consequences.

Changing perceptions of disability
Over the last thirty years the disability movement has been advocating to change how we as a society perceive people with disabilities.¹ The most commonly known and opposing concepts of disability are the medical and social models of disability. The medical model is now (internationally) considered unhelpful for people with disabilities for a number of reasons detailed below, of particular importance is that it justifies the removal of legal capacity. The social model of disability recognises ways in which society has disabled the individual and looks for more assistive methods for people to retain and exercise their legal capacity.

Medical Model
Traditionally, the medical model (sometimes known as the ‘individual’ model) of disability has dominated cultural, legal and policy responses to disability. The model conceptualises disability as a specific condition that makes the individual different from what is considered ‘normal’. The condition is part of the person’s own body and will result in a decreased quality of life or experience of the world. From this point of view, disability is a tragedy and people with disabilities are to be pitied.² Their lack of ability to participate fully in society without assistance is considered to be the result of bodily impairment and not due to society’s unwillingness to adapt. This results negatively for people with disabilities who are now considered an ‘other’ and are ostracised from regular societal participation.

Social Model

¹ Oliver, M, ‘The social model of disability: Thirty years on.’ (2013) Disability & Society, 28(7), 1024-6
The social model of disability conceptualises disability as a ‘social construct’.³ People with disabilities have impairments associated with their respective conditions but their disability arises from the social barriers that restrict them. These barriers can be physical, for instance in the form of stairs without an accessibility ramp, or emotional and mental, such as destructive social norms. People With Disabilities Australia, a non-profit disability rights and advocacy organisation that is made up by people with disabilities, sums up the social model as seeing disability as ‘the result of interaction between living with impairments and an environment filled with physical, attitudinal, communication and social barriers’.⁴

For example, if everyone in a community needed a wheelchair, ramps would be as commonplace as stairs. Consequently, whilst the impairment of needing a wheelchair would remain, the disability of not being able to use stairs or access locations would be removed. If all people were clinically depressed, it is likely that measures such widespread counselling at worksites would be commonplace. In this way the social model endeavours for society to accommodate its citizens so as to make sure their impairments do not become disabilities.⁵

Many domestic and international instruments have institutionalized the medical model as the way in which their society deals with people with disabilities.⁶ There has been some progress to a more social model interpretation. The International Classification of Functioning, Disability and Health (and the UN) define disability as ‘a result of an interaction between a person (with a health condition) and that person’s contextual factors (environmental factors and personal factors)’. Thus, ‘disability is not seen as an individual’s intrinsic feature but a result of interaction in an environment’⁷ and therefore society, and not the individual, needs to change. The CRPD is based on the social model of disability and seeks to bring about a shift from the medical model to state parties recognising the social model as the best means of including people with disabilities in society.

**Convention on the Rights of Persons with Disabilities (CRPD)**

The CRPD’s objective 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’⁸

Australia was an original signatory to the CRPD.⁹ The CRPD and the Optional Protocol were ratified by Australia and were entered into force in Australia in 2008.

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³ Ibid.
⁴ Productivity Commission, ‘Disability Care and Support’ (July 2011) 54 Vol 1: Productivity Commission, ‘Disability Care and Support’ (July 2011) 54 Vol 2, 98.
⁵ People with Disability Australia, Above n 2
⁷ Ibid.
and 2009, respectively. Therefore, Australia has accepted the obligations under the CRPD to recognise the rights of people with disabilities as they are explained within the document.

The CRPD is unique in its design, structure and content. It consolidates existing fundamental human rights obligations, rather than creating new ones, to assist countries with understanding how best to guarantee human rights for people with disabilities. The parentage of rights in the CRPD can be traced to previous United Nations treaties and conventions adopted by the General Assembly, like the Universal Declaration of Human Rights (UDHR), adopted in 1948, and the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966.

The CRPD is the first human rights instrument that expressly focuses on disability. The CRPD recognises that environmental and social barriers further hinder the participation in society of people with disabilities,\(^9\) thus, enforcing the social model of disability and requiring its adoption by State parties. It comprises two documents: the Convention itself, which contains the main human rights provisions, and an Optional Protocol to the Convention, that sets out the procedure for individuals to pursue complaints against their State parties for violations of their rights enshrined within the CRPD.\(^10\)

**Article 12**

Article 12 is the most relevant article within the CRPD for a discussion regarding guardianship as recognises that everyone, regardless of disability, has legal capacity before the law. Article 12 enshrines the right to equal recognition before the law for people with disabilities. This right is not new. As discussed above, the CRPD does not create any new rights; Article 12 therefore describes how state parties can ensure the right to equal recognition before the law for people with disabilities, on an equal basis with all others.

During the drafting of the CRPD there was much debate surrounding Article 12.\(^11\) To enshrine a right to equal recognition before the law, the drafters were ensuring that people with disabilities had full legal capacity on an equal basis with others in all aspects of life.\(^12\) Simply put, not only were people with disabilities now to be holders of rights, state parties would be required to ensure they could exercise those rights. Legal capacity is discussed further below.

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\(^10\) *UN Convention on the Rights of Persons with Disabilities*, Preamble, e

\(^11\) *UN Convention on the Rights of Persons with Disabilities Optional Protocol*, Art 1


\(^13\) Ibid.
Article 12 obliges state parties to be proactive to ensure this right is exercised and protected. Paragraph 3 requires state parties to provide access to supports, should it so be required, so people with disabilities can exercise their legal capacity effectively.\(^\text{14}\) This could be assistive technologies for communication or providing plain language information. Paragraphs 4 and 5 relate to problems arising when assistance from third parties is required for people to exercise their legal capacity. For example, the possibility of carers or guardians abusing their decision making authority or having an undue influence of the person. These abuses are legitimate concerns for both substituted and supported decision making regimes.

**Legal Capacity**

‘The General Comment on the Rights of Persons with Disabilities on Article 12 is clear, Legal capacity includes the capacity to be a holder of rights and an actor under the law’.\(^\text{15}\) Legal capacity grants a person agency and standing to fight for their rights under the law. It ensures participation in society is accessible and meaningful for all. As such, for everyone to be considered equal before the law all must enjoy legal capacity to exercise and hold rights. The General Comment expresses concern that many state parties have legislation that conflates the concepts of legal capacity and mental capacity whereby if a person is deemed mentally incapable their legal capacity will be restricted or removed as a result.\(^\text{16}\) Mental capacity relates to the decision making ability of a person. The NSW Attorney General’s Capacity Toolkit,\(^\text{17}\) explains a common method to assess decision-making ability/ mental capacity. The basic test for whether a person has mental capacity is to assess whether they understand what the question they are being asked means; that they are able to use relevant information and retain it; that they understand the consequences and; then can communicate that decision to others.\(^\text{18}\) This kind of test, or similar, is conducted on people whose mental capacity is being questioned and has the potential to limit or remove their legal capacity.

The CRPD establishes that a person should not be denied legal capacity due to a mental capacity assessment.\(^\text{19}\) Article 5 of the CRPD enshrines the right to equality and non-discrimination and in conjunction with Article 12 requires that State parties remove legal capacity from persons only on an equal basis. Thus a person’s gender, race or disability cannot be a reason to remove or limit their legal capacity.\(^\text{20}\) A lack of ‘mental capacity’ or the requirement for assistance or reasonable accommodations and support to make decisions is not a reason to question a person’s legal capacity.\(^\text{21}\)

\(^{14}\) *UN Convention on the Rights of Persons with Disabilities, 12(3)*  

\(^{15}\) *Committee on the Rights of Persons with Disabilities, General Comment No 1: Article 12: Equal recognition before the law, 11th sess, CRPD/C/GC/1 (19 May 2014), 3*  

\(^{16}\) *General Comment No 1: Article 12: Equal recognition before the law, CRPD/C/GC/1, 1*  

\(^{17}\) *New South Wales, Attorney General’s Department, Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales (2008)*  

\(^{18}\) *Anna’s legislating personhood 86*  

\(^{19}\) *Ibid. 8*  

Decision making processes vary from person to person and are influenced by a number of factors including one’s cultural and environmental background. Mental capacity is not an objective standard and depends not only on the socio-political standards of the society but also the opinions of those conducting tests of its competency. This testing holds people with cognitive disabilities to a higher standard than the general population because they are required to prove their capacity. Mental capacity assessments are not conducted routinely to all persons reaching a certain milestone but are conducted based on personal attributes such as one’s disability, thus not only are the tests themselves subjective but they are applied in a discriminatory manner.

**Substituted and Supported Decision Making**

Substituted decision making occurs when one person has been entrusted with making decisions for another person whose decision making capacity has been determined to be below a particular standard. Substituted decision making regimes are not compliant with Article 12. They remove an individual’s legal capacity and entrust it to another person, often known as a guardian. The guardian is then often required to act in what they consider to be the individual’s ‘best interests’. Participation of the individual in society is then limited to what is mediated on their behalf through the actions taken by their guardian.

The current *Guardianship and Administration Act 1986* (Vic) (GAA) establishes a substituted decision making regime. The General Comment on the Rights of Persons with Disabilities on Article 12, issued by the Committee on the Rights of Persons with Disabilities, is a useful tool to understanding legal capacity and how substituted decision making is not an appropriate means for people with disabilities to exercise their rights. It advocates for supported decision making mechanisms to be put in place to ensure the will and preferences of the individual are heard and acknowledged. This is alternative to substituted decision making regimes where the ‘best interests’ of a person are considered paramount. The General Comment acknowledges that many State Parties have misunderstood the obligations arising from Article 12 and that changes to decision-making regimes; such as guardianship laws, will need to be significantly altered to comply with Article 12 and with the CRPD broadly.

Supported decision making can take many different forms but the most important goal is to ensure that the will and preferences of the person are being accurately...
represented. The Convention does not indicate how to establish supported decision making regimes. The General Comment notes that it may include both informal and formal support arrangements, for example: the individual nominates a trusted person to assist them exercise their legal capacity; they require assistive technology to communicate their will and preference; they have an advocate or peer support in place.  

**Best Interests / Will and Preferences**

There is a distinct difference between making decisions in a person’s best interests and having a person’s will and preferences represented. Decisions made in someone’s best interests do not require their approval, and are largely paternalistic. This approach prohibits the individual from taking risks that may or may not be successful by removing their ability to make the decision themselves. It is important that everyone, regardless of disability, is able to freely make mistakes and take risks.

The General Comment insists that ‘best interests’ should be replaced by ‘will and preference’ whereby the individual is the primary decision maker and they are then supported by others so far as is necessary. Will and preference of the individual is a shift to indicate that the control of the decision making is with the person with a disability who is being supported to exercise their legal capacity. It is important to acknowledge that an individual’s autonomy in decision making does not require them to make that decision alone. Supported decision making is a mechanism through which people with disabilities may exercise their legal capacity autonomously; they are provided assistance and support but the decision is at their choosing.

There is a requirement under the GAA that a guardian must act in the *best interests* of the ‘represented person’ (the person lacking decision making capability under the GAA). It does not make it a requirement for the guardian to consider the wishes of the represented person. Section 28 of the Act sets out the exercise of authority of guardians under the Act. The represented person’s best interests are considered to be of utmost importance.

28  **Exercise of authority by guardian**

(1) A guardian must act in the best interests of the represented person.

(2) *Without limiting subsection (1), a guardian acts in the best interests of a represented person if the guardian acts as far as possible—*

(a) as an advocate for the represented person; and

(b) in such a way as to encourage the represented person to participate as much as possible in the life of the community; and

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29 Ibid 4  
30 Ibid 5  
31 Above n 12, 10  
32 Ibid.  
33 Guardianship and Administration Act 1986 (Vic), s28(1)  
34 Ibid s 3 (definition of ‘represented person’)
in such a way as to encourage and assist the represented person to become capable of caring for herself or himself and of making reasonable judgments in respect of matters relating to her or his person; and

(d) in such a way as to protect the represented person from neglect, abuse or exploitation; and

(e) in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person.

Whilst the considerations in s28(2) are considered to be positive interactions where the represented person is well supported, they are not mandatory considerations of the guardian. Considerations, inclusive of the wishes of the represented person\textsuperscript{35} are able to be implemented only so far as is possible, without limiting the what the guardian considers to be the ‘best interests’ of that person.\textsuperscript{36} Thus, because the wishes of the represented person do not have to be considered and are not of greatest importance, s28 of the GAA is not compliant with Article 12.

The Act

The GAA is largely inconsistent with the purpose of the Convention and specifically with Article 12. The GAA is paternalistic in form and purpose. The Objects of the GAA list provisions for providing consent to medical procedures on behalf of a represented person before giving a recommendation as to how to limit the full use of powers provided for within the GAA.\textsuperscript{37} It should also be of concern that section 4(2) where there is recommendation to limit a guardian’s exercise of authority, the wishes of the person with the disability are listed last,\textsuperscript{38} indicating their importance, behind the best interests of the person and freedom of their decision making to be attempted to be preserved.\textsuperscript{39}

There are many references to the persons ‘best interests’ throughout the GAA which is indicative of the substituted decision making regime that informs procedures that are put in place for the person’s own good. This is especially present within Part 4A, ‘Medical and Other Treatments’ which applies specifically to people considered ‘incapable of giving consent’ to medical procedures.\textsuperscript{40} To be ‘incapable of giving consent’ the person must fall under s36 (2)(a) “[the person] is incapable of understanding the general nature and effect of the proposed procedure or treatment; or (b) [the person] is incapable of indicating whether or not he or she consents or does not consent…”\textsuperscript{41} It is important to note that it is not required under the Act that both of these subsections are fulfilled but that one or the other is fulfilled. This is not compliant with the Convention. In practical terms, if the person did not fall under s36(2)(a) and therefore did understand the procedure but fulfilled s36(2)(b) whereby it

\textsuperscript{35} Ibid s28(2)(e)
\textsuperscript{36} Ibid s28(2)
\textsuperscript{37} Ibid s4(1)(f), s4(2)
\textsuperscript{38} Ibid s4(2)(c)
\textsuperscript{39} Ibid s4(2)(a), (b)
\textsuperscript{40} Ibid s36 (1)
\textsuperscript{41} Ibid s36(2)(a) and (b)
was considered they were incapable of indicating their consent, which would be
determined by someone else, this would be very difficult. There would need to be
research into that person’s communication strategies which would then be provided to
them so they may indicate their will and preference.

The plenary guardianship appointments are particularly at odds with Article 12.
Section 24 of the GAA details the authority of a plenary guardian and it is quite
extensive. The power and control that a plenary guardian may exercise over a
represented person is detailed in s24(2) and is extreme, especially s24(2)(e) where the
guardian may ‘restrict visits to the represented person to such extent as may be
necessary in his her own best interests...[emphasis added]’ Again, the paternalism of
the Act limits the freedom of decision and exercise of will of the represented person.

**Discretion**

There are few sections within the GAA that the Tribunal has discretion and may
incorporate principles of Article 12. Under the GAA it is the role of the Tribunal to
make guardianship orders appointing a guardian for a represented person.42

Section 22 of the Act details the requirements of making a Guardianship Order. The
Tribunal must be satisfied that s 22(1)(a), (b) and (c) are all fulfilled to make the
order. Subsection (b) gives some discretion to the Tribunal. It requires that the person
is unable, by reason of their disability, to make reasonable judgments in respect of all
or any of the matters relating to her or his person or circumstances. There is no
definition within the GAA of what are considered to be ‘reasonable judgments’. It
also provides no mention as to whether these ‘reasonable judgments’ must be
performed solely by the represented person, thus without supportive assistance. There
is room here for the Tribunal to consider that supported decision making is to be part
of the ‘reasonable judgment’ of the person. Section 22(2) requires the Tribunal to
consider a number of factors to determine is a person is in need of a guardian under
s22(1)(c). There is room for the Tribunal to make decisions more closely aligned with
the Convention and with the aim of maintaining a person’s legal capacity. Firstly
ss22(2)(a) requires the Tribunal to consider if there could be a less restrictive means
of fulfilling the person’s ‘need’ for a guardian. Subsection 22(2)(ab) requires the
Tribunal to consider the wishes of the proposed represented person. These subsections
may allow the Tribunal to make a decision that determines that a guardian under the
Act may be too restrictive of the person’s freedom and it would be more appropriate
for the person to be assisted in another form. The Tribunal may make
recommendations to increase informal supports instead of appointing a guardian. This
would be more closely aligned to the Convention as it could facilitate a process of
supported decision making. Subsections 22(2)(b) and (c) require the Tribunal to
consider the wishes of the family and the desirability of preserving those
relationships. It is here that the Tribunal may turn its mind to part of the aims of
supported decision making, that the individual is able to choose the people who

42 Ibid s22, s33, s35
support them. It is important the Tribunal look into whether the individual has a relationship with their family that would indicate the family, or particular members of the family, are whom the individual would want to be consulted in this circumstance.

By the presence of the word ‘may’ section 22 allows the Tribunal to choose whether to appoint a plenary guardian or a limited guardian or decide not to appoint a guardian at all. This is a discretion that the Tribunal may take to limit problematic substituted decision making so as to comply with the Convention.

Section 30 of the Act is the a useful discretion for the Tribunal to introduce supported decision making mechanisms for those individuals who are currently under a guardianship order. The discretions within the section allow the Tribunal to give advice to guardians about how to exercise their authority of the represented person, to approve or disapprove particular measures of guardians and to make any order as necessary. The Tribunal may introduce supported decision making mechanisms within this section and disapprove measures of guardians that are excessively limited to represented persons. These could be to ensure that the represented person has access to assistive technology or to communication tools that allow them to express their own will and preference. It could recommend that the guardian give more weight to the represented person’s will and preference when considering how to make decisions in their ‘best interests’.

At this juncture the Guardianship and Administration Act is not compliant with the Convention on the Rights of People with Disabilities. There is need for reform to the existing system of substituted decision-making ensure that people with disabilities are not restricted or unable to exercise their legal capacity on the basis of disability. There are some means through which the Tribunal may use its discretion to further the aims of the CRPD, and guardians may choose to exercise their authority in a less substituted and more supported decision making way. A person’s need to for assistive technology or support when making decisions is not enough to remove their legal capacity and it should be the aim of the state to ensure this does not occur.

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43 Ibid s30(3)(b)
44 Ibid s30(3)(a)
45 Ibid s30(3)(c)
I INTRODUCTION

Voting is one of the most direct and critical ways in which citizens can influence their nation’s governmental decision making, and is recognised by the *Universal Declaration of Human Rights* (UDHR) as a fundamental right to participatory government. The role of elections in the context of political rights is enshrined in several international human rights documents like the *International Covenant on Civil and Political Rights* (ICCPR), which is the key international guarantee of free elections and voting rights, including freedom of expression, assembly, and association in a manner that does not discriminate based on the “status” of any individual. However, systematic disenfranchisement of individuals, based on their membership in a certain group or their ‘status’ as having a disability, can lead to exclusion and hinder the enjoyment of their rights on an equal basis.

In the specific case of persons with disabilities, the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) guarantees a right to personhood and recognition of enjoying legal capacity on an equal basis with others in all aspects of life, including the full and effective participation in political and public life through the opportunity to vote and be elected. This brief describes and challenges the current state of Australian electoral laws, particularly the way in which they problematize individuals with intellectual disabilities. Secondly, we establish the relevance of the right to enjoy legal capacity as envisioned in the CRPD, based on the social model of disability. Thirdly, we utilise international precedent and cross-jurisdictional comparison as a point of reference for human rights compliance on a global scale. This analysis will lead to the development and proposal of viable legal recommendations that directly address the deficiencies surrounding Australian voting rights. Consequently the analysis aims to facilitate progress in Australia’s disability rights to be in line with the international movement and standards, ensuring Australia’s international obligations are met.

The CRPD, discussed throughout this brief, was signed by Australia in 2007 and ratified in 2008, and is the fundamental document that collects and articulates pre-existing international human rights and correlating State instruments as they impact

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49 Ibid art 29.
51 Ibid.
on people with disabilities. The CRPD is the first binding international human rights instrument that expressly focuses on disability and that was written with input from persons with disabilities. It aims 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’ \(^{52}\). Several articles of the Convention, including its preamble, support the broader rights associated with recognizing legal capacity and the right to vote (rights whose parentage originate in the UDHR \(^{53}\) and the ICCPR \(^{54}\)). However, it is articles 12 and 29 that directly, and thus with the most legal force, address the necessary presumption of both legal capacity and voting rights.

Article 12 of the CRPD establishes that persons with disabilities have the ‘right’ to recognition everywhere as persons before the law and shall enjoy legal capacity on equal basis with others in all aspects of life. This requires State Parties like Australia to ensure that appropriate measures of access are provided and effective safeguards to prevent abuse are put in place in order for individuals to exercise their legal capacity effectively. The General Comment No. 1 clarifies State Parties’ obligations under Article 12 to move away from substituted decision-making frameworks to a more supported decision-making one, where people with disabilities can exercise their legal capacity through full and equal recognition under the law by making fundamental decisions about their own lives. \(^{55}\) The General Comment further clarifies that the concept of legal capacity is not to be confused with mental capacity to discriminatorily restrict or deny legal capacity based on their perceived disability or decision-making skills \(^{56}\) and that a disability or impairment should never be the sole basis for a denial of legal capacity. \(^{57}\) Article 29 of the CRPD dictates that State Parties shall guarantee the political rights of persons with disabilities. \(^{58}\) Importantly, State Parties must ensure that disabled persons have the capacity and opportunities to enjoy their legal rights on an equal basis with others. Presumptive legal capacity and the rights (e.g. voting) that flow from this capacity are an example of the substantive change that should materialise following a ratification of the CRPD. Article 29 extends to the ability of persons with disability to effectively participate in elections on an equal basis with others. \(^{59}\)

Australian law assumes adults to have legal capacity to make decisions that affect their lives unless evidence to the contrary exists. \(^{60}\) For approximately 700 000

\(^{52}\) *UN Convention on the Rights of Persons with Disabilities*, above n 3, art 1.

\(^{53}\) *Universal Declaration of Human Rights*, above n 1, art 21.

\(^{54}\) *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN GAOR Supp. (No 16) at 52, UN Doc A/6316 (16 December 1966), art 25(b).


\(^{56}\) Ibid 13.

\(^{57}\) Ibid 9.

\(^{58}\) *UN Convention on the Rights of Persons with Disabilities*, above n 3, art 29.

\(^{59}\) Ibid, art 29(a).

\(^{60}\) *Borthwick v Carruthers* (1787) 99 ER 1300; *Re Cumming* (1852) 42 ER 660, 668.
Australians categorised as having an intellectual disability,\(^6^1\) this imposed status may be sufficient evidence to deny their legal capacity to make decisions. This statistic does not encompass individuals with other cognitive impairments such as dementia or episodic impairments, who might also be disenfranchised under this regime. One such decision is the right to political determination through the vote - a decision mandatory for all Australians recognised as having adequate legal capacity under the law. Current Australian law allows for a judgment of mental health or abilities to dictate an individual’s right to legal personhood. Where the law does not recognise an individual as a legal ‘person’, autonomous participation in society becomes extremely restricted. Without acknowledgment by the law, individuals can be precluded from independently accessing financial services and employment, making decisions that affect their lives and functioning as equal citizens.

Section 93(8)(a) of the Australian *Commonwealth Electoral Act 1918*\(^6^2\) creates an opportunity for the law to exclude people in a discriminatory way. Current wording of section 93(8)(a) allows discretion to possibly preclude individuals characterised as having intellectual disabilities from voting. This will be further examined below. To deprive citizens of rights based on their status as ‘disabled’ contravenes international law and exacerbates the vulnerabilities of a class of citizens, rather than supporting them to participate freely and equally in their society. Presently, Australian electoral law precludes persons of ‘unsound mind’ from voting. This effectively confers a presumption onto the individual that based on their medical diagnosis of a mental ability deviating from the norm, they lack sufficient decision-making capability. This presumption of incapacity impliedly places a burden on the individual in question to prove their right to decision-making capacity and regain full legal personhood. However citizens not subject to the ‘unsound mind’ provision do not have to prove their ability to decide on a vote - their capacity is presumed by the law.

Australian law fuses the right to legal personhood with medical diagnoses and in doing so prescribes to the ‘medical’ approach to disability or the ‘Medical Model’. This model allows legislation to be driven by medical categorisation of persons and has dominated policy-making in Australia for several decades. The medical model problematizes disability by isolating individuals who do not fit within the societal norm and inherently excludes their participation within the community. Within the medical model, disability is a condition which society imposes upon the individual. Due to these disabling barriers, the individual does not get the opportunity to self-define.\(^6^3\)

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\(^{6^2}\) Commonwealth Electoral Act 1918 (Cth), s 93(8)(a).

As an alternative within the disability rights sphere, there is now acceptance of the ‘Social Model’ of disability as an underpinning for the CRPD. The Social Model changes the framework through which ‘disability’ is interpreted. It identifies disability as being created by society through barriers to full participation. Thus it is society, not the individual, that needs to change to accommodate variations amongst people. This brief subscribes to the Social Model in its interpretation of disability.

II DEFINITIONS

‘Vote’ means: The formal act of an elector in an election to choose the candidate the elector most wants to be the representative for that division. Australia has a secret vote, and enforces compulsory voting.

‘Disability’ means:
○ total or partial loss of the person’s bodily or mental functions
○ total or partial loss of a part of the body
○ the presence in the body of organisms causing disease or illness
○ the malfunction, malformation or disfigurement of a part of the person’s body
○ a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction
○ a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment, or that results in disturbed behaviour;
and includes a disability that:
• presently exists
• previously existed but no longer exists
• may exist in the future
• is imputed to a person (meaning it is thought or implied that the person has disability but does not).

‘Unsound mind’ means: There is no definition provided in the Commonwealth Electoral Act 1918 or at common law of this term resulting in the formation of this vague exclusion. This term is conceivably applied to disenfranchise people with a range of impairments, including intellectual and psychosocial disabilities, acquired brain injury or a degenerative or episodic brain condition such as dementia. For the purposes of this brief, the ‘unsound mind’ exclusion will apply to people with intellectual disabilities.

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64 Professor Emeritus Ron McCallum AO, ‘‘Nothing About Us Without Us”: national responses to the CRPD six years on’ (Speech delivered at the King & Wood Mallesons/Castan Centre Annual Human Rights Lecture, 22 August 2014).
66 Disability Discrimination Act 1992 (Cth) s 4 (definition of ‘disability’)
‘Carer’ means:
People who are paid to provide support and assistance to people with a disability, chronic or mental illness etc – this may include family members. This group includes personal care workers, education and training workers and nursing care, residential care and community care staff.

‘Legal capacity’ means:
This includes recognition, under the law, of a person’s rights and duties, as well as his or her authority to take action to exercise those rights or duties.\(^{68}\)

‘Discrimination’ means:\(^{69}\)
Pursuant to the Disability Discrimination Act 1992 (Cth) section 5, ‘discrimination’ for the purposes of this brief will be characterised as either ‘direct disability discrimination’ or ‘indirect disability discrimination’, defined below.

‘Direct disability discrimination’ occurs when:\(^{70}\)
(1) A person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different;
(2) The discriminator also discriminates against the aggrieved person on the ground of a disability of the aggrieved person if:
   (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
   (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.
(3) Circumstances are not materially different because of the fact that, because of the disability, the aggrieved person requires adjustments.

‘Indirect disability discrimination’ occurs when:\(^{71}\)
(1) The discriminator discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
   (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
   (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
   (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.
(2) The discriminator also discriminates against the aggrieved person on the ground of a disability of the aggrieved person if:

\(^{68}\) UN Doc. CRPD/C/GC/1, 11 April 2014, 11-12.
\(^{69}\) Disability Discrimination Act 1992 (Cth) s 4 (definition of ‘discrimination’)
\(^{70}\) Ibid s 5.
\(^{71}\) Ibid s 6.
(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
(b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
(c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

III THE AUSTRALIAN LEGAL LANDSCAPE

8 Current Australian electoral laws are at odds with this international precedent. International law characterises legal capacity as being ‘inherent in all persons by virtue of their humanity’\(^{72}\), rather than contingent on traits such as sex, race or mental capacity. This premise prohibits the derogation of legal personhood on the basis of an intellectual impairment.

9 Pursuant to Article 12 of the CRPD, access to rights should be based on an individual’s legal personhood and legal capacity recognised on an equal basis for all persons.\(^{73}\) Instead, the current Australian law deprives the rights of disabled persons by creating obligations under section 93(8)(a) that imprecisely attach to their particular characteristic of intellectual impairment.

A Commonwealth Electoral Act 1918 (the Electoral Act)

10 Section 93 of the Electoral Act requires all Australian citizens above the age of 18 to be enrolled voters, subject to a series of exceptions found in subsections 7, 8 and Part VIII. Section 93(8)(a) bars persons of ‘unsound mind...incapable of understanding the nature and significance of enrolment and voting’ from being registered on any Electoral Roll.\(^{74}\)

11 The ‘unsound mind’ provision is emulated in section 48(2)(d) of the Victorian Constitution, enacting the provision in Victorian State elections.\(^{75}\) Both the Australian and Victorian Electoral Commissions (AEC and VEC respectively) facilitate the ‘unsound mind’ exemption through a two-page form; ‘Removal of Elector’s Name from Roll’. The form has two requirements:

1. That a registered medical practitioner certify the elector’s unsoundness of mind (s118(4) of the Electoral Act) and;

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\(^{72}\) Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal Recognition Before the Law, adopted 11 April 2014 CRPD/C/GC/1, [2].


\(^{74}\) Commonwealth Electoral Act 1918 (Cth) section 93(8)(a).

\(^{75}\) Constitution Act 1975 (Vic) section 48(2)(d).
2. That another currently enrolled voter (the objector) completes and submits the form, objecting to the person’s enrolment based on the section 93(8)(a) provision.

12 Section 93(8)(a) is worded such that it imposes a condition that almost exclusively affects individuals with intellectual impairments, thereby being indirectly discriminatory on the basis of disability.\(^\text{76}\)

13 Commentators have drawn on international instruments and cross-jurisdictional precedent in advocating a shift from the current interest-based approach, to a rights-based approach.\(^\text{77}\) Presently, the 93(8)(a) provision reinforces an outlook to disability that problematizes the individual. Section 93(8)(a) creates a system whereby an individual must earn the privilege of an inherent right, to a different standard than other citizens within the same society. An individual caught by section 93(8)(a) is vulnerable to losing the right to vote based on another citizen’s discretion. Citizens not caught by section 93(8)(a) do not face this same barrier to enacting their voting rights. Not only does this provision uphold an out-dated conceptualization of disabled persons as citizens, its limitations are discriminatory. In 2013, 6,939 Australian citizens were removed from the Electoral Roll due to section 93(8)(a).\(^\text{78}\) This provision is a significant barrier in recognising disabled persons’ full rights to active participation in political life. As such, it has been the greatest subject of criticism throughout the sector.

B Understanding the ‘Unsound Mind’

14 The construction of the ‘unsound mind’ provision condemns persons with intellectual impairments to a presumption of legal incapacity. The current law confers an active duty on those deemed of ‘unsound mind’ to have an understanding of the nature and significance of voting. It does not however, impose this same threshold for other voters. Further, the provision is underpinned by a misguided convergence of mental and legal capacities.\(^\text{79}\) That is, determination of mental incapacity necessarily leads to determination of legal incapacity.

15 The conflation of mental capacity and legal personhood occurs when decision-making deficit is assumed based on medical diagnosis. This is characterised as the ‘medical’ approach to disability, whereby an individual’s medical diagnosis impacts their ability

\(^{76}\) See ‘Part II: Definitions’ of this brief for ‘indirect discrimination’. See also Disability Discrimination Act 1992 (Cth) section 6 for extended definition of indirect discrimination.


\(^{79}\) Persons With Disability Australia, Australian Centre for Disability Law and Australian Human Rights Centre, Submission 66 to the Australian Law Reform Commission, January 2014.
to act autonomously in society. The medical model contravenes the CRPD and its
effect in electoral law specifically contravenes Article 12 of the CRPD, which
requires parties to recognise that persons with disabilities enjoy equal legal capacity.80
Yet this medical approach informs current Australian laws across the spectrum of
civil involvement, including voting, guardianship and employment.

16 Advocacy organisations have mainly argued for the repeal of the Electoral Act’s
‘unsound mind’ provision.81 The Australian Law Reform Commission’s (ALRC)
Final Report on equality and capacity for people with disabilities in the law, draws on
Australian commentary that condemns section 93(8)(a) for contravening Article 29 of
the CRPD.82 The Victorian Law Reform Commission (VLRC) and the Human Rights
Law Centre (HRLC) have reinforced this in subsequent submissions on the topic.83 In
light of Australia’s international obligations, section 93(8)(a) can be considered as
breaching Article 29 of the CRPD – the right of disabled persons to participate
equally in political and public life. The HRLC’s Submission in 2014 condemned
93(8)(a) as ‘archaic’ and ‘stigmatising’.84 The repeal of section 93(8)(a) will be
discussed further in the recommendations section of this brief.

C Emergence of the Social Model in Australian Legislation

17 The disability rights movement has posited an alternative ‘social model’ as a
necessary departure from the medical approach.

18 Policy and commentary in Australia is starting to incorporate the social model, which
has particularly gained traction since the CRPD was adopted by the United Nations in
2006 and ratified in Australia in 2008. In practice, the model requires greater action
by governments, organisations and service providers to establish equal opportunity
and address discrimination, rather than placing the onus on the ‘problematic’
individual.

19 The Disability Discrimination Act 1992 (Cth) (DDA) introduced Action Plans, which
aim to actively eliminate discrimination in organisations.85 Part III of the DDA
legislates the Action Plans, requiring policies and programs to be researched,
communicated, drafted, implemented and reviewed pursuant to the objects of the
DDA.86 The Action Plans reflect the social model in the positive duty they impose on

80 UN Convention on the Rights of Persons with Disabilities, above n 6, art 12.
81 See Human Rights Law Centre, above n 10.
82 See Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, Report
124 (2014).
83 See Human Rights Law Centre, above n 10.
84 See Human Rights Law Centre, above n 10, 2.
86 Ibid.
organisations to develop inclusive, non-discriminatory cultures and practices.\textsuperscript{87} Notably however, organisations can \textit{voluntarily} adopt Action Plans under the DDA.

20 The implementation of the \textit{Disability Act 2006 (Disability Act)} in Victoria is arguably an example of local legislative acknowledgment of an international instrument. Construction of the Victorian \textit{Disability Act} incorporates international law in interpreting the federal legislation. Rather than mirroring the federal law, Victoria’s \textit{Disability Act} stepped further, making Action Plans a mandatory requirement for public sector bodies.\textsuperscript{88}

21 Australia did not ratify the CRPD until 2008, yet legislative changes such as these even before Australia’s ratification are good examples of a willingness amongst Australian legislators to engage international best practice domestically. Despite this, the social model’s greatest presence remains in the academic and reform spaces with many service providers and government bodies continuing to defer to the medical model – including the Electoral Commission, as discussed below.

\textbf{D Australian Electoral Commission (AEC)}

22 Any elector may object to another elector’s right to be on the Electoral Roll under section 93(8)(a). Some protection does currently exist in the \textit{Electoral Act} for individuals affected by section 93(8)(a). The AEC is required under section 116 of the \textit{Electoral Act} to give written notice of an objection to a challenged elector, providing details of the objector and grounds for the objection.\textsuperscript{89} The challenged elector then has twenty days to respond to the objection, after which time and if no adequate response has been made, his or her name will be removed from the Roll.

23 In practice, this objection process is not robust enough to sufficiently empower electors challenged under section 93(8)(a). Research conducted by the AEC found that 28,603 were removed from the Electoral Roll between 2008 – 2012 on the basis of section 93(8)(a).\textsuperscript{90} Legislation allows the AEC to post notice of an objection to the challenged elector’s known or recorded address, but makes no further requirements to ensure the notice was in fact received and read by that elector. Thus section 116 disregards the reality that many people with intellectual impairments may not have appropriate access to their posted mail, or assistance in reading or understanding it. Further, the objection process does not address the underlying presumption of incapacity conferred by section 93(8)(a).

\textbf{E Assistive Voting}


\textsuperscript{88} \textit{Disability Act 2006 (Vic), s 38.}

\textsuperscript{89} \textit{Commonwealth Electoral Act 1918, s 116(1), (2)(b)(i), (ii), (iii).}

\textsuperscript{90} Australian Law Reform Commission, above n 15, 263.
Currently, assistive mechanisms exist for persons who are registered to vote. They include:
1. Postal voting;
2. Mobile voting units;
3. Electoral Officials stationed to provide assistance at polling centres on Election Day;
4. Assistive materials, including magnifying glasses, easy English guides to voting, and guides with captions and in Auslan.

These assistive mechanisms can facilitate greater voting participation, but are not fully comprehensive in recognising the voting rights of persons with disabilities. They do not sufficiently allow for independent and secret voting, nor does information delivery of either the semantics of voting or policy platforms sufficiently cater for individuals with intellectual impairments.

This brief will draw chiefly on cross-jurisdictional comparisons to make some recommendations on improvement in assistive technology. However it will largely focus its legal analysis on the current deficiency in Australian law that segregates the rights of persons with intellectual impairments.

**F Common Law Precedent**

This area is largely unexplored in Australian courts, with *Roach v Electoral Commissioner* currently one of few cases addressing the deprivation of voting rights. In *Roach*, the High Court ruled that the 2006 amendments to the *Electoral Act* excluding prisoners from voting were inconsistent with Australia’s Constitutional system of representative democracy. The Court deemed insufficient rationale had been applied in denying that right to every citizen serving a prison sentence. The *Roach* precedent is very notable in that it entrenched voting as a ‘fundamental incident of citizenship’. A 4-2 majority of the Court held a democratically elected and representative Parliament as being paramount to Australian society. As such, the Court upheld the right to vote beyond all but a proportionate limitation for a ‘substantial reason’.

*Roach* was invaluable in upholding the inherent nature of citizens’ rights to vote, yet it did not condemn the discrimination inherent in the ‘unsound mind’ provision. The case related specifically to citizens serving a prison sentence (section 93(8AA)), thus it was not before the Court to consider the constitutional validity of section 93(8)(a). However, mental capacity was considered a substantial reason for deprivation of the

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91 *Roach v Electoral Commissioner* [2007] HCA 43.
92 *Roach* [2007] HCA 43.
93 Ibid.
94 Ibid.
95 Ibid [83]. See also *McGinty v Western Australia* (1996) 186 CLR 140 [170].
right to vote throughout the case. For example, Counsel for the plaintiff provided that the ‘only’ rational basis for limiting the constitutional right to vote is a ‘person’s [mental] capacity’. 96

29 Further in obiter, the Court specifically upheld the validity of precluding individuals of ‘unsound mind’ from voting where it is ‘reasonably appropriate and adapted’ considering the ‘constitutionally prescribed system of representative government’. 97 Gleeson CJ deemed 93(8)(a) an ‘obvious’ substantial reason for removal from the Electoral Roll. 98 This was supported by the joint judgment of Gummow, Kirby and Crennan JJ who considered it reasonable to protect the ‘integrity of the electoral process’. 99

30 The plaintiff’s submissions in Roach emphasised the impugned rights to political communication and participation and argued they were contravened by the amendments limiting prisoners’ rights to vote. 100 Pursuant to the authority of Levy (1996), such limitations must be ‘necessary for the attainment of some overriding public purpose’ and require ‘compelling justifications’. 101 The Court upheld the importance of the right to free political communication in Roach.

31 Individuals’ rights to political communication and freedom is inherently conferred through the Constitution. 102 Accordingly, that right should only be removed where substantial contravention of the public interest is at stake. Section 93(8)(a) thus contravenes Article 12(3) and is arguably unconstitutional on the basis that it effects an inherent denial of a constitutional right to a class of citizens on a basis that is neither substantially justified or proportionate.

32 Again the Court did not adapt its reasoning to section 93(8)(a) in this case, however the rationale for the arguments in Roach nevertheless may be applicable in future cases concerning persons with intellectual impairments, particularly since Australia’s ratification of the CRPD.

G Policy Directions

33 Policy strategy on developing the disability sector has been silent on the issue of legal capacity and the right to vote. The Report to the Council of Australian Governments on National Disability Strategy 2010 – 2020 (the Strategy) is a key policy resource to

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96 Roach [2007] HCA 43.
97 Ibid.
98 Ibid [9].
99 Ibid [88].
100 Roach [2007] HCA 43 [167].
emerge from the government sector. The Strategy was a response to Australia’s ratification of the UNCRPD in 2008 and aims to guide a body of policy that promotes disabled persons’ abilities to participate equally in Australian society.\textsuperscript{103}

34 The Strategy seeks to promote principles of the CRPD in Australian policy making and covers the areas of community participation and support, economic security, health, learning skills and rights protection. The Strategy establishes actions plans for each of its recommendations and seeks participation from the government and community sectors, as well as from persons with disabilities.

35 Outcome 2 of the Strategy specifically addresses rights protection, justice and legislation and discusses the need for reform in the electoral system.\textsuperscript{104} Future Action Area 2.8 requires people with disability to have ‘every opportunity to be active participants in the civic life of community’ and attributes this responsibility to the Australian Electoral Commission.\textsuperscript{105} The Strategy recognises participation in civic life as being a fundamental democratic right and thus, it is a duty of the State to ensure people with disabilities are supported to practice this right. However, the Strategy’s suggestions focus exclusively on expanding assistive technology to increase accessibility of voting for individuals already on the Electoral Roll. Thus it aims to ease the process through which the right to vote may be exercised, impliedly only affecting persons to whom the right has been granted. It is silent on the issue of individuals with intellectual impairments being denied access to the right itself through section 93(8)(a).

36 As a national long-term action plan on holistic progress in the disability sector, the Strategy can be taken to reflect the current attitude amongst lawmakers towards disabled persons’ rights to legal capacity. Evident in the Strategy’s silence on the problem underlying section 93(8)(a) is Australia’s adherence to a medical approach that justifies segregation of disabled persons from full participation in society.

37 The ALRC’s Final Report outlined National Decision Making Principles (the Principles) designed to ‘reflect the paradigm shift’ heralded by the CRPD.\textsuperscript{106} The Principles worked around four ideological pillars:
   1. Everyone has an equal right to make decision and to have their decisions respected;
   2. Persons who need support should be given access to the support they need in decision-making;
   3. A person’s will and preference must direct decisions that affect their lives; and


\textsuperscript{104} Department of Families, Housing, Community Services and Indigenous Affairs, above n 42, 6.

\textsuperscript{105} Ibid 78.

\textsuperscript{106} Australian Law Reform Commission, above n 15, 63.
4. There must be appropriate and effective safeguards in relation to interventions for persons who may require decision-making support.\textsuperscript{107}

38 These Principles were intended to guide legislative reform across the country so as to bring Australian law closer in line with current international best practice established by the CRPD. Though the Principles themselves facilitate a paradigm shift towards that of the social model, the ALRC’s report goes on to make recommendations that contravene these Principles. The ALRC’s proposed decision-making ability test – intended to replace the unsound mind provision – resolutely entrenches the disenfranchisement brought by 93(8)(a).\textsuperscript{108} Though the Report’s Principles are aspirational, its recommendations illustrate instead an adherence to Australia’s current interest-based model.

39 The ALRC’s Final Report recommended the unsound mind provision be substituted with a ‘decision-making ability test’. This test proposes ‘valid and sufficient’ reasons be established to bar an individual from voting. Specifically, the vote will be denied if a person cannot:

a) Understand information relevant to voting at the particular election;
b) Retain that information for a sufficient period to make a voting decision;
c) Use or weigh that information as part of the process of voting; or
d) Communicate their vote in some way.

40 This test has been received critically by the sector for the onerous burden it places on disabled persons to prove their capacity in order to attain a right. The HRLC condemns implementation of this test on the bases it indirectly discriminates against persons with disabilities and there is no evidence-based justification for its formulation.\textsuperscript{109} It intertwines legal personhood with mental capacity where reform should aim to do the opposite. Far from moving facilitating a paradigm shift, the ALRC’s proposed decision-making ability test establishes an even \textit{higher} standard for disabled persons thus creating more onerous a burden for them to \textit{prove} their right to equal treatment.

41 Australia’s mandatory voting requirement has been cited as a reason for the difficulty in legislating to encompass Article 29. Whilst the requirement is a relevant consideration, it should be seen as a mechanism that demands equal participation of all Australian citizens, rather than a justification for exempting some individuals from otherwise universal rights. The mandatory provision could instead be facilitated through a widening of support mechanisms so as to make voting as accessible as possible to \textit{all} Australian citizens, rather than used divisively. This could include

\textsuperscript{107} Australian Law Reform Commission, above n 15, 63.

\textsuperscript{108} Ibid 20.

\textsuperscript{109} Human Rights Law Centre, above n 10, 9.
provision of available supports and an ‘opt-out’ voting option for some individuals. Such changes would facilitate a social model approach in relieving individuals from the burden of proving their eligibility to rights, and instead placing that burden on society to actively promote equal opportunity.

42 In its report on guardianship, the VLRC supported a different, six-step capacity assessment process. The following process was academically devised and has received support amongst the sector:

**Step 1**
Ensure there is a valid trigger present to justify a capacity assessment, such as a person demonstrating behaviour that puts themselves or others at risk, or making choices that seems inconsistent with their previously held values.

**Step 2**
Engage the person in the assessment process by seeking agreement and informing the person about the process as far as possible.

**Step 3**
Gather information about the triggers for the assessment, and information about the person that can help inform an assessment of their decision making.

**Step 4**
Educate the person about the relevant decisions to the extent necessary to ensure that ‘ignorance’ is not mistaken for ‘incapacity’.

**Step 5**
Assess the person’s capacity by diligently and thoroughly determining whether a person understands and appreciates the decisions they face.

**Step 6**
Take appropriate action based on the person’s capacity results, including arranging for a substitute decision maker if necessary.

43 This process is extremely useful in its practical implementation of the CRPD’s principles – particularly, in its presumption of capacity. It creates an invaluable starting point from which to propose reform. This brief will draw on the six-step process in its recommendations, but not adhere to them precisely. Step 6 especially promotes the model of substituted decision making rather than current international best practice of supported decision making. The brief will consider this in its analysis.

### IV INTERNATIONAL PRECEDENT

**A. Cross-Jurisdictional Comparisons**

44 “When a discrete group of citizens is disenfranchised, its consequent lack of political power may be reflected in a systematic neglect of the issues of greatest importance to its members or that group.”

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of disability politics, candidates, campaigns, platforms of the parties, and voting 
mechanisms contribute to the actions and strategies of organisations in the disability 
sector.\textsuperscript{113} Disenfranchisement of individuals under the broad category of mental 
impairments is generally motivated by the notion of preserving the integrity of the act 
of voting and the electoral process.\textsuperscript{114} Article 25 of the ICCPR internationally 
enshrines the universal right to vote, with a General Comment that states “it is 
unreasonable to restrict the right to vote on the ground of physical disability or to 
 impose literacy, educational or property requirements”.\textsuperscript{115} Therefore, it is unclear 
from this General Comment whether restrictions based on mental incapacity or 
intellectual disability should also be read as being prohibited. However, the CRPD 
Committee recognised a “general failure to understand”\textsuperscript{116} the human rights 
framework surrounding legal capacity and utilised the General Comment on Article 
12 to clarify that a disability or impairment should never be the basis for denying 
legal capacity.\textsuperscript{117}

45 In the United States, the federal Voting Rights Act of 1965 specifically permits states 
to enact laws that deny voting rights to individuals based on their status of having 
criminal convictions or mental incapacity.\textsuperscript{118} In Europe, ‘mentally disabled’ 
individuals were excluded from the right to vote in most of the central and eastern 
European countries, as of 2000, while other nations like Netherlands and Germany 
passed regulations depriving legal capacity for people with intellectual disabilities 
with regards to voting.\textsuperscript{119} Despite the CRPD’s widespread acceptance and ratification, 
only five democratic states - Canada, Ireland, Italy, Austria and Sweden - have placed 
no legal constraints on voting rights of adults on the status based assessment of 
mental incapacity.\textsuperscript{120} Consolidated studies have shown that in general, adults with 
disabilities are less likely to be registered to vote; less likely to vote; more likely to 
vote by absentee ballot; more likely to report difficulties with accessing polls, using 
ballets and voting; and are under-represented at the polls, leading to have 
comparatively low political involvement.\textsuperscript{121}

46 All of the following jurisdictions are selected for comparative purposes due to their 
commonality of being signatories and party to the CRPD, as Australia is. 
Additionally, we aim to compare common law jurisdictions such as New Zealand, 
Canada and the United Kingdom (also with similar historical legal systems as

\textsuperscript{113} Michael J. Prince, ‘Enabling the Voter Participation of Canadians with Disabilities: Reforming Canada’s 
\textsuperscript{114} Roach v Electoral Commissioner [2007] HCA 43, 88. 
\textsuperscript{115} Office of the High Commissioner for Human Rights. ICCPR, General Comment No 25, para 10. 
\textsuperscript{116} UN Doc. CRPD/C/GC/1, 11 April 2014. 
\textsuperscript{117} Ibid. 
\textsuperscript{119} Vyhnánek, Ladislav. ‘Mental Disability and the Right to Vote in Europe: A Few Notes on the Recent 
Development.’ (2010). In VII\textsuperscript{th} World Congress of the International Association of Constitutional Law, 1. 
\textsuperscript{120} Blais A, Massicotte L, Yoshinaka A. ‘Deciding who has the right to vote: a comparative analysis of election 
\textsuperscript{121} Elections Canada, ‘Electoral Participation of Electors with Disabilities: Canadian Practices in a Comparative 
Australia), and juxtaposing them with CRPD State Parties with civil law systems such as Estonia, which have made legislative and regulatory amendments to their voting systems (Estonia is a pioneer in this regard). By doing so, we gain perspective on how these jurisdictions have complied better (or retained similar restrictions as Australia does) with their international obligations. Through this cross-jurisdictional comparison of selected State Parties’ inclusive political engagement with their citizens, the effect of people with intellectual disabilities on the character of electoral politics can be harnessed to extrapolate alternatives to address the current problems encountered in Australian electoral law and make recommendations based on these, as closely applicable to the domestic framework here.

1 New Zealand

47 The *Electoral Act 1993* (NZ) defines ‘mental impairment’ as one that causes a person to lack, wholly or partly, the capacity to understand the nature of any decision about registering as an elector. This is similar to the ‘unsound mind’ provision in Australian electoral legislation, as it similarly holds citizens with intellectual impairments to an ambiguous and higher standard of understanding the electoral process. The legislation further alienates some citizens with disabilities, as a person detained in a hospital under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* or in a secure facility under the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003*, is disqualified for registration as an elector, under certain circumstances of treatment, compulsory care orders and/or court findings. Citizens who have a ‘physical or mental impairment’, under New Zealand’s electoral legislation, may apply for registration as an elector through a ‘representative’, who acts on behalf of the individual, much like an appointed guardian does through the framework of substituted decision-making.

48 Despite the restrictive legislative approach that appears counter to its CRPD obligations, electoral reform in New Zealand’s disability sphere was sparked by the Royal Commission’s report on the Electoral System entitled ‘Towards a Better Democracy’ in 1986. Focusing on regulatory and policy changes, the Electoral Commission of New Zealand developed a disability strategy called ‘Access 2020’ to improve accessibility of information and venues, developed and implemented in consultation with the disability sector. Access 2020 identifies and reduces barriers people with disabilities may face during the enrolling and voting process, by taking the improvements made over three electoral cycles and embedding them into a long-term framework. The aim is to develop policies and processes that are in compliance

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122 Commonwealth Electoral Act 1918 (Cth), s 93(8)(a).
123 Electoral Act 1993 (NZ), s 80 (c).
124 Ibid ss 85-86.
with the democratic and civil rights of citizens enshrined in the *New Zealand Bill of Rights Act 1990*, where every citizen over the age of 18 has the right to vote in elections by equal suffrage and by secret ballot\textsuperscript{126}, along with the New Zealand Disability Strategy, and the vision outlined by Article 29 of the CRPD to achieve inclusive participation in political and public life. The objectives of Access 2020 is that by 2020:\textsuperscript{127}

1. Disabled voters will be able to cast an independent and secret ballot in parliamentary elections.
2. Disabled New Zealanders can access the Electoral Commission’s services and information in ways that meet their needs.
3. Research and relationship programs provide ongoing opportunities for improvement.

49 The Commission aims to facilitate participation in parliamentary democracy, promote understanding of the electoral system for people with intellectual disabilities, and maintain confidence in the electoral system’s administration. By working closely with the disability sector, the Electoral Commission delivered telephone dictation voting in the 2014 general election, to voters with visual or other impairments (including intellectual) that prevent them from being able to mark their paper ballot without assistance, thus ensuring their inalienable right to cast a secret ballot\textsuperscript{128}, as enshrined by the Bill of Rights. The Government indicated its support for the encouragement of the use of assistive technologies by making amendments to the voting regulations,\textsuperscript{129} so that voters eligible for the telephone dictation voting service could pre-register and vote during the advance voting period. The Commission continues to provide information in accessible formats, facilitate programs for voters with intellectual disabilities and monitor the results of overseas electronic voting initiatives to determine the potential for an Australasian online voting process.\textsuperscript{130} After each election, the Commission carries out a review, which entails a comprehensive overview of post-election surveying of voters and non-voters with a disability and agencies used to create specific resources, and consultation with the disability sector for further improvements and best practice approaches.\textsuperscript{131} Access 2020 Strategy aims to establish a Disability Advisory Group, including representatives from disability organisations and government agencies. Its aim was to provide guidance, advice, testing of services and products, and research focusing on disabled voters, so as to inform the Commission’s approach on inclusion and accessibility-related matters.

2 Canada

\textsuperscript{126} *New Zealand Bill of Rights Act 1990*, s 12.
\textsuperscript{127} Ibid s 2.
\textsuperscript{128} Ibid s 5.
\textsuperscript{129} Electoral Act 1993 (NZ), s 170 (6), s 267.
\textsuperscript{130} Elections New Zealand, above n 79, 6.
\textsuperscript{131} Ibid 8.
50 As mentioned above, Canada is one of the few democratic jurisdictions that have placed no statutory exclusion on voting rights of adults based on mental incapacity. This underlying foundation is compliant with the CRPD’s objective to not deprive individuals from their rights based on their status of disability. Despite not having a national disability discrimination law, disability policies in Canada are rooted in general laws that comply with the Canadian Charter of Rights and Freedoms. Elections Canada, informed by consultations with disability organisations, implements measures to reduce and eliminate barriers when voting by improving accessibility of polling sites and signage, providing training to electoral staff, introducing a monitoring and feedback process for polling site accessibility, and offering a variety of voting methods in alternate formats that could enhance political participation of voters with intellectual disabilities. The British Columbia Election Act 1996 requires voting places to be accessible and contains absentee voting provisions for those who cannot attend a voting place due to a disability. In Ontario, the Accessibility for Ontarians with Disabilities Act 2005 (AODA) sets out the framework for the development of province-wide mandatory accessibility standards.

51 The methods of advance voting, absentee voting (or voting by mail), voting at home, voting at the office of a returning officer, mobile polls and proxy voting are available to all eligible voters, including features like innovative ballot design and formatting to maximize voting in secret, and enhanced access to the polls for voters with disabilities. Elections Ontario has established the Elections Ontario Accessibility Advisory Committee to advise on initiatives pertaining to the removal of barriers and to increase opportunities available in the electoral process for people with disabilities. Furthermore, electoral reforms have succinctly developed broad categories of different types of impairments; for instance, voters with permanent disabilities, serious illnesses or infirmity are generally dealt with through the process of early voting, either by mail and/or in person, and by providing mobile polling for individuals in hospitals, aged care facilities, rest home, etc. Like Australia, the Canadian jurisdiction also subscribes to the widespread reform for voters with any disability to obtain assistance from another person or a registered election official should they request for it. Since there is no legal exclusion or restriction for voters based on mental incapacity, Canada’s policies and legislative framework that encourage inclusive political participation include individuals with intellectual and cognitive impairments and their access to the electoral process.

52 Elections Ontario, under the 2010 electoral legislation amendments, ensures that six months prior to the election day, the CEO must post proposed voting locations on a website in order to generate public consultation, along with advance poll and

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133 Michael J. Prince, above n 67.
134 Ibid.
135 Ibid.
election day voting locations that are accessible to voters with disabilities. In addition to this, legislative requirements include a summary reporting the measures taken by the Electoral Commission to provide and increase access for disabled voters before the day of the election.\(^{137}\) With the foundation of a presumption of capacity, these amendments made to the *Election Act* display Canada’s gradual but sure shift away from the medical model of viewing disability towards its CRPD-compliant social construct. By focusing on interactions between voters and assistive technologies, along with enhancing the role of public policies and fostering a societal sense of participation, Canadian electoral laws give people with intellectual disabilities a more even platform to enjoy their legal capacity and participate effectively in their political life.

### 3 Europe

53 Moving from the common law to the civil law system, the CRPD has been signed and/or ratified by a majority of the European states (including the European Union itself), enshrining the right for citizens to vote. The CRPD further obligates states to ensure assistive voting procedures and facilities, accessibility and ease of understanding and use, along with the right to cast a secret ballot without intimidation, and to hold office, with assistance provided at their request.\(^ {138}\) Despite this, multiple legislative techniques are used by European States, much like Australia, that restrict the right to vote for adults with intellectual disabilities. Countries like The Netherlands and Albania provide an express limitation clause directly in their Constitution curtailing the rights of persons placed under guardianship, so they may not exercise their right to vote.\(^ {139}\) Other countries like the Czech Republic and Slovakia permit legislators to restrict this right, rather than placing a limitation clause in the Constitution, by depriving legal capacity through the enactment of a specific provision in the electoral legislation that acts as an impediment for those with intellectual disabilities in exercising their voting rights.

54 The European Court of Human Rights (ECtHR) has established that Article 3 of Protocol No. 1 in the European Convention on Human Rights (ECHR) guarantees individual rights, including that of voting and standing for election\(^ {140}\), which is in-line with CRPD obligations. *Hirst v United Kingdom*\(^ {141}\) established that any “departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates.”\(^ {142}\) Exclusion of any groups or categories of the general population must accordingly be reconciled with the

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\(^{138}\) *UN Convention on the Rights of Persons with Disabilities*, above n 3, art 29.

\(^{139}\) Ladislav, above n 73.

\(^{140}\) Mathieu-Mohin and Clerfayt v Belgium, ECtHR No. 9267/81, 113; *Hirst v. United Kingdom (No 2)* [2005] ECtHR 681.

\(^{141}\) *Hirst v. United Kingdom (No 2)* [2005] ECtHR 681.

\(^{142}\) Ibid 59.
underlying purposes of Article 3 of Protocol No. 1 of the ECHR. In addition to this, ‘soft-law’ sources like the ‘European Commission for Democracy through Law on the Code of Good Practice in Electoral Matters’ states that any deprivation of the right to be elected and to vote must be provided for by law, and that it is solely for a court to conclusively come to a finding of ‘mental incapacity’. While other European soft-law sources mandate Council of Europe member states to ensure persons with an intellectual disability are not excluded from their right to vote or stand for election, on the basis of their membership or status as having a disability, This shows the inconsistencies and tension with which mental incapacity with regards to voting rights is dealt with and enforced within European CRPD State Parties.

(a) The United Kingdom

As with the Australian ‘unsound mind’ provision, the UK’s stance on assessing an individual’s diagnosis and decision-making capability with respect to voting, could directly impact their right to political participation counter to their obligations under the CRPD. Recent amendments to the electoral legislation in the UK abolished the common law notion of incapacity to vote based on the diagnosis of a mental disorder, in compliance with the CRPD’s objective of all citizens being able to enjoy inclusive political participation. The Electoral Commission has taken the stance that mental incapacity does not form a barrier to being included on the electoral roll, and legislation covering England and Wales expressly prohibits substituted decisions with regards to voting. This seemingly inclusive approach against disability discrimination, however, does not prohibit emergency proxy voting regulations, which permit the appointment of a proxy voter if a person is a mental health patient detained under civil powers, as governed by the UK’s Electoral Commission guidelines for electoral registration officers. Therefore, while legislative reforms have been put in place to protect the rights of people with intellectual disabilities, practical exclusions of this nature further encourage a medical model of assessing capacity, hindering individuals’ access to their right to vote. Denying individuals the opportunity to vote seriously undermines fundamental rights of citizens and if a vote is cast for someone who lacks capacity, by another person, it undermines democracy.

143 Ladislav above n 73, 6.
144 Council of Europe, Recommendation R, 2006, s 3.1.3.
147 Mental Capacity Act 2005 (UK), s 29.
148 Marcus Redley, Julian C Hughes and Anthony Holland, ‘Voting and mental capacity: Voting is a political right, not a matter of competence to make decisions’ (2010) 341(7771) British Medical Journal 466.
However, keeping in-line with the legislative reforms, the disability and non-governmental sectors are campaigning to increasing awareness and education about electoral processed, by encouraging people with intellectual disabilities to take on an active role in their political lives. For instance, ‘Every Vote Counts’ is a campaign launched in the UK by United Response\textsuperscript{151}, a charity for Britons with a disability, exactly one year before the 2015 general election. ‘Every Vote Counts’ is designed with the intention to increase the proportion of people with ‘learning disabilities’ who vote, by making politics accessible to all. This campaign provided easy English guides to voting, while encouraging political parties to directly communicate with their constituents in an accessible and public manner, to increase awareness of the right to vote for people with intellectual disabilities. The main political parties released accessible manifestos, as a result of this campaign, doubling the numbers of people with intellectual disabilities who voted.\textsuperscript{152} Campaigns of this nature aim to increase awareness, access and education on the issue of right to vote, by working in consultation with the disability sector, service providers, support workers and the regulatory arm of the government.

(b) Estonia

Estonia’s pioneering efforts to push all of its major services online, including voting,\textsuperscript{153} belie its small size and its location on the periphery of Europe. Furthermore Estonia’s membership in both the EU and NATO offer further credence to the conception of Estonia as a relatively liberal, west leaning state from which Australia could valuably reference. It should also be noted that Estonia signed the CRPD in 2010 (ratified in 2012), and has installed the ‘Estonian Chamber of Disabled People’ as an independent mechanism for monitoring the treaty’s implementation.

According to its Constitution, everyone is equal before the law in Estonia.\textsuperscript{154} This includes people with disabilities having the same human rights, including the right to vote. For disabled persons who are unable to complete the physical act of voting, they may nominate another to do so,\textsuperscript{155} whether by a personal assistant, early voting, voting at home, digital voting, or mobile voting. The state also ensures that voting practices, means and materials are accessible and easy to understand.\textsuperscript{156} Estonian citizens with intellectual disabilities have constitutionally entrenched rights to join political organizations, NGOs and other groups that allow them to engage politically and influence policy.

\textsuperscript{151}United Response, Every Vote Counts <http://www.unitedresponse.org.uk/every-vote-counts>.
\textsuperscript{152}Ibid, ‘About the Campaign’ <http://www.unitedresponse.org.uk/every-vote-counts>.
\textsuperscript{153}Brenton Holmes, ‘E-Voting: The Promise and the Practice’ (Background Note, Parliamentary Library, Politics and Public Administration Section, 2012) 25.
\textsuperscript{154}The Constitution of the Republic of Estonia §12.
However, in accordance with the *Riigikogu Election Act*\(^\text{157}\) and the Estonian *Local Government Council Election Act*,\(^\text{158}\) a person who has been declared incapable by a court of understanding or comprehending voting rights, loses the right to vote or stand for election. The process by which one can regain political enfranchisement is available. However in another similarity to the difficulties faced by Australian disabled voters, there are no mechanisms to ensure that intellectually disabled voters (particularly those with a mental impairment) are aware of their disenfranchisement and the pathways leading to re enfranchisement.\(^\text{159}\) Indeed there is still significant work to be done in constructing frameworks that carry out Estonia’s obligations under the UNCRPD.\(^\text{160}\) By and large, Estonia has made significant steps in ensuring the accessibility of the voting process for its disabled citizens, and the ability of such people to engage politically.

**B International Decisions**

Through the decisions below, the CRPD Committee and the ECtHR have elucidated and reinforced their positions regarding the rights and obligations flowing from the UNCRPD. In this way, their judgments are relevant beyond the parties and nations directly mentioned in each case. However their decisions can create precedents of sorts, not only through a consistent articulation of principles flowing from international instruments, but applying pressure and corresponding reform options to State parties. Thus whilst it is important to note that the jurisdictions of both bodies do not directly influence Australia, the CRPD Committee and other bodies can pressure Australia and for example obligate Australia to write reports on their actions to enforce international instruments. For instance the ECHR covers the Council of Europe\(^\text{161}\), within which, all member states are contracting parties to the ECHR.\(^\text{162}\) Similarly the CRPD Committee, whilst a body overseeing a convention that Australia has ratified, cannot directly obligate Australia as a state, or legally change domestic Australian law. Nonetheless their decisions and opinions are indicative of the rights and protections expected to be enjoyed by intellectually disabled Australians.

**1 Alajos Kiss v Hungary**\(^\text{163}\)

After the above-mentioned *Hirst* case had been decided in 2005, wherein departure from universal suffrage was found to risk undermining democracy,
the ECtHR issued an important judgment in *Alajos Kiss v Hungary*, on the voting rights for individuals with intellectual or mental disabilities. The applicant was diagnosed with manic depression and had thus been placed under partial guardianship. Due to the provision in the Hungarian constitution containing an absolute voting ban for persons under guardianship\(^{164}\), the applicant could not vote in the parliamentary elections of 2006. After complaining to the Electoral Office and to the Pest Central District Court, where the case was dismissed as the contested provision in the Hungarian Constitution was upheld, the applicant brought his complaint of disenfranchisement due to an unjustified and discriminatory deprivation of his right to vote, to the ECtHR.\(^{165}\) The Hungarian government contested that “only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs”\(^{166}\), which the ECtHR took into account. However, ultimately, the ECtHR held unanimously that an absolute ban on voting rights for individuals under partial guardianship violated the right to free elections, as articulated in Article 3 of Protocol 1 in the ECHR. The Court said that:

[A] wide margin of appreciation should be granted to the national legislature in determining whether restrictions on the right to vote can be justified in modern times and, if so, how a fair balance is to be struck. In particular, it should be for the legislature to decide as to what procedure should be tailored to assessing the fitness to vote of mentally disabled persons. The Court observes that there is no evidence that the Hungarian legislature has ever sought to weigh the competing interests or to assess the proportionality of the restriction as it stands... The Court cannot accept, however, that an absolute ban on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation.\(^{167}\)

62 The Court also noted that Hungary had ratified the CRPD on 20 July 2007, which underpins the obligation for equal recognition before the law under Article 12 and the equal political right of persons with disabilities and the opportunity to enjoy them with others under Article 29. The applicant submitted that, in his view, modern legislation should reflect the trend in international law, as seen in the CRPD, to accept that the decision-making capacity of people with intellectual disabilities should be recognised as much as possible, especially with regards to voting rights, which the Court took into account.\(^{168}\) Additionally, the Court considered the soft-laws discussed in a previous section of this brief, including Council of Europe’s recommendation that

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\(^{164}\) *Hungarian Constitution 1949* art 70(5). Currently repealed.  
\(^{166}\) Ibid 38.  
\(^{167}\) Ibid 41-42.  
\(^{168}\) Ibid 31-32.
“a measure of protection should not automatically deprive the person concerned of the right to vote...”

and that member states “ensure that no person with a disability is excluded from the right to vote or to stand for election on the basis of her/his disability...”

63 The ECtHR found that the applicant lost his voting rights due to the imposition of an automatic, blanket restriction on the franchise of individuals under partial guardianship and is therefore, a victim of the measure, and that the treatment of those with intellectual or mental disabilities as a single class “is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny.”

An indiscriminate removal of voting rights, the Court decided, was not compatible with the legitimate grounds for restricting an individual’s right to vote, especially “without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship”.

The Court concluded that an automatic exclusion or ban from the right to vote by persons under partial guardianship was disproportionate, and a violation of Article 3 of Protocol No. 1 in the ECHR. Hirst and Alajos Kiss were cases that broadened the principle of individual judicial assessment to individuals with intellectual disabilities, and considered the underlying principles with the CRPD to come to its conclusion.

2 Bujdoso v Hungary

64 This case is another example of the CRPD’s clear elucidation of the principles emanating from the Protocol. Six plaintiffs wrote to the CRPD Committee in an official UN communication. All six plaintiffs were placed under partial or full legal guardianship as a consequence of judicial decisions within Hungary. As a consequence of Article 70(3) of the Hungarian Constitution:

The right to vote shall not be granted to persons who are under guardianship limiting or excluding their capacity, to persons who are subject to a final legal judgment forbidding them to participate in public affairs, nor to persons who are incarcerated on the basis of a

169 Council of Europe, Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults (adopted on 23 February 1999), Recommendation R(99)4.
172 Ibid. 44.
173 Ibid.
175 See generally Mental Disability Advocacy Center, Guardianship and Human Rights in Hungary (2007) MDAC <http://www.mdac.info/en>. Partial guardianship occurs where adults are seen to ‘only partially’ lack capacity to make decisions on their own behalf.
176 Hungarian Constitution 1949 art 70. Note that the Hungarian Constitution was heavily amended in 1989, and was replaced in 2011.
The plaintiffs adamantly argued their cognisance of politics, voting, and more importantly, that they could feasibly participate in the process of voting. The plaintiffs also referenced the rigidity of the Hungarian system, in which one of their only domestic remedies was to have their guardianship revoked in order to retain voting rights. Whilst this may seem preferable in some ways in order to simply have their voting rights reinstated, the plaintiffs recognised their intellectual disability and did not wish to revoke their partial or full guardianship. Further, plaintiffs were unable to seek the most direct legal action, because the local courts were not able to reinstate their voting rights.

The substantial portion of Hungary’s submission was drawing attention to their repealing of article 70(5) of its Constitution. Following the repeal, rather than automatically exclude from suffrage all persons under any form of guardianship, a judge may now make decisions determining the suffrage of each potential elector. In this way, the State Party argued Hungary no longer treated disabled adults as a homogenous group, but rather allowed a spectrum of disability in which judges could operate and make determinations. Specifically this would operate via article XXIII (6) of the new amended Constitution – stating that if all relevant information has been considered by a court, then a disabled adult’s disenfranchisement is effective and they shall have no suffrage.

In a practical sense, judges considered expert witnesses (principally forensic psychiatrists) to decide on a person’s potential exclusion from suffrage. Critically the new system – which Hungary advocated for as evidence of their CRPD compliance – still excludes persons from voting if it deemed their ‘discretionary power’ has been reduced. This unclear and arbitrary threshold (similar to the ‘unsound mind’ Australian equivalent) does not abide by the CRPD Committee interpretation of the CRPD as demanding a presumption of legal capacity from its signatories. As an aside, it should be noted that Hungary has attracted criticism on other areas of Constitutional reform, such as an erosion of the rule of law and fundamental human rights protections being jeopardized.
In response, the CRPD Committee restated their views on the CRPD. Firstly, that article 12 protects capacity as a voting citizen. Furthermore, not recognizing legal capacity is insufficient as a rationale for disenfranchisement. The CRPD Committee has stated in other correspondence that article 12 and other articles have a presumption of voting rights. This was clearly breached in the case of Budjoso.

In response to Hungary’s legislative amendments that allow assessment of individuals on a case by case basis (arguing this doesn’t result in an automatic exclusion from voting), the CRPD Committee disagreed. Instead they reinforced their view that article 29 protects the right to vote, stating that article 29 ‘does not provide for any reasonable restriction or exception for any group of persons with disabilities.’ Even with an individual assessment, Hungary’s new system breaches article 29 and falls under the article 2 description of discrimination. Clearly following this decision, there is no scope for exceptions regarding the presumption of disabled persons to vote.

The restrictive and rigid approach of Hungary is similar to many other countries who have signed the CRPD, not just Australia. Whilst voting rights may be more easily restricted in the Hungarian system, the response of the CRPD to the disenfranchisement of potential voters with an intellectual disability is similar to previous comments and is analogous to responses regarding Australia’s position. Furthermore, such a limiting structure is also prevalent within seemingly progressive regions, such as Europe. The third-party intervention of the Harvard Law School Project on Disability (‘HLSPD’) in support of the plaintiffs’ claim directly lamented not only these figures, but the general stereotyping of all intellectually disabled people as incapable. In describing these stereotypes (and the domestic legislative instruments they produce) as ‘unacceptable’ and ‘empirically unfounded’, their comments

183 Committee on the Rights of Persons with Disabilities, above n 128.
185 See, eg, Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Australia, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) [52].
186 Committee on the Rights of Persons with Disabilities, above n 128, 9.4.
187 Ibid.
189 Committee on the Rights of Persons with Disabilities, above n 128, 5.3.
(supported by the UN Committee) strike a chord with the HRLC’s critique of Australia voting rights law as being ‘archaic’ and ‘stigmatising’.\(^{191}\)

Going on, the HLSPD submitted that the fundamental human right to vote should never in any circumstances be subject to a proportionality assessment.\(^{192}\) The HLSPD cites three reasons for their position:

(a) capacity assessments constitute discrimination on the basis of disability
(b) they inevitably result in disenfranchising capable individuals
(c) in practice, their application leads to the disenfranchisement of a large number of persons with disabilities.

Clearly Australia falls within such an action; the current ‘unsound mind’ provision, and any other proposed proportionality test, is inconsistent with not just the HLSPD’s position, but also the position of the CRPD Committee.

Additionally, the CRPD comments upon the role of medical practitioners, lawyers, social workers and others involved in the support of disabled persons. These groups are complicit, intentionally or not, in the problems surrounding disenfranchisement by carrying the long-entrenched belief that those with an intellectual disability are ‘incapable of managing their affairs, making competent decisions or participating in public affairs’.\(^{193}\) This is particularly important given the inappropriate and undefined role of Australian medical practitioners in assessing the capability of mentally disabled Australians to vote. Furthermore the ambiguous threshold to which mentally disabled persons must understand the process, concept and importance of voting is likely a test that a larger proportion of the voting population would fail. With reference to Article 29 of the Convention, the CRPD Committee reaffirms that taking part in elections should never be contested, nor subject to an assessment of voting capacity.\(^{194}\) All legal justifications for removing the right to vote on the basis of mental disability are strongly contested and rebutted in *Bujdoso v Hungary*.\(^{195}\)

The Committee’s position is cemented by their comments in reports on other states, consistently stating the importance of voting rights to all people, regardless of mental incapacity. For example, the Committee has urged the immediate implementation of the Convention in Tunisia, a state with an even more lacking domestic framework.


\(^{193}\) Committee on the Rights of Persons with Disabilities, above n 128, 5.11.

\(^{194}\) Ibid.

\(^{195}\) Committee on the Rights of Persons with Disabilities, above n 128. See also Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) [52].
than Hungary or Australia. In this way, the Committee has repeatedly made clear that the right to vote cannot be denied on any basis to persons with disabilities, irrespective of legal status, type of impairment, or institutionalisation.

74 The CRPD Committee and a variety of other legal bodies do not limit the reach of the CRPD to merely negative duties, but rather interpret the CRPD as necessitating positive actions by member States. Inaccessible polling places, lack of easily comprehensible electoral information, confusing or difficult ballot design, and inadequately trained electoral officials have all been identified as issues that can prevent persons with disability from exercising the right to vote on an equal basis with others. NSW Electoral Commission was found to have unlawfully discriminated against a blind person by failing to provide a Braille ballot paper. The UN Office of the High Commissioner for Human Rights has noted that article 29 provides not only for the right, but also for the opportunity to vote, thereby imposing a duty on states to actively ensure that persons with disabilities are in fact given the opportunity to exercise their right to vote.

V CONCLUSIONS AND RECOMMENDATIONS

75 This brief supports a realignment of domestic mechanisms with the international instruments that Australia has ratified in order to presume legal capacity and the right of all to vote. Rather than impose an arbitrary, unclear and inconsistently applied test, the electoral system should seek to include all capable voters. This would be done by presuming legal capacity and consequently allowing a presumption of the ability of all to vote.

76 Firstly, such a position would bring Australian law in harmony with Australia’s CRPD obligations. Most relevantly, article 12 dictates access to rights should be based on an individual’s legal personhood and legal capacity recognised on an equal basis for all persons. By enabling mentally impaired persons with a supported decision making model, rather than creating obligations specifically tailored to their cognitive impairment, Australia would back up their CRPD commitments with a model of action supported by not only the CRPD, but the series of DPOs and advocacy organisations mentioned previously, such as Persons with Disabilities Australia and the HRLC.

77 Secondly, the CRPD Committee’s position, made most patently clear in Bujdoso, clearly supports the interpretation of the CRPD as not only opposing any negative right placed on intellectually impaired citizens, but obligating states to take positive

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196 Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee on the Rights of Persons with Disabilities: Tunisia, CRPD/C/TUN/CO/1 (2011) [35].
198 Fittler v New South Wales Electoral Commission (No 2) (Unreported, NSW ADT, 14 April 2008).
action. By replicating the policy and/or legislative frameworks of other countries such as New Zealand and Canada, Australia can fulfil their obligations and join the select group of nations who are leading CRPD signatories in their action.

**A Recommendations**

78 **To Parliament:**

1) Repeal section 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth).
2) Reject the proposed replacement test of the ALRC that is based on an ambiguous threshold of ‘decision-making ability’.
3) Review the law allowing for guardianship and trusteeship.
4) Require political parties produce Easy English and accessible policy information packages.

79 **To Carers and Guardianship Tribunal Members:**

(5) Engage with the six step test supported by the VLRC as a basic framework for moving on situations where it is necessary to assess decision making ability, especially if the ALRC’s new decision making test is adopted.

80 **To Policy Makers and Advocacy Groups:**

(6) Create and advocate for policy that takes positive action recommended by the CRPD Committee, in order to fulfil CRPD obligations.

**B Recommendation Reasoning**

1. **Repeal section 93(8)(a) of the *Commonwealth Electoral Act 1918***.

We concur with both the ALRC and the HRLC submissions that section 93(8)(a) of the *Electoral Act 1918* should be repealed immediately. As previously discussed, it articulates the antiquated and stigmatising influence of the medical model that has hamstrung developments in the disability human rights sphere. Doing so would remove one of Australia’s chief failings as identified by the CRPD Committee, namely its lack of a presumption of capacity pertaining to the voting rights of people with disabilities.

2. **Reject the proposed replacement test of the ALRC that is based on an ambiguous threshold of ‘decision-making ability’**.

Our criticism extends to the ALRC’s proposed new test as we broadly agree with the HRLC’s thorough criticism. Namely, that the new test:

- disenfranchises those who fail to meet an ambiguous threshold of decision-making ability, and may actually be harder to satisfy than the previous test;
- may itself also be in breach of the CRPD (signed and ratified by Australia), as it perpetuates the substituted decision-making paradigm;
● has yet to be supported with an evidence based rationale by either the ALRC or any other government body.

83 The ALRC’s willingness to advocate for the removal of s 93(8)(a) is indeed encouraging. However, their ‘middle ground’ position, as previously stated, is still deeply problematic. Perhaps this view is at least partly due to their recent change of stance from previously agreeing with the High Court in Roach, that there are instances where disenfranchisement is necessary to maintain the integrity of the electoral process, and applying this rationale to the mentally impaired. The ALRC’s moderate position on the voting rights spectrum is still insufficient with respect to Australia’s CRPD obligations, and must continue its transition towards the presumption of capacity demanded by the CRPD Committee.

3. Review the law allowing for guardianship and trusteeship.

84 Abolish the methods of deprivation of legal capacity that are discriminatory on the basis of disability in purpose of effect, and take action to develop laws and policies that replace regimes of substituted decision-making with supported decision-making. Supported decision-making systems respect the person’s autonomy, will and preferences.199

4. Require political parties produce Easy English and accessible policy information packages.

85 Persons with intellectual impairments revealed during consultation that information about particular party platforms that was appropriately accessible or understandable was difficult to find. Consulted individuals cited this as being one of the greatest difficulties in their electoral decision-making. It is beyond the scope of bodies such as the Electoral Commission to produce Easy English information packages about parties’ platforms. However, this brief recommends Parliament legislate that accessible and Easy English policy packages are mandatory as a condition of political parties’ candidacy.

86 This recommendation is underpinned by the idea of legal agency - that is, that an individual is reasonably capable of exercising rights. It is unfair to condemn persons as being incapable of ‘understanding the nature and consequence of voting’ if the relevant information they must understand is not available to them in an appropriate format. This recommendation thus seeks to alleviate some indirect disability discrimination that currently exists within the electoral process. It is pursuant to Article 12(3) of the CRPD, requiring State Parties ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’200

199 Ibid 7.
200 UN Convention on the Rights of Persons with Disabilities, above n 3, art 12(3).
5. Engage with the six step test supported by the VLRC as a basic framework for moving on situations where it is necessary to assess decision making ability, especially if the ALRC’s new decision making test is adopted.

87 For situations where legal capacity tests are necessary, or if the ALRC’s new test were to be implemented, the six step test previously argued would be an ideal and academically formulated method for determining capacity. Importantly, the test does not activate until properly deemed necessary, and offers a thorough framework for assessment, unlike the current system in both respects.

6. Create and advocate for policy that takes the positive action recommended by the CRPD Committee, in order to fulfil CRPD obligations.

88 The CRPD Committee, particularly in their General Comment on article 12, provides an outline for the sorts of policy changes necessary to implement article 12 rights and obligations within a given state. Broadly, these include:

- refraining from any action that deprives person with disabilities of the right;
- refraining from any action that deprives persons with disabilities of the right to equal recognition before the law; and
- taking action to prevent non-State actors and private persons from interfering with the ability of persons with disabilities to realize and enjoy their human rights, including the right to legal capacity.

89 Additionally States are obligated to provide general training for those receiving support (i.e. those with disabilities), so they may decide when less support is needed or when they no longer require support in order to exercise and enjoy their legal capacity. Cumulatively these measures do not simply allow Australia to do the minimum in regard to their international obligations, but ‘build the confidence and skills of persons’ with disabilities so that they exercise their legal capacity with less support in the future. Such an outcome enables Australians with intellectual disabilities and ultimately lessens the load of carers and government services.

C Concluding Remarks

90 Australia is yet to fulfil its obligations since ratifying the CRPD, as evidenced by a failure to presume the human rights established in the Convention. Specifically, there is not a presumption of legal capacity and corresponding voting rights, indicative of an interests-based medical model that within the disability rights industry is widely considered inferior to the enabling qualities of the social model. Australia’s failure can be remedied by repealing the ‘unsound mind’ provision of the Commonwealth Electoral Act 1918 (Cth) and presuming the ability of its cognitively impaired citizens to vote, and where necessary, institute an unambiguous framework designed to assess

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201 Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law Adopted 11 April 2014 CRPD/C/GC/1.
202 Ibid 6-7.
203 Ibid.
the decision making ability of voters when absolutely necessary. From this starting point, Australia can conform to its international obligations, thus joining the select group of nations who are leading other CRPD signatories with their domestic reform with respect to a presumption of legal capacity.
Education Project

Partner Organisations:

- John Bartholomeusz, University of Divinity
- Melbourne Graduate School of Education
I INTRODUCTION

This memorandum provides information to the University of Divinity on fulfilling legal obligations with respect to disability at the domestic and international levels. This information should provide the necessary starting point for the development and implementation of a University-wide inclusion policy. The provision of this information should better inform decision-making pertaining to disability within the University community. With this information, the University should be able to fulfil its legal obligations, provide reasonable adjustments for persons with disabilities and comply with the Disability Standards for Education 2005.

An inclusion policy will allow the University of Divinity to further its involvement in collective efforts to make our society inclusive, and enable persons with disabilities to enjoy the same opportunities as persons without disabilities in all areas.

This memorandum outlines:

- basic theories that have informed how disability is conceptualised;
- the domestic legal obligations that the University must comply with;
- a non-exhaustive list of steps that the University could take in order to comply with these obligations;
- the international human rights obligations that are relevant to creating an inclusion policy for persons with disabilities;
- the principles that are crucial to creating a model inclusion policy;
- the key areas that a model policy should address;
- analysis of the implementation and effectiveness of University policy in addressing disability discrimination; and
- concluding comments.

II THEORETICAL MODELS OF DISABILITY

A Discrimination under the Medical Model of Disability

1 Medical Model

The medical model is the lens through which societies have traditionally viewed and responded to disability. According to Kayess and French, the medical model conceives of disability as a deficiency or deviation from the norm. Its focus is on the ‘affliction’ caused by the condition or impairment and the provision of cure,
treatment, care and protection to change the person so that they better conform with existing social processes and structures.\textsuperscript{204}

From this point of view, impairment or difference is seen as the cause of the barriers that persons with disabilities commonly face in society. This view of disability has encouraged policy-makers to concentrate their efforts on ‘correcting’ difference. Disability rights activists such as Michael Oliver argue that the medical model fosters an environment in which persons with a disability lose their independence, choice, and control over their own lives.

2 Resulting Discrimination

Different forms of discrimination may occur as a consequence of social organization and traditional responses to disability informed by the medical model. Direct discrimination occurs when a person with a disability is treated less favourably than a person who does not have a disability, and where this differential treatment occurs because of the disability. An educational institution’s refusal to enrol a student because of their particular disability constitutes direct discrimination.

Indirect discrimination occurs where a practice, policy or rule that applies to everyone has a detrimental effect on persons with a disability. Acts or practices may be fair on their face, but may operate as unfair barriers to advancement in various areas of public life. These measures are discriminatory in outcome, and cannot be justified on objective grounds. An Example of indirect discrimination is when educational institutions do not make reasonable adjustments to their curriculums or facilities to enable a person with a disability to perform to his or her ability.

B Social Model of Disability and Special Measures

1 Social Model

The social model of disability challenges the assumptions that underpin the medical model. This model offers an alternative understanding of disability. Under the social model, disability is caused by the way society is organized, rather than by the individual’s impairment or difference.\textsuperscript{205} Without removing these structural barriers, persons with impairments cannot enjoy equal opportunity. It is not a person’s inability to walk that keeps a wheelchair-user from entering a building. The barrier lies in the fact that there are no ramps to facilitate wheel-chair access. Under this model, persons with an impairment are not objects of charity, medical treatment and social protection. They are persons that possess a range of rights that should allow them to access equal opportunity.\textsuperscript{206}

III DOMESTIC LEGAL OBLIGATIONS

\textsuperscript{204} Kayess R, French P, ‘Out of darkness into Light: Introducing the Convention on the Rights of People with Disabilities.’

\textsuperscript{205} Michael Oliver; The social Model of Disability: thirty years on; p1225

\textsuperscript{206} Kayess and French.
A Legislation

The University of Divinity’s legal obligations towards prospective and current students (‘students’) under Australian law are set out under the Victorian Equal Opportunity Act 2010 and the Commonwealth Disability Discrimination Act 1992. The Disability Discrimination Act empowers the Minister for Education to enact Disability Standards for Education. Education providers must comply with these Standards. The Disability Standards apply to higher education providers, which includes universities. Overall, the law is designed to ensure that students with disabilities can enjoy the same, or equal opportunities, with students without disabilities.

B Disability Under Australian Law

Under Australian law, a disability includes:

- loss of bodily or mental function;
- loss of a body part;
- disease or illness;
- bodily malfunction, malformation or disfigurement;
- learning difficulties; and
- mental illness.

The law also covers:

- a disability that others assume the student has;
- any behaviours that are a symptom or manifestation of a disability;
  - For example, a student with a cognitive impairment may exhibit disruptive behaviour. Under the legislation, it is unlawful to discriminate on the basis of this disruptive behaviour, as it is a manifestation of the student’s disability.
- both disability that a student currently or previously had; and
- a disability that could exist in the future.
  - For example, a disability that a student is genetically predisposed towards.

C Areas of Discrimination

The Victorian and Commonwealth Acts prohibit discrimination on the grounds of disability in three key areas of education:

1. Admission;
2. During Enrolment; and

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207 Disability Discrimination Act (Cth) s 31 (‘DDA’).
208 Ibid s 32.
209 Disability Standards for Education 2005 (Cth) s 1.5 (‘Disability Standards’).
210 Equal Opportunity Act (Vic) s 4 (‘EOA’), DDA s 4.
211 DDA s 4, EOA s 4.
212 DDA s 22, EOA s 4.
1. The prohibition on discrimination in admission covers:\(^{213}\):
   - selecting who will be admitted as a student;
   - refusing or not accepting an application for admission; and
   - imposing discriminatory terms or conditions in admitting students.
     o In Clarke v Catholic Education Office [2003] FCA 1085, a high school refused to allow a student with a hearing impairment to receive Auslan support in the classroom. The Federal Court held that the requirement that the child access education without Auslan support was a discriminatory condition of enrolment.\(^{214}\)

2. The prohibition on discrimination during enrolment covers:\(^{215}\):
   - denying or limiting access to benefits that the university provides;
     o These benefits may include accessible classrooms and toilet facilities, participation in activities outside the classroom and providing course materials in an accessible format.
   - expelling a student; or
   - subjecting the student to any other detriment.
     o This includes subjecting the student to humiliation or denigration.\(^{216}\)
     o The phrase ‘any other detriment’ is a catch-all, which covers educational settings that are hostile or harassing.\(^{217}\)

3. The prohibition on discrimination in setting curricula covers:\(^{218}\):
   - developing curricula that will exclude students from participation, or subject them to any other detriment.

**D Defining Reasonable Adjustments**

A reasonable adjustment is an important concept in Australian disability anti-discrimination legislation. A reasonable adjustment is a measure or action that an education provider takes to assist a student with a disability:\(^{219}\):
   - in applying for admission or enrolment;
   - to participate in a course; or
   - to use facilities or services.

The adjustment’s purpose is to allow the student to enjoy the same or comparable opportunities that a student without the disability would enjoy (equal opportunity).\(^{220}\)

Under the Disability Standards, the university has an obligation to take reasonable steps to ensure that prospective and current students enjoy opportunities free from

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\(^{213}\) DDA s 22(1), EOA s 38(1).
\(^{215}\) DDA 22(2), EOA 38(2).
\(^{216}\) DDA s 4, EOA s 4
\(^{217}\) Rees, above n 11, 492.
\(^{218}\) DDA s 22(2A).
\(^{219}\) Disability Standards s 3.3.
\(^{220}\) Ibid s 2.2.
discrimination and on the same basis as students without the disability. These opportunities include:

- seeking admission and obtaining a place;\(^{221}\)
- participating in course activities and using University facilities and services;\(^{222}\)
- participating in learning and assessment;\(^{223}\) and
- accessing student services, including specialised student services.\(^{224}\)

**E Discrimination and Reasonable Adjustments**

Both direct and indirect discrimination can take place where an education provider fails to make reasonable adjustments.\(^{225}\) Indirect discrimination via a failure to make reasonable adjustments occurs when:

1. An education provider requires a student with a disability to comply with a requirement.
   - For example, by scheduling a class in an upstairs room the provider imposes the requirement that students climb the stairs in order to access classroom education.

2. The only way the student with the disability can comply with the requirement is if the education provider makes reasonable adjustments for the student.
   - The provider could schedule the class in a downstairs room, so that the student can access classroom education.

3. The education provider does not make reasonable adjustments; and
   - The provider fails to schedule the class in a downstairs room.

4. The failure to make reasonable adjustments disadvantages the student.
   - The result of the failure to change the room is that the student cannot access classroom education.

**F Making Reasonable Adjustments**

The University must take three steps in making reasonable adjustments for a current or prospective student with a disability:

1. Consultation;
2. Assessment of reasonableness; and
3. Implementation.

1 **Consultation**

The University has a duty to consult the student or their representative about how disability affects their ability to participate in various aspects of university life.\(^{226}\)

Consultation should cover whether:\(^{227}\):

\(^{221}\) Ibid ss 4.2(1), (2).
\(^{222}\) Disability Standards s 5.2(1).
\(^{223}\) Ibid s 6.2(1).
\(^{224}\) Ibid s 5.2(1), 7.2(1).
\(^{225}\) DDA ss 5(2), 6.
\(^{226}\) Disability Standards ss 3.5, 5.2(2)(a), 5.2(4), 6.2(2)(a), 6.2(4), 7.2(5)(a), 7.2(6)(a), 7.2(8).
\(^{227}\) Ibid s 3.5.
the adjustment is reasonable;
the adjustment is necessary to enable the student to enjoy equal opportunity;
there are any alternatives available that would provide equal benefit to the student and less disruption to the University.

Consultation with the student should be repeated throughout the student’s education, to adapt to the student’s changing needs. 228

Consultation may require an independent expert to assess what adjustments a student requires. The types of adjustments needed may vary between students, depending on their individual circumstances. The same student may require different types of adjustments across multiple areas of education. Some students with disabilities may not require any adjustments at all.229

2 Assessment

After this consultation, the University needs to decide whether the adjustment is necessary to allow the student to enjoy equal opportunity.

In determining whether an adjustment is reasonable, the University must consider all relevant facts and circumstances:230:

- the student’s circumstances, including the nature of their disability;
- the proposed adjustment’s nature;
- the adjustment’s effect on the student, including the student’s ability to:
  - achieve learning outcomes;
  - participate in courses or programs; and
  - work independently.
- the effect of making the adjustment on any other person, including the University, its staff or other students, including:
  - the financial impact;
  - the number people that will benefit or be disadvantaged; and
  - whether the adjustment will need to be changed during the student’s time at the University.
- the effect of making the adjustment on the community;
- the consequences for the University of making the adjustment; and
- the consequences for the student of not making the adjustment.

3 Implementation

If the University finds that the adjustment is necessary to allow the student to enjoy equal opportunity, the University must make the adjustment.231

The University should take reasonable steps to make sure that it makes the adjustment within a reasonable time frame.232

228 Disability Standards ss 5.2(3), 6.2(3), 7.2(7).
229 Ibid s 3.4.
230 DDA s 11, EOA s 40(3).
231 Disability Standards ss 5.2(2)(c), 6.2(2)(c).
What constitutes a reasonable time frame will depend on whether:

- the student has provided information about how their disability affects their education;
- the adjustment is reasonable; and
- there are other available adjustments that are less disruptive that equally benefit the student.

In different areas of education, adjustment may take different forms. The Disability Standards set out the types of measures that a University can take in affording equal opportunity to prospective and current students in areas including admission, course participation and accessing facilities and services, learning experiences, and support services.

(a) Admission

To afford the student equal opportunity in gaining admission, the University can ensure that:

- enrolment information addresses the student’s needs, is accessible and available in different formats;
- enrolment procedure allows the student to apply without undue difficulty;
- information about courses are accessible, so the student can make informed choices about enrolment.

(b) Course Participation and Accessing Facilities and Services

To afford the student equal opportunity in course participation and accessing university facilities and services, the University can take the following measures:

- ensure that activities in the curriculum are flexible enough to permit the student’s participation;
- review course requirements after consultation with the student, so that the course includes activities the student can participate in;
- negotiate and implement appropriate programs that enable participation;
- provide extra support help the student achieve the desired learning outcomes;
- offer the student a reasonable substitute activity in the context of the course’s aims, where an activity that the student cannot participate in is necessary to the course; and
- ensure that activities conducted outside the classroom are inclusive.

(c) Learning Experiences

To afford the student equal opportunity in participation in learning experiences, the University can ensure that:

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232 Ibid s 3.7.
233 Disability Standards s 3.7.
234 Ibid s 4.3.
235 Ibid s 5.3.
236 Ibid s 6.3.
• the curriculum, teaching materials and assessment are accessible and appropriate to the student;
• course delivery and learning activities are considered in light of the student’s learning capacity and needs;
• course materials are provided in an appropriate format in a timely manner;
• teaching strategies meet the student’s learning needs and address disadvantage that results from the student’s disability; and
• assessment is adapted so that the student can demonstrate the assessable knowledge and skills.

In adjusting a course or program, the University may maintain requirements that are inherent in or essential to the course’s nature.237 Where an adjustment would compromise these ‘essential requirements’, the University can choose not to make the adjustment.

(d) Support Services

To afford the student equal opportunity in accessing support services, the University can ensure that238:
• specialised services for students are available, by collaborating with third party service providers;
  o These services may include health, personal care and therapy services.
  o Service providers may include speech therapists, occupational therapists and physiotherapists.
• staff are aware of any specialised services for students and can guide the student on how to access the services;
• any necessary specialised equipment allowing the student to participate in the course is available; and
• properly trained support staff are available to the student, including interpreters, note-takers and aides.

G Exception to Making Adjustments

The University does not have an obligation to make adjustments where a student requires adjustments and the University has complied with the legal requirements for making reasonable adjustments and239:
• the adjustments required are not reasonable in the circumstances; or
• the student cannot or could not participate or derive substantial benefit from the program, even after the adjustments are made.

H Harassment and Victimisation

1 Definition of Harassment and Victimisation

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237 Disability Standards s 3.4(3).
238 Ibid s 7.3.
239 EOA s 41.
Disability harassment includes any action in relation to the disability that is reasonably likely to humiliate, offend, intimidate or distress the student in the circumstances. This includes harassment on the basis of the student’s need for adjustments and use of supports, including a guide dog, interpreter or wheelchair. Disability harassment includes harassment of a relative or friend of the student with the disability.

Victimisation is subjecting a student to detriment because they may or have made a complaint about their treatment in relation to disability.

2 Duty to Prevent Harassment and Victimisation

The University has a duty to develop and implement strategies and programs to prevent harassment of students with a disability or harassment of their friends and family.

The University has a duty to take reasonable steps to ensure that staff and students are aware of:

- their obligation not to harass or victimise students with disabilities or their associates;
- what action should be taken if harassment occurs; and
- the available complaint mechanisms for students that experience harassment or victimisation.

3 Implementation

To enable students to participate in an educational environment free from harassment, the University can ensure that:

- its policies expressly prohibit disability harassment and victimisation;
- its policies expressly prohibit harassment of the student’s friends or family;
- complaint-handling mechanisms ensure fairness, transparency and accountability;
- students and staff are informed and receive reminders of their right and responsibility to maintain an environment free of harassment;
- any professional development programs for staff include information about and training to handle harassment in education settings; and
- harassment or victimisation is handled promptly, with regard to the matter’s severity.

IV HUMAN RIGHTS OBLIGATIONS

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240 Disability Standards s 8.1.
241 Disability Standards s 8.5.
242 Ibid s 8.1.
243 DDA s 42. EOA s 104.
244 Disability Standards s 8.3(1).
245 Ibid s 8.3(2).
246 Ibid s 8.5.
The Convention on the rights of people with a disability (CRPD) embraces ideas incorporated in the social model of disability, and has therefore been described as an important ‘paradigm shift’ away from the traditional social welfare approach to a rights-based approach. The definition of disability, contained in article 1 of the CRPD illustrates this:

“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.“

The convention has exerted and will continue to exert a direct influence in the ongoing development of Australia’s anti-discrimination legislation. The Convention was adopted in 2006, and came into force in 2008 after the twentieth country lodged ratification documents with the UN. Australia was an early signatory to the Convention, and ratified it in 2009. Australia has also signed the Optional Protocol to the convention, allowing individual complaints against Australia to be heard by the Committee on the Rights of Persons with Disabilities. Australia is therefore under a binding obligation in international human rights law to incorporate the Convention’s principles into domestic laws and policies. When the University of Divinity adopts an inclusion policy for persons with disabilities, it will be complying with and upholding the following articles of the CRPD:

A Equality and Non-Discrimination

Article 5 of the CRPD aims to promote equality and eliminate discrimination. It instructs state parties to realise this goal by reasonably accommodating persons with disabilities. The University would realise this end by allowing an equal opportunity in enrolment, courses and providing support services where necessary.

B Accessibility

Article 9 of the CRPD upholds the right to accessibility. The Article aims to advance the ability of persons with disabilities to live independently and participate fully in all aspects of life. It requires State parties to take appropriate measures in ensuring access to the physical environment, transportation, information and communications, and to other facilities and services open or provided to the public.

By adopting a disability inclusion policy, the University of Divinity will be implementing measures to identify and eliminate obstacles and barriers to access. Examples of such measures include access to information in appropriate formats, providing personalised and clear information to students who require support and ensuring that classrooms are accessible.

C Education

247 (Kayess and French, p3)
Article 24 upholds the right to education for persons with a disability. The Article requires State parties to create an inclusive education system at all levels. Persons with disabilities must be able to access tertiary education and vocational training without any form of discrimination and on an equal basis with other students. Persons with disabilities should be able to enjoy full and equal participation in education. This can be realised through measures such as accommodating the individual’s requirements, and providing individualised support measures to maximise both academic and social development. Particular measures may include ensuring that appropriate methods of communication are available and making reasonable adjustments.

V BEST PRACTISE

A Principles for Best Practise

The following eight general principles are expressed in the Australian Vice-chancellors Committee guidelines on students with disabilities. In the context of Australia’s self-regulating tertiary sector, these principles were designed to reflect best practice in higher education disability policy in the full range of local environments in which Australian tertiary institutions operate. They are broad and flexible, and therefore readily applicable to any domestic tertiary institution, regardless of size or circumstances.

The disability policy should be rendered inclusive, comprehensive, equitable, explicit, systemic, respectful, consultative and adequately resourced. This memorandum expresses the view that these eight principles accurately capture the spirit of what the social model of disability, the current National and State disability anti-discrimination schemes, and the CRPD all seek to achieve. The University should aim to, insofar as is possible, reflect these eight principles within the University’s inclusion policy framework.

1 Inclusiveness

Core activities of the University should be designed and implemented in order to accommodate the needs of all students including students with a disability. Examples may include the need for all information that is published by the University to be fully accessible to people with a disability. This includes the compliance of the University’s website and online student services with web accessibility guidelines.248 Regarding University culture and safety, the policy should promote an inclusive culture that values diversity, does not tolerate harassment or discrimination and encourages a secure and safe environment for all.

2 Comprehensive

Provision for students with a disability should cover all core university activities in recognition of the right to participate fully in the academic and social life of the University. Professional development programs should ensure that all staff are aware of their responsibilities, including vicarious liability under University policies, state and federal legislation and have the knowledge and skills they need to work effectively with students with a disability.

3 Equitable

University responses to the needs of students with a disability should recognise the rights and responsibilities of all parties and ensure that solutions are equitable for all concerned.

4 Explicit

Policies should clearly identify student and staff responsibilities in relation to provision of services and adjustments, the procedures outlining how these services and adjustments will be implemented, as well as clearly expressed and accessible dispute resolution mechanisms. For example, the University should explicitly provide information about the support services available to students with a disability, any special entry procedures, course requirements and student rights and responsibilities. Staff responding to student enquiries should also be made aware of services for students with disabilities. This will enable them to ensure that the information they provide is consistent, accurate and useful. Policies and codes of conduct should also explicitly prohibit discrimination, harassment and victimisation of students with a disability, and ensure that strategies are in place to prevent these behaviours.

5 Systemic

Consideration of the needs of the diverse student population should be embedded within University-wide planning, administrative support and quality assurance processes.

6 Respectful

Universities should ensure that all their interactions with students with a disability are characterised by respect for their rights to dignity, privacy, confidentiality and equity. Article 22 of the CRPD explicitly creates an obligation for State parties to protect the privacy of health, personal and rehabilitation information of people with a disability on an equal basis with others. For example, University policies should be able to balance the right to privacy of a student with a disability with the facilitation of disability-related information to staff in order to ensure the provision of services and accommodations.

7 Consultative
Students and staff should be engaged in planning and evaluation of teaching and support strategies. The University should actively seek feedback from all stakeholders regarding the effectiveness of service provision for students with a disability and use this information to inform planning. Grievance procedures should deal with all grievances arising directly or indirectly from a student’s disability fairly and in a timely manner.

8 Adequately Resourced

Universities should provide adequate resources to enable the provision of learning Environments and services that address the needs of students with a disability or disabilities.

**B Inclusion policy Headings**

The following is an example of a University disability policy in the Australian context. Headings have been adapted from the Australian National University’s disability policy. The ANU’s disability policy was implemented in 2007, and it has been integrated into the wider policy framework of the University.

<table>
<thead>
<tr>
<th>Policy title</th>
<th>Disability policy, disability inclusion policy (or similar)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>To promote an inclusive work and study environment for students and staff with a disability at University X.</td>
</tr>
<tr>
<td>Overview</td>
<td>The University’s policy for an inclusive work and study environment for students and staff with a disability at University X.</td>
</tr>
<tr>
<td>Scope</td>
<td>This policy applies across the University’s learning and teaching environment. The language of this section could well be adapted in order to cover interactions in online learning environments.</td>
</tr>
<tr>
<td>Definitions</td>
<td>The definitions in this section should mirror those key definitions that are contained within the DDA.</td>
</tr>
<tr>
<td></td>
<td>1. The definition of disability as defined by the Disability Discrimination Act 1992 (Cth), including physical, intellectual, psychiatric, sensory, neurological, learning disabilities, physical disfigurement and the presence in the body of disease-causing organisms. The DDA covers disabilities which people have now, have had in the past, may have in the future, or are believed to have.</td>
</tr>
<tr>
<td></td>
<td>2. Disability discrimination (as defined in the DDA).</td>
</tr>
<tr>
<td></td>
<td>3. Direct and indirect disability discrimination as defined in the DDA.</td>
</tr>
<tr>
<td></td>
<td>4. Defences to claims of unlawful discrimination include assessments of inherent requirements or unjustifiable hardship of the position or the course.</td>
</tr>
</tbody>
</table>
5. Disability harassment occurs when someone is made to feel intimidated insulted or humiliated because of their disability as specified under the DDA.

6. Inherent requirements are the fundamental, essential elements to the learning and assessment requirements of the particular course or the performance of the role and tasks of the position. The University considers whether the person could perform requirements if a reasonable adjustment or adjustments are made, including adjustments to facilities, equipment, work or study practices or training.

7. Reasonable adjustments are measures which an employer of educator implements to enable the staff member with a disability to undertake the inherent requirements of the position or a student with a disability to undertake the inherent requirements to meet the academic standards of their course of study.

8. Universal design principles is an approach towards enabling services and environments to be as usable by as many people as possible regardless of age, ability or circumstance. The seven principles of universal access are:
   - Fairness, flexibility, logical, understandable, toleration of differences, straightforward in use, and physical accessibility.

9. Unjustifiable hardship is a defence to a claim of unlawful discrimination on the grounds of disability. It requires the University to consider all relevant circumstances of a particular situation before making a decision in the employment or educational access of a person with a disability.

<table>
<thead>
<tr>
<th>Policy Statement</th>
<th>Rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td>University X recognises through its strategic planning the responsibility to value the diversity of backgrounds and perspectives of prospective and existing staff and students to enable all members of the University community to perform at their best. This incorporates the full inclusion of people with disabilities in employment and education to enable them to perform at their best in University life. (If applicable,) The adoption of a disability action plan would demonstrate University X’s commitment towards further inclusion of people with disabilities in The University environment that is free from discrimination.</td>
<td></td>
</tr>
</tbody>
</table>

| Policy Statement | |
|------------------||
| University X is committed to equality of opportunity in all aspects of its operations for staff and students. University X strongly supports the continued inclusion of people with disabilities in all aspects of the University community. To further advance the inclusion of people with disabilities, University X will undertake the following: |
| - Encourage access to and participation in employment and education |
| - Encourage positive, informed and unprejudiced attitudes towards people |
| - Continue to take all reasonable steps to eliminate |
discrimination
- Provide appropriate access to facilities, resources and support including to implement improved information technology for people consistent with equal opportunity principles
- Special measures unless there is unjustifiable hardship

Disclosure
University X acknowledges that information that is provided to it about a person’s disability / health status is personal and private. University X will respect the confidentiality of all such information in accordance with the relevant privacy legislation.

Students with disabilities
University x implements the disability Standards for Education 2005, providing students and prospective students with a disability the right to education on the same basis as any other students, including the right to comparable access, services and facilities, and the right to participate in education and training without discrimination. University x has a positive obligation to make changes to reasonably accommodate the needs of a student with a disability.

Policy Implementation Responsibilities
The implementation of this policy is the responsibility of all staff and students of the University. However some areas of the University community have specific responsibilities. For example, the University’s disability liaison officer is responsible for ensuring that persons with disabilities receive the appropriate special considerations where requested. These special areas of responsibility for implementation could be outlined in this policy document, or within a separate disability action plan.

Grievances
Outlining University X’s particular grievance procedures, and how these procedures fit within the overall policy framework and in particular, with the University’s policies on the prevention of discrimination, harassment and bullying.

VI ANALYSIS
The following analysis draws upon the experiences of presenting this memorandum to the University of Divinity, as well as personal reflections on disability support within tertiary institutions. In general terms, the following comments have a direct connection to the complexity of Australia’s disability discrimination laws. This section also identifies other considerations associated with the development and application of a University disability policy. These are summarised as follows:
- the mechanisms through which disability complaints may be made are reactive and not proactive;
- the necessity for University policy and those staff members responsible for implementing this policy to recognise the unique characteristics of disability discrimination obligations versus other established grounds of discrimination, such as race and sex discrimination;
• The challenge of disseminating clear and accurate information about the nature and scope of a University’s obligations with respect to disability discrimination;
• the importance of making this information available and accessible to all administrative and academic staff who interact with students;
• the identification of and appropriate responses to visible, and non-visible disability;
• creating a culture which is supportive of disability, and encourages disclosure of issues pertaining to disability in order that students receive appropriate levels of support;
• the importance of appropriately trained disability support staff to the successful implementation of a University disability policy; and
• the consultation and involvement of students and staff with a disability in informing the institution’s response to disability through its policy documents, and the implementation of the principles contained therein.

A Disability Discrimination in Education

In the Australian context, there are many more disability discrimination complaints made than complaints made on other grounds. For example, in 2012-13, 37% of all complaints made to the Australian Human rights commission related to disability discrimination matters. This statistic highlights two points.

First, that obligations pertaining to disability discrimination are often not well understood, and are therefore often not adequately addressed or complied with by potential respondents. The recommended principles which have been elaborated on in previous sections of this paper inform a fresh perspective of disability which takes human diversity into account. Subsection B will detail the importance of this human diversity perspective in contributing to a more informed approach to disability, and to the successful attainment of disability policy objectives.

Second, the relatively high number of disability discrimination complaints demonstrates an imperative for institutions to take proactive measures before the point in time at which a disability discrimination complaint is initiated. Proactive measures may include steps to insure that employees at all levels of the organisation are aware of the obligations pertaining to disability, or where they are able to seek clear guidance in circumstances where they are unsure of these obligations. It is put that the most effective way for a tertiary education institution to achieve this objective is through the adoption and implementation of a specific disability strategy that is fully incorporated within the institution’s policy framework. Subsection c will expand upon this point further.

249 Rees et al, at p322, 6.3.10.
Communicating the social model of disability, and how this model has informed Australia’s legal obligations, to University was one of the most challenging aspects of the presentation. It was clear from comments and questions from various members of the board that from the perspective of University administration, disability was viewed as a problem to be managed. Risk management and cost minimisation were prominent topics of discussion. There was also a degree of uncertainty regarding disclosure of a disability, and the concepts of reasonable adjustment and unjustifiable hardship. There are several disadvantages of responding to disability in this piecemeal manner.

The first is that it does not adequately appreciate the full range of disabilities, including those which are not immediately apparent such as psycho-social impairments. In this sense, this memorandum has consistently put forward the idea that disability is an integral part of society and individual communities, and it does not occupy a separate sphere from the public spaces in which institutions such as the UoD operate. Recognising the diverse challenges and abilities of individual members of a specific community will therefore enable the community to respond positively to these challenges innovatively, and pragmatically address these challenges before they are able to be negatively characterised as problems for the particular individual, or for the community as a whole.

The second problem with a perceived or real knowledge gap relates to the issue of consistency. If individual academic and administration staff interpret and apply their separate understandings of what disability legislation requires of them, this will only serve to exacerbate confusion, and erode the trust which is essential if disclosure of sensitive disability-related information is to occur. Once again, the creation of a disability policy is crucial to address the challenge of responding consistently to disability. It is crucial that there are clear lines of communication to staff members within the organisation who possess this knowledge, or for disability-training to be undertaken throughout the organisation more generally.

C Proactive Measures

Although disability discrimination laws do recognise and draw from the social model of disability, the enforcement of obligations by individual complainants does not foster an environment of proactive compliance. The occurrence of disability discrimination is most likely much higher than is represented in official statistics, as the challenges of making a complaint and successfully navigating legal processes are significant. Recognising that disability in all its forms exists as a manifestation of human diversity, it is put that institutions must take the lead to eliminate disability discrimination within their domains before the point of law enforcement.
In order for this to happen in the context of a University environment, it is essential for staff and students with a disability to be consulted, and involved in the processes associated with policy development and implementation. Meeting policy objectives will largely depend upon the ability of the policy to be understood and applied consistently by all members of the University community. The presence of disability support staff who are easily accessible to students with a disability is also essential.

VII CONCLUSION

With knowledge of its domestic legal obligations with respect to disability, the University will be empowered to create an inclusion policy that facilitates equal opportunity for both current and future students. This first practical step can pave the way for creating a more inclusive culture and environment for students with disabilities.

The most effective way for the University of divinity, and indeed, any other educational institution to meet disability-related legal obligations is through the development and implementation of a clearly-articulated vision of the institution’s position with respect to disability. The social model of disability and the acceptance of human diversity should form the core of this strategy.

The memorandum has outlined a detailed disability policy outline for the University of Divinity. It is anticipated that this outline will inform the University of Divinity’s future policy direction with respect to disability. It is also hoped that this memorandum has achieved the objective of communicating important disability-related information to the University. In doing so, the memorandum has hopefully clarified legal obligations in what is a complex area of the law.
Advocating for Students with Disability: 
a Clinicians’ Resource

Ashleigh Pinto – Melbourne Law School Disability Human Rights Clinic

I BACKGROUND

A Human Rights

Education is a right that students with disabilities enjoy under international law, specifically Article 24 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Under the CRPD, persons with disabilities should:

- not be excluded from the education system;
- enjoy equal opportunity in accessing inclusive and quality education; and
- receive the support they need in education.

B Domestic Law

Under domestic law, schools have legal obligations to students. These are set out under:

- the Victorian Equal Opportunity Act 2010; and
- the Commonwealth Disability Discrimination Act 1992 (DDA)

At the Commonwealth level there are Disability Standards for Education that schools must comply with (Standards). The Standards ensure that students with disabilities can enjoy equal opportunity with students that do not have a disability in the key areas of:

- enrolment;
- participation;
- curriculum; and
- access to support services.

The Victorian Minister for Education has issued an order that outlines procedures that Government schools must follow in suspending and expelling students.

II LEGAL CONCEPTS

A Disability

Under Australian law, disability includes ‘psychological’ and ‘mental’ impairments that:

- result in total or partial loss of mental function or disturbed behaviour; and

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251 Disability Standards for Education 2005 (Cth) (Standards).

252 Minister for Education (Vic), Procedures for Suspension and Expulsion, Order No. 625, 1 March 2014.

• affect learning, thought processes, perceptions of reality, emotions or judgment.

The impairment does not have to exist presently. Disability covers impairments that existed in the past and impairments that might exist in future, due to a genetic predisposition for example.254 Disability also covers behaviours that are a symptom or manifestation of the impairment.255 For example, behaviour that is a direct result of a person’s psycho-social impairment is a disability. This includes anxiety and depressive impairments, bipolar, schizophrenia, ADHD and PTSD.

B Equal Opportunity

Equal opportunity is the right of students with disabilities to enjoy the same or similar opportunities in education as students without disabilities.256

C Discrimination

Discrimination can take the form of:
• direct discrimination;
• indirect discrimination; or
• harassment and victimisation.

D Reasonable Adjustments

Reasonable adjustments are a measure or action that a school takes to assist a student with a disability257:
• in applying for admission or enrolment;
• to participate in a course; or
• to use facilities or services.

The adjustment’s purpose is to enable the student to enjoy equal opportunity. For example, where students are expected to give an oral presentation, the school could allow a student with an anxiety disorder to sit an alternative form of assessment.

III THE STUDENT’S RIGHTS

A Direct Discrimination

Students have a right to an education free from direct discrimination.258 Direct discrimination is where a person is treated unfavourably because of their disability. Direct discrimination can also take the form of failing to make reasonable adjustments.259 Direct discrimination in education occurs where a school treats a student with a disability unfavourably because of the disability. For example, a school may refuse to enrol a student with a disability, or tell a parent that their child cannot go on camp unless the parent attends.

B Indirect Discrimination

Students have a right to be educated free from indirect discrimination.260 This is where a person with a disability is treated in the same way as other students, but the effect is less

254 DDA s 4, EOA s 4.
255 Ibid.
256 Standards s 2.2.
257 Ibid s 3.3.
258 DDA ss 5(1), 22. EOA ss 8, 38.
259 DDA s 5(2).
260 DDA ss 6, 22. EOA s 9, 38.
favourable because of the disability. This occurs where students must satisfy an unreasonable requirement, condition or practise that may disadvantage them. For example, indirect discrimination may occur where a school requires a student to attend a certain level of classes to remain enrolled, and the student can’t satisfy this requirement because they suffer from an anxiety disorder. Indirect discrimination can also take the form of failing to make reasonable adjustments.

C Reasonable Adjustments

Schools have a legal duty to make reasonable adjustments for a student with disabilities where:

- the student cannot satisfy a requirement in accessing education or benefits connected to education; and
- the student needs the adjustment to participate in or substantially benefit from the education program.

The student should provide any supporting information about how the disability affects their education. After receiving a request for reasonable adjustments, the school must take three steps:

1. Consultation
2. Assessment
3. Implementation

1 Consultation

The school must consult with the student or their representative about how the disability affects their education. Consultation should cover whether:

- the adjustment is reasonable;
- the adjustment is necessary to enable the student to enjoy equal opportunity;
- there are alternatives available that would provide equal benefit to the student and disrupt the school less.

2 Assessment

The school must consult with the student or their representative about how the disability affects their education. Consultation should cover whether:

- the adjustment is reasonable;
- the adjustment is necessary to enable the student to enjoy equal opportunity;
- there are alternatives available that would provide equal benefit to the student and disrupt the school less.

The school can refuse to make the adjustments if they are not reasonable

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261 DDA s 5(2).
262 EOA s 40.
263 Standards s 3.7(2).
264 Standards s 3.5.
265 Ibid.
266 Standards s 3.6.
267 Ibid s 3.5.
in the circumstances, or the student could not participate or derive substantial benefit even after the adjustments were made.\textsuperscript{268}

3 Implementation

If the school finds that the adjustment is reasonable, they must make the adjustment within a reasonable time.\textsuperscript{269}

Examples of adjustments include:

- modifying teaching and learning activities;
- providing adaptive devices;
- having class materials in accessible formats (e.g., large print, audio);
- alternative assessment tasks;
- ensuring access to extracurricular activities; and
- planning additional breaks from learning.

These are just a few examples of what might be appropriate. Consultation between the school, family and other service providers is required.

D Suspension and Expulsion

Direct or indirect discrimination can take the form of or culminate in suspension and expulsion. A school might decide to suspend or expel a student for a range of reasons. If this occurs, the school must observe the following procedures:

1. Suspension

Only a principal can suspend or expel a student.\textsuperscript{270} A decision to suspend a student should take into account the student’s disabilities and educational needs.\textsuperscript{271} Before suspending a student, the principal must give the student an opportunity to be heard and consider other measures to address the student’s behaviour.\textsuperscript{272} The principal must verbally communicate to the student or their representative reasons for the suspension and when the suspension will take place.\textsuperscript{273} The principal must also provide work for the student when the suspension is for less than three days.\textsuperscript{274} Where the suspension is longer, the principal must develop a learning plan.\textsuperscript{275} A student cannot be suspended for more than five days at a time.\textsuperscript{276} During a school year, a student can’t be suspended for more than 15 school days. A student should not automatically be expelled where they have been suspended for 15 days.\textsuperscript{277}

2. Expulsion

Before expelling a student, the principal must hold a behaviour review conference.\textsuperscript{278} The student and their representative can bring an independent support person.\textsuperscript{279} At the conference, the principal must:\n
- tell the student and their representative that the principal is considering expulsion;

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{268} EOA s 41.
\item \textsuperscript{269} Standards s 3.7.
\item \textsuperscript{270} Minister for Education, above n 3, ss 5, 9.
\item \textsuperscript{271} Ibid s 7(1).
\item \textsuperscript{272} Minister for Education, above n 3, s 7(2).
\item \textsuperscript{273} Ibid s 7(3).
\item \textsuperscript{274} Ibid s 7(3)(d).
\item \textsuperscript{275} Ibid s 7(3)(e).
\item \textsuperscript{276} Ibid s 8(1).
\item \textsuperscript{277} Ibid s 8(5).
\item \textsuperscript{278} Ibid 11(4).
\item \textsuperscript{279} Minister for Education, above n 3, s 11(7).
\item \textsuperscript{280} Ibid s 11(5).
\end{itemize}
\end{footnotesize}
• outline the grounds for expulsion and evidence for the grounds;
• give the student an opportunity to be heard

If the student and their representative do not attend the conference, the principal must send the student and their representative in writing the key points discussed.  
In deciding whether to expel the student, the principal must consider whether expulsion is appropriate in light of the student’s behaviour, educational needs, disability and social circumstances.
Where a student has been expelled, the principal must provide a Notice of Expulsion that includes the grounds and reasons for the expulsion.
The principal must ensure that students under the age of 17 are participating in other educational or development opportunities after the expulsion.
The principal must provide the student with meaningful in the interim.

A student has a right to appeal an expulsion, in an Expulsion Appeal form. A Notice of Expulsion should include a copy of this form. An Expulsion Review Panel must review the decision to expel the student. The Panel will provide an opportunity for the student and their representative to be heard. The Panel has the power to overturn the expulsion.

D Harassment and Victimisation
Students have a right to freedom from harassment in relation to their disability, from staff at the school. Students have a right to freedom from victimisation. Victimisation is threatening to subject or subjecting a student with a disability to detriment because they may make or have made a complaint about their treatment.

IV STEPS TO TAKE
Where a student faces discrimination in school, these steps can be taken:

A Communicating with the School
The student or their representative should firstly approach the school to discuss how to stop the discrimination continuing. This discussion might involve asking for reasonable adjustments, asking for proper procedure to be followed in suspension or expulsion, or otherwise informing the school of the student’s legal rights.

B Lodging a Complaint
If the school fails to make a reasonable adjustment, or discrimination otherwise continues to happen, the student or their representative can make a complaint to the Victorian Equal Opportunity and Human Rights Commission, or the Australian Human Rights Commission. In Victoria, a complaint should be made within 12 months of the discrimination.

281 Ibid s 11(10).
282 Ibid s 11(11).
283 Ibid s 11(14).
284 Ibid s 12(2).
285 Ibid s 12(3).
286 Ibid, s 13.
287 Ibid s 11(14).
288 Ibid s 13(6).
289 Ibid s 13(7).
290 Ibid s 13(15).
291 DDA s 37.
292 Ibid s 42. EOA s 103.
293 DDA s 42. EOA s 104.
294 EOA s 207.
the complaint and facilitate conciliation between the parties, to try to resolve the issue.

C Court Proceedings
If conciliation fails, the student or their representative can seek adjudication at VCAT, or the courts, such as the Federal Circuit Court or the Federal Court.295 VCAT and the Courts have the power to order the school to296:
- stop the discrimination;
- require the school to take action to remedy any loss or damage suffered; or
- order compensation.

V More Information
See http://resource.dse.theeducationinstitute.edu.au for an online guide on the Disability Standards.

295 Australian Human Rights Commission Act (Cth) s 46PO(1) (‘AHRC Act’). EOA s 123.
296 AHRC Act s 46PO(4). EOA s 125.
THE UNIVERSITY OF DIVINITY’S LEGAL OBLIGATIONS TOWARDS STUDENTS UNDER DOMESTIC LAW

I LEGISLATION

The University of Divinity’s legal obligations towards prospective and current students (‘students’) under Australian law are set out under the Victorian Equal Opportunity Act 2010 and the Commonwealth Disability Discrimination Act 1992 (‘DDA’). The DDA empowers the Minister for Education to enact Disability Standards for Education (‘Standards’). Education providers (‘providers’) must comply with these Standards. The Standards apply to higher education providers, including universities. Overall, the law is designed to ensure that students with disabilities can enjoy the same, or equal opportunities, with students without disabilities.

II DISABILITY UNDER AUSTRALIAN LAW

Under Australian law, a disability includes:

- loss of bodily or mental function;
- loss of a body part;
- disease or illness;
- bodily malfunction, malformation or disfigurement;
- learning difficulties; and
- mental illness.

The law also covers:

- a disability that others assume the student has;
- behaviours that are a symptom or manifestation of a disability;
  - For example, a student with a cognitive impairment may exhibit disruptive behaviour. It is unlawful to discriminate on the basis of this disruptive behaviour, as it is a manifestation of the student’s disability.
- both disability that a student currently or previously had; and
- a disability that could exist in the future.
  - For example, a disability that a student is genetically predisposed towards.

III AREAS OF DISCRIMINATION

The law prohibit discrimination on the grounds of disability in three key areas of education:

4. Admission;

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297 DDA s 31.
298 Ibid s 32.
299 Standards s 1.5.
300 DDA s 4. EOA s 4.
301 DDA s 4. EOA s 4.
302 DDA s 22. EOA s 4.
5. During Enrolment; and


4. The prohibition on discrimination in admission covers\(^{303}\):
   - selecting who will be admitted as a student;
   - refusing or not accepting an application for admission; and
   - imposing discriminatory terms or conditions in admission.
     - In Clarke v Catholic Education Office, a high school refused to allow a student
       with a hearing impairment to receive Auslan support in the classroom. The Federal
       Court held that the requirement that the child access education without Auslan
       support was a discriminatory condition of enrolment.\(^{304}\)

5. The prohibition on discrimination during enrolment covers\(^{305}\):
   - denying or limiting access to benefits that the University provides;
     - These benefits include accessible classrooms and toilet facilities, participation in
       activities outside the classroom and providing course materials in an accessible
       format.\(^{306}\)
   - expulsion; or
   - subjecting the student to any other detriment.
     - This includes subjecting the student to humiliation or denigration.\(^{307}\)
     - The phrase ‘any other detriment’ is a catch-all, which covers hostile or harassing
       educational settings.\(^{308}\)

6. The prohibition on discrimination in setting curricula covers\(^{309}\):

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\(^{303}\) DDA s 22(1). EOA s 38(1).


\(^{305}\) DDA 22(2), EOA 38(2).

\(^{306}\) Standards s 4.3.

\(^{307}\) DDA s 4, EOA s 4

\(^{308}\) Rees, above n 55, 492.

\(^{309}\) DDA s 22(2A).
• developing curricula that will exclude students from participation, or subject them to any other detriment.

IV DISCRIMINATION AND REASONABLE ADJUSTMENTS
Direct and indirect discrimination can occur where a provider fails to make reasonable adjustments. Indirect discrimination via a failure to make reasonable adjustments occurs when:

5. A provider requires a student with a disability to comply with a requirement.
   • For example, by scheduling a class in an upstairs room the provider imposes the requirement that students climb stairs to access classroom education.

6. The only way the student can comply with the requirement is if the provider makes reasonable adjustments.
   • The provider could schedule the class in a downstairs room, so that the student can access classroom education.

7. The provider does not make reasonable adjustments.
   • The provider fails to schedule the class in a downstairs room.

8. The failure to make reasonable adjustments disadvantages the student.
   • The result of the failure to change the room is that the student cannot access classroom education.

V DEFINING REASONABLE ADJUSTMENTS
Reasonable adjustments are a measure or action that a provider takes to assist students with disabilities in:

• applying for admission or enrolment;
• participating in a course; or
• using facilities or services.

The adjustment’s purpose is to allow the student to enjoy the same or comparable opportunities that a student without the disability would enjoy (equal opportunity). The University must take reasonable steps to ensure that students enjoy opportunities free from discrimination and on the same basis as students without the disability.

_________________________________________________________________________

311 Standards s 3.3.
312 Ibid s 2.2.
313 See also EOA s 40.
• seeking admission and obtaining a place\textsuperscript{314};
• participating in course activities and using University facilities and services\textsuperscript{315};
• participating in learning and assessment\textsuperscript{316}; and
• accessing student services, including specialised student services\textsuperscript{317}

VI MAKING REASONABLE ADJUSTMENTS
The University must take three steps in making reasonable adjustments for a current or prospective student with a disability:

4. Consultation;
5. Assessment of reasonableness; and
6. Implementation.

A Consultation
The University has a duty to consult the student or their representative about how disability affects their ability to participate in university life.\textsuperscript{318} Consultation should cover whether\textsuperscript{319}:

• the adjustment is reasonable;
• the adjustment is necessary to enable the student to enjoy equal opportunity;
• there are less disruptive alternatives available that would provide equal benefit to the student.

Consultation should be repeated throughout the student’s education, to adapt to the student’s changing needs.\textsuperscript{320}

B Assessment
After consultation, the University must decide whether the adjustment is necessary to allow the student to enjoy equal opportunity.

In determining whether an adjustment is reasonable, the University must consider all relevant facts and circumstances\textsuperscript{321}:

• the student’s circumstances, including the nature of their disability;
• the adjustment’s nature;

\textsuperscript{314} Standards ss 4.2(1), (2).
\textsuperscript{315} Ibid s 5.2(1).
\textsuperscript{316} Ibid s 6.2(1).
\textsuperscript{317} Ibid ss 5.2(1), 7.2(1).
\textsuperscript{318} Standards ss 3.5, 5.2(2)(a), 5.2(4), 6.2(2)(a), 6.2(4), 7.2(5)(a), 7.2(6)(a), 7.2(8).
\textsuperscript{319} Ibid s 3.5.
\textsuperscript{320} Ibid ss 5.2(3), 6.2(3), 7.2(7).
\textsuperscript{321} DDA s 11. EOA s 40(3).
the adjustment’s effect on the student, including the student’s ability to:
  - achieve learning outcomes;
  - participate in courses or programs; and
  - work independently.
• the effect of making the adjustment on the University, its staff, students and the general community
• the consequences for the University of making the adjustment; and
• the consequences for the student of not making the adjustment.

C Implementation
If the University finds that the adjustment is necessary to allow the student to enjoy equal opportunity, the University must make the adjustment.322
The University should take reasonable steps to make sure that it makes the adjustment within a reasonable time frame.323 In different areas of education, adjustment may take different forms. The Standards set out the types of measures that a University can take in affording equal opportunity to prospective and current students in areas including admission, course participation and accessing facilities and services, learning experiences, and support services.

1 Admission
To afford the student equal opportunity in gaining admission, the University can ensure that324:
  - enrolment information is accessible and available in different formats; and
  - information about courses are accessible, so the student can make informed choices about enrolment.

2 Course Participation and Accessing Facilities and Services
To afford the student equal opportunity in course participation and accessing university facilities and services, the University can take the following measures325:
  - ensure that activities in the curriculum are flexible enough to permit the student’s participation;
  - negotiate and implement programs that enable participation;
  - provide extra support help the student achieve the desired learning outcomes; and
  - ensure that activities conducted outside the classroom are inclusive.

3 Learning Experiences
To afford the student equal opportunity in participation in learning experiences, the University can ensure that326:

322 Standards ss 5.2(2)(c), 6.2(2)(c).
323 Ibid s 3.7.
324 Ibid s 4.3.
325 Ibid s 5.3.
course delivery and learning activities are considered in light of the student’s needs;

course materials are provided in an appropriate format in a timely manner;

teaching strategies meet the student’s learning needs and address disadvantage that results from the student’s disability; and

assessment is adapted so that the student can demonstrate assessable knowledge and skills.

In adjusting a course or program, the University may maintain requirements that are inherent in or essential to the course’s nature. Where an adjustment would compromise these ‘essential requirements’, the University can choose not to make the adjustment.

4 Support Services
To afford the student equal opportunity in accessing support services, the University can ensure that:

- specialised services for students are available, by collaborating with third party service providers;
  - These services may include health, personal care and therapy services.
- staff are aware of any specialised services for students and can guide the student on how to access the services;
- any necessary specialised equipment allowing the student to participate in the course is available; and
- trained support staff are available to the student, including interpreters, note-takers and aides.

VII EXCEPTION TO MAKING REASONABLE ADJUSTMENTS
The University does not have to make adjustments where a student requires adjustments and the University has complied with the legal requirements for making reasonable adjustments and:

- the adjustments required are not reasonable in the circumstances; or
- the student cannot or could not participate or derive substantial benefit from the program, even after the adjustments are made.

VIII HARASSMENT AND VICTIMISATION

326 Standards s 6.3.
327 Ibid s 3.4(3).
328 Ibid s 7.3.
329 EOA s 41.
A Definition of Harassment and Victimisation
Disability harassment includes any action in relation to the disability that is reasonably likely to humiliate, offend, intimidate or distress in the circumstances.\textsuperscript{330} This includes harassment on the basis of the need for adjustments and use of supports, including a guide dog, interpreter or wheelchair.\textsuperscript{331} Disability harassment includes harassment of a relative or friend of the student with the disability.\textsuperscript{332} Victimisation is subjecting a student to detriment because they may or have made a complaint about their treatment in relation to disability.\textsuperscript{333}

B Duty to Prevent Harassment and Victimisation
The University has a duty to develop and implement strategies and programs to prevent harassment of students with a disability or harassment of their friends and family.\textsuperscript{334} The University has a duty to take reasonable steps to ensure that staff and students are aware of:\textsuperscript{335}

- their obligation not to harass or victimise students with disabilities or their associates;
- what action should be taken if harassment occurs; and
- available complaint mechanisms for students that experience harassment or victimisation.

C Implementation
To enable students to participate in an educational environment free from harassment, the University can ensure that:\textsuperscript{336}

- its policies expressly prohibit disability harassment and victimisation;
- complaint-handling mechanisms ensure fairness, transparency and accountability; and
- harassment or victimisation is handled promptly, with regard to the matter’s severity.

IX CONCLUSION
With knowledge of its domestic legal obligations with respect to disability, the University will be empowered to create an inclusion policy that facilitates equal opportunity for both current and future students. This first practical step can pave the way for creating a more inclusive culture and environment for students with disabilities.

\textsuperscript{330}Standards s 8.1.
\textsuperscript{331}Ibid s 8.5.
\textsuperscript{332}Ibid s 8.1.
\textsuperscript{333}DDA s 42. EOA s 104.
\textsuperscript{334}Standards s 8.3(1).
\textsuperscript{335}Ibid s 8.3(2).
\textsuperscript{336}Ibid s 8.5.
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Minister for Education (Vic), *Procedures for Suspension and Expulsion*, Order No. 625, 1 March 2014
Disability Discrimination as a Public Health Issue Project

Partner Organisations:
- Melanie Schleiger, Victoria Legal Aid
Discrimination in the workplace and mental health: the acquisition of depression and anxiety

Abstract

This paper examines the mental health effects of workplace discrimination on the grounds of protected attributes which include religion, race, gender, age and disability as well as sexual harassment in the Victorian context. The paper includes a literature review of the relevant case law, legislation and existing research and studies on the health effects of workplace discrimination. When read from the perspective of the social model of disability, this literature indicates that workplace discrimination has disabling mental health consequences that result in social and economic burdens. On this basis, this paper advocates for governmental and societal recognition that discrimination is a public health issue requiring an urgent and meaningful response.

This paper also outlines how the principles of the Convention on the Rights of Persons with Disabilities (“CRPD”) can be useful when discussing workplace discrimination and potential reform. Finally, the paper includes workplace policy recommendations and advocates for acquired depression and anxiety to be addressed as a public health issue.

Introduction

A recent article by the Chief Executive of BeyondBlue, the premier support organisation for individuals suffering anxiety and depression in Australia, was titled with the question on the minds of many Australians experiencing mental health issues. The title was ‘Depression: does your boss really need to know?’ and the article discusses the stigma and negative consequences that come with informing your employer of a mental health issue. It is not farfetched to suggest that when an individual develops depression or anxiety from events of discrimination in their workplace, it would be even more difficult for individuals to speak up about their lived experience. This report discusses precisely this issue – the mental health effects of discrimination occurring in the workplace and what should be done to address this problem from a legal perspective. It also argues that discrimination-induced depression or anxiety should be addressed as a public health issue as the effects of both anxiety and depression can be disabling to the individual.

‘Public health’

Public health is the principle of addressing issues that affect populations rather than individuals. Public health initiatives focus on bringing about widespread benefit to the

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population through increasing health outcomes to individuals or clusters of individuals. Mass immunisation schemes that create herd immunity within the community are an example of medical public health initiatives. Whilst health and medicine are directly linked, lifestyle initiatives that intend to improve public health such as healthy eating programs or skin cancer awareness campaigns can also be considered to be preventative public health measures.

It is useful to frame discrimination-induced anxiety and depression as a public health issue because it enables a broad-based approach that, whilst not completely eliminating discrimination, will provide strategies for workplaces to reduce the social cost and economic cost of depression and anxiety. Discrimination-induced anxiety and depression should be categorised as a public health issue because it of its ability to effect a large portion of the population. If categorised as a public health issue, it would also provide impetus for a widespread government health initiative.

Defining ‘people with disability’
In this report, we draw on the following definition of disability

‘The disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities’

However, we argue that the CRPD’s definition of what discrimination is on the basis of ‘disability’, which reads

‘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 field.’

and we posit that people with anxiety and depression also experience exclusions and restrictions that impairs many of their interactions within society.

Legislation
This discussion draws on key provisions of the Equal Opportunity Act 2010 (Vic) (“EOA”), the Fair Work Act 2009 (Cth) (“FWA”) and the Sex Discrimination Act 1984 (Cth) (“SDA”), because these are the most relevant provisions relating to discrimination and public health within the Victorian rights framework.

The EOA seeks to eliminate discrimination, sexual harassment and victimisation before and recognises that discrimination can cause social and economic disadvantage.

EOA s 3 Objectives
The objectives of this Act are—
(a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;

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339 The Union of the Physically Impaired Against Segregation and the Disability Alliance, Fundamental Principles of Disability, 1975, 20.
(b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
(c) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation;
(d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—
   (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
   (ii) equal application of a rule to different groups can have unequal results or outcomes;
   (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;
(e) to enable the Victorian Equal Opportunity and Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions;
(f) to enable the Victorian Equal Opportunity and Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Victorian Civil and Administrative Tribunal for resolution of such disputes.

The EOA addresses both direct and indirect discrimination. Section 3(d)(iii) raises ‘reasonable adjustments’, which is the legislated requirement for people to make changes that are within reason to ensure substantive equality is maintained. Reasonable adjustments are a key method in addressing indirect discrimination and is thus an important and positive element of the Victorian legislation.

The FWA prohibits discrimination in the workplace.

FWA s 3 Objectives
The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms.

This Act contains provisions to increase participation in the workforce including provisions that require employers to consider flexible working hours for workers and the right to parental leave.341

Section 351 FWA prohibits discrimination throughout the employment relationship on the basis of 13 attributes as follows:

s 351(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.\footnote{Ibid 858.}

Section 351 ‘Discrimination’ features a shifting onus of proof, whereby once an allegation has been made, the burden of proof shifts to the employer to show that an alleged adverse action was in fact taken for a reason other than on the basis of a prohibited reason.\footnote{Ibid 865.} This applies to both employees and prospective employees.

For the purposes of the FWA, adverse action includes the following:

The employer against the employee:
- dismisses the employee; or
- injures the employee in his or her employment; or
- alters the position of the employee to the employee’s prejudice; or
- discriminates between the employee and other employees of the employer.

The prospective employer against a prospective employee:
- refuses to employ the prospective employee; or
- discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.

Sexual harassment is a form of discrimination on the basis of sex/gender. Sexual harassment is defined under s 92 and is prohibited under s 93 of the EOA. Further, SDA outlines the meaning of sexual harassment as follows:

SDA s 28 ‘Meaning of sexual harassment’
(1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if:
   (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
   (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of sub-section (1), the circumstances to be taken into account include, but are not limited to, the following: (a) sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
   (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
   (c) any disability or the person harassed; any other relevant circumstance.

(2) In this section: conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.
What principles of the CRPD are useful when discussing workplace discrimination?

The ‘social model of disability’:

‘The idea behind the social model of disability stemmed from the Fundamental Principles of Disability document first published in the mid-1970s (UPIAS 1976), which argued that we were not disabled by our impairments but by the disabling barriers we faced in society.’344

The medical model of disability holds that disability is something that needs to be “fixed” and that the problem is “located within” the individual which qualifies them to be lumped in a category that is in need of “clinical intervention.”345 The social model of disability seeks to move away from viewing people with disability as “lesser” and needing to be “fixed” or made “whole.” In the context of depression and anxiety, adopting the social model means recognising that social attitudes, as manifested in workplace discrimination, cause barriers to full access and participation. The medical model remains the dominant lens through which disability is viewed.

The CRPD adopts the ‘social model’ of disability and this is useful because it seeks to bring about a shift in how we view and address disability by focusing on social factors, as well as attitudinal and environment barriers. These are relevant to the topic of discrimination law as they give weight to the notion that discrimination and disability are connected and that discrimination must be addressed on this basis. We advocate that the CRPD can be read to include mental health issues acquired as a result of workplace discrimination within ‘disability.’ The CRPD preamble states

(e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others…

On its face, this suggests that a person must have an impairment which becomes ‘disabling’ due to social factors. We advocate that the social model should be adopted in the fullest extent and argue that a person does not necessarily require an impairment that then interacts with attitudinal and environmental factors in order to develop disability. The CRPD does not directly address the issue of non-impaired people acquiring an impairment from a social barrier such as discrimination. It does, however, acknowledge that disability ‘is an evolving concept’ and this allow for developments in the conceptualisation of disability. For our purposes, it is clear that the CRPD does not directly address disability acquired through discrimination, it can still be read into it because of the heavy focus on the social model within the CRPD itself. The CRPD definition of disability in Article 1 uses the term ‘include[s],’ which means the non-exhaustive nature of the CRPD can be interpreted to be inclusive of instances where disability (anxiety and depression) arises from social factors (workplace discrimination).

We posit that a person without impairment interacting with attitudinal and environmental factors only, such as discrimination in the workplace, can acquire disability. In this, the barrier

(discrimination in the workplace) is not related to the interaction between an individual’s impairment and society; it is society alone creating the disability. Recognition of the social model is a key step in the logic to recognising that discrimination is a social barrier that is disabling, however the social model as reflected in the CRPD remains directly linked to the necessity of pre-existing impairment and fails to recognise that attitudinal and environmental factors alone can be disabling.

Article 5 outlines the CRPD’s equality and non-discrimination rights for people with disabilities as follows:

**Article 5 - Equality and non-discrimination**
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.

As discussed, Victorian legislation prohibits discrimination on the basis of protected attributes (EOA s351). Victorian and Commonwealth case law recognise the disabling impact of discrimination on the person, successfully drawing the link to show that discrimination is disabling.

**Research demonstrating the link between discrimination and mental health outcomes**

This literature review evaluates articles that discuss a relationship or correlation between discrimination and mental health issues, namely depression and anxiety. The review demonstrates a strong consensus in the literature that there is a link between experiences of perceived and actual discrimination and poorer mental health outcomes. This has been documented in research from the 1980s to the present day. Research began with the impacts of sex and gender discrimination. However, the greatest bulk of literature has been focused upon discrimination on the grounds of race and ethnicity. As a result, racial discrimination has accrued a high quantity of persuasive material and acceptance within academia and despite this narrow focus, we argue that these studies are relevant to other forms of discrimination. The empirical resources could also be useful in future policy submissions or advocacy for change in this area.

This review has focused primarily on publications that published or commissioned by VicHealth as well as looking further afield for research that could be applicable to this area.

The report by Yin Paradies, *Ethnicity and Health: A systematic review of empirical research on self-reported racism and health* canvasses the relationship between discrimination and

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347 Yin Paradies, 'Ethnicity and Health: A systematic review of empirical research on self-reported racism and health’ (2006)

35 *International Journal of Epidemiology* 888.
mental health and it argues that an event of self-reported racism precedes the effect on the individual’s mental health. It also suggests that physical health implications do actually occur but at a much slower timeframe due to a “lag” in how mental health affects individuals. It is a valuable resource as it presents an incredibly thorough examination of the research currently performed within this field by summarising the data from 138 previous research papers. The report also acknowledges the weaknesses that are inherent in most of the research that has been done in this field, the main one being the ‘self-reported’ aspect of discrimination. This is an issue because it means data does not include those unwilling to speak about such issues, however, there is not an easy way around this flaw other than implementing research that attempts to gather objective information. A further area that the report identifies as an area for future inquiry is the distinction of stress and race-based discrimination and what associated effects do they have on individuals.

The report Preventing race-based discrimination and supporting cultural diversity in the workplace: an evidence review: full report also focusses on the relationship between discrimination and its effect on mental health and is also concerned with racial discrimination. Trenerry, Franklin and Paradies argue that discrimination causes negative mental health outcomes that include “[p]sychological, psychiatric and emotional distress, depression/depressive symptoms, anxiety [and] stress.” Further to this, it posits that race-based discrimination is a greater “occupational stressor” than other forms of stressors in the workplace. It includes a comprehensive discussion of what race-based discrimination is, how it permeates systemically and interpersonally. It also shows what measures can be taken in the workplace and employment settings to reduce discrimination and how the allocation of resources should be based. The recommended measures are “implementing organisational accountability/development, diversity training, resource development and provision, serving as sites for positive inter-group contact, serving as ‘role models’ in anti-discrimination and pro-diversity practice for other organisations.” The paper acknowledges that these measures are a good starting point and the difficulty in developing such resources, but argues that workplace-specific resources would be the ideal standard for better outcomes. It also proffers a summary of the principles that must be followed when applying the recommendations as a form of best practice. These principles and the measures in this article are discussed further in the ‘recommendations’ section of the piece.

A third relevant study that warrants mention, ‘Estimating the economic benefits of eliminating job strain as a risk factor for depression’, is not related directly to discrimination, but provides an analysis of the costs of depression to the Australian economy. This article focusses on the idea of ‘job strain’ and how it doubles the likelihood of depression of workers who suffer it. It contends that understanding the benefits of reducing or eliminating employment-related stressors will increase support for implementation of methods for prevention and intervention. The article defines ‘job strain’ to include factors relating to “job control (how much say you have over how to do your work), the combination of high job demands and low job control (defined as job strain), job insecurity, low social support at work, and effort-reward

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348 Ibid 895.
350 Ibid 14.
351 Ibid 16.
352 Ibid 11.
353 Ibid 38-46.
354 Ibid 47.
imbalance.”356 The article provides a comprehensive statement of the figures that demonstrate the economic impact of depression and anxiety on employers and the economy. Per the article, as at 2007 the economic cost of depression on Australian workplaces is $12.7 billion. Whilst job stress and discrimination are not identical concepts, it is important to understand when advocating for change that there is a cost-benefit argument to be made.

In ‘To whom will ye liken me, and make me equal? Reformulating the role of the Comparator in the identification of discrimination’,357 Asher Emanuel provides a useful discussion of section 19 of the New Zealand Bill of Rights Act 1990. This article is useful for the Victorian context because it analyses the legislative approach and judicial responses to legislative attempts to address discrimination.

The research discussed in this section establishes links between poor mental health outcomes and discrimination. Whilst the majority of research discussed has been on racial grounds, the arguments are transferable because they go to the identity of the person. Within the workplace, the outcome of discrimination is the same – one is targeted, verbally or physically harassed, has their job conditions altered or is overlooked for promotion for a reason relating to their identity. This focus on issues that go to identity is the reason why the arguments are transferable.

The case law has also begun to recognise the disabling consequences of discrimination. This is evidenced by the factors taken into by the decision-makers in these cases and in awarding damages. The cases discussed below indicate that there are outstanding issues in framing the mental health consequences of discrimination yet they also show that there is a slow shift in recognition of this area.

Analysis of relevant case law

Bevilacqua v Telco Business Solutions (Watergardens) PL No. 2 (Human Rights) [2015] VCAT 693 (28 May 2015)

Stephanie Bevilacqua (Applicant) was a full-time employee for Telstra (Respondent) who experienced severe morning sickness during her pregnancy. She alleged that the store manager and managing director had directly and indirectly discriminated against her because of her pregnancy and had failed to make reasonable adjustments pursuant to s 20 of EOA.

This case shows that there is a gap in the language utilised in discrimination law and medical diagnoses – as highlighted in this case, the Tribunal held that the employer did not fail to make reasonable adjustments because the Applicant’s doctor had described the requested reduction in work hours as ‘needed’ but not ‘required’. It is important that medical professionals and anti-discrimination mechanisms work in tandem, especially in understanding that certain language can be fatal to a particular claim. This will ensure that individuals and employers know their duties and rights after medical diagnoses.

The Tribunal accepted that there was indirect discrimination against the Applicant because they required employees to work full-time, not take sick leave, minimise length and frequency

of toilet breaks and requiring them to do heavy lifting, amongst other things. Due to the Applicant’s pregnancy, the workplace practices that may have been in place before the Applicant’s pregnancy became indirectly discriminatory after she became pregnant. This is relevant because it shows that the circumstances of the individual can cause certain facets of the workplace to become discriminatory and it is important to take note that should somebody in the workplace acquire disability or anxiety, the characteristics or requirements of the workplace could become discriminatory either directly or indirectly through the change in the circumstances of the employee.

Importantly, this case established that (1) discrimination in the form of unfavourable treatment caused hurt, humiliation and anxiety and (2) that severe morning sickness is a disability that requires the employer to make reasonable adjustments


Ms Poniatowska (Applicant) worked for Employment Services Australia Pty Ltd (ESA) from 30 January 2005 to 21 February 2006 when her employment was terminated. She was terminated on the ground of unsatisfactory performance after receiving three warning letters. Ms Poniatowska pursued avenues open to her through the Industrial Relations Commission of South Australia and the Human Rights and Equal Opportunity Commission (HREOC).

The Applicant, Ms Poniatowska, was subjected to various forms of verbal and physical sexual harassment at the hands of her employer and a colleague. An issue raised at trial was the delay in time between the conduct occurring and when the company was made aware of the conduct (when the proceedings were initiated) and what impact this had on the reliability of the Applicant’s memory. The judge, Mansfield J, found that the evidence was affected by a “reconstruction over time”. These comments raise questions about the expectations the Courts have upon people who have been discriminated against, especially when they have experienced adverse consequences as a result. There is an expectation that people experiencing depression or anxiety that has been caused by discrimination will be able to report conduct when it happens or shortly thereafter. This attitude shows little understanding of the symptoms or debilitating aspects of depression and anxiety. Whilst Mansfield J stated it was ‘understandable’ that Ms Poniatowska was ‘humiliated and shocked’, it is still the case that lawyers should advise a potential complainant that they must, as quickly as possible, make a formal complaint within their organisation (if such a processes exists) to bolster their case.

The judgment went in favour of the Applicant when Mansfield J acknowledged that there were no mechanisms for addressing any workplace grievances. This is important because it shows the Courts understand the limited avenues that people may have to address conduct of this nature and we make recommendations to this point below.

Ms Poniatowska indicated her attitude early on in the correspondence that the requests would be offensive if they continued. This was taken into account by the Mansfield J and shows that the Court may have expectations that unwanted advances or conduct will be rebuffed or that it

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359 Ibid.
360 Ibid [105].
361 Ibid [136].
362 Ibid [289].
will be made clear by the recipient that they are unwelcome. This should be taken into account when developing education models, as well as in advice to people who are currently victims of such conduct. If this reasoning is followed, it places a quasi-onus or positive duty on individuals to rebuff advances in order for a case to be decided in their favour. So whilst the Court acknowledged the absence of grievance processes, it also takes into account, and views favourably, attempts made by an complainant to mitigate the situation. Lastly, the Court took into account the clinical diagnoses and medicines prescribed as an indicator for damages assessment. The field of law is very reliant on medical evidence and assessment, which whilst this is probably the easiest measure of the effects of discrimination, it is also inconsistent with the social model of disability. Also this is an issue sees the increasingly intermingling of discrimination law and tort law.

**Eatock v Bolt [2011] FCA 1103**

Eatock brought a class action against journalist, Andrew Bolt, and the Herald and Weekly Times, complaining that articles written by Bolt and published by the Herald and Weekly Times contravened s 18C(1) of the Racial Discrimination Act which outlines:

(1) It is unlawful for a person to do an act, otherwise than in private, if:
   (a) The act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
   (b) The act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Eatock argued that the published newspaper articles were offensive on racial grounds to fair-skinned Aboriginal persons. The Respondents denied the claim and held that in any event s 18D RDA exempted their conduct. Section 18D provides that conduct done ‘reasonably’ and ‘in good faith’ is not unlawful…

(b) in the course of any statement [or] publication...made...for any genuine...purpose in the public interest; or
(c) in making or publishing...
(ii) a fair comment on any event or matter of public interest

**Outcome**

Bromberg J held that Bolt and Herald and Weekly Times had contravened s 18C and did not fall into an exemption under s 18D. Bromberg ordered that the articles were not to be republished and that corrective notices were to be published in the newspaper.

**Discrimination and mental health**

Bromberg J stated that claims in the published articles that people with mostly European heritage but some Aboriginal heritage falsely identify as Aboriginal to gain employment and that fair skin colour indicates non-Aboriginality would have offended, insulted, humiliated or intimidated Aboriginal people. We posit that being offended, insulted, humiliated or intimidated on the grounds of race is detrimental to mental health in the same way it is being recognized in the case law that being offended, humiliated or intimidated on the grounds of sex/gender is detrimental to mental health because being offended, insulted or humiliated

363 Ibid [336], [356], [359].
because of a protected attribute and aspect of the complainant’s identity can result in disabling experiences, such as anxiety and depression.

**Richardson v Oracle Corporation Australia Pty Limited [2013] FCA 102**

This appeal judgement signals a significant shift in the treatment of sexual harassment cases. Here, the full court of the Federal Court awarded damages of $130,000 plus costs in an appeal of an original decision that awarded damages of $18,000. Ms Richardson (Appellant) worked for Oracle (First Respondent) in 2008.

At first instance, Buchanan J held that employee, Mr Tucker, had ‘engaged in conduct contrary to s 28B(2) of the SDA by sexually harassing the Applicant’ and that the employer was vicariously liable pursuant to s 106 of the SDA because it failed to show that it took all reasonable steps to prevent Mr Tucker from sexually harassing Ms Richardson. On appeal, Kenny, Besanko and Peram JJ reiterated and upheld the finding at first instance, however the amount of damages awarded was greatly increased.

**Discrimination and mental health**

Kenny J gives some attention to the Applicant’s experience of “reliving” the harassment she suffered at the AHRC and in the present court, however it is noted by the Court that this stress is not causally linked to the initial harassment and is therefore not a ground for claiming damages.

On appeal it was noted that the trial judge erred ‘by assessing general damages by reference to the nature of Mr Tucker’s unlawful conduct rather than by reference to the impact of that unlawful conduct on Ms Richardson’. Kenny J highlights that the trial judge stated “that “Mr Tucker’s conduct was not accompanied by physical elements of sexual harassment” since the absence of physically harassing conduct was capable of throwing light on the loss and damage suffered by his victim’ [50]. This is problematic because it prioritises the physical harassment and harm over forms of mental and emotional harassment. While there is a real life distinction between the forms of harassment, to give greater weight to one arbitrarily limits the potential legal remedy of the other form, especially when each case of harassment must be assessed on the impact on the individual. It is out-dated to compare the physical and non-physical in determining damages as opposed to the determined impact.

It is important to note that when a victim of discrimination develops depression and anxiety, the workplace discrimination does not have to be the sole causing factor of the mental illness. This is important precisely for the reason that there will always be arguments made towards susceptibilities or other factors external to the workplace.

It was found that having consideration of the nature and extent of Ms Richardson’s injuries as well as the prevailing community standards lead to the conclusion that the low level of damages awarded by the trial judge was in error and were ‘manifestly inadequate’. Per *Amaca Pty Ltd v King*, the appeal in question acknowledges that ‘the community may place...
higher value on the loss of enjoyment of life and the compensation of pain and suffering than in the past.\textsuperscript{371} Large damages were awarded to acknowledge the loss suffered through the decline in the Applicant’s sexual relationship with her partner. Kenny J acknowledges that damages awarded for loss of enjoyment of life and pain and suffering are generally higher in areas of law outside anti-discrimination law.\textsuperscript{372} This reference by Kenny J to discrepancies in damages assessment between anti-discrimination law and other laws is significant to building a case for reform in this field. As discrimination has the potential to cause serious mental health problems, there should be a standardisation in the way damages are awarded. Ironically, the way damages are assessed and as the law currently stands is discriminatory.

**SAGONA v R & C PICCOLI INVESTMENTS PTY LTD & ORS [2014] FCCA 875**

On 28 August 2012, the Applicant advised her employer that she was pregnant and intended to take maternity leave. The Applicant resigned on 20 September 2012 and claims that the circumstances giving rise to her resignation amounted to constructive dismissal\textsuperscript{[11].}\textsuperscript{373}

This case considers discrimination on the grounds of pregnancy, breaching ss 340 and 351 of the *Fair Work Act 2009* (Cth) (‘the FWA’) as well as constructive dismissal, altering the employee’s position to her prejudice and demand to work unreasonable hours, and is found in favour of the Applicant.

The Applicant in this case was treated adversely during and after her pregnancy, made to work for conditions below what she would normally have been receiving.\textsuperscript{374}

The case shows the Court will look to the complete employee-employer relationship to determine whether there has been unreasonable action or discrimination, as seen here where the court looked to the 12 years prior to the discriminatory conduct occurring and saw that the Applicant had not been asked to sign a contract until a week after she became pregnant.\textsuperscript{375} It is these factors that caused the Applicant to resign after experiencing “extreme stress and anxiety”.\textsuperscript{376}

The matter of the adverse action claim in relation to the Applicant returning to work on a part-time basis was poorly argued. Whelan J was not able to make a finding within the meaning of s 351 FWA.\textsuperscript{377} The Applicant argued in reliance on s 65 FWA which provides that an employee can request changed working arrangements in order to care for their child. Section 65(3) provides that the request for changed working arrangements to allow for the care of a child must be in writing, and 65(5), the employer may refuse only on reasonable business needs. In this case, s 65 had no helpful application because the Applicant had not put her request in writing.\textsuperscript{378}

The law as it stands works effectively as it places the onus on the alleged discriminator to prove they were not doing acting in a discriminatory manner. Importantly, s 360 outlines that ‘a person takes action for a particular reason if the reasons for the action include that

\textsuperscript{371} Ibid [98].
\textsuperscript{372} Ibid [107].
\textsuperscript{374} Ibid [48].
\textsuperscript{375} Ibid [71].
\textsuperscript{376} Ibid [120].
\textsuperscript{377} Ibid [245].
\textsuperscript{378} Ibid [245].
reason’. Thus, the prohibited reason cannot form any part of a decision that effects an employee’s conditions. It is also effective that there is a presumption that the Respondent must displace to show that their conduct was not motivated by the prohibited reason, either completely or in part.

Whelan J held that Respondents had been unreasonable and utilized meetings about her employment to convey her position and remuneration were in jeopardy. Importantly, the Court took into account the mental health plan the Applicant’s GP undertook and the stress and anxiety caused by the conduct.

**Workplace policy recommendations, and explores potential hurdles in their implementation**

The literature and case law above provide a solid grounding to enable preliminary recommendations for reform. We have identified recommendations in three categories: how to address discrimination as a public health issue; what internal workplace policies should be endorsed; and areas of further inquiry.

**How to address discrimination as a public health issue:**

The starting point for developing an issue as one in the context of public health is to organise the framework that in which the issue will sit. Nancy E. Kass argues that an asking particular questions will ensure an ethical framework will be introduced. These questions are “what are the public health goals of the… program?”, how effective is the program in achieving its stated goals?”, “what are the known or potential burdens of the program?”; “can the burdens be minimised?”; “is the program being implemented fairly?” and “how can the benefits and burdens of a program be fairly balanced?”.

We recommend that any action taken to develop discrimination as a public health issue should be periodically examined with the spirit of these questions in mind.

By taking other public health initiatives as guides, we recommend initiatives such as public education campaigns to better inform people and their employers of the impacts of discrimination. These campaigns could be both informative of workplace rights and how individuals can seek external help when internal mechanisms are inadequate. Such campaigns could tap into the growth in mainstreaming workplace wellbeing and mindfulness culture.

In advocating for this issue, there needs to be government acceptance of the link between negative mental health outcomes and discrimination, especially for future policy and legislative development. Getting to this point would be easier if the case was made for improved data collection f those who are discriminated against in the workplace (self-reported and objective discrimination) and the mental health or other consequences are documented.

**From the cases examined above:**

There are certain facets from the cases examined above that show where reforms need to occur.

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379 *Fair Work Act 2009* (Commonwealth) s 60.
380 Above n. 37, [227]
381 *Ibid* [229].
382 *Ibid* [320].
The first is that there needs to be a standardisation of language so that there can be uniformity when medical evidence is given and that judges will have a threshold to work off. This was seen above in Bevilacqua whereby there was a distinction between the whether the Applicant needed or required something. These distinctions prevent laypersons from understanding their rights after they have been given a medical diagnosis and this is equally applicable to employers trying to understand their obligations.

The second point that should be highlighted is that Courts look to the actions taken by victims of discrimination, even where they have limited processes to make formal complaints. This shows there is a type of onus placed on the victim of discriminatory action, which is an area that should be looked into for reform, as it cannot in many cases be appropriate to expect somebody whose mental health is being affected by discrimination to have to call out that discrimination in one way or another.

The third point is that there is still a heavy emphasis placed on the distinction of physical and verbal harassment, with physical harassment being deemed as more severe. This was seen in Richardson, where the trial judge gave greater weight to physical harassment. In making a case that discrimination-induced depression and anxiety needs to be recognised, it does not make sense that these distinctions should still be prevalent in courtroom reasoning and the research linking the effects of discrimination to negative mental health renders this distinction arbitrary. A recommendation here would be to work to eliminate this distinction.

**Internal workplace policies:**

As discussed above, the measures that workplaces take can mitigate substantially the impacts of discrimination on employees. An issue that has stood out the most is that there has been instances where employees in smaller businesses and even franchise businesses have not been aware of the grievance or reporting procedure. This is a huge barrier to instances of discrimination being reported and addressed. Therefore, we recommend mandatory education in workplace induction and ongoing professional development training. A practical solution for employees, particularly in smaller organisations with limited internal complaint mechanisms, is to make it mandatory for businesses to provide information about external avenues available to workers in such situations, such as JobWatch or mental health groups or even establishing a joint complaint mechanism between VLA, JobWatch, the Victorian Human Rights and Equal Opportunity Commission and other interested bodies in order to fill the gap when businesses do not have reporting mechanisms.

Other recommendations that can be taken from the Preventing race-based discrimination and supporting cultural diversity in the workplace report include diversity training, conflict resolution training and also looking into the effects on bystanders of situations in which discrimination occur.\(^\text{384}\)

In regard to sexual harassment policy specifically, the AHRC advises that policies should be inclusive of those who will be regulated by the policies, as a mechanism for increasing compliance.\(^\text{385}\) Examples of this range from having an official launch ceremony in the workplace to asking employees to sign the policy and affirm acceptance of the policy.\(^\text{386}\)

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\(^{384}\) Above n 11, 47-48.


\(^{386}\) Ibid 24.
examples could also be taken into other facets of discrimination, when and where they arise in the workplace context.

**Areas for further inquiry or focus:**
There are areas that need to be further developed in relation to discrimination-related anxiety and depression. The areas that most need addressing in the employment context are the absence of any safety net, outside the realm of tort law, for those who acquire depression or anxiety from workplace incidents of discrimination. This is particularly so for casual employees and employees with low job security, as they have minimal entitlements or employment rights to fall back on. Another area where there are gaps is within the realm of insurance, namely income protection insurance, which generally do not cover mental health-related work absences.

Another area that should be focussed on, particularly in developing future campaigns or advocacy, would be to engage in longitudinal research in order to observe whether increasing multiculturalism in workplaces is resulting in more or less instances of workplace discrimination. This would be interesting because of the continually changing nature of the Victorian demographic and as workplaces become increasingly diverse as a result of the changing demographic. This research could be undertaken by, or in conjunction with, VicHealth.

**Conclusion**

The social model of disability is reflected in the CRPD and should therefore inform the current discourse around disability, including depression and anxiety associated with workplace discrimination. Existing studies indicate that discrimination leads to disabling mental health consequences. These health consequences have both a human cost – the lived experience of anxiety and depression – and an economic cost as outlined, the review of the relevant research showed that the b. The cases summarized in this report show that Courts are beginning to recognize these health impacts of discrimination. However more needs to be done in developing the case law, especially as a major shortcoming is that we cannot know how the court will respond to a claim that is based entirely upon discrimination that has resulted in an individual acquiring depression, anxiety or other negative mental health consequence.

Framing anxiety and depression arising from workplace discrimination as a public health concern could facilitate a more systematic approach to reducing workplace discrimination. Public health concerns have generally received widespread governmental responses. Discrimination-induced disability is a significant issue and requires the level of systematic response that it may only receive if it is recognized as a public health issue. This report has touched upon practical recommendations that could go to both addressing this problem in the workplace, such as developing public education campaigns or internal workplace strategies as well as recommendations of what areas of case law need to be further examined, such as the distinction between physical and non-physical harassment.

Whilst there is much more that needs to be done in this area, it is clear that there is strong academic basis for the claim that discrimination is an issue that requires a public response and it is also clear that discrimination cases are beginning to acknowledge the link as well.

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D Treaties

The National Disability Insurance Scheme and the CRPD Project

Partner Organisation:
- Brian Du Bois, Administrative Appeals Tribunal (Melbourne Registry)
The National Disability Insurance Scheme and the *Convention on the Rights of Persons with Disabilities*

Abstract

The NDIS reflects a fundamental paradigm shift in the perception and treatment of persons with disabilities in Australia and gives effect to the United Nations’ Convention on the Rights of Persons with Disabilities (‘CRPD’) and towards a ‘social model of disability’.

The NDIS is administered by the National Disability Insurance Agency (‘NDIA’). The Administrative Appeals Tribunal (‘AAT’) has jurisdiction to hear appeals of certain NDIA decisions made under the NDIS Act. Since 2013, the AAT has reviewed decisions concerning the access criteria for becoming a participant of the NDIS and the definition of ‘reasonable and necessary supports’, amongst others.

This paper was prepared for the AAT Members to assist their decision-making process in undertaking NDIS merits review by providing guidance on how to best interpret and apply the NDIS legislative scheme consistently with the CRPD. The authors contend that a purposive interpretation of the NDIS legislative scheme is critical to achieve its underlying purpose, to fundamentally change the treatment and perception of disability in Australia.

The research paper proceeds in three parts:

Part 1 focuses on the link between domestic legislation and international instruments. It explores the incorporation of the CRPD into Australian domestic law via the NDIS Act, as well as the social model of disability underlying both the CRPD and the NDIS.

Parts 2 and 3 identify two areas – early intervention and social inclusion, respectively – in which a purposive interpretation of the NDIS Legislative Scheme would be most appropriately applied. By drawing on analyses of recent AAT decisions in the NDIS jurisdiction, these Parts highlight the importance of applying a purposive interpretation of the NDIS legislative scheme, and provide tangible recommendations on how best to do so.
I INTRODUCTION AND AIMS

The National Disability Insurance Scheme (‘NDIS’) has been described as ‘a new way of funding individualised support for people with disability that involves more choice and control and a lifetime approach to a person’s support needs’. It sought to address an existing system of disability support and care that was ‘underfunded, unfair, fragmented and inefficient’. The NDIS was enacted in 2013 via the National Disability Insurance Scheme Act 2013 (Cth) (‘NDIS Act’).

The NDIS reflects the fundamental paradigm shift embodied by the United Nations Convention on the Rights of Persons with Disabilities (‘CRPD’). Indeed, a primary object of the NDIS Act is to ‘give effect to Australia’s obligations under the [CRPD]’.

The CRPD effected a move away from the medical model of disability towards a social model of disability. The medical model views persons with disabilities as victims of their conditions or objects of charity. It promotes the idea of medical treatment as necessary to cure or to normalise persons with disabilities. In contrast, the social model empowers them as citizens and individuals and recognises that disability is caused by societal barriers interacting negatively with an individual’s impairment(s). Under this model, disability is seen as the societal failure or inability to accommodate a person’s physical, sensory, mental or other bodily impairment.

Practically, the NDIS is administered by the National Disability Insurance Agency (‘NDIA’). The Administrative Appeals Tribunal (‘Tribunal’) has jurisdiction to hear appeals of certain NDIA decisions made under the NDIS Act. Supplementary Rules have been made by the Minister to aid interpretation of the NDIS Act, such as the National Disability Insurance Scheme (Becoming a participant) Rules, and the National Disability Insurance Scheme (Supports for participants) Rules. Collectively, the NDIS Act and associated Rules are referred to as the ‘NDIS Legislative Scheme’.

Since 2013, the Tribunal has received several applications for review of NDIA decisions. To date, it has considered the access criteria for becoming a participant of the NDIS, the definition of ‘reasonable and necessary supports’, and the appropriateness of funding particular supports through the NDIS.

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390 National Disability Insurance Scheme Act 2013 (Cth), s 3(1)(a) (‘NDIS Act’).
392 NDIS Act, s 103.
393 Ibid s 209(1).
394 National Disability Insurance Scheme (Becoming a participant) Rules 2013 (Cth) (‘Participant Rules’).
395 National Disability Insurance Scheme (Supports for participants) Rules 2013 (Cth) (‘Supports Rules’).
This paper seeks to assist the decision-making process of Tribunal Members when undertaking merits review in the NDIS jurisdiction. It provides guidance on how to interpret and apply the NDIS Legislative Scheme consistently with the CRPD. It contends that a purposive interpretation of the NDIS Legislative Scheme is critical to fulfilling its aim of achieving a fundamental paradigm shift in the treatment and perception of disability in Australia. A purposive approach would involve greater recognition of the benefits of early intervention, and a broader understanding of barriers to social inclusion and participation, than is currently being adopted by the Tribunal.

Part II focuses on the link between domestic legislation and international instruments. It explores the incorporation of the CRPD into Australian domestic law via the NDIS Act, as well as the social model of disability underlyng both the CRPD and the NDIS.

Parts III and IV identify two areas in which a purposive interpretation of the NDIS Legislative Scheme would be most usefully applied. Part III focuses on early intervention in the NDIS, and Part IV focuses on social inclusion in the NDIS. By drawing on analyses of recent Tribunal decisions in the NDIS jurisdiction, these Parts seek to highlight the importance of applying a purposive interpretation of the NDIS Legislative Scheme and to provide tangible recommendations on how best to do so.

We sincerely hope this paper is of some assistance in future Tribunal decisions.
Thank you for your consideration.

Sincerely,

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II THE NDIS AND THE CRPD

A Overview
The Administrative Appeals Tribunal has been granted jurisdiction to review reviewable administrative decisions under section 103 of the NDIS Act. In reviewing a decision, a Member is invited to substitute or uphold the decision appealed against to reach the correct or preferable decision. In Australia, legislation is to be construed in a manner which promotes its purpose under section 15AB of the Acts Interpretation Act 1901 (Cth). The NDIS’s first objective is to give effect to the CRPD in section 3 of the NDIS Act. The interpretive principles which apply to statute that give effect to Australia’s human rights treaty obligations can also assist a purposive approach to the NDIS Act in reaching the correct or preferable decision.

The correct or preferable decision is that which gives effect to the text of the Act and its purpose. However, in order to do so, it is necessary to consider both the purpose of the NDIS Act and its place in the broader context of disability reform in Australia. Domestic jurisprudence on the interpretation of statute shows that legislation like the NDIS Act, which gives effect to treaty obligations, should be in accordance with human rights treaty obligations, to the extent permissible by the language of the statute.

B Main Questions
Part II will address the following questions:

1. What is the correct or preferable decision?
2. What is the purpose of the NDIS Act and how should it be applied in interpretation?
3. Where does the NDIS and CRPD fit into the disability reform context in Australia?
4. What is the CRPD?
5. What does the paradigm shift from the medical model to the social model mean?
6. To what extent has the NDIS Act incorporated the CRPD?
7. What are the interpretive principles for Acts which give effect to human rights treaty obligations like the NDIS?
8. What extrinsic materials can be referred to in this interpretive process?
9. What role should the CRPD play in Tribunal decision-making on the NDIS?

C Reaching the Correct or Preferable Decision and the NDIS
The following questions are proposed to approach the process of reaching the correct or preferable decision in NDIS cases at the Tribunal. These are based on the questions identified in Re Becker and Minister for Immigration and Ethnic Affairs to be applied when reviewing an administrative decision. It provides a useful framework for application of the interpretive principles detailed later in Part II that can assist Members in reviewing a decision under the NDIS Act:

399 NDIS Act, ss 100, 103.
Was it the case that the decision-maker could make that decision or reach that outcome under the *NDIS Act* and the relevant section?

If the NDIA had a policy which governed or affected the exercise of the decision-maker’s power, is that policy consistent with the *NDIS Act*?

If the NDIA has such a policy, is there any reason why the Tribunal ought not to apply that policy either generally or in this particular case?

Finally, on the facts and with regard to any policy considerations which ought to be applied, is the decision the correct or preferable decision?

Policy or rules cannot alter a legislative power or the manner or basis for its exercise and subsection 6(2)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), provide that while decision-makers can take policy into account, decisions may not be made according to a policy or rule without regard to the merits of the particular case and furthermore, policy should be consistent with the Act itself.

These principles highlight that policy should not be applied inflexibly and decisions should be on the merits of the individual case and also be in accordance with the purpose of the Act. This is particularly pertinent in NDIS decision-making due to the individualisation of participant plans, the diversity of participants and variations in the lived experience of disability, even among those with the same diagnosis. Such a focus on the individual promotes the purpose of the Act in giving effect to the *CRPD* and its general principles in Article 3 as well as the other objects under section 3(1) and the general principles of the *NDIS Act* in section 4.

**D Objects of the NDIS Act and the CRPD**

Subsection 3(1) of the *NDIS Act* outlines the objects of the NDIS. These are:

a. To give effect to Australia’s obligations under the Convention of the Rights of Persons with Disabilities;

b. To provide for the NDIS;

c. To support the independence and the social and economic participation of people with disabilities;

d. To provide reasonable and necessary supports, including early intervention, for participants in the NDIS;

e. To enable those with a disability to exercise free choice and control in the pursuit of their goals and the planning and delivery of their supports;

f. For the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability;

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g. For the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the mainstream community;

h. To raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability; and

i. To give effect to Australia’s obligations under the International Covenant on Civil and Political Rights [ICCPR],\(^\text{403}\) the International Covenant on Economic, Social and Cultural Rights [ICESCR],\(^\text{404}\) the Convention on the Rights of the Child [CRC],\(^\text{405}\) the Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW]\(^\text{406}\) and the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD].\(^\text{407}\)

Under subsection 3(2), the objects are to be achieved through adopting an insurance based approach, informed by actuarial analysis, to the provision of funding of supports. In giving effect to the objects of the Act, regard is to be had under subsection 3(3) to:

a. The progressive implementation of the NDIS;

b. The need to ensure the financial stability of the NDIS;

c. The broad context of disability reform provided for in the National Disability Strategy 2010-2020 and the Carer Recognition Act 2010; and

d. The provision of services by other agencies, Departments or organisations and the need for interaction between the provision of mainstream services and the provision of supports under the NDIS.

In Australia, the mandated approach to legislative interpretation is the purposive approach provided for in subsection 15AA(1) of the Acts Interpretation Act 1901 (Cth).\(^\text{408}\) This requires that ‘the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is clearly stated in the Act) is to be preferred.’ Courts can look for the meaning of provisions of an Act by reference to the objects or preamble of an Act.\(^\text{409}\)

Justice Crennan, former Justice of the High Court of Australia, has explained that ‘the purposive approach requires an answer to the question: ‘What does the language of the statute mean having regard to the purpose or ‘mischief’ to which the statute was directed?’\(^\text{410}\) This mischief was identified in the Productivity Commission Inquiry Report, Disability Care and

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\(^{407}\) New York on 21 December 1965 ((1975) ATS 40).

\(^{408}\) Michael Kirby, ‘Statutory Interpretation: The meaning of meaning’ (Symposium on Statutory Interpretation, RMIT University Melbourne, 13 August 2009) [3].

\(^{409}\) Newcastle City Council v GIO General Ltd, (1997) 191 CLR 85, [93].

\(^{410}\) Susan Crennan, ‘Statutes and the Contemporary Search for Meaning’ (Statute Law Society Paper, London, 1 February 2010).
Support, as being a prior model of disability care and support that was ‘inequitable, underfunded, fragmented and inefficient and [gave] people with a disability little choice’. 411

Context is an important consideration when giving proper meaning to the text and structure of legislation. 412 It should be considered in the first instance and not only where ambiguity arises. Furthermore, context is broadly defined to encompass the existing state of the law as well as the mischief that the statute was intended to remedy. 413 In order to determine this, consideration must be given to the reform context in which the NDIS arose.

E The Disability Reform Context in Australia

1 Reform background

The first objective of the NDIS Act in s 3(1)(a) is to give effect to Australia’s obligations under the CRPD, as the first legally binding international human rights treaty concerning persons with disabilities. This arises because the NDIS is an outcome of the international and domestic movement towards recognising persons with disabilities as citizens and holders of rights, rather than objects of charity or pity.

The NDIS finds its source in the disability reform context in Australia that originated in the CRPD:

   1. The CRPD was adopted by the UN General Assembly on 13 December 2006.
   2. Australia was among the first signatories on the 30 March 2007.
   3. Australia ratified the CRPD in July 2008.
   5. The Shut Out Report: The Experience of People with Disabilities and their Families in Australia was released in 2009.
   8. The NDIS Bill was first introduced into Parliament in 2012 and received assent in March 2013.
   9. The NDIS Act 2013 came into effect in July 2013 and is being incrementally implemented across Australia.

In implementing the objects of the NDIS Act, the broader context of disability reform – as provided for in the Strategy and the Carer Recognition Act 2010 – must be considered. 414 This further demonstrates the importance of recognising the principles that drove the movement and of ensuring a consistent national approach that gives effect to the legislative purpose.

411 Productivity Commission, above n 388, 2.
414 NDIS Act, s 3(3)(c).
2 The National Disability Strategy 2010-2020

The National Disability Strategy, which is to be considered in the implementation of the Objects of the NDIS Act per section 3(3), states that the then prospective NDIS, with a focus on early intervention and long term care, would be an important contribution to the Strategy’s reform goals. One of the purposes of the Strategy is to ‘help ensure that the principles underpinning the CRPD are incorporated into policies and programs affecting people with disability, their family and carers’.

Moreover, its six key policy areas are aligned with the CRPD, and it has adopted the principles contained in Article 3 of the CRPD. These include:

- respect for inherent dignity;
- individual autonomy including the freedom to make one’s own choices and independence of persons;
- non-discrimination;
- full and effective participation and inclusion in society;
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- accessibility;
- equality between men and women;
- respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

3 Productivity Commission Inquiry Report: Disability Care and Support 2011

The 2011 Productivity Commission Inquiry Report, Disability Care and Support, which recommended the NDIS, found that disability support in Australia was ‘inequitable, underfunded, fragmented and inefficient and gives people with a disability little choice’. The report stated that major reform was needed and it recommended the NDIS as an appropriate vehicle for managing community supports, rather than the previous, ‘ill-suited’ clinical orientation which prescribed to a medical model of care.

F What is the CRPD?

Australia was a leader and active participant in the development of the CRPD and contributed greatly to the text of the Convention itself. The CRPD is not the first human rights instrument that deals with issues around disability discrimination, disadvantage and practical equality; but it is the first binding one. The CRPD arose from a broader reconceptualisation of disability discrimination, disadvantage and practical equality.
and recognition of the need for a legally binding agreement that obliges States to guarantee fundamental rights to persons with disabilities. These rights are not new, but are instead sourced from existing international treaties and human rights obligations, including:

- Universal Declaration of Human Rights;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;

The CRPD consolidated and clarified the application of those rights to people with disabilities. Specifically, it seeks ‘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’.422

G Medical Model vs Social Model of Disability

The CRPD represents a paradigm shift in the international disability rights movement. It reflects a move away from viewing persons with disabilities as victims of their conditions or objects of charity, to a focus on empowering them as citizens and holders of rights. This rationale fundamentally underpins the CRPD and was a key impetus behind the establishment of the NDIS to focus on individualized plans and participant participation in their community supports.423

The CRPD rejects the medical model of disability in favour of a social model of disability. The medical model of disability views a person’s body as the source of disability. It identifies disability via a narrow inquiry into the limitations – whether physical, sensory, mental or intellectual – of the particular person. It emphasises difference and alienates people with disabilities from the wider community, as well as promoting the focus of medical treatment for the purpose of ‘normalising’ people with disabilities.424 In contrast, under a social model of disability, a person’s impairment is viewed as an aspect of human diversity and that disability results where a person with impairments faces socially constructed attitudinal and environmental barriers.425

For instance, a person’s paraplegia is an impairment, but their disability results from a building’s lack of ramps. This model promotes the independence and choice of the individual and attention to their wants and particular needs to support their full and inclusive participation in society rather than focusing on clinical outcomes above all else. This shift is reflected in the recent Tribunal decision of McCutcheon v National Disability Insurance Agency,426 where effective and beneficial treatment was considered in light of the lived experience of the individual. While it did not clinically ‘treat’ or improve the applicant’s condition, chiropractic treatment managed her pain and maintained her mobility and general functioning. The NDIA’s reliance on literature review examining the effectiveness of chiropractic treatment in cases of

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422 CRPD, art 1.
423 Ibid.
425 CRPD, art 1.
chronic back pain generally as the basis for refusing to consider it ever as a ‘reasonable and necessary support’ was a rigid application of policy which failed to consider the individual and reflected a medical model approach to disability.

H Interpreting Acts which incorporate treaties

The CRPD is incorporated via s 3 of the NDIS Act, which lists the statute’s objects. Section 15AB(2)(d) of the Acts Interpretation Act 1901 (Cth) expressly permits the consideration of and reference to treaties or international agreements mentioned in an Act, when interpreting it. Where domestic legislation incorporates obligations from international treaties, either in whole or in part, the following principles have been held to apply:

- there is a presumption that legislation complies with, and is to be administered according to, Australia’s international obligations;\(^{427}\)
- fundamental rights are not to be interpreted to be abrogated or curtailed unless there is clearly manifested intention and language that the legislature directed its attention to the rights or freedoms in question and decided to so limit them;\(^{428}\)
- exemptions or restrictions of rights must be narrowly interpreted;\(^{429}\)
- where the provision of a treaty is transposed into the statute, the language of the statute shall have the same meaning as in the treaty;\(^{430}\)
- primacy should be given to the text of a treaty with consideration to its context, objects and purpose;\(^{431}\)
- in determining the meaning of a provision in the treaty, the court may apply the international rules for treaty interpretation, namely articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties;\(^{432}\)
- the court may seek assistance from the jurisprudence of specialist international courts, tribunals and specialist UN Committees;\(^{433}\) and
- where statute is intended to give effect to an international human rights treaty, the statutory provisions should be beneficially construed.\(^{434}\)

While Australia is the only western democracy without a bill of rights, human rights charter or directives, there is a common law interpretative principle that is protective of rights and freedoms against statutory incursion which operates to presume that an Act, in so far as


\(^{429}\) X v Commonwealth (1999) 200 CLR 177, 223 (Kirby J).

\(^{430}\) Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 230–1 (Brennan CJ).

\(^{431}\) Pilkington (Australia) Ltd v Minister of State for Justice & Customs (2002) 127 FCR 92, 100 [26] (Mansfield, Conti and Allsop JJ).

\(^{432}\) Entry into force for Australia and generally on 27 January 1980. See also Minister for Foreign Affairs and Trade v Magno (1992) 37 FCR 298, 303–5 (Gummow J).

\(^{433}\) AB v Registrar of Births, Deaths and Marriages [2007] FCAFC 140, [14], [16] (Black CJ), [66] (Kenny J with Black CJ and Gyles J agreeing).

\(^{434}\) JW v City of Perth (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J), 22–3 (Gaudron J), 27 (Toohey J), 39, 41–2 (Gummow J), 58 (Kirby J). See also Acts Interpretation Act 1901 (Cth), s 15AA.
possible, is meant to be interpreted in compliance with human rights. Where a law is uncertain, it should be approached in such a way as to ensure that it does not breach our international legal obligations so long as it is not inconsistent with the statute nor creates new rights. The CRPD is both incorporated into domestic law and the Act and it is premised on universal fundamental human rights principles that form part of Australian law already.

As there is express provision in the Acts Interpretation Act for consideration and reference to treaties or international agreements mentioned in an Act when interpreting it decision-makers can consider the CRPD as well as the ICCPR, ICESCR, CRC, CEDAW, ICERD. The CRPD should be referred to when considering cases brought under the NDIS Act to ensure that the Act is being interpreted so as to give effect to the CRPD according to the legislative intent expressed in the first substantive section and objectives of the Act.

1 Is there an obligation to consider the CRPD and be familiar with its principles?

The Strategy highlights that access to justice requires greater awareness by the judiciary, legal professionals and court staff of disability issues, and failure to consider the CRPD may be grounds for appeal. In the decision in Teoh, the CRC was not given due consideration in a decision that affected children and resulted in a want of procedural fairness. In that instance the Convention was not part of domestic law but when considering the status of the convention in Australian law, Chief Justice Mason and Justice Deane found that:

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention ... at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.

The court further found that ‘there are strong reasons for rejecting a narrow conception of ambiguity’ because not only is it excepted that statute is to be interpreted and applied as much as the language permits in conformity with international law it would be inconsistent to not require such construction and so:

If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more

435 See e.g. Potter v Minehan (1908) 7 CLR 277; Bropho v Western Australia (1990) 171 CLR 1, 15; Coco v The Queen (1974) 179 CLR 427, 437; Human Rights Act 1988 (UK), 3(1): ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights’. See A. Lester, D. Pannick and J. Herbert (Gen. Eds), Human Rights Law and Practice (3rd ed, LexisNexis, 2009), 42 [par.2.3.1]. See also Human Rights Act 2004 (ACT), s30; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 32(1).
438 Acts Interpretation Act 1901 (Cth), s 2(d).
than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.\textsuperscript{440}

The CRC was only ratified in \textit{Teoh}, not incorporated into law that affected the relevant decision. The discussion in later case \textit{Minister for Immigration and Ethnic Affairs; Ex parte Lam},\textsuperscript{441} expressed skepticism (but did not overrule \textit{Teoh}) because they considered ratification insufficient to constitute a positive statement but the specific reasoning relied on the separation of power evidenced in the constitution. The distinction between a ratified treaty which was undertaken by the executive and the implementation of treaties in Australian law by the legislature does not apply to the \textit{CRPD} and the NDIS as it was incorporated into the \textit{NDIS Act} by the legislature after ratification. \textit{The implementation of treaties by legislation is the way that the rights, benefits and obligations set out in treaties to which Australia is a party are conferred or imposed on individuals in Australian law.}\textsuperscript{442}

As the \textit{CRPD} is validly incorporated into the \textit{NDIS Act} itself\textsuperscript{443} it may raise a legitimate expectation that failing to consider the \textit{CRPD} in NDIS decisions constitutes a lack of procedural fairness, or even that there is a requirement to consider the \textit{CRPD}. Other policy issues given for the \textit{Administrative Decisions (Effect of International Instruments) Bill 1995} (Cth) was the perceived administrative difficulty but this would not be the case here because the relevant treaties, with the \textit{CRPD} given particular prevalence, are referred to in the \textit{NDIS Act}.

Moreover, there are higher burdens placed upon decision-makers under subsection 28(c) of the \textit{Australian Postal Corporation Act 1989} (Cth), section 7 of the \textit{Australian Maritime Safety Authority Act 1990} (Cth) and subsection 160(d) of the \textit{Broadcasting Services Act 1992} (Cth) which require performance of functions in accordance with Australia’s international obligations.\textsuperscript{444} Section 4 of the \textit{NDIS Act} also requires actions under the act follow certain principles, which align with Article 3 of the \textit{CRPD} according to extrinsic materials (see below). This obligation is lower than that imposed on these other decision-makers as it is the \textit{CRPD} as incorporated in the NDIS and not general treaty obligations, but it demonstrates the same general requirement to consider the relevant treaty obligation in actions and decisions by administrative decision-makers.

\section{Reliance on Extrinsic Materials}

According to section 15AB(1) of the \textit{Acts Interpretation Act 1901} (Cth), it is permissible to make use of any extrinsic material to interpret an Act for confirmation of the meaning of a

\textsuperscript{440} \textit{Minister for Immigration and Ethnic Affairs v Teoh} (1995) 183 CLR 273, 287 (Mason CJ and Deane J)

\textsuperscript{441} (2003) 214 CLR 1.

\textsuperscript{442} \textit{Minister for Foreign Affairs, Senator Gareth Evans and the Attorney-General, Michael Lavarch, International Treaties and the High Court Decision in Teoh}, (Joint Statement, 10 May 1995). A statement in similar terms was released by the Attorney-General of South Australia on 8 June 1995.

\textsuperscript{443} See other cases where treaties and other international law obligations have been found to be incorporated by an Act: \textit{Minister for Immigration and Ethnic Affairs v Wu Shan Liang} (1996) 185 CLR 259; \textit{De L v Director-General, NSW Department of Community Services} (1996) 187 CLR 640; \textit{Qantas Airways Ltd v Christie} [1997] 2 Leg Rep SL 5a; \textit{Project Blue Sky Inc and Ors v Australian Broadcasting Authority} [1997] 7 Leg Rep SL 2a.

\textsuperscript{444} Susan Roberts, ‘\textit{Teoh v Minister For Immigration: The High Court Decision and the Government's Reaction to it}’ (1995) 2 AJHR 135.
provision by taking into account its context and purpose, and to determine the meaning where it is ambiguous or obscure and when the ordinary meaning results in a manifestly absurd or unreasonable outcome. There is express permission to consider the explanatory memorandum relating to the Bill as well as any other relevant document laid before or furnished to the members by a Minister before the provision was enacted. Generally, when determining if consideration should be given to any material, or its weight, regard shall be had, in addition to other relevant matters, to the desirability of persons being able to rely on the ordinary meaning conveyed by the text taking into account its context in the Act and purpose or object underlying the act and the need to avoid prolonging legal or other proceedings.

1 Statement of Compatibility with Human Rights

The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) introduced the requirement of a statement of compatibility with human rights for all new legislation. Specifically, a statement of compatibility is to be prepared and presented in respect of each Bill introduced into a house of parliament to inform parliamentary debate and scrutiny. The Act provides that statements of compatibility are not binding on any court or tribunal, allowing the decision-maker to come to other conclusions if appropriate. However, the explanatory memorandum provides that it does not preclude the operation of s 15AB of the Acts Interpretation Act 1901 (Cth) and so Members can consider the statement of compatibility as they would any other relevant extrinsic material laid before, or presented to, the members of Parliament by a Minister prior to the legislation’s enactment.

The NDIS Act’s statement of compatibility with human rights explicitly highlights that the ‘placement of the CRPD as the first of a number of objectives in the Bill is designed to promote the status of the CRPD and emphasise its critical nature in the interpretation of the legislation.’ It also further demonstrates the legislative intention to incorporate the CRPD into Australian domestic law. In particular, the statement of compatibility directs attention to several key, relevant articles: namely articles 3, 4, 5, 7, 8, 12, 13, 19, 20, 21, 22, 23, 26, 28, 30 and 31 as being rights engaged by the NDIS Act. Furthermore, it states that the NDIS Act’s general principles in section 4, which require anyone exercising power or performing functions under the Act to do so according to those principles, also align closely with Article 3 of the CRPD.

The statement of compatibility highlights the need for a consistent approach in the context of disability reform in order to achieve ‘an integrated, effective and systematic way of delivering the NDIS in accordance with established human rights frameworks laid out in the CRPD’. This demonstrates further how important it is to apply an approach which considers the contextual origins of the NDIS in the CRPD and the requirement to implement it according to the established human rights framework it operates within.

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445 Acts Interpretation Act 1901 (Cth), s 15AB(1).
446 Ibid, s 15AB(2)(e).
447 Ibid, s 3.
448 [5].
449 [5-6].
2 Concluding Observations on the Initial Report of Australia from the UN Committee for the CRPD

In interpreting provisions or treaties that engage Australia’s international obligations, consideration of the jurisprudence of specialist international courts, tribunals and specialist UN Committees is permissible. The UN Committee for the CRPD is the specialist UN Committee which is empowered to monitor the implementation of the CRPD and all State parties are obliged to submit regular reports to the committee on how the Convention rights are being implemented.

In September 2013, Australia was reviewed in the 10th session of the Committee of the CRPD and in the concluding observations the Committee congratulated Australia on the introduction of the new national disability scheme, DisabilityCare Australia (which is now the NDIS). However, it also recommended that Australia withdraw its declarations regarding the CRPD and made other comments on the status of disabled persons in Australia and practical compliance with the CRPD. It found Australia was not realising many rights recognised in the CRPD and identified ways which this could be remedied.

The Australian Law Reform Inquiry, Equality, Capacity and Disability in Commonwealth Laws, responded to these recommendations by identifying ways that Australia could refine its practice and laws to ‘maintain its leadership in championing and implementing reforms for persons with disability’ with regard to the CRPD and international law and frameworks. The National Decision-making Principles that resulted were in favour of supported decision-making, rather than substitute decision-making, in line with the paradigm shift signaled by the CRPD. The report provides the basis for a significant amount of reform that has occurred since. It is a good reference to identify Australian practices which are not consistent with the CRPD, as well as to determine what ‘mischief’ was targeted by each reform.

3 General Comments from the UN Committee for the CRPD

In interpreting the NDIS Act, the Tribunal may inform its decision by referring to general comments from the CRPD Committee on the operation of any articles of the CRPD that are relevant to the case in question. The CRPD Committee has published two General Comments that discuss Article 12 (equal recognition before the law) and Article 9

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450 AB v Registrar of Births, Deaths and Marriages [2007] FCAFC 140, [14], [16] (Black CJ), [66] (Kenny J with Black CJ and Gyles J agreeing).
457 Maloney v The Queen, B57/2012, 23 November 2012, 10; AB v Registrar of Births, Deaths and Marriages [2007] FCFCA 140, [14]-[16]; Acts Interpretation Act 1901 (Cth), ss 1, 3.
458 See: http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx
(accessibility). A further General Comment on Article 6 (women with disabilities) is currently being drafted.

The first General Comment made by the Committee for the CRPD on equal recognition before the law stated that ‘equality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights’.

The draft General Comment on Article 6 will be particularly relevant, once adopted, for Australia given the outcome of Australia’s initial report in 2013. This report urged Australia to more comprehensively consider women with disabilities in public programmes and in access to effective, integrated response systems to family, domestic and institutional violence. In these contexts, disabled women are disproportionately affected. Recognition of these issues for all women has led to the Australian Government announcing a Women’s safety package to Stop the Violence. NDIS practices and decision-making should be in line with this focus.

Recognition and respect of the desire for independence and a sensitive approach to ensure those that have, or are vulnerable to, experiencing violence or abuse can be empowered by the NDIS and not forced into reliance or a subordinate position to their family or partner as the only possible place and providers of care. This is vital for the realisation of their rights and the aims of the Stop the Violence campaign and to do otherwise could constitute institutional violence that perpetuates a cycle of dependency and enables exploitation of women with disabilities which undermines the aims of the NDIS and the CRPD.

4 Jurisprudence from the UN Committee for the CRPD

The Optional Protocol, to which Australia is a signatory, gives the Committee competence to examine individual complaints regarding alleged violations by State parties. There is jurisprudence on the CRPD available to guide interpretation of the articles and what they require in a factual context from the Committee. The Committee does not have the jurisdiction to overturn a domestic judgment or decision, but it can conclude if the circumstances of the case reveal a breach of the CRPD. One such case, H.M. v Sweden, involved the failure of Sweden’s administrative bodies and courts to take into account a woman’s rights to equal opportunity for rehabilitation and improved health. It was found that the principle of proportionality had not been applied in considering reasonable accommodation or the particular benefit to the individual when making that administrative decision.

460 See http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx
462 UN Committee on the Rights of Persons with Disabilities, General Comment No. 1: Equal Recognition before the Law
463 UN Committee on the Rights of Persons with Disabilities, Draft General comment on Article 6: Women with disabilities, CRPD/C/14/R.1
466 See http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx
467 CRPD/C/7/D/3/2011.
It highlighted that discrimination on the basis of disability in Article 2 means 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 field. Neutral application of the law without consideration to the circumstances of the individuals to which it is applied may have discriminatory effect and can violate the rights enshrined under the CRPD when States, without objective and reasonable justification, have failed to treat differently persons whose situations are significantly different or have failed to address the individual’s particular disability related needs.

The outcome was that the Committee found that there had been a violation of the claimant’s rights under the CRPD and that they were due compensation and reconsideration of their application. Moreover, the Committee found that the State is under an obligation to ensure that the manner in which the legislation is applied by domestic courts is consistent with their obligations under the CRPD to ensure that the legislation did not have the effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with disabilities on an equal basis with others in practice. In this instance the relevant law did provide for departures from strict application of the restrictions and so the original decision-maker came to a disproportionate conclusion which violated rights protected by the CRPD.

J  Key Findings
1. A purposive approach in reaching the correct or preferable decision would give effect to the text of the NDIS Act by applying the principles that underline the NDIS and the context it was formed and operates in. The CRPD as the source of many of its rights and principles as per legislative intention expressed in the Act and extrinsic materials.

2. What is the purpose of the NDIS Act is, among others, to give effect to the CRPD in the delivery of community supports for persons with a disability.

3. The NDIS is an outcome of the international disability rights movement and the disability reform context that began with the ratification of the CRPD. The NDIS operates in the broader disability reform context in Australia which is aligned with the CRPD principles.

4. The CRPD is the first legally binding human rights treaty that deals with the human rights of persons with disabilities. The CRPD consolidated and clarified the application of existing universal human rights to people with disabilities.

5. The CRPD represents a paradigm shift in the conception of disability to the interaction between a person and barriers rather than arising from the individual and recognises those with disabilities as holders of rights rather than objects of charity or pity.

6. The NDIS gives effect to the CRPD as it applies in Australia and has lifted language and ideas from the text. Extrinsic documents demonstrate that the CRPD was intended to be a
critical tool for interpreting the *NDIS Act* and there may be a procedural fairness requirement to consider the rights in the *CRPD* when making decisions under the NDIS.

7. Presumption that our laws are to be in compliance with and administered according to, Australia’s human rights treaty obligations and unless there is an express abrogation or curtailment of those rights specifically and interpretation of such restriction is to be narrowly construed. This is according to the principle of legality, approved by the HCA that ensures that fundamental rights cannot be overridden by general language or ambiguity. Parliament must identify what rights and how they are limited with specificity: it did with the declaration that permitted substituted decision-making where such arrangements are necessary, as a last resort and subject to safeguards.

8. Extrinsic materials: the explanatory memorandum, the statement of compatibility with human rights, material produced by specialist UN Committees, treaties referred to in the Act and other documents that are deemed relevant.

9. The *CRPD*’s principles are incorporated into the *NDIS Act* and so the *CRPD* can assist in the interpretation of the *NDIS Act*. 
A Why Focus on Early Intervention?

The CRPD articulates the human right to early intervention for children with disabilities. This right is significant because early intervention is increasingly recognised as being beneficial for the developmental, health and support needs of children with disabilities. Early intervention is a system of services that gives specialised support to children with a disability or developmental delay, and their families, in order to promote development, well being and community participation.  

As such, the CRPD recognises that the identity of a child with a disability is not to be defined through medical diagnosis alone, but looks to the provision of specialist intervention and support services to enable children to reach their full potential and participate in an inclusive society. Moreover, focusing on the right to development in the early years reflects the importance of ensuring a life of quality for children with disabilities and their families.

Early intervention features strongly in the NDIS Act, and although the term itself is not defined, accessing early intervention requires that certain criteria be satisfied (as discussed below). Parliament specifically intended its inclusion in the Act, with the second reading speech referring to the NDIS as a ‘move away from the crisis model, where families only receive support if they are unable to continue in their caring role’ and the aim of early intervention to ‘improve a person’s functioning, or slow or prevent the progression of their disability over their lifetime’.  

This section of the brief focuses on references to early intervention in both the CRPD and the NDIS Act, and discusses the key principle of ‘current good practice’ in the Act and its role in determining whether the early provision of a support is ‘reasonable and necessary’. This is examined in light of the requirement to have regard to ‘expert opinion’, and the discretion to include ‘lived experience’ in considering evidence, whilst still giving effect to the aims and objectives of the social model of disability contained in the CRPD.

Certain aspects of recent decisions by the Tribunal reflect a propensity to adopt the medical model of disability in the interpretation of current good practice concerning early intervention. These cases will be discussed, and alternative approaches to decision-making considered, with a focus on a purposive interpretation of the NDIS Legislative Scheme and the application of early intervention articles of particular relevance in the CRPD.

B References to Early Intervention in the CRPD

The CRPD contains rights that are relevant to the provision of early intervention and provides a framework for States parties to the CRPD to develop and expand early intervention programs to benefit children and their families.

469 Commonwealth, Parliamentary Debates, House of Representatives, 29 November 2012, 13877 (Julia Gillard, Prime Minister).
470 Supports Rules, rr 3.2, 3.3.
Although there is no definition of ‘early intervention’ in the CRPD, elements of the Preamble give some guidance, recognising ‘the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support’, 471 and that ‘children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children’. 472 This lack of strict definitions or criteria in the CRPD ensures broad protection to children who require specialist interventions.

The following articles in the CRPD have particular relevance for children with disabilities and their right to access early intervention:

<table>
<thead>
<tr>
<th>Convention on the Rights of Persons with Disabilities</th>
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<tbody>
<tr>
<td><strong>Article 25: Health</strong></td>
</tr>
<tr>
<td>States Parties are to ‘provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children…’</td>
</tr>
<tr>
<td><strong>Article 26: Habilitation and rehabilitation</strong></td>
</tr>
<tr>
<td>States Parties are obligated to ‘enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life’. Article 26(1)b specifies that these services ‘begin at the earliest possible stage, and are based on the multidisciplinary assessment of individuals needs and strengths’</td>
</tr>
<tr>
<td><strong>Article 3: General Principles</strong></td>
</tr>
<tr>
<td>One of the general principles of the Convention shall be ‘respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities’</td>
</tr>
<tr>
<td><strong>Article 7: Children with disabilities</strong></td>
</tr>
<tr>
<td>Articulates the guiding principle that ‘in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration’</td>
</tr>
</tbody>
</table>

C References to Early Intervention in the NDIS Act

In order to become a participant in the NDIS, a person must meet the access criteria in s 21(1) of the NDIS Act. Early intervention is first referenced in sections 3 and 4 and draws attention to the objects and guiding principles of the Act to provide early intervention supports to people with disability. Section 25 specifies the early intervention requirements for a (child) participant, whilst section 34 sets out criteria that address the question of what general supports will be provided and the ‘reasonable and necessary supports’ that will be funded.

As such, the framework for early intervention in the NDIS Act broadly provides that:

People with disability should be supported through ‘early intervention’ (ss 3, 4, 25) and benefit from the provision of:

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471 CRPD, Preamble (j)
472 Ibid Preamble (r).
‘Reasonable and necessary supports’ (s 34(1)) – provided that the support:

will be, or is likely to be, effective and beneficial, having regard to ‘current good practice’ (s 34(1)(d))

D ‘Current Good Practice’

Even though the criteria in s 34 are cumulative and must therefore all be satisfied, recent cases have shown that it is the consideration of current good practice that is central to the question of whether or not a support will be funded.\textsuperscript{473} The meaning of current good practice is not explained in the \textit{NDIS Act}, however, the \textit{Supports Rules} set out criteria that the Tribunal must apply in deciding whether a support meets s 34(1)(d):

\begin{tabular}{|c|}
\hline
\textbf{National Disability Insurance Scheme (Supports for participants) Rules 2013 (Cth)}
\hline
\textbf{Rule 3.2} \\
\hline
\textit{In deciding whether the support will be, or is likely to be, effective and beneficial for a participant, having regard to current good practice, the CEO is to consider the available evidence of the effectiveness of the support} \\
\hline
\textbf{Rule 3.2(b)}
\hline
\textit{Evidence may include the lived experience of the participant or their carers, but:} \\
\hline
\textbf{Rule 3.3}
\hline
\textit{Evidence must include expert opinion} \\
\hline
\end{tabular}

The \textit{discretion} to include ‘lived experience’ in the analysis of current good practice facilitates the consideration of a participant’s first-hand knowledge and experience, in line with \textit{CRPD} principles and the social model of disability upon which it is based. However, the \textit{obligation} to consider ‘expert opinion’ suggests a more objective approach to current good practice, in line with the medical model of disability. It may characterise disability as an individual problem with treatment conceived of in terms of medical care, and ‘measure’ early intervention in relation to \textit{prevention and cure}, success of \textit{treatments}, and effectiveness of \textit{outcomes} rather than broadening the enquiry to ask whether a particular support might enhance a child’s capacity to interact with their families and communities.

‘DISCRETION’

Person 
with 
disability
Minimisation
Participation
Accommodation
First-hand 

‘OBLIGATION’

Disability, 
Treatment, 
Therapies
Outcomes
Goals
Results
Prevention

E  ‘Autism Spectrum Disorder’
The Tribunal has recently made some decisions that relate to early intervention for children with Autism Spectrum Disorder (‘ASD’). ASD is characterised by impaired ability to interact socially and regulate behaviour in school, home and community settings, so these decisions that consider a child’s capacity to participate in society are particularly relevant. Due to the prevalence of autism in young children in Australia, and diagnoses rising every year, it is likely that the Tribunal will increasingly be involved in the review of participants’ plans and their need for early intervention supports.
The cases below consider the meaning of current good practice and its correlation to evidence and expert opinion.

F  Case Studies: Recent Tribunal Decisions


This case concerned a three-year-old boy with autism and whether or not the NDIS should fund The Listening Program (‘TLP’); an intensive therapy program whereby music is played at different frequencies which correspond to different areas of brain and body function. Frequencies are able to be adjusted, based on the individual child, and target specific areas such as the vestibular system, speech and language, memory and attention, as well as literacy and receptive language.

In defining current good practice in relation to TLP, the Tribunal considered that:

‘Evidence, even if anecdotal, from a sufficient number of qualified therapies of positive outcomes in sufficient numbers of children may be enough to say that [TLP] should be regarded as current good practice’. 475

Ultimately, the decision not to fund TLP was upheld, and in coming to this conclusion, the Tribunal had regard to evidence and expert opinion that concluded:

- There is no evidence that TLP is effective as a treatment for autism 476
- That evidence from literature reviews demonstrate difficulties in measuring outcomes in autism, because children develop at different rates 477
- That ‘merely collecting anecdotal and testimonial evidence (of TLP) is insufficient to evaluate its beneficial effect on a broad range of functions’ 478

In this way, ‘evidence’ was defined in terms of treatment, measurement of outcomes and evaluation, demonstrating a narrow inquiry into the child’s limitations and using the language of the medical model of disability.


The Tribunal in this case considered whether or not to vary the applicant’s plan so as to provide for an occupational therapy (‘OT’) room at the applicant’s home. As the five-year-old boy had a diagnosis of Asperger’s syndrome and experienced developmental delay in areas of social interaction, an OT room was considered an effective way to minimise ‘meltdowns’ or ‘shutdowns’, and help him to manage his anxiety and moderate arousal levels, thereby minimising fear and increasing his capacity to engage in physical activities with other children in the community.

Additionally, as the child’s family lived in the Adelaide Hills, a forty-five minute drive from Adelaide, the child had to leave school early one day a week in order to arrive at the sessions on time and the mother was concerned about the effects of missing school on an ongoing basis. Having an occupational therapy room at home would therefore reduce the need for the child to miss regular school, as well as travel considerable distance to attend appointments.

476 Ibid [47].
477 Ibid [49].
478 Ibid [52].
In having regard to current good practice, the Tribunal concluded:

“We consider that it is appropriate that we be guided by expert evidence as to best practice in this area, and that it would not be appropriate for us to endorse or approve expenditure on items which expert evidence suggested were unlikely to be effective in achieving their intended aims.”

The decision under review was upheld, and the requested occupational therapy equipment was not included in the applicant’s plan. In deciding that the equipment sought did not meet the criteria in section 34, the Tribunal relied on expert opinion that:

- Sensory integration therapies are not efficacious for children with ASD
- Compared with other children, the assessments suggest that the child is performing in the average to above average range in all areas, therefore the recommendations for a home program seem to be unjustified
- Alternative therapies and approaches, such as cognitive behavioural therapy and star jumps are a more effective way to address self-regulation & behaviours of concern

In deciding against the provision of an OT room, the Tribunal focused on the lack of evidence that sensory integration therapy would improve ‘life stage outcomes’ for the child. In adopting this view, and comparing the child with other children without a disability, the Tribunal demonstrated a qualitative and quantitative approach to decision-making, reflective of the medical model of disability, instead of applying a purposive interpretation to the principle of current good practice.

G Recommendations: An Alternative Approach to Current Good Practice in Light of the CRPD

Articles 3, 7, 25 and 26 in the CRPD are tools that can specifically be used as an aid to the interpretation of current good practice in the context of early intervention. The following section highlights ways in which these articles could have been applied in the reasoning of TKCW and ZNDV.

1 ‘Expert opinion’ – Article 26, CRPD and TKCW (The Listening Program)

As discussed above, expert opinion in TKCW highlighted ‘deficiencies’ or ‘shortcomings’ in the evidence, resulting in the decision not to fund the requested supports. However, the obligation to have regard to expert opinion may nevertheless be approached in a way that treats evidence more broadly. For instance, if the Tribunal were to incorporate a CRPD ‘framework’ into their consideration of research and findings, opinions could be expressed in a way that focuses on the interaction between the child living with impairment and their environment - (the social model), rather than seeking to measure prevention, cure and treatment of the child’s

480 Ibid [77].
481 Ibid [71].
482 Ibid [76].
483 Ibid [89].
impairment (the medical model). In this way, the obligation to consider expert opinion can become an enquiry – lessening the need to focus on ‘outcomes’ and ‘results’, and acknowledging the need to facilitate the child’s participation in society.

For example, in applying Article 26 of the CRPD, Tribunal members can have regard to the key words in bold to guide their reasoning in order to achieve a purposive interpretation of expert opinion:

**ASK** - Is there evidence that the expert has considered the individual needs and strengths of the child, such that that a particular service or programme will enable a child to participate fully in all aspects of life? (Article 26, CRPD)

In deciding not to fund TLP the Tribunal gave considerable weight to the view of a professor and special educator who had worked in autism for thirty years, but had no experience as a TLP practitioner, and was not known to TKCW or his family. Her evidence was that based on a literature review, TLP had ‘not been shown to be more effective than chance in improving outcomes for children with autism’. In other words, any benefits that TLP might hold for an individual child are not to be treated as significant because outcomes must be treated collectively, not considered on an individual basis.

However, an OT expert who had been using TLP for eleven years was consulted by the Tribunal, although her views not given considerable weight. Her evidence was that TLP usually improves articulation and language, therefore increasing the capacity to regulate emotions and interact socially. Had the above question been posed, the answer may have been found in some of the evidence provided by the TLP expert. The Tribunal’s reasoning process could then have addressed the potential of this therapy to enable TKCW to participate more fully in society, thereby ameliorating some of the impaired social functioning that characterises autism.

2 ‘Lived experience’ – Article 25, CRPD and ZNDV (Occupational therapy room at home)

The discretion to recognise a participant’s first-hand knowledge and experience is indicative of the way in which the NDIS Act incorporates the social model of disability. In ZNDV, the mother gave oral evidence that she anticipated using the occupational therapy room for short periods of time during the week when she felt that her child was on the verge of a ‘melt down’ or ‘shut down’ as a result of being anxious or overloaded. In this way, an occupational therapy room would ‘assist the applicant’s progress generally with his physical development and confidence’ and would result in him being ‘more willing to engage in physical activities with other children in the community’.

However, as in TKCW, considerable weight was given to evidence from the expert; a former occupational therapist and autism researcher, not familiar with ZNDV or his family. Having considered assessments of ZNDV provided by his treating occupational therapist, the expert found that ‘the applicant’s fine and gross motor skills were good for his age and he did not
need occupational therapy to develop these’. Further, because an occupational therapy room could only be used at home, it would be of ‘limited benefit’. 488

In deciding not to provide funding for the equipment, the mother’s evidence of lived experience was largely ignored, and the potential benefits to the child of ‘engaging in physical activities with other children in the community’ 489 was overruled by the expert’s opinion that ZNDV was ‘clearly highly intelligent’ and could be better assisted in his development by a psychologist. 490 This approach focused on the child’s ‘intelligence’ and cognitive ability, ignoring the crucial aspect of his impaired social functioning, which was impacting on his ability to fully participate in the community.

Article 25 of the CRPD highlights the way in which Tribunal members could have applied the principle of current good practice more broadly, by considering the lived experience of both the child and the child’s family:

**ASK** - How might the support minimize or prevent further disabilities and what benefits might flow from the early provision of a particular service or programme within the child’s own community? (Article 25, CRPD)

Had the above question been asked, the enquiry would have focused on the potential for the child to self-manage anxiety, develop social skills in a ‘comfortable and familiar place’, 491 and perhaps reduce the need for further supports in the long term.


The obligation to have regard to expert opinion is best expressed when balanced with the discretion to consider lived experience. McCutcheon related to the provision of chiropractic treatment for an adult with spina bifida and scoliosis, and whether this type of support would be considered as reasonable and necessary. Although not an early intervention case, it is included here because it demonstrates a broader approach to current good practice, by acknowledging the relevance of lived experience and its correlation with expert opinion.

The Tribunal expressed the view that lived experience requires a degree of subjectivity and that its consistency (or not) with ‘reliable, relevant and independent evidence’ should inform the decision to fund treatments and determine how much probative value is to be given to the first-hand knowledge of a participant. 492 That is, how much weight lived experience should be given will depend on all of the available evidence. The Tribunal considered the following approach:

1. Where lived experience is **consistent** with ‘reliable, relevant and independent evidence’, it will likely be given a good deal of weight

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488 Ibid [78].
489 Ibid.
490 Ibid [76].
491 Ibid [52].
2. Where lived experience is at odds with other evidence, it may be given less weight
3. Where reliable, relevant, independence evidence is lacking, evidence of lived
   experience may be particularly important.493

Viewing lived experience in this way establishes an approach to the interpretation of evidence
that is consistent with the social model of disability, as it takes into account the participant’s
own experience and understanding of their condition and acknowledges the limited role that
literature review can play in determining the most effective treatment in an individual case.494

H ‘Evolving capacities’ – Article 3

As the above early intervention cases demonstrate, the capacity of children with ASD to
integrate themselves into society is evolving, due to the increasing emphasis on the importance
of helping children with ASD to be more actively involved in the community. However, social
and functional impairments do not only affect children with ASD; ‘evolving capacities’ is a
concept that applies to all children with disabilities and their right to be involved in the
community in a meaningful way.

For these reasons, therapies and programmes that aim to develop a sense of self and preserve
identities are to be encouraged and supported (Article 3, CRPD).

I ‘Best interests of the child’ – Article 7

The ‘best interests of the child’ is a universal principle, and a primary consideration in actions
and decisions concerning children.495 Where there is ambiguity in a particular case as to
‘evidence’, or where ‘expert opinion’ fails to address the impact of impairment on functioning,
it is appropriate and important to foreground the welfare of the child:
   ‘In all actions concerning children with disabilities, the best interests of the child shall
   be a primary consideration’ (Article 7, CRPD)

J Conclusion

I ‘Look to the Convention for Early Intervention’ – Articles 3, 7, 25, 26

Having regard to articles 3, 7, 25 and 26 of the CRPD can assist the Tribunal to apply a
purposive approach to the interpretation of current good practice and consider its importance in
the context of early intervention.

Characterising early intervention in a way that gives effect to Australia’s human rights
obligations as referenced in the NDIS Act facilitates the application of the social model of
disability in decision-making, and is a way to ensure the continued provision of early supports
and services for children with disabilities and their families.

493 Ibid.
494 Ibid [84].
495 Australian Human Rights Commission, The Best Interests of the Child,
IV SOCIAL INCLUSION AND THE NDIS

A Why Focus on Social Inclusion?

The NDIS was implemented as part of a broader paradigm shift in the treatment and perception of persons with disabilities in Australia. It sought to address an existing system of disability support and care that was ‘underfunded, unfair, fragmented and inefficient’, with a specific view to ‘maximise the social and economic participation of people with a disability, create community awareness of the issues that affect people with disabilities and facilitate community capacity building’. This paradigm shift represented a move away from a medical model of disability towards a social model. Persons with disabilities were no longer to be viewed as objects of pity in need of medical ‘fixing’, but rather as citizens and holders of rights to be empowered. Under a social model, ‘disability’ is the societal failure or inability to accommodate a person’s physical, sensory, mental or other bodily impairment. In reflecting the operation of the CRPD, which is the seminal manifestation of this paradigm shift, the NDIS – in effect – implements a social model of disability into Australian domestic law.

The pursuit of fuller and more effective social inclusion and participation for persons with disabilities is fundamental to the social model itself. This derives from the model’s focus on how a person’s impairment factually impacts their ability to participate in society. The social model identifies the factual barriers to meaningful social interaction faced persons with disabilities, rather than the minimum medical treatment necessary to ‘normalise’ their impairments.

Reflecting this context, an explicit aim of the NDIS is to support the social and economic participation of persons with disabilities. This paper contends that the NDIS Legislative Scheme should be interpreted, and applied, by the Tribunal in such a manner as to reflect this overarching purpose. This purposive interpretation would ensure the NDIS Legislative Scheme is applied consistently with the CRPD. The following analysis seeks to articulate how the Tribunal’s current interpretation and application of the NDIS Legislative Scheme is inconsistent with a purposive interpretation.

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496 See, eg, National Disability Strategy, above n 416, 20; NDIS Act, s 3(3).
497 Productivity Commission, above n 388, 2.
498 Ibid 63.
499 Harpur, above n 391, 2–4, 11.
500 Ibid 2–4.
501 See, eg, NDIS Act, s 3(1)(a); National Disability Strategy, above n 416, 9.
502 Harpur, above n 391, 3
503 NDIS Act, s 3(1)(c).
504 See also Acts Interpretation Act 1901 (Cth), s 15AA.
This Part adopts the CRPD’s terminology of ‘persons with disabilities’. For the purposes of this paper, it can be considered synonymous with ‘people with disability’, as used in the NDIS Act.

B Key Recommendation: Apply a Purposive Interpretation to the NDIS Legislative Scheme

To achieve the intended fundamental paradigm shift in the treatment and perception of disability in Australia, the Tribunal must interpret and apply the NDIS Legislative Scheme in a purposive manner. A purposive interpretation should reflect the NDIS’ overarching goal to achieve fuller and more effective inclusion and participation for persons with disabilities in Australian society.

The Legislative Scheme should be applied in a manner that reflects the social model of disability embodied in the CRPD. It should be interpreted consistently with a focus on the interaction between a person’s impairment and broader societal attitudes and environments, and should be applied in a manner that addresses the factual impact of this interaction on the person with disabilities. Practically, the Tribunal should conceptualise the barriers to full and effective social participation more broadly than it has to date. It must reject a medical model approach that narrowly inquires into how to ‘fix’ a person’s impairment and overlooks factual barriers to meaningful social participation faced by the person with disabilities. This would require greater consideration of the impact of attitudinal and environmental barriers faced by persons because of their impairment, including intangible barriers such as stigma or embarrassment. In particular, references to ‘social and economic participation’ throughout the NDIS Act should be purposively interpreted as being to ‘full and effective’ social and economic participation. This would best reflect the purpose (and terminology) of the CRPD.

Finally, this broader understanding of social barriers must inform the assessment of both the participant access criteria, and the assessment of reasonable and necessary supports. This is indicated by the legislation itself, and is crucial to avoid the arbitrary exclusion of both persons and disabilities who should, in theory, be supported by the NDIS. Ultimately, the Tribunal should apply a purposive interpretation throughout the entire Legislative Scheme to ensure that the NDIS fulfills its overarching aim.

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505 See, eg, CRPD, arts 1, 8, 19.
506 See, eg, NDIS Act, s 3(1)(c), 4, 5, 6.
507 See, eg, NDIS Act, s 3(1)(a); Acts Interpretation Act 1901 (Cth), s 15AB(2)(d).
508 See, eg, NDIS Act, ss 3(1)(c), 4(11)(c), 34(b).
509 See, eg, CRPD, Preamble (3), arts 3, 19; Acts Interpretation Act 1901 (Cth), s 15AB(2)(d); NDIS Act, s 3(1)(a).
510 Ibid.
511 NDIS Act, s 24.
512 Ibid s 34.
513 See, eg, NDIS Act, ss 24(1)(d), 34(b).
C References to social inclusion in the CRPD

The CRPD seeks to improve the social inclusion and participation of people with disabilities. In particular, it articulates the key rights and duties of States Parties through which they should pursue fuller and more effective social inclusion for persons with disabilities domestically.

<table>
<thead>
<tr>
<th>CRPD</th>
<th>Relevance</th>
</tr>
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<tbody>
<tr>
<td><strong>Preamble</strong></td>
<td></td>
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<tr>
<td><strong>Clause (e)</strong></td>
<td>‘disability results from … attitudinal and environmental barriers that hinders their full and effective participation in society’</td>
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<tr>
<td><strong>General Principles</strong></td>
<td></td>
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<tr>
<td><strong>Article 3</strong></td>
<td>‘full and effective participation and inclusion in society’</td>
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<tr>
<td><strong>Living independently and being included in the community</strong></td>
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<tr>
<td><strong>Article 19</strong></td>
<td>‘full inclusion and participation in the community’</td>
</tr>
<tr>
<td><strong>Awareness-raising</strong></td>
<td></td>
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<tr>
<td><strong>Article 8</strong></td>
<td>‘promote positive perceptions and greater social awareness towards persons with disabilities’</td>
</tr>
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</table>

The following articles are particularly relevant to this aim:

Both the Preamble and article 3 establish the pursuit of full and effective social participation as a general, overarching principle of the CRPD. Article 19 imposes substantive obligations on States Parties to take ‘effective and appropriate measures to facilitate’ this. Article 8 makes clear that the CRPD seeks to address a broad conceptualisation of the barriers to social inclusion faced by persons with disabilities, which includes intangible barriers such as stigma and negative stereotypes.

D References to social inclusion in the NDIS Act

Similar references to supporting the social participation of persons with disabilities can be found throughout the NDIS Act, both as broader, overarching principles and as specific, substantive provisions.

First, the objects of the NDIS Act include:

- supporting the independence and social and economic participation of people with a disability;  
- raising community awareness of the issues that affect the social and economic participation of people with disability;  

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514 NDIS Act, s 3(1)(c).  
515 Ibid s 3(1)(h).
• facilitating **greater community inclusion** of people with disability.\(^{516}\)

Second, a general principle guiding all action taken under the *NDIS Act* is that any action should support persons with disabilities ‘to **participate in and contribute to social and economic** life to the extent of their ability’.\(^{517}\)

Finally, decision-makers are directed to consider the capacity for social inclusion of persons with disabilities when assessing the two key operational elements of the *NDIS Act*. First, to become a participant of the NDIS, a person’s impairment must ‘affect’ their capacity for social or economic participation, and *may also* result in ‘substantially reduced functional capacity’ to undertake social interaction.\(^{518}\) These criteria ensure that the NDIS is, at the very least,\(^{519}\) made accessible to persons who actually face barriers to social inclusion as a result of their impairments. Second, reasonable and necessary supports funded or provided by the NDIS should support people with disabilities to be ‘included in the community as **fully participating citizens**’,\(^{520}\) and assist them to **undertake activities that facilitate** their social and economic participation.\(^{521}\) These criteria ensure that the NDIS provides or funds supports which are reasonable and necessary to facilitating greater social inclusion.

Given the established links between the NDIS and the *CRPD*, as well as the *NDIS Act*’s own reference to ‘fully participating citizens’,\(^{522}\) all bare references to ‘social and economic participation’ should be interpreted as ‘full and effective’ social and economic participation.\(^{523}\) Additionally, while a departure from the language of the *CRPD*, the added references to ‘economic participation’ in the *NDIS Act* further reinforce the ‘full and effective’ nature of the social inclusion sought to be implemented by the NDIS.

**E Case Studies: Recent Tribunal Decisions and Recommendations**

The following case studies analyse recent Tribunal decisions to determine whether a purposive interpretation of the NDIS Legislative Scheme has been applied by the Tribunal. In particular, they identify where and how the Tribunal’s interpretation is inconsistent with a social model of disability and the overarching aim of facilitating fuller and more effective social participation. Additionally, each study proposes where and how a purposive interpretation might have been applied to better achieve this fundamental purpose of the NDIS. Notably, they do not necessarily suggest alternative outcomes.

\(^{516}\) Ibid.
\(^{517}\) Ibid s 4(2).
\(^{518}\) Ibid s 24(1)(c)(ii).
\(^{519}\) See also *NDIS Act*, s 13.
\(^{520}\) *NDIS Act*, s 4(11)(b).
\(^{521}\) Ibid s 4(11)(c), 34(b).
\(^{522}\) Ibid s 4(11)(b).
\(^{523}\) See, eg, Ibid s 3(1)(a); *Acts Interpretation Act 1901* (Cth), s 15AB(2)(d).
1 Becoming a participant: the disability access criteria

(a) Mulligan v National Disability Insurance Agency [2014] AATA 374

Facts
Mr Mulligan, 61, had chronic ischaemic heart disease, cardiomyopathy, Conn’s Syndrome and sciatica. 524
Physical exertion quickly left him short of breath, and he could not walk more than 100m on level ground without needing to rest. Daily tasks were made very difficult by his consistent back pain, 525 and he had repeatedly ceased employment because of his pain and restricted movement. 526 Despite this, Mulligan could physically manage most activities by pushing through the pain, 527 although his wife provided significant support. 528 Mulligan had regular panic attacks and had been hospitalized 15–20 times. 529 A fear of panic attacks restricted his social life, which he found depressing. 530
Mulligan failed to qualify as a participant in the NDIS. He sought review in the Tribunal. 531

Issue
Did Mulligan’s impairment result in a ‘substantially reduced functional capacity’ to undertake the activities listed in s 24(1)(c), as read in conjunction with r 5.8 of the Participant Rules. 532

Outcome
Decision affirmed: Mulligan was not an eligible participant of the NDIS.

The Tribunal found that Mulligan’s functional capacity for mobility and self-care was ‘undoubtedly’ but not ‘substantially reduced’. 533 Mulligan participated ‘effectively, if not efficiently’ in these activities. 534

Analysis
The Tribunal’s interpretation of s 24(1)(c) was consistent with a medical, not social, model of disability. It failed to adequately consider the factual impact of Mulligan’s impairment on his capacity to undertake daily activities. Rather, the Tribunal focused

525 Ibid [30]–[31], [37].
526 Ibid [3], [28]–[30].
527 Ibid [31].
528 Ibid [32], [39].
529 Ibid [30].
530 Ibid [33].
531 Ibid [1].
532 Ibid [12], [45].
533 Ibid [46].
534 Ibid.
on whether or not Mulligan’s impairments rendered him dependent on assistance to undertake these activities.

The Tribunal found that Mulligan was ‘effectively, if not efficiently’ mobile and able to perform self-care. In assessing the impact of Mulligan’s impairment on his functional capacity for these activities, the Tribunal focused on whether Mulligan could independently perform them, rather than his broader manner of performance. This is apparent from the Tribunal’s assessment of independent expert evidence:

Ms Hedditch said she thought that Mr Mulligan’s capacity for mobility and self-care was substantially reduced. We asked her to explain how that squared with her report that he is independent, or largely so, in those areas.

The Tribunal concluded that, as Mulligan could walk and perform self-care independently, his functional capacity was not ‘substantially’ reduced. That Mulligan performed ‘most activities with difficulty, often with a great deal of pain, and more slowly than he would without his impairments’, appears to have been inconsequential to the Tribunal’s inquiry.

The Tribunal misconceived the threshold for a ‘substantial reduction’ in functional capacity as a loss of independence. This is contrary to r 5.8 of the Supports Rules, which makes clear that a ‘substantial reduction’ may exist even where the activity can be ‘completely’ performed without assistance. The Tribunal’s inquiry focused on ‘curing’ the physical impairment to achieve a minimum level of independent function, rather than addressing the broader, factual barriers to social inclusion created by the impairment, such as pain and fear. This reasoning implicitly affirmed a medical model of disability that viewed a person’s impairment as a disability to be cured or normalised. It implied that independent physical function was the only barrier to social inclusion.

The NDIS Act reflects the social model of disability in the CRPD by drawing a distinction between ‘disability’ and ‘impairment’, both throughout the NDIS Act and within the terms of s 24. On appeal, Justice Mortimer noted that r 5.8 of the Participants Rules ‘requires the decision-maker to look, as a matter of factual assessment, at the outcome or effect of a person’s impairment on the performance of each, and any, of those six activities’ in s 24(1)(c). The tiered functional capacities in rr 5.8(a)–(c) illustrate that the factual reality of the participant’s impairment is the correct focus of the inquiry under s 24(1)(c). The Tribunal should consider the

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535 Ibid.
536 Ibid [43].
537 Ibid [46].
538 Supports Rules, r 5.8(a).
539 See, eg, NDIS Act, ss 13, 24(1)(a), 24(1)(b)–(d); Mulligan [2014] AATA 374, [18].
Section 24(1)(c) lists the following activities: (i) communication; (ii) social interaction; (iii) learning; (iv) mobility; (v) self-care; (vi) self-management.
manner in which the relevant activity is undertaken, not merely whether it can be undertaken independently or not.

Contrary to the text, structure and overarching purpose of the NDIS Legislative Scheme, the Tribunal’s approach misconstrued the NDIS’ purpose as supporting persons with disabilities to achieve a minimum level of independence, rather than meaningful social inclusion and participation. It conflated the distinct inquiries in s 24(1)(a) and s 24(1)(b)–(e), as well as the separate elements of ‘independence’ and ‘social and economic participation’ in s 3(1)(c). It applied a narrow definition of ‘ability’ in s 4(2) that was inconsistent with the broader purpose of the NDIS Act.

The Tribunal’s failure to directly address Mulligan’s functional capacity for ‘social interaction’ under s 24(1)(c)(ii) further demonstrated the medical model nature of their inquiry. It was also an error of law.\(^541\)

(b)  Recommendations: Applying a purposive interpretation to s 24

The Tribunal might have applied a purposive interpretation of the NDIS Legislative Scheme,\(^542\) consistent with the CRPD, as follows:

First, when assessing the disability requirements in s 24, the Tribunal should have applied a purposive interpretation by asking whether the participant’s capacity to participate in society was substantially reduced in fact. The Tribunal should have identified whether the factual impact of the impairment reduced the applicant’s capacity for full and effective social participation, not merely for independent performance of the relevant activity.

Second, the Tribunal could have ensured that the NDIS reflected a social model of disability by adopting a broader understanding of the barriers to meaningful social participation. A lack of physical independence is not the only barrier faced by persons with disabilities. The Tribunal should have considered broader attitudinal and environmental factors that factually impaired the applicant’s ability to interact socially, such as the psychological impact of his impairment. The Tribunal should have looked beyond the bodily impairment itself.

Third, the Tribunal should have applied the distinct inquiries mandated by the text and structure of the NDIS Legislative Scheme. It should have considered the applicant’s impairment separately from the interaction of that impairment with societal barriers. This approach was affirmed on appeal to the Federal Court of Australia,\(^543\) in overturning the Tribunal’s reasoning.

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542 See above Part IV, B Key recommendation: Apply a purposive interpretation to the NDIS Legislative Scheme.
543 Mulligan v National Disability Insurance Agency [2015] FCA 544, [55], [56], [66], [67], [77] (Mortimer J).
2  Reasonable and necessary supports: meaning of ‘enable’

(a)  Young v National Disability Insurance Agency [2014] AATA 401

Facts

Mr Young was an NDIS participant with emphysema and type 1 diabetes.\textsuperscript{544} His emphysema seriously limited his capacity for movement and exercise.\textsuperscript{545} He used a portable oxygen supply at all times, which was large, heavy and difficult to transport.\textsuperscript{546} Young was embarrassed to use his oxygen supply in public and was reluctant to engage in social activities and work.\textsuperscript{547} A smaller oxygen supply would have given him greater freedom of movement and motivation for social engagement.\textsuperscript{548}

Young used an automatic insulin pump to manage his type 1 diabetes,\textsuperscript{549} having previously injected himself with insulin manually.\textsuperscript{550} The pump made a ‘massive’ change to his life, improved his disposition, marriage and ability to undertake unscheduled daily activities.\textsuperscript{551} Having ceased private health insurance, Young was no longer able to afford the insulin pump.

The NDIA refused to fund either of these supports. Young sought a review in the Tribunal.\textsuperscript{552}

Issue

Were these supports most appropriately funded by the NDIS under s 34(1)(f), being supports that ‘enable[d] [Young] to undertake activities of daily living’, per r 7.4 of the Supports Rules.

Outcome

Decision affirmed: supports were not appropriate for NDIS funding.

The Tribunal found that these supports did not ‘enable’ Young to ‘undertake activities of daily living’ because he was \textit{not unable} to perform the same tasks without the supports.\textsuperscript{553}

\textsuperscript{544} Young v National Disability Insurance Agency [2014] AATA 401, [1] (‘Young’).
\textsuperscript{545} Ibid [9].
\textsuperscript{546} Ibid [9]–[10].
\textsuperscript{547} Ibid [10].
\textsuperscript{548} Ibid [11].
\textsuperscript{549} Ibid [20].
\textsuperscript{550} Ibid [19].
\textsuperscript{551} Ibid [20]–[21].
\textsuperscript{552} Ibid [3].
\textsuperscript{553} Ibid [37].
Analysis

The Tribunal’s interpretation of r 7.4 was consistent with a medical, not social, model of disability. It failed to adequately consider how the supports would address the factual impact of the impairments on Young’s capacity to engage in effective social participation. Rather, the Tribunal applied a narrow definition of ‘enable’ by assessing whether Young would be ‘unable’ to undertake the relevant activities without the requested supports.554

The Tribunal was satisfied that Young’s physical impairments were sufficiently treated by his existing supports. The manner in which they permitted him to engage in social activities was irrelevant.555 The Tribunal agreed with the NDIA that the supports requested only provided ‘additional benefits or supports on top of what [Young] already needs and uses’.556

This interpretation of ‘enable’ is consistent with a medical model of disability, which focuses on curing a person’s impairment to a minimum level of ‘normal’ function. It fails to empower the person to achieve full and effective social inclusion by overcoming the factual impact of their impairment. Practically, because the Tribunal was satisfied that Young could physically breathe and manage his diabetes, it did not seek to consider his factual capacity to engage in meaningful social interaction. This was inconsistent with the NDIS Act’s guiding principles to empower persons with disabilities to be included in society as ‘fully participating citizens’.557 It applied a narrow definition of ‘participation’ under ss 3(1)(c), 4(2) and 4(11)(c) inconsistent with CRPD principles supporting ‘full and effective’ participation for persons with disabilities.558

The Tribunal declined to recognise the embarrassment of, and stigma towards, persons with disabilities as legitimate attitudinal and environmental barriers to effective social inclusion and participation.559 The Tribunal applied a narrow definition of ‘ability’ in s 4(2) that focused directly on Young’s impairment, rather than its broader impact. It failed to acknowledge that Young’s capacity for social participation was, in reality, restricted by the psychological impact of his impairments. A purposive interpretation would assess reasonable and necessary supports by reference to this psychological barrier. The Tribunal’s failure to address the functional impact of attitudinal barriers to social inclusion was inconsistent with the social model of disability reflected in the NDIS.

554 Ibid.
555 Ibid.
556 Ibid [31].
557 NDIS Act, s 4(11)(b).
558 See, eg, CRPD, Preamble (e), arts 1, 3(c).
559 Young [2014] AATA 401, [36]–[37].
(b)  **Recommendations: Applying a purposive interpretation to s 34**

The Tribunal might have applied a purposive interpretation of the NDIS Legislative Scheme,\(^{560}\) consistent with the *CRPD*, as follows. (Although *Young* primarily considered r 7.4 of the *Supports Rules*, the following recommendations are applicable to s 34 more broadly.)

First, when assessing whether supports are reasonable and necessary under s 34, the Tribunal should have adopted a **purposive interpretation** by asking whether they would, in fact not theory, support the participant to achieve **full and effective social inclusion**. The inquiry is not what would make the participant’s life easier or more convenient, but what would facilitate *meaningful* social participation beyond a minimum level of function. Practically, the Tribunal should have applied an interpretation of ‘participation’ that was consistent with the *CRPD*’s focus on ‘full and effective’ participation.

Second, the Tribunal could have reflected a **social model definition of ‘disability’** by identifying the factual impact of the participant’s impairment on their capacity to participate in society. It should have identified the supports reasonable and necessary to **remove these barriers**, not merely to ‘fix’ the impairment itself (as is done under a medical model approach). The Tribunal should have inquired as to what was reasonable and necessary to **factually** enable the participant to engage in full and effective social participation, as intended by the *CRPD*.

Moving forward, the Tribunal should adopt **broader interpretations** of the terms ‘assist’, ‘value for money’ and ‘effective and beneficial’ in s 34 that reflect this factual inquiry and the overarching aims of the NDIS.\(^{561}\)

3  **Recent developments: recognition of broader barriers to social inclusion**

(a)  **McCutcheon v National Disability Insurance Agency [2015]**

**AATA 624**

**Facts**

Ms McCutcheon was a NDIS participant with spina bifida, scoliosis, Perthes’ disease, chronic renal failure and heart disease.\(^{562}\)

In April 2014, the NDIS ceased to fund her chiropractic treatment.\(^{563}\) Subsequently, McCutcheon reported a marked decrease in mobility and became increasingly reliant on her wheelchair.\(^{564}\) In May 2014, she quit work as a domestic cleaner because of her

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\(^{560}\) See above Part IV, B Key recommendation: Apply a purposive interpretation to the NDIS Legislative Scheme.

\(^{561}\) See *NDIS Act*, ss 3, 4.

\(^{562}\) *McCutcheon* [2015] AATA 624, [1].

\(^{563}\) Ibid [27].

\(^{564}\) Ibid [29].
deteriorating physical health.\textsuperscript{565} McCutcheon’s capacity for social interaction and activities with her daughter became limited, straining their relationship.\textsuperscript{566} She also discontinued her education.\textsuperscript{567} McCutcheon found chiropractic treatment beneficial primarily for pain relief and to maintain mobility.\textsuperscript{568}

The NDIA rejected chiropractic treatment as a reasonable and necessary support appropriate for NDIS funding.\textsuperscript{569} McCutcheon sought review in the Tribunal.

**Issue**

Having regard to current good practice, was chiropractic treatment ‘effective and beneficial’ for McCutcheon, or was it likely to be, under s 34(1)(d).\textsuperscript{570} Furthermore, was it most appropriately funded or provided through the NDIS, per s 34(1)(f) read in conjunction with r 7.4 of the Supports Rules.

**Outcome:**

Decision substituted: chiropractic treatment was, or was likely to be, effective and beneficial for McCutcheon,\textsuperscript{571} and was most appropriately funded or provided through the NDIS.\textsuperscript{572}

**Analysis**

The Tribunal found chiropractic treatment to be ‘effective and beneficial’ because it maintained McCutcheon’s mobility and functioning at a level from which she could pursue effective social participation.\textsuperscript{573} The Tribunal noted that maintaining this level of function was:

\begin{quote}
integrimly linked to her ability to live in the community, have a social life and, it [was] to be hoped, participate in education by continuing her studies, and in employment.\textsuperscript{574}
\end{quote}

The Tribunal explicitly acknowledged that the manner in which McCutcheon physically performed certain activities impacted her capacity to engage in full and effective social participation. A reduction in her mobility would have reduced her ability to engage in meaningful social participation, despite it still being physically possible for her to perform these daily activities in her wheelchair.\textsuperscript{575}

\begin{flushleft}
\textsuperscript{565} Ibid [20].
\textsuperscript{566} Ibid [29].
\textsuperscript{567} Ibid [30].
\textsuperscript{568} Ibid [32], [41].
\textsuperscript{569} Ibid [2].
\textsuperscript{570} Ibid [15].
\textsuperscript{571} NDIS Act, s 34(1)(d).
\textsuperscript{572} Ibid s 34(1)(f).
\textsuperscript{573} McCutcheon [2015] AATA 624, [82], [90].
\textsuperscript{574} Ibid [102].
\textsuperscript{575} Ibid [88].
\end{flushleft}
The Tribunal rejected the NDIA’s contention that ‘effective and beneficial’ required a long-term change or improvement in the participant’s condition. 576 It accepted that the chiropractic treatment was for pain relief and to maintain flexibility and movement, rather than for any functional improvement of impairment. 577 In doing so, the Tribunal applied a purposive interpretation of ‘effective and beneficial’, consistent with the social model of disability, that addressed the factual barriers faced by McCutcheon as a result of her impairment.

The Tribunal assessed the actual manner in which McCutcheon performed daily activities, rejecting a narrow approach measured solely by reference to physical improvement of the impairment. 578 Rejecting the medical model, it looked beyond treating an impairment to achieve a minimum level of ‘normal’ function and instead addressed the factual impact of the impairment as a barrier to meaningful social and economic participation. The Tribunal applied a purposive interpretation by conceptualising the factual improvement of the participant’s capacity to engage in full and effective social and economic participation as ‘a benefit for the participant’. 579

The Tribunal also applied this purposive interpretation to the meaning of ‘enable’ in r 7.4 of the Supports Rules. 580 In contrast to Young, the Tribunal held that the treatment enabled McCutcheon to undertake daily living activities by affording her a sufficient ‘degree of mobility’. 581 The Tribunal’s assessment considered how the supports would improve the manner in which McCutcheon performed daily activities, rather than whether or not she was ‘unable’ to perform them without. 582

The Tribunal applied a purposive interpretation of the NDIS Legislative Scheme consistent with a social model of disability. It affirmed that disability is broader than a person’s physical impairment and that ‘reasonable and necessary’ supports under the NDIS are intended to address the factual impact of a person’s impairment, not merely the impairment itself.

Indeed, the Tribunal’s acknowledgement of the difficulty in separating ‘chronic pain from the condition which [caused] it’, 583 demonstrated a nuanced understanding of disability consistent with the social model.

Finally, the Tribunal afforded ‘very considerable weight’ to McCutcheon’s subjective evidence of her ‘lived experience’. 584 Moving forward, this further affirms the

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576 Ibid [83].
577 Ibid [41], [64].
578 Ibid [83].
579 NDIS Act, s 34(1)(d).
580 McCutcheon [2015] AATA 624, [102].
581 Ibid.
582 Ibid; cf Young [2014] AATA 401, [37].
583 Ibid [105].
584 Ibid [84], [90].
legitimacy of a purposive interpretation that focuses on the impact of the impairment as factually experienced by the participant.

F An interpretive trend: Applying a purposive interpretation throughout…

The Tribunal should apply a purposive interpretation throughout the entire NDIS Legislative Scheme. The following provisions, however, are particularly relevant to effecting full and effective social inclusion and participation for persons with disabilities.

Practically, the Tribunal should interpret the words bolded below in a manner consistent with their use in the context of achieving meaningful social interaction and participation. For instance, the ‘capacity’ of a person with a physical impairment to participate effectively in society might be impacted by intangible barriers, such as stigma. The Tribunal should enquire beyond the person’s physical, largely clinical, capacity to engage in society.

<table>
<thead>
<tr>
<th><strong>NDIS Act</strong></th>
<th><strong>Relevance</strong></th>
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G Conclusion

585 NDIS Act, s 4(11)(c).
Recent decisions by the Tribunal have demonstrated a tendency to apply a medical model interpretation of the NDIS Legislative Scheme. Moving forward, the Tribunal should seek to apply a **purposive interpretation** that reflects the **social model** of disability embodied in the *CRPD*,\(^{586}\) and the **overarching aim** of facilitating fuller and more effective social inclusion and participation for persons with disabilities.

A purposive interpretation would focus on the **factual impact** of a person’s impairment on their capacity to engage in full and effective social participation. It would require the Tribunal to conceptualise the **barriers** to social participation more broadly than it has to date. A medical model inquiry into how to ‘fix’ a person’s impairment must be replaced with proper consideration of the impact of **attitudinal and environmental** barriers to meaningful social and economic participation. This approach should inform the assessment of both the **participant access criteria**\(^{587}\) and **reasonable and necessary supports**,\(^{588}\) but should also be applied throughout the entire NDIS Legislative Scheme.

## V CONCLUSION

The *CRPD* articulates Australia’s international human rights obligations to guarantee fundamental rights to persons with disabilities. It embodies a social model of disability, the key elements of which have been incorporated into domestic law via the *NDIS Act*.\(^{589}\) In doing so, the NDIS seeks to address the physical, attitudinal, communication and social barriers faced by persons with disabilities in daily life. In this way, the *CRPD* provides a tangible framework from which the Tribunal can adopt a purposive approach to interpretation of, and decision-making under, the NDIS Legislative Scheme. The Tribunal should apply a purposive interpretation in order to ensure that the NDIS supports the independence and social and economic participation of people with disability in the Australian community.

The field of early intervention produces important benefits for children with disabilities, and the right to access early supports and services is recognised in both in the *CRPD* and the *NDIS Act*. In providing these supports, the *NDIS Act* specifies that regard must be had to the principle of current good practice in determining whether or not a requested support is reasonable and necessary for a participant.\(^{590}\)

A number of recent decisions by the Tribunal reflect a tendency to favour the medical model of disability when considering this principle. This paper contends that the application of specific articles in the *CRPD* should have formed part of the Tribunal’s

\(^{586}\) See, eg, Ibid s 3(1)(a); *Acts Interpretation Act 1901* (Cth), s 15AB(2)(d).

\(^{587}\) *NDIS Act*, s 24.

\(^{588}\) *NDIS Act*, s 34.

\(^{589}\) See, eg, *NDIS Act*, ss 3, 4.

\(^{590}\) *NDIS Act*, s 34(d).
reasoning in these cases, in order to better apply the social model of disability and to further promote the purposes of the NDIS and the *CRPD*.

Additionally, the Tribunal should seek to apply a **purposive interpretation** that reflects the **social model** of disability embodied in the *CRPD*, and the **overarching aim** of facilitating fuller and more effective social inclusion and participation for persons with disabilities

A purposive interpretation would focus on the **factual impact** of a person’s impairment on their capacity to engage in full and effective social participation. It would require the Tribunal to conceptualise the **barriers** to social participation more broadly than it has to date, in particular by focusing of the factual impact of **attitudinal and environmental** barriers to meaningful social and economic participation. This approach would inform the assessment of both the **participant access criteria** and **reasonable and necessary supports**, but should also be applied throughout the NDIS Legislative Scheme in its entirety.

Finally, this paper suggests alternative approaches to the Tribunal’s reasoning in recent cases. It does not seek to argue that the outcomes of these decisions would necessarily have been different had a purposive interpretation to the NDIS Legislative Scheme been applied. Rather, this paper seeks to highlight the importance of recognising Australia’s international obligations under the *CRPD* when taking action under the NDIS Legislative Scheme. In that context, this paper seeks to provide guidance on how to apply a purposive interpretation to the NDIS Legislative Scheme, such that all persons with disabilities in Australia are able to access reasonable and necessary supports and services, and to enjoy full and effective social inclusion and participation.

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591 See, eg, *NDIS Act*, s 3(1)(a); *Acts Interpretation Act 1901* (Cth), s 15AB(2)(d).
592 *NDIS Act*, s 24.
593 *NDIS Act*, s 34.
VI RESOURCES

A The NDIS and the CRPD

NDIS

- National Disability Insurance Scheme Act 2013 (Cth), s 3
- Productivity Commission, Disability Support and Care, Report No 54 (2011)
- Explanatory Memorandum & Statement of Compatibility with Human Rights, National Disability Insurance Scheme Bill 2013 (Cth)

UN Committee for the CRPD

- General Comment on Article 12: Access to Justice, CRPD/C/GC/1
- General Comment on Article 9: Accessibility, CRPD/C/GC/2
- Draft General comment on Article 6: Women with disabilities, CRPD/C/14/R.1
- Website: [http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx)

UN CRPD Jurisprudence


Statutory Interpretation

- Acts Interpretation Act 1901 (Cth)
- Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
- CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384
- Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
- K-Generation Pty Limited v Liquor Licensing Court [2009] HCA 4
- Coco v The Queen (1994) 179 CLR 427
- R v Home Secretary; Ex parte Simms [2000] 2 AC 115
- Annetts v McCann (1990) 170 CLR 596
- X v Commonwealth (1999) 200 CLR 177
- Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225
- Pilkington (Australia) Ltd v Minister of State for Justice & Customs (2002) 127 FCR 92
- Minister for Foreign Affairs and Trade v Magno (1992) 37 FCR 298
- AB v Registrar of Births, Deaths and Marriages [2007] FCAFC 140
- IW v City of Perth (1997) 191 CLR 1

**B Early Intervention and the NDIS**

- National Disability Insurance Scheme Act 2013 (Cth), ss 4, 25, 34
- National Disability Insurance Scheme (Supports for participants) Rules 2013, rr 3.2, 3.3
- National Disability Insurance Scheme (Becoming a participant) Rules 2013, Pts 6, 7

**C Social Inclusion and the NDIS**

- Paul Harpur, ‘Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities’ (2012) 27 *Disability & Society* 1
- United Nations, Convention on the Rights of Persons with Disabilities, Preamble; arts 3, 8, 19
- Young v National Disability Insurance Agency [2014] AATA 401
- McCutcheon v NDIA [2015] AATA 674
- National Disability Insurance Scheme Act 2013 (Cth), ss 3, 4, 24, 34
- National Disability Insurance Scheme (Supports for participants) Rules 2013, r 7.4
- National Disability Insurance Scheme (Becoming a participant) Rules 2013, r 5.8
Unfitness to Plead Litigation Project

Louis Andrews
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Editor’s note: Both litigation teams worked with ACDL on confidential client matters and consequently their memoranda cannot be included here. Both teams however participated in a show-case Mock Trial at the conclusion of the semester and the briefing document follows.
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

Adopted during the Committee’s 14th session, held in September 2015

I. Introduction
Since the Committee on the Rights of Persons with Disabilities (hereinafter, the Committee) adopted a statement on article 14 of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter, the Convention), in September 2014, (CRPD/C/12/2, Annex IV), some United Nations bodies as well as intergovernmental processes have developed guidelines on the right to liberty and security as well as on the treatment of prisoners, which make reference to the deprivation of liberty of persons with disabilities. Some regional bodies have also considered adopting additional binding instruments which would allow for involuntary internment and forced treatment of persons with intellectual and psychosocial disabilities. The Committee, on the other hand, has further developed its understanding of article 14 while engaging in constructive dialogues with several States parties to the Convention.

The Committee, being the international monitoring body of the Convention, has adopted these guidelines to provide further clarification to States parties, regional integration organizations, National Human Rights Institutions and national monitoring mechanisms, organizations of persons with disabilities, civil society organizations as well as United Nations agencies, bodies, and independent experts about the obligation of States parties pursuant to the Convention on the Rights of Persons with Disabilities to respect, protect and guarantee the right of persons with disabilities to liberty and security. These guidelines replace the statement adopted by the Committee on article 14 of the Convention.

II. The right to liberty and security of persons with disabilities

The Committee reaffirms that liberty and security of the person is one of the most precious rights to which everyone is entitled. In particular, all persons with disabilities, and especially persons with mental disabilities or psychosocial disabilities are entitled to liberty pursuant to article 14 of the Convention.

Article 14 of the Convention is in essence a non-discrimination provision. It specifies the scope of the right to liberty and security of the person in relation to persons with disabilities, prohibiting all discrimination based on disability in its exercise. Thereby, article 14 relates directly to the purpose of the Convention, which is to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect of their inherent dignity.
5. This non-discrimination nature of article 14 provides evidence of the close interrelation with the right to equality and non-discrimination (article 5). Article 5(1) recognizes that all persons are equal before and under the law and are entitled to equal protection of the law. Article 5(2) prohibits all forms of discrimination on the basis of disability and guarantees to persons with disabilities equal and effective legal protection against discrimination on all grounds.

III. The absolute prohibition of detention on the basis of impairment

There are still practices in which States parties allow for the deprivation of liberty on the grounds of actual or perceived impairment.\footnote{Impairment in these guidelines is understood as a physical, psycho-social, intellectual or sensory health condition which may or may not come with functional limitations of the body, mind or senses. Impairment differs from what is usually considered a normal health condition. Disability is understood as the social effect of the interaction between individual impairment and social and material environment as described in Art. 1 CRPD.} In this regard the Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or to others. This practice is incompatible with article 14 as interpreted by the jurisprudence of the CRPD committee. It is discriminatory in nature and amounts to arbitrary deprivation of liberty.

During the negotiations of the Ad Hoc Committee leading up to the adoption of the Convention there were extensive discussions on the need to include a qualifier, such as “solely” or “exclusively”, in the prohibition of deprivation of liberty due to the existence of an impairment in the draft text of article 14(1)(b). States opposed it, arguing that it could lead to misinterpretation\footnote{Ad Hoc Committee, Third Session, Daily summary of discussions, May 26, 2004; Fifth Session, Daily summary of discussions, January 26, 2005.} and allow deprivation of liberty on the basis of disability.\footnote{Ibid., Fifth Session, Daily summary of discussions, January 26, 2005.} Civil society also opposed the use of qualifiers.\footnote{Ibid., Fifth Session, Daily summary of discussions, January 27, 2005.} Consequently, article 14(1)(b) prohibits the deprivation of liberty on the basis of impairment even if additional factors or criteria are also used to justify the deprivation of liberty. The issue was settled in the seventh meeting of the Ad Hoc Committee.

The absolute ban of deprivation of liberty on the basis of impairment has strong links with article 12 of the Convention (equal recognition before the law). In its General Comment No. 1, the Committee has clarified that States parties should refrain from the practice of denying legal capacity of persons with disabilities and detaining them in institutions against their will, either without their consent or with the consent of a substitute decision-maker, as this practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.\footnote{CRPD/C/GC/1, para. 40}
Enjoyment of the right to liberty and security of the person is central to the implementation of article 19 on the right to live independently and be included in the community. The Committee has stressed this relationship with article 19. It has expressed its concern about the institutionalization of persons with disabilities and the lack of support services in the community, and it has recommended implementing support services and effective deinstitutionalization strategies in consultation with organizations of persons with disabilities. In addition, it has called for the allocation of more financial resources to ensure sufficient community-based services.

IV. Involuntary or non-consensual commitment in mental health institutions

Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent for health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments. Involuntary commitment in mental health facilities carries with it the denial of the person’s legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.

V. Non-consensual treatment during deprivation of liberty

The Committee has emphasized that States parties should ensure that the provision of health services, including mental health services are based on free and informed consent of the person concerned. In its General Comment No. 1, the Committee stated that States parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment. The Committee stated that, “in conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.”

VI. Protection of persons with disabilities deprived of their liberty from violence, abuse and ill-treatment

599 CRPD/C/ESP/CO/1, paras. 35-36; CRPD/C/CHN/CO/1, para. 25; CRPD/C/ARG/CO/1, para. 24; CRPD/C/PRY/CO/1, para. 36; CRPD/C/AUT/CO/1, para. 30; CRPD/C/SWE/CO/1, para. 36; CRPD/C/CRI/CO/1, para. 30; CRPD/C/AZE/CO/1, para. 29; CRPD/C/ECU/CO/1, para. 29; CRPD/C/MEX/CO/1, para. 30.

600 Ibid.

601 CRPD/C/CHN/CO/1, para. 25; CRPD/C/AUT/CO/1, para. 31; CRPD/C/SWE/CO/1, para. 36.

602 CRPD/C/KOR/CO/1, para. 29, CRPD/C/DOM/CO/1, para. 27, CRPD/C/AUT/CO/1, para. 30.

603 CRPD/C/ECU/CO/1, para. 29 d), CRPD/C/NZL/CO/1, para. 30, CRPD/C/SWE/CO/1, para. 36.

604 CRPD/C/GC/1, para. 41
The Committee has called on States parties to protect the security and personal integrity of persons with disabilities who are deprived of their liberty, including by eliminating the use of seclusion and various methods of restraint in medical facilities, including physical, chemical and mechanic restraints. The Committee has found that these practices are not consistent with the prohibition of torture and other cruel, inhumane or degrading treatment or punishment against persons with disabilities pursuant to article 15 of the Convention.

**VII. Deprivation of liberty on the basis of perceived dangerousness of persons with disabilities, alleged need for care or treatment, or any other reasons.**

Through all the reviews of State party reports, the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.

Persons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and to others when they do not consent to and/or resist medical or therapeutic treatment. Like persons without disabilities, persons with disabilities are not entitled to pose danger to others. Legal systems based on the rule of law have criminal and other laws in place to deal with those matters. Persons with disabilities are frequently denied equal protection under these laws by being derogated to a separate track of law, mental health laws. These laws commonly have a lower standard when it comes to human rights protection, and are incompatible with article 14 of the Convention.

The freedom to make one’s own choices established in article 3(a) of the Convention includes the freedom to take risks and make mistakes on an equal basis with others. In its General Comment No. 1, the Committee stated that decisions about medical and psychiatric treatment must be based on a determination of the person’s autonomy, will and preferences. Deprivation of liberty on the basis of impairment or health conditions in mental health institutions which deprives persons with disabilities of their legal capacity also amounts to a violation of article 12 of the Convention.

**VIII. Detention of persons unfit to plead in criminal justice systems**

The Committee has established that declarations of unfitness to stand trial or non-responsibility in criminal justice systems and the detention of persons based on those declarations is contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.

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605 CRPD/C/NZL/1, para. 32, CRPD/C/AUS/CO/1, para. 36.
606 For example, severity of impairment, observation, or prevention of long-term detention.
607 CRPD/C/GC/1, para. 21
The Committee has also called for States parties to remove those declarations from the criminal justice system. The Committee has recommended that “all persons with disabilities who have been accused of crimes and… detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation”\(^{608}\), as well as procedural accommodations to ensure fair trial and due process.\(^{609}\)

**IX. Conditions of detention of persons with disabilities**

The Committee has expressed its concerns for the poor living conditions in places of detention, particularly prisons, and has recommended that States parties ensure that places of detention are accessible and provide humane living conditions. More recently, it recommended “that immediate steps are [to be] taken to address the hard situations in institutions.”\(^{610}\) Regarding reasonable accommodation, the Committee has recommended that States parties establish legal frameworks for the provision of reasonable accommodation that preserve the dignity of persons with disabilities, and guarantee the right to reasonable accommodation for those detained in prisons.\(^{611}\) It has also addressed the need to “[p]romote training mechanisms for justice and prison officials in accordance with the Convention’s legal paradigm”.\(^{612}\)

While developing its jurisprudence under the Optional Protocol to the Convention\(^{613}\), the Committee has affirmed that, under article 14(2) of the Convention, persons with disabilities deprived of their liberty have the right to be treated in compliance with the objectives and principles of the Convention, including conditions of accessibility and reasonable accommodation. The Committee has recalled that States parties must take all relevant measures to ensure that persons with disabilities who are detained may live independently and participate fully in all aspects of daily life in their place of detention, including ensuring their access, on an equal basis with others, to the various areas and services, such as bathrooms, yards, libraries, study areas, workshops and medical, psychological, social and legal services. The Committee has stressed that a lack of accessibility and reasonable accommodation places persons with disabilities in sub-standard conditions of detention that are incompatible with article 17 of the Convention and may constitute a breach of article 15(2).

**X. Review mechanisms and monitoring of detention facilities**

\(^{608}\) CRPD/C/AUS/CO/1, para. 30.  
\(^{609}\) CRPD/C/MNG/CO/1, para. 25, CRPD/C/DOM/CO/1, para. 29 a), CRPD/C/CZE/CO/1, para. 28, CRPD/C/HRV/CO/1, para. 22, CRPD/C/DEU/CO/1, para. 32, CRPD/C/DNK/CO/1, para. 34 and 35, CRPD/C/ECU/CO/1, para. 29 b), CRPD/C/KOR/CO/1, para. 28, CRPD/C/MEX/CO/1, para. 27, CRPD/C/NZL/CO/1, para. 34  
\(^{610}\) CRPD/C/HRV/CO/1, para. 24  
\(^{611}\) CRPD/C/COK/CO/1, para. 28 b), CRPD/C/MNG/CO/1, para. 25, CRPD/C/TKM/CO/1 para. 26 b), CRPD/C/CZE/CO/1, para. 28, CRPD/C/DEU/CO/1, para. 32 c), CRPD/C/KOR/CO/1, para. 29, CRPD/C/NZL/CO/1, para. 34, CRPD/C/ACE/CO/1, para. 31, CRPD/C/AUS/CO/1, para. 32 b), CRPD/C/SLV/CO/1, para. 32  
\(^{612}\) CRPD/C/MEX/CO/1, para. 28  
\(^{613}\) CRPD/C/11/D/8/2012
The Committee has stressed the necessity to implement monitoring and review mechanisms in relation to persons with disabilities deprived of their liberty. Monitoring existing institutions does not entail the acceptance of the practice of forced institutionalization. Article 16(3) of the Convention explicitly requires monitoring of all facilities and programmes that serve persons with disabilities in order to prevent all forms of exploitation, violence and abuse, and article 33 requires that States parties establish a national independent monitoring mechanism and ensure civil society participation in monitoring (paras. 2 and 3).

**XI. Security measures**

The Committee has addressed security measures imposed on persons found not responsible due to “insanity”. Initially, the Committee requested that States parties modify legislation to ensure due process guarantees for the application of security measures to persons found to be exempt from criminal responsibility, and to ensure that persons with disabilities are subject to the same guarantees and conditions as those applicable to any other person. More recently, the Committee has also recommended eliminating security measures including those which involve forced medical and psychiatric treatment in institutions, while expressing concern about security measures that involve indefinite deprivation of liberty and absence of regular guarantees in the criminal justice system.

**XII. Diversion mechanisms and restorative justice schemes**

The Committee has stated that deprivation of liberty in criminal proceedings should only apply as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime.

**XIII. Emergency and crisis situations in the context of deprivation of liberty of persons with disabilities**

In its General Comment No. 1, the Committee states that States parties must respect and support the legal capacity of persons with disabilities to make decisions at all times, including in crisis situations, regardless of whether this crisis situation occurs in institutionalised settings or in the community. States parties must ensure that support is provided to persons with disabilities deprived of their liberty, including in emergency and crisis situations, that “accurate and accessible information is provided about service options and that non-medical approaches are made available”. The Committee also states that, “States parties must abolish policies and legislative provisions that allow or perpetrate forced treatment”, and that “decisions relating to a person’s physical or mental integrity can only be taken with the free and informed consent of the persons concerned”. In paragraph 41 of its General Comment No. 1,

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614 CRPD/C/CRI/CO/1, para. 28  
615 CRPD/C/ECU/CO/1, para. 29 c)  
616 CRPD/C/DEU/CO/1, para. 31  
617 CRPD/C/NZL/CO/1, para. 34  
618 CRPD/C/GC/1, para. 42  
619 Ibid, para. 42
the Committee states that, “in conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities”. 620

The Committee has also called for States parties to ensure that persons with disabilities are not denied the right to exercise their legal capacity on the basis of a third party’s analysis of their “best interests”, and that practices associated with “best interests” determinations should be replaced by the standard of “best interpretation of the will and preferences” of the person. 621

**XIV. Access to justice, reparation and redress to persons with disabilities deprived of their liberty in infringement of article 14 taken alone, and taken in conjunction with article 12 and/or article 15 of the Convention.** Persons with disabilities arbitrarily or unlawfully deprived of their liberty are entitled to have access to justice to review the lawfulness of their detention, and to obtain appropriate redress and reparation. The Committee calls States parties’ attention to Guideline 20 of the “United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court”, adopted by the Working Group on Arbitrary Detention on 29 April 2015, during its 72th session. Guideline 20 contains specific measures for persons with disabilities, including the following: 622

”126. The following measures shall be taken to ensure procedural accommodation and the provision of accessibility and reasonable accommodation for the exercise of the substantive rights of access to justice and equal recognition before the law:

(a) Persons with disabilities shall be informed about, and provided access to, promptly and as required, appropriate support to exercise their legal capacity with respect to proceedings related to the detention and in the detention setting itself. 623 Support in the exercise of legal capacity must respect the rights, will and preferences of

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620 Ibid, para. 41
621 Ibid, para. 21
622 A/HRC/30/36
623 CRPD/C/GC/1, para. 42
624 Ibid, para. 42
625 Ibid, para. 41
626 Ibid, para. 21
627 A/HRC/30/36
628 Human Rights Committee General Comment no. 35, para. 18: “The individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to prevent conditions of detention incompatible with the Covenant.” Oxford Pro Bono Publico study: In regard to preventive detention proceedings, there is a very strong trend toward guaranteeing the right to be heard and to legal representation (p. 97). Further, there is a significant trend in the practice of States toward guaranteeing the right to information and to legal representation to a person with a mental illness during detention proceedings (p. 99).
persons with disabilities and should never amount to substituted decision-making; 624

(b) Persons with psychosocial disabilities must be given the opportunity to promptly stand trial, with support and accommodations as may be needed, rather than declaring such persons incompetent;

(c) Persons with disabilities can access, on an equal basis with other persons subject to detention, buildings in which law-enforcement agencies and the judiciary are located. The jurisdictional entities must ensure that their services include information and communication that is accessible to persons with disabilities. 625 Appropriate measures shall be taken to provide signage in Braille and in easy to read and understand forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to communication in the facilities of jurisdictional entities; 626

(d) Individuals who are currently detained in a psychiatric hospital or similar institution and/or subjected to forced treatment, or who may be so detained or forcibly treated in the future, must be informed about ways in which they can effectively and promptly secure their release including injunctive relief;

(e) Such relief should consist of an order requiring the facility to release the person immediately and/or to immediately cease any forced treatment, as well as systemic measures such as requiring mental health facilities to unlock their doors and inform persons of their right to leave, and establishing a public authority to provide for access to housing, means of subsistence and other forms of economic and social support in order to facilitate de-institutionalization and the right to live independently and be included in the community. Such assistance programs should not be centred on the provision of mental health services or treatment, but

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624 Committee on the Rights of Persons with Disabilities, General Comment No. 1, para. 17: “Support” is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication. Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences.

625 Committee on the Rights of Persons with Disabilities, General Comment No. 2, para. 37

626 Committee on the Rights of Persons with Disabilities, General Comment No. 2, para. 20.
free or affordable community-based services, including alternatives that are free from medical diagnosis and interventions. Access to medications and assistance in withdrawing from medications should be made available for those who so decide. 627

(f) Persons with disabilities are provided with compensation, as well as other forms of reparations, in the case of arbitrary or unlawful deprivation of liberty. 628 This compensation must also consider the damage caused by the lack of accessibility, denial of reasonable accommodation, lack of health care and rehabilitation, which have affected the person with disability deprived of liberty.”

Geneva, September 2015

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627 HRC General Comment no. 35, para. 19: “States 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”.

628 This includes deprivation of liberty based on disability or perceived disability, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability.
Violence against Women with Psycho-social Disabilities Project

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Illuminating Invisibility
Domestic Violence and Women with Disabilities

I Executive Summary
In recent years domestic violence has become a matter of increasing importance and concern in Australia. Despite increased media coverage and an abundance of political discussion, the opportunities to hear the voices of women with disabilities have been few and far between. This report investigates the experiences of women with psychosocial disabilities against whom domestic violence is committed and analyses the legislative and policy responses in a human rights context. It demonstrates that although international human rights law is limited in the way in can directly influence Australian law, the human rights frameworks provided by the Convention on the Rights of Persons with Disabilities (the CRPD) can be a useful tool to guide the development of a more inclusive response to domestic violence. Within Australian jurisdictions, legislative schemes have been developed to attempt to provide protection to women who are the victims of domestic violence. This report will discuss some of the ways in which Commonwealth and Victorian laws operate to effect this goal. Whilst some of these provide valuable mechanisms to prevent the violation of the rights of women with disabilities through domestic violence, there is much room for development and improvement to allow for more effective and efficient protections. Finally, this report contends that in order to fulfil its obligations under the CRPD and provide for a response that is inclusive and accessible to persons with psychosocial disabilities who experience domestic violence, Australia must adopt a number of changes to ensure it complies with the rights protected under international law.

II Factual Overview of Domestic Violence Against Women with Psychosocial Disabilities in Australia
The focus of this paper is domestic violence against women with psychosocial disabilities. Psychosocial disability has been conceptualised in many different ways; from a “continuum of tension, stress and distress, to a biomedical understanding associated with a number of mental health conditions including schizophrenia, bipolar disorder, depression and substance use disorders.”\(^{629}\) This report will use the term psychosocial disability to describe the experience of people with mental health conditions who are impaired or restricted from participating fully in society. This definition, as used by disabled people’s organizations such as the World Organisation of Users and Survivors of Psychiatry, recognises that the disability arises not as a result of the individual’s condition but rather the societal barriers they face.\(^{630}\) This


report will engage with a number of the disabling factors that women with psychosocial disabilities may encounter when they experience situations of domestic violence.

No common definition of what constitutes violence against women with disabilities currently exists, which has led to differing legal definitions across jurisdictions in Australia.footnote[631] Georgina Dimopoulos in the Voices Against Violence report defines violence against women with disabilities as “a human rights violation resulting from the interaction of systemic gender-based discrimination against women and disability-based discrimination against people with disabilities.”footnote[632] This definition encompasses a wide range of violence including emotional, verbal, social, economic, psychological, spiritual, physical and sexual abuses.footnote[633] This paper will use the definition of violence against women as set out in the Declaration on the Elimination of Violence Against Women: “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”footnote[634] This declaration is the first international instrument explicitly addressing violence against women and provides a structure for national and international development.footnote[635]

Domestic violence may be perpetrated against women with psychosocial disabilities by a range of different perpetrators, including domestic or intimate partners and family members. The Family Violence Protection Act 2008 (Vic) has widened the scope of the definition of ‘family member’ to include ‘family-like relationships’, so that the protections under this legislation can be afforded against carers in institutional or residential settings.footnote[636] This has particular importance in the case of women with psychosocial disabilities, who often have institutional or out-of-home living arrangements and can be dependant on others for everyday care.

Whilst there is a dearth of primary data on the frequency and nature of domestic violence against women with disabilities, it is now widely recognised that women with disabilities experience violence at a higher rate and for longer periods of time.

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footnote[631]{Leanne Dowse, Karen Soklati, Aminath Didi, Georgia van Toorn and Carolyn Frohmader, Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia (Background Paper, National Symposium on Violence Against Women and Girls with Disabilities, October 25 2013) 22.}


footnote[633]{Ibid.}

footnote[634]{Declaration on the Elimination of Violence Against Women, A/RES/48/104, UN GAOR, 85th plenary meeting (20 December 1993).}


footnote[636]{Family Violence Protection Act 2008 (Vic), ss 7-8.}
than women in the general population. Recent reports show that women and girls with disabilities are twice as likely to experience violence as women and girls without disabilities, and over one third of women with disabilities experience some form of partner violence. Many forms of abuse are still standard practice in psychiatric wards in Australia, with medical experimentation, chemical restraint and the use of electroconvulsive therapy still common forms of treatment. The practice of forced sterilisation is also currently legal and sanctioned by Australian Governments.

Domestic violence against women with psychosocial disabilities is an intersectional concern, as these women are subject to multiple forms of vulnerability and discrimination. Violence against women with disabilities is the product of the intersection of gender-based discrimination, disability-based discrimination and other forms of subordination. Violence is usually about power and control, where perpetrators use violence in order to control or dominate their victim. Women with psychosocial disabilities are often more dependent on others for care and communication. These women frequently experience greater power imbalances in their residential environments, social isolation and limited choice and control. They are also subject to social stereotypes, inadequate housing and exposure to poverty, underemployment and poor-quality health care. Psychosocial disabilities can exacerbate a woman’s vulnerability or entrapment due to her fear, dependence and an inability to access appropriate services. All of these factors can contribute to higher rates of domestic abuse and lower instances of reporting.

III. The operation of the Convention on the Rights of Persons with Disabilities: Australia’s obligations in an international law context

Australia is party to two international conventions that impact the way in which the response to domestic violence against women with psychosocial disabilities must be shaped. Australia has been a signatory to the Convention on the Elimination of all forms of Discrimination Against Women (‘CEDAW’) since 1983 and the Optional Protocol in 2008. CEDAW fails to directly address disability or violence, thereby limiting its usefulness in the context of domestic violence for the advocating of the rights of women with disabilities. The Convention on the Rights of Persons with

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637 Above n 4, 9.
638 Above n 3, 1; National Disability Services, Submission to Royal Commission into Family Violence, 28 May 2015, 2.
640 Carolyn Frohmader, PWDA Fact Sheet: Forced Sterilisation (Fact Sheet, Women with Disabilities Australia, November 2014) 1.
641 Above n 4, 9.
642 Ibid.
643 Above n 10, 3.
644 Above n 4, 23.
647 State parties to the Optional Protocol recognise the competence of the Committee on the Elimination of Discrimination Against Women to consider complaints from individuals who believe their rights have been violated Optional Protocol to the Convention on the Elimination of Discrimination Against Women.
Disabilities provides a more nuanced approach that recognises the compounded impact of belonging to multiple groups subject to discrimination, and the increased risks of violence and abuse faced by women with disabilities. This recognition makes the CRPD a crucial tool in advocating for the change that is needed to address the deficiencies in the current response to domestic violence in Australia, as it acknowledges the need to adapt services and responses to the individual needs of a diverse community.

Australia ratified the CRPD on 17 July 2008 and the Optional Protocol on 21 August 2009. The CRPD imposes obligations and responsibilities on Australia to take measures to ensure the full enjoyment of human rights by persons with disabilities, including the adoption of all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention. An individual may also make a complaint to the Committee on the Rights of Persons with Disabilities (‘the Committee’). The Committee may make suggestions and recommendations regarding the complaint to Australia, but they have no binding effect. In Australia international conventions only become binding once they are enacted into domestic law. Legislation that comprehensively protects the rights expressed under the CRPD has not yet been enacted, and there is no independent right to access an Australian court in relation to a breach of the CRPD, unless the right is protected under existing legislation. This limits the scope and power of the CRPD. Although international bodies, such as the Committee, play an important role in influencing Australian government policies and decisions, it is the responsibility of the Government to ensure that there is an adequate human rights framework in place to fulfil Australia’s obligations under international law.

Violence against women is widely recognised as a human rights violation. This report proposes that a human rights framework must be applied in order to overcome the problems associated with domestic violence against women with psychosocial disabilities. It is evident from the huge disparity in the rates of domestic violence against women with and without disabilities in Australia that there is a need for a specialised response. Even though domestic violence is occurring in a private setting, in its draft general comment on Article 6 of the CRPD, Women with disabilities, the Committee recognises that the CRPD imposes an obligation on States to take responsibility for private discrimination. Framing a response to the issues faced by

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649 CRPD Preamble para q.
651 Optional Protocol to the Convention on the Rights of Persons with Disabilities art 5.
653 See, eg, CRPD art 16; United Nations Declaration on the Elimination of Violence Against Women; Above n 4, 10.
654 Committee on the Rights of Persons with Disabilities, General Comment on Article 6: Women with Disabilities, 14th sess, UN Doc CRPD/C/14/R.1 para 22.
women with disabilities who endure domestic violence around the obligations established under the CRPD has the potential to overcome the disparity. Women with Disabilities Victoria commends the CRPD for its ‘comprehensive and holistic’ approach to the human rights of people with disabilities. 656

The CRPD adopts a social model of disability, recognising that ‘disability is an evolving concept’ and that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers.’657 This shapes the definition of disability that is adopted by the CRPD which defines disability to 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.’658 Acknowledging the external factors that disable people with various impairments is crucial in understanding the diverse barriers encountered by women with disabilities who are subjected to domestic violence. It ensures that the focus is placed not on fixing the person, but fixing the system in which a person is unable to fully and effectively recognise their rights as a result of a disability. Embracing the human rights framework that the CRPD aspires to achieve is crucial in facilitating the development of policies and legislative reform that are needed to reduce domestic violence and provide an adequate response to those experiencing it.

**IV. Australia’s response to violence against women with psychosocial disability**

In Australia, there is currently no specific legal framework that addresses the investigation and prosecution of violence against women with disabilities.659 However, a number of state and Commonwealth legislative schemes exist which provide some protection for women with psychosocial disabilities who experience domestic violence. This report will focus on Victorian and Commonwealth legislation to provide an overview of the types of legislative protections that exist Australia-wide.

**State Legislation**
The *Family Violence Protection Act 2008* (Vic) (FVPA) provides for Family Violence Intervention Orders to be made to protect women with disabilities who have experienced domestic violence from a family member. Its purpose is to maximise the safety of children and adults who have experienced family violence, to prevent and reduce family violence and to promote the accountability of perpetrators of family violence.660 The Act recognises that family violence extends beyond physical and sexual violence and recognises that it may involve emotional or psychological abuse

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656 Above n 4, 37.
657 *CRPD* Preamble para e.
658 *CRPD* art 1.
659 Above n 4, 19.
660 *Family Violence Protection Act 2008* (Vic), s 1.
or overt or subtle exploitation of power imbalances.\textsuperscript{661} Section 8 broadens the definition of ‘family member’ so that victims can apply for protection against perpetrators in family-like relationships, including carers. An application for a Family Violence Intervention Order can be made by police officers, the person seeking protection or a person they have authorised.\textsuperscript{662}

The \textit{Personal Safety Intervention Orders Act 2010} (Vic) (PSIOA) aims to protect the safety of victims of assault, sexual assault, harassment, property damage or interference with property, stalking and serious threats, and to promote the resolution of disputes through mediation where appropriate.\textsuperscript{663} The main protection afforded under this act is a Personal Safety Intervention Order, which is an order made by a magistrate to protect a person from physical or mental harm caused by someone who is not a family member.\textsuperscript{664} An order of this kind can be applied for in a similar manner as a Family Violence Intervention Order. The court, if it considers appropriate, can require the parties to attend mediation to resolve conflict between them.\textsuperscript{665} This focus on mediation can be problematic for women with psychosocial disabilities, as power imbalances may still be prevalent and might hinder their ability to negotiate effectively with the perpetrator.\textsuperscript{666} This Act does not recognise the unique position of women with disabilities.

The \textit{Crimes Act 1958} (Vic) provides some protection for women with cognitive impairment. Cognitive impairment is encompassed by the definition of psychosocial disability used in this report. The Act recognises that women with cognitive impairment may be at greater risk of sexual assault in two specific circumstances; when receiving medical or therapeutic services or when residing in or attending a facility.\textsuperscript{667} The provisions make it a crime for a person providing medical or therapeutic services or a worker at a facility to sexually penetrate or commit an indecent act with a woman with a cognitive impairment unless they are her spouse or partner.\textsuperscript{668}

\textbf{Commonwealth Legislation}

There is currently a substantial lack of Commonwealth legislation that specifically addresses the issue of violence against women with disabilities. The primary concern of the \textit{Family Law Act 1975} (Cth) is not the prevention of family violence but the interests of the children in a family and protection the institution of marriage.\textsuperscript{669}

\begin{itemize}
  \item \textsuperscript{661} \textit{Family Violence Protection Act 2008} (Vic), s 5.
  \item \textsuperscript{662} \textit{Family Violence Protection Act 2008} (Vic), s 45.
  \item \textsuperscript{663} \textit{Personal Safety Intervention Orders Act 2010} (Vic), s 1.
  \item \textsuperscript{664} https://www.legalaid.vic.gov.au/find-legal-answers/personal-safety-intervention-orders
  \item \textsuperscript{665} \textit{Personal Safety Intervention Orders Act 2010} (Vic), s 26.
  \item \textsuperscript{666} Above n 4, 75.
  \item \textsuperscript{667} \textit{Crimes Act 1958} (Vic) ss 51-52.
  \item \textsuperscript{668} Ibid.
\end{itemize}
Family violence is defined in the Act as violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family or causes the family member to be fearful.\footnote{Family Law Act 1975 (Cth), s 4AB.} Whilst the Family Violence Best Practice Principles serve as guide and a voluntary ‘checklist’ of issues that judges, court staff, legal professionals and litigants may take into account at each stage of the case management process in family law disputes involving children, they fail to acknowledge the increased vulnerability and detrimental impacts of domestic violence for women with psychosocial disabilities.\footnote{Above n 4, 88.} Injunctions can be made under this Act, but breach of this is not a criminal offence like under the Victorian legislation.\footnote{Above n 4, 91.} The Australian Law Reform Commission and NSW Law Reform Commission have argued that the features and dynamics of family violence in the Family Law Act should mirror the provisions of state and family legislation as far as possible.\footnote{Above n 11, 307 [7.48].} This would allow for a more cohesive legislative framework nationwide and provide a broader range of protection for women with psychosocial disabilities who have experienced domestic violence.

V Positive aspects of the current situation in Australia

The interventions made available under Victorian legislation are one of the few options accessible to women with psychosocial disabilities who seek safety from domestic violence. As Dimopoulos in the Voices Against Violence Paper notes, “the availability of intervention orders in emergency situations, and their injunctive rather than punitive operation, enable intervention orders to supplement criminal justice responses to family violence or to provide a remedy where the criminal law may not apply.” The FVPA stipulates that behaviour may constitute family violence even if it would not amount to a criminal offence.\footnote{Above n 4, 49.} This offers a wider range of protection for women with psychosocial disabilities. These orders are flexible and broad in their application, as they apply to a wide range of abuse, including the more latent forms, and to people in family-like relationships, such as carers. They are also relatively straightforward to obtain, even by women who are reluctant to involve the police.\footnote{Above n 4, 46.} Contravention of both types of intervention orders is a crime.\footnote{Personal Safety Intervention Orders Act 2010 (Vic), s 100; Family Violence Protection Act 2008 (Vic), s 123.}

The FVPA and the PSIOA also increase police powers to respond to family violence more efficiently and effectively.\footnote{Above n 4, 48.} For example, s119 of the PSIO and s159 of the FVPA allow police to search premises for firearms or weapons without a warrant.\footnote{Personal Safety Intervention Orders Act 2010 (Vic), s 119; Family Violence Protection Act 2008 (Vic), s 159.}
Victoria Police have developed a Family Violence Code of Practice that recognises that some groups of women in the community are particularly vulnerable to violence due to isolation by language, disability or mental health issues. Section 2.5.3 recognises the unique requirements of women with disabilities who have experienced family violence and attempts to equip police with a set of procedures and the knowledge required for understanding how to deal with situations in which a woman with a disability has experienced family violence.

The Office of the Public Advocate in Victoria manages the Independent Third Person program, which aims to assist people with psychosocial disabilities and police officers in interviews. These independent third parties facilitate communication, support the person through the process and help the person in understanding their rights. Whilst the common law has recognized the importance of the ITP role, it is not enshrined in legislation.

There are a number of provisions in the Evidence Act 2008 (Vic) which modify procedures for giving evidence in court, for example allowing evidence to be given in a narrative form, enabling an interpreter to be used, or ensuring that witnesses who cannot hear adequately or speak adequately be questioned in any appropriate way. However, there is argument by Dimopoulos that these protections do not go far enough, and that they should be a mandatory requirement for all civil and criminal matters relating to family violence for people with a disability. This would help to ensure adequate support for people with psychosocial disabilities in accessing the justice system.

Whilst the Victorian and Commonwealth legislative schemes provide some protection for women with psychosocial disabilities who have experienced family violence, there is much room for improvement. The current protections partly meet Australia’s obligations under the CRPD, particularly under articles 13, 15 and 16, by attempting to provide greater access to justice, and freedom from violence and abuse and cruel, inhuman or degrading treatment. However, as noted, there are substantial gaps in the present framework with a lack of cohesion and a significant number of barriers facing women with psychosocial disabilities who have experience domestic violence and are attempting to access or participate in the justice system.

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681 Above n 4, 109.
682 Ibid; see Director of Public Prosecutions (Vic) v Alsem (Ruling) (Unreported, County Court of Victoria, Judge Gucciardo, 15 November 2012).
683 Evidence Act 2008 (Vic), ss 29(2), 30-31.
684 Above n 4, 125.
685 Above n 4, 16.
686 Above n 20.
VI Negative aspects of the current situation in Australia

Despite the increasing number of legislative changes, programs and organisations in Australia that have sought to address the problem of domestic violence in Australia, there remain a number of glaring deficiencies in the way with which the problem is dealt. The deficiencies illuminate a failure to address domestic violence against women with psychosocial disability in a manner consistent with the human rights framework that the CRPD provides. In it’s concluding observations on the initial report of Australia, adopted in October 2013, the Committee expressed a number of concerns with regards to the human rights of persons with disabilities, some of which illuminate issues that arise within Australia’s response to domestic violence against women with psychosocial disabilities, in particular around the issues of data collection and access to justice.687

Data Collection

There is the lack of statistical evidence about the prevalence and incidence of violence against women with disabilities.688 Within the data that is available, there is no disaggregated data indicating the different rates of domestic violence experienced by women according to disability type. Women with Disabilities Victoria note the invisibility of violence against women with disabilities because of a failure to identify them in data collection processes on violence.689 Women With Disabilities Australia suggest that the gaps in the evidence base arise because of the multiple, sometimes conflicting, understandings of disability and violence.690 Collecting data that accurately reflect the rates of violence may be affected by the underreporting of this type of crime, and by a failure to believe those that are reported.691 However mere difficulty in the collection of data does not excuse the lack of available data. The importance of data collection is recognised in the CRPD. As a signatory to the CRPD Australia has ‘[undertaken] to collect appropriate information, including statistical and research data, to enable [Australia] to formulate and implement policies to give effect to the present Convention.’692 The CRPD requires that the information be disaggregated, as appropriate,693 and accessible to the community.694 The Committee specifically notes it’s concerns about this dearth of information.695 It has recommended a comprehensive assessment of the situation of girls and women with

687 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, UN Doc CRPD/C/AUS/Co/1 (21 October 2013) 2 [16]-[17], 4 [27]-[30], 7 [53]-[54].
689 Ibid, 15.
692 CRPD art 31(1).
693 CRPD art 31(2).
694 CRPD art 31(3).
695 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, UN Doc CRPD/C/AUS/Co/1 (21 October 2013) 9.
disability.

It recommends all data be disaggregated by age, gender, type of disability, place of residence and cultural background.

In our review of the available literature we found minimal data relating to domestic violence that referred specifically to women with psychosocial disabilities. This could be due to the general invisibility of this form of disability, which is made visible only if workers specifically enquire, and if women with disabilities are willing to disclose information about their disability. One Western Australian study on domestic violence against women with disabilities, reported in 2003, recorded that the most prevalent disability was psychiatric, however this data did not include women living in institutional settings. The experiences of women with disabilities who face violence are not all the same, and the lack of data (particularly disaggregated data) presents numerous problems in the development of methods to deal with domestic violence against women with psychosocial disabilities.

Firstly, we do not know the extent of incidences of domestic violence against women with this type of disability. This makes it difficult to demonstrate any need for specialised services that can provide assistance targeted to the difficulties women with psychosocial disabilities may be experiencing. There are numerous reports with anecdotal evidence of the kinds of violence being experienced by women with psychosocial disabilities, however having a statistical evidence base may assist in demonstrating more explicitly the need for funding or change. It will also draw attention to the different needs of people with disabilities, ensuring, for example, that when agencies develop plans to make their services accessible they do not simply focus on physical accessibility.

Secondly, data is needed so as to provide a way in which to measure any changes in rates of violence or problems experienced within the agencies assisting victims of domestic violence. As the Committee notes, the collection of data will enable the measurement of future progress towards the implementation of the CRPD. Only with comprehensive data will it be possible to determine if and how any steps taken to manage the problem of domestic violence are successful on a systematic level. Particularly with regard to the experiences of women accessing services and navigating the justice system, this data does not have to be statistical, as anecdotal evidence can also provide a valuable tool with which to assess the successes and limitations of any accommodations and services that are made available.

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696 Ibid, 8-9.
697 Ibid, 9.
701 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, UN Doc CRPD/C/AUS/Co/1 (21 October 2013) 8-9.
The collection of data can also have the effect of bringing the attention of agencies and services to an individual’s need for additional support services or alternative dispute resolution options as a result of their disability.\footnote{702} Although persons with disabilities should never be required to disclose their disability, encouraging a safe and supportive environment in which it may be disclosed may enable access to specialised services and mechanisms that provide the support needed to enable women to safely and effectively gain the assistance they require.

**Access to Justice**

There is limited research relating specifically to the experiences of women with psychosocial disabilities when they interact with the justice system, particularly with regards to those who experience domestic violence. The following discussion relies largely on research into the experiences of people with disabilities without specifying the nature of the disability. We believe that in many situations the barriers that women with disabilities will face will be similar regardless of disability type, however the nature of the adjustments that should be made to enable access to justice on an equal level with women without disabilities may differ. It also relies on research into the the experience of women with cognitive disabilities who have experienced crime of a non-domestic nature, and relies on an assumption that in certain situations the barriers presented by the criminal justice system will be the same regardless of the crime. This report is intended to provide a brief overview of the current status of domestic violence against women with psychosocial disabilities in Australia, and it is necessary to note that what is discussed below is merely a small snapshot of some of the disabling factors that are encountered when attempting to use the criminal justice system to respond to situations of violence.

The CRPD places an obligation on Australia to ensure effective access to justice for persons with disabilities on an equal basis with others, requiring that accommodations be made to facilitate direct and indirect participation in all stages of legal proceedings.\footnote{703} This necessitates the creation of an environment in which women with psychosocial disabilities are able to report incidences of domestic violence and interact with the criminal justice system without encountering the many barriers they face today.

**Barriers to reporting domestic violence**

There are numerous barriers that may arise when women with disabilities seek redress to the violence they are experiencing. This results in many crimes going unreported.\footnote{704} Many of these barriers may be faced by women without disabilities, however the presence of a psychosocial disability can exacerbate the problems encountered. The additional stress the barriers may cause can exacerbate the

\footnote{702 Healey, Humphreys and Howe, ‘Inclusive Domestic Violence Standards’, above n 63, 59.}
\footnote{703 CRPD art 13(1).}
symptoms experienced as a result of their mental health condition, in turn increasing the risk that they will encounter further barriers.\footnote{705}

One initial barrier is that women with psychosocial disabilities may be unaware that they are experiencing domestic violence.\footnote{706} They may see their experiences as normal due to a lifetime of discrimination and demeaning experiences.\footnote{707} Women with Disabilities Victoria identify a lack of education and access to information to be a factor in the failure to understand that sexual violence is being committed.\footnote{708} Women with psychosocial disabilities may be more susceptible to having perpetrators of violence using psychological abuse to control them, causing them to question their state of mind and the credibility of their own understanding of their experience.\footnote{709}

This in itself can constitute a form of violence. In order to counter this, Australia must fulfil its obligation under Article 16 of the CRPD to take all educational measures to protect persons with disabilities from gender-based exploitation, violence and abuse. This requires, at the very least, the provision of clear and accessible information to potential victims and perpetrators, and to the community as to the meaning of domestic violence, particularly with regards to the expansion of the definition of domestic violence to include non-physical forms of violence, and to violence perpetrated by non-intimate partners.

Societal marginalisation and negative community perceptions contribute towards creating a world in which women with disabilities come to accept and to expect discriminatory behaviours. Women who have had previous experience with the police or justice system may be reluctant to report violence for fear they will not be taken seriously, or for fear they may be subjected to an order under mental health legislation.\footnote{710} People with disabilities have less chance of being believed if they do choose to report violence,\footnote{711} and the presence of a mental illness can be used to discredit and call in to question the reliability of a victim.\footnote{712} Some women have given evidence that, upon making a complaint, service providers have suggested they take their medication, rather than accepting that a crime had been committed and dealing with the problem before them.\footnote{713}

The presence of a disability may, in some instances, be seen to mitigate the guilt of an offender. The perceived burden of persons with disabilities, and that burden as a justification for violence, was seen very publicly in the recent murder of a woman with an acquired brain injury by her husband. The reporting of the incident focused heavily on her disability, with the perpetrator being seen as a ‘victim’. These perceptions may lead to the victim being reluctant to report violence for fear they will be blamed, or perhaps because they feel that are to be blamed, and therefore deserving of the violence. The CRPD imposes an obligation on Australia to adopt immediate measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, with explicit reference to encouraging the media to portray persons with disabilities in a manner consistent with the purpose of the Convention. The Australian Press Council has issued a guideline stating that the identification of someone as a person with an intellectual disability is generally undesirable, suggesting careful consideration of the reasons for publication and the possible consequences, however their no guidelines with respect to psychosocial disability more broadly, or notions of victim blaming. The Press Council should review its guidelines regarding the media’s reporting of domestic violence and crime against people with psychosocial disabilities, to ensure it does not exacerbate the problem of victim blaming.

Women may also choose not to report crime for fear of the repercussions, even if the report does result in action being taken against the perpetrator. Seeking intervention orders can be problematic for women with disabilities as the immediate exclusion of the perpetrator may take away the woman’s source of support. Women with psychosocial disability may be reluctant to report violence because of the risk of losing custody of their children, in some cases to the person who has perpetrated the violence. Article 23 says that States shall ensure the rights and responsibilities of persons with disabilities with regard to guardianship, and shall provide appropriate assistance in the performance of child-rearing responsibilities. Yet research has shown that children are removed from the custody of parents with disabilities at high rates. Women have also reported a fear of being subject to involuntary treatment, or being placed in institutional care, should they attempt to report crimes against

717 CRPD art 6.
719 Above n 4, 81.
720 Beyond Doubt, above n 76, 21; Domestic Violence Resource Centre, above n 81; Woodlock et al, above n 79, 16.
721 Goodfellow and Camilleri, above n 84, 55; Woodlock, Western and Bailey, above n 78, 50.
722 Domestic Violence Resource Centre, above n 81, 4.
them. Article 14 requires that State Parties ensure that persons with disabilities enjoy the right to liberty and security of person on an equal basis with others. Until Australia fulfils these obligations, fear of the consequences of engaging the authorities to assist in matters of domestic violence will continue to have a limiting effect on women with psychosocial disabilities who require assistance. Measures must be taken to ensure that the reporting of domestic violence is not leading to these outcomes, and to ensure the availability of alternative accommodation, childcare support services, and appropriate health care, in place of the deprivation of the liberty and rights of these women.

**Issues within the criminal justice system**

If women with psychosocial disabilities do overcome the barriers to reporting domestic violence they are likely to encounter further problems in their interactions with the criminal justice system itself, which can result in a failure to achieve the desired outcomes and a future reluctance to invoke the assistance of the criminal justice system.

The Australian Human Rights Commission notes that many people with disability are not identified by the police as having a disability, meaning that they are not able to access the support systems and alternative processes that may better facilitate an effective investigation. Women may be reluctant to self-report a psychosocial disability for fear that they will be perceived in a negative light. Negative attitudes towards people with disabilities, and assumptions as to their capabilities, can lead to them being viewed as unreliable or unable to provide credible evidence even if the police officers believe the violence has taken place. This can lead to decisions not to investigate or prosecute, as police and lawyers may not see potential for a case to succeed.

Article 13 of the CRPD places an obligation on Australia to promote training to those working in the administration of justice in order to ensure equal access to justice for persons with disabilities, and the Committee has expressed concerns about the lack of training for staff within the justice system.

In part because of the tight 72 hour time frame for applying for Family Violence Safety Notices, and in part because of their disability, women with disabilities have been found to be less likely to attend court, which increases the likelihood that the court will dismiss intervention order applications. An evaluation of the Family Violence Safety Notice pilot program found that adequate assessments, formal referrals and alternative arrangements were essential in ensuring women receive the

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724 *Beyond Doubt*, above n 76, 26.

725 Australian Human Rights Commission, above n 95, 8.

726 Above n 4, 14.

727 CRPD art 13(2).


729 Above n 4, 82.
support they need to get to court.\textsuperscript{730} Under the \textit{Personal Safety Intervention Order Act} and \textit{Family Violence Protection Act} a police officer can make an application for a final intervention order, however the conditions that may be imposed are limited.\textsuperscript{731} These limitations are necessary to ensure that women’s decision not to pursue an application are respected, however service providers should implement policies and procedures to ensure that the decision has not been made merely because of the difficulties that arise because of inadequate support and adjustments.

This discussion has by no means executed a comprehensive evaluation of all of the problems associated with the problems that arise for women with psychosocial disabilities who are seeking assistance in matters of domestic violence. It has not addressed the additional difficulties that may be faced by women who may, as a result of factors such as culture, race, sexuality, class or religion, suffer the compounded effects of multiple discrimination. Nor has it addressed the problems that might arise for women with psychosocial disability should the perpetrator of domestic violence be charged with a criminal offence which proceeds to trial. This report does not intend to address all of the issues, but merely to draw attention to the way in which psychosocial disability can amplify and increase issues that arise as a result of the perpetration of domestic violence, in order to generate further thought and discussion on an often invisible problem.

\textbf{VII Further Research and action}

\textbf{Current Initiatives}

A number of initiatives have been instigated, particularly in recent years, which address domestic violence against women with disabilities and the problems associated with gaining access to the justice system. In February this year the Australian government announced the commencement of a Royal Commission into Family Violence. Whilst not specifically targeted to women with disabilities, submissions from advocacy organisations such as Women with Disabilities Australia have highlighted the need for the particular issues facing women with disabilities to be addressed.

In 2014 the Voices Against Violence project was launched which brings together the experiences of women with disabilities, staff and volunteers, reviews of legislation and the records of the Office of the Public Advocate, and makes recommendations for future action.\textsuperscript{732} This is claimed to be the most significant research ever into the family violence experiences of women with disabilities in Victoria.\textsuperscript{733} A number of

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\textsuperscript{731} \textit{Personal Safety Intervention Orders Act} 2010 (Vic) ss 63(1)-(2), 87(1)-(2); \textit{Family Violence Protection Act} 2008 (Vic) ss 75(1)-(2), 110(1)-(2).
\textsuperscript{733} Ibid.
\end{flushright}
other disability advocacy organisations have undertaken research in this field and presented their findings in detailed reports.  

The National Plan to Reduce Violence Against Women and their Children 2010 - 2022 provides a single, unified strategy that brings together government efforts to reduce violence against women.  

It identifies women and girls with disabilities as a group that are at a significantly higher risk of violence.  

This plan has put in place a number of initiatives aimed at making communities safe, preventing violence and ensuring perpetrators are held responsible for their actions.  

The second action plan aims to reduce violence by providing information and raising awareness through initiatives such as The Line campaign, running respectful relationship education projects nationwide, providing training to health workers, making improvements to domestic or family violence orders through the creation of a national scheme and setting national outcome standards for best practice perpetrator interventions.  

The issue of protecting women and girls with disabilities from abuse and violence is presently the focus of a number of investigations in Australia including the Australian Government Senate Inquiry into violence, abuse and neglect against people with a disability in institutional and residential settings and the Royal Commission into Institutional Child Sex Abuse.  

The Federal Government has also implemented a number of plans to reduce violence against women and improve the lives of women with disabilities.  

**Recommendations**  
This report proposes a number of recommendations to address the issues identified with the current legal and institutional frameworks surrounding violence against women with psychosocial disabilities.  

1. It is recommended that the Australian Government, and people working with women with psychosocial disabilities who are victims of domestic violence, continue to develop initiatives consistent with the human rights set out in the Convention on the Rights of Persons with Disabilities.  

2. Secondly, a procedure should be developed in order to facilitate appropriate, sensitive, and safe data collection with regards to the rates of women with disabilities.

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735 Above n 3, 2.  
737 Ibid.  
740 State Disability Plan 2013-16 and a National Disability Strategy 2010-20, as well as a National Plan to Reduce Violence against women and their children 2010-2022, consultation occurring on the development of a Quality and Safeguarding Framework for the National Disability Insurance Scheme
psychosocial disabilities experiencing domestic violence, and the experiences of interacting with the justice system.

3. Thirdly, it is recommended that inclusive education and awareness initiatives be implemented to assist people with psychosocial disabilities to recognise violent acts and know their rights. This will assist them in participating fully in society, thus reducing the vulnerability and susceptibility to domestic violence.

4. Service providers and police should undergo further education and training to raise awareness of, and reduce stereotyping of, psychosocial disability. This should be coupled with increased sensitivity training to enable them to better uphold the human rights of women with psychosocial disability when interacting with the justice system.

5. It is recommended that legislation be introduced, or the existing legislation amended, to allow for a cohesive national scheme and greater flexibility within the legal system to accommodate the needs of women with psychosocial disability. As Dimopoulos notes, “adopting a ‘disability lens’ to the development of appropriate protections, which are sensitive to the human rights and needs of women with disabilities, will serve to ensure that the rights of such women are not marginalised or overlooked in the formulation of laws, policies and procedures.”\(^{741}\)

\(^{741}\) Above n 4, 17.
Have questions about this Collection?

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