



Melbourne Law School
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Disability Human Rights Clinic

Final Projects Collection



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Cover photo: 2019 Disability Human Rights Clinic Students with Eleanore Fritze and Alex Callahan

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GROUP 1 PROJECT

Improving Access to Legal Assistance and Disability Advocacy for Persons with Disabilities: Disability Support Pension at Administrative Appeals Tribunal

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Improving Access to Legal Assistance and Disability Advocacy for Persons with Disabilities Making Disability Support Pension at Administrative Appeals Tribunal

I Introduction

Persons with disabilities can appeal to the Administrative Appeals Tribunal ('AAT') regarding a rejection by Centrelink of their applications for Disability Support Pension ('DSP'). Our project will develop legal and practical arguments for improving access to legal and disability advocacy assistance for persons with disabilities during the process of appealing a DSP decision.

In our understanding, currently, relatively few AAT applicants have legal assistance or disability advocacy support during the process of an AAT appeal. The Australian Federation of Disability Organizations ('AFDO') has raised a concern that this situation impedes access to justice for many applicants with disabilities. Therefore, AFDO requested Melbourne Law School's Disability Human Rights Clinic ('DHRC') to study the impact of accessibility of legal assistance and disability advocacy as a measure of access to justice during this process under the perspective of the *Convention on the Rights of Persons of Disability* ('CRPD').

Under the framework of the CRPD, particularly articles 12 and 13, our report will identify some problems with currently available forms of support, introduce the National Disability Insurance Scheme ('NDIS') Appeals Model as an example of how to improve access to legal assistance and disability advocacy supports. We will also outline what changes would be required to improve the NDIS Appeal Model in line with the requirements of the CRPD.

Regarding the method of this study, firstly, we conducted a literature review of DSP and NDIS Appeal processes and different means of support currently available to persons with disabilities during their appeals. We also sought the views of expert informants from legal aid, community legal services and disability advocacy organizations.¹ Finally, we applied a human rights analysis in suggesting a new support model for the DSP appeal process.

II Background

1 What is DSP and the process of appealing unfavourable decisions?

The DSP, a program administered by Centrelink, is a form of social security available to some people who have a physical, intellectual or psychiatric impairment which results in a continuing inability to work.²

There are a number of criteria that a person must satisfy to be eligible for the DSP. According to the *Social Security Act 1991*(Cth), these criteria include that the person must:³

¹ We would like to thank Mr. Len Jaffit and Ms. Olympia Sarrinikolaou from Victoria Legal Aid, Ms. Gillian Wilks from Social Security Rights Victoria, and Ms. Mary Mallett from Disability Advocacy Network Australia for their valuable inputs.

² Department of Social Services, '1.2.5.10 Disability Support Pension (DSP) - Description', *Social Security Guide* (Web Page, 11 November 2019) <<https://guides.dss.gov.au/guide-social-security-law/1/2/5/10>>.

³ *Social Security Act 1991* (Cth) s 94.

- Be 16 years of age and above at the time of the claim; and
- Have a physical, psychiatric, or intellectual impairment; and
- Have a physical, psychiatric, or intellectual impairment that scores at least 20 points under one or more of 15 ‘impairment tables’; and
- Have an impairment that prevents them from working 15 hours per week, or from retraining for work, for at least the next two years; and
- Meet residence requirements; and
- Have actively participated in a program of support for at least 18 months or completed the entire program if such program is less than 18 months. The program of support here means a program which is funded wholly or partly by the Commonwealth and aimed to help people find or maintain work.⁴ However, there are some exemptions for this requirement, such as where a person has a severe impairment (i.e. 20 or more points under the impairment table).

To determine whether a person meets the criteria, Centrelink requires a completed application form and medical evidence of the person’s injury, illness or impairment.⁵ For more information, please refer to the DHRC 2018 report.⁶

2 What is the AAT’s process in dealing with DSP appeals?

A person whose DSP is cancelled or whose application is rejected can appeal the decision. The process of challenging such a decision is set out in the *Social Security (Administration) Act 1999* (Cth). First of all, that person needs to seek an internal review from a Centrelink’s authorised review officer.⁷ We should note that the Chief Executive Officer or Secretary of Centrelink is also capable of affirming, varying or setting the decision aside.⁸ Next, if the applicant still disagrees with the decision from the internal review, he/she can bring the matter to the AAT.⁹

Upon receiving the application to review the decision, the AAT will arrange informal conferences with the parties to discuss the case, collect more information, and try to find a resolution that both parties can agree upon.¹⁰ If a mutual resolution cannot be reached, the AAT will undertake an independent merits review in order to make the ‘correct or preferable decision’.¹¹ In

⁴ Ibid s 94(5).

⁵ *Social Security (Administration) Act 1999* (Cth) s 63(4).

⁶ Eunice Ghita and Eliza Waters, ‘Thematic Analysis of Administrative Appeals Tribunal (AAT) Decisions Involving Claiming and Reviewing the Disability Support Pension, *Final Project Collection* (Melbourne Law School Disability Human Rights Clinic, 2018) 97, 103-4 (‘2018 Report’).

⁷ Ibid s 129(1).

⁸ Ibid s 135(1)(b).

⁹ Ibid s 142.

¹⁰ Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *Provision of Services Under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition* (2017) 15.

¹¹ *Drake and Minister for Immigration and Ethnic Affairs* [1978] AATA 71.

evaluating an application for review, the Tribunal must 'step into the shoes' of the original decision-maker.¹² The AAT is also permitted to take into account evidence which may not have been available to the officers of Centrelink at the time of the original decision.¹³

There are two phases of an AAT review: the first review and the second review. However, we should note that the applicants do not necessarily go through both phases. The first review takes place in the AAT's Social Services and Child Support Division while the second review is conducted in the General Division of the AAT.¹⁴ During both reviews, the applicant can be assisted and/or represented by a legal professional and/or a disability advocate. However, the applicant can also choose to represent him/herself if he/she sees fit, or if there is no support available for him/her during the time of the hearing. For more information regarding the process of the first and second reviews, please refer to our 2018 report.¹⁵

If the person affected by refusal or cancellation of the DSP is not satisfied with the AAT's decision, he/she may have an option to appeal that decision to the Federal Court. The Court has the power to set aside AAT decisions only if such decisions involved an error of law. We should note that questions regarding error of fact will not be considered by the Federal Court of Australia.¹⁶

3 What is the support currently provided to persons with disabilities during the process of appealing DSP decision?

According to our informants, in Victoria, when the AAT becomes aware of a person with a disability who does not have legal assistance when appealing an administrative decision, it may refer that person to a duty service run by Victoria Legal Aid ('VLA') or directly refer him/her to VLA or Social Security Rights Victoria ('SSRV'). Disability advocacy organizations may also provide assistance with AAT appeals and other DSP-related matters.

3.1 Victoria Legal Aid

VLA is a statutory authority that operates under the *Legal Aid Act 1978* (Vic). It is funded by the Australian and Victorian governments to provide free legal information, advice and education to all Victorians.¹⁷

According to our informant at VLA, it is currently operating an in-house practice and provides assistance in three main ways. Regarding DSP AAT appeals, first of all, VLA provides advice over the telephone where anyone can call and obtain general advice from a legal professional.¹⁸ Secondly, a person who will appear before the AAT in the General Division (second stage review)

¹² *Shi and Migration Agents Registration Authority* (2008) 235 CLR 286.

¹³ *Ibid.*

¹⁴ Welfare Rights & Advocacy Service, Disability Support Pension (2016) <<http://www.wraswa.org.au/wp-content/uploads/2016/05/DSP-FACTSHEET-Update-02.05.16-v2.pdf>>.

¹⁵ '2018 Report' (n 6).

¹⁶ *Administrative Appeals Tribunal Act 1975* (Cth) s 44(1).

¹⁷ *Legal Aid Act 1978* (Vic) s 6.

¹⁸ 'Get Help Over the Phone', *Victoria Legal Aid* (Web Page) <<https://www.legalaid.vic.gov.au/get-legal-services-and-advice/free-legal-advice/get-help-over-phone>>.

can arrange an appointment and obtain some more advice on a face-to-face basis.¹⁹ Thirdly, if the applicant wants to be formally represented by VLA during his/her AAT appeal process²⁰, he/she can apply for a grant of legal assistance. However, subject to the limited resources provided to VLA, the eligibility criteria for obtaining this legal assistance can be very strict.

In order to be represented by VLA before an AAT hearing regarding social security and other benefits, an applicant will need to satisfy the following requirements:²¹

- The person seeking a grant of legal assistance may incriminate him/herself if unrepresented; or
- The case is complicated; or
- The person cannot adequately represent him/herself due to special circumstances; or
- The case involves an important or complex question of law; or
- Significant medical evidence is required; and
- A means test is satisfied; and
- The merits test is satisfied.

For the means test, VLA usually considers whether the person cannot afford the full cost of private legal services. The means test 'sets thresholds for an applicant's income and assets, as well as their expenses and legal costs'.²² VLA will conduct an assessment of the applicant's income, assets, expenses and the type of legal matter. The applicant will have to provide a range of supporting documents such as a copy of his/her latest pay slip, a health care card, or a Centrelink separation certificate.²³ Based on the assessment, the person's eligibility for legal assistance will be determined, as well as whether or not the applicant will have to contribute to the legal fees. Besides the means test, the merit test will be conducted to make sure that VLA honestly believes that it is more likely to succeed than not and that the case is one that a reasonable self-funded litigant would spend his/her money on.²⁴

¹⁹ 'See A Lawyer', *Victoria Legal Aid* (Web Page) <<https://www.legalaid.vic.gov.au/get-legal-services-and-advice/free-legal-advice/see-lawyer>>.

²⁰ 'Get Help At Court', *Victoria Legal Aid* (Web Page) <<https://www.legalaid.vic.gov.au/get-legal-services-and-advice/free-legal-advice/get-help-court>>.

²¹ 'Guideline 2--Social Security and Other Benefits: Administrative Appeals', *VLA Handbook for Layers* (Web Page) <<https://handbook.vla.vic.gov.au/handbook/5-commonwealth-civil-law-guidelines/guideline-2-social-security-and-other-benefits-administrative-appeals>>.

²² '12--Means Test', *VLA Handbook for Layers* (Web Page) <<http://handbook.vla.vic.gov.au/handbook/12-means-test>>.

²³ Ibid.

²⁴ '13--Commonwealth Merits Test', *VLA Handbook for Layers* (Web Page) <<https://handbook.vla.vic.gov.au/handbook/13-commonwealth-merits-test>>.

According to information from our informant, most DSP rejection or cancellation cases involved complex matters which may lead to a risk of prosecution and required significant medical evidence. In addition, the fact that the person may have ‘intellectual, psychiatric or physical disability’ falls under the Commonwealth’s definition of ‘special circumstances’.²⁵ As a result, those cases will likely satisfy the requirements above.

3.2. Social Security Rights Victoria

Social Security Rights Victoria Inc. provides legal information and assistance to individuals in relation to social security law, including cancellation and refusal of DSP applications.²⁶ SSRV also provides specialist information through a free Worker Help Line for financial counsellors, disability advocates, social workers, doctors and community lawyers to help support their clients.²⁷

According to our informant, SSRV lawyers provide a range of legal assistance services such as assessment of documentation, negotiation with Centrelink and providing representation at the AAT hearings. This assistance is ‘subject to guidelines and availability of assistance’.²⁸ Due to limited resources and obligations under funding agreements, SSRV must prioritize the provision of more intensive assistance, such as legal casework or representation services. As such, people who are ‘vulnerable and disadvantaged’²⁹ or the professionals assisting them are normally given priority. ‘Vulnerability’ and ‘disadvantage’ will be assessed using a list of factors such as age, race, level of education, and disability or significant health issues, including mental illness ...³⁰ Other factors such as the merit of the case will also be considered.³¹

3.3. Other disability advocacy organizations

According to the ‘*Report of the Special Rapporteur on the Rights of Persons with Disabilities*’, support for persons with disabilities ‘encompasses a wide range of formal and informal interventions’, including ‘personal assistance; support in decision-making; communication support [...] and community services’.³² Thus, disability advocacy organizations, such as Disability Justice Australia or Disability Advocacy Network Australia, may also provide support to people making applications for DSP or pursuing appeals in the AAT. These advocates are not

²⁵ ‘The Commonwealth’s Special Circumstances’, *VLA Handbook for Layers* (Web Page) <<https://handbook.vla.vic.gov.au/handbook/15-special-circumstances/commonwealths-special-circumstances>>.

²⁶ ‘Services’, *Social Security Rights Victoria* (Web Page) <<https://www.ssr.org.au/services/>>.

²⁷ Ibid.

²⁸ Ibid.

²⁹ ‘Eligibility for Assistance’, *Social Security Rights Victoria* (Web Page) <<http://www.ssr.org.au/wp-content/uploads/Eligibility-for-Assistance.pdf>>.

³⁰ Ibid.

³¹ Ibid.

³² *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc A/HRC/34/58 (20 December 2016) 5[14], 19[82] (‘*Report of the Special Rapporteur*’).

usually legally qualified, so they are providing advocacy support as distinct from legal assistance and representation.

According to our expert informant, disability advocacy services in Victoria mainly provide assistance with putting together applications to access services and connecting the person with legal or other services. However, our informant suggests that the disability advocate can be more active in terms of standing up and talking on behalf of people at the Tribunal, especially for straightforward cases.

III Legal assistance and disability advocacy

Receiving assistance from legal and disability advocacy organizations is critical for equal and effective access to justice under articles 12 and 13 of the CRPD. Although they are different, the two types of assistance may be equally important for persons with disabilities.

1. Legal assistance

In the context of seeking AAT review of a DSP decision made by Centrelink, legal assistance means access to legal aid and have legal representation before AAT hearing for persons with disabilities who cannot afford private legal services.

The complexity of the legal issues and evidence requirements may create difficulties for persons with disabilities being represented by laypersons or being self-represented during the appeal process. For example, in *GFHF and Secretary*, even though the applicant received assistance from her WorkCover claims manager, she still provided the wrong answer in the application form, because she said she did not understand the question.³³ This example indicates the necessity of legal assistance in mounting the best argument and ensuring the validity and admissibility of the evidence. In addition, legal professionals know how to communicate effectively in a legal environment such as the AAT. Thus, the use of legal assistance may help the applicants maximize the merits of their appeals, especially in complex cases.

2. Disability advocacy

Disability advocacy can be categorized into generalist advocacy, where persons with any type of disabilities receive support, and specialist advocacy, which provides support for persons with a certain type or diagnosis of disability.³⁴ Specialist advocacy can also deal with 'specific issues such as housing, education or employment', 'diverse cultural and linguistic backgrounds', or 'Aboriginal and Torres Strait Island backgrounds'.³⁵ Apart from dealing with non-legal matters such as providing background knowledge regarding the process and emotional and communicational support, our expert informant was of the view that disability advocates can deal with straightforward legal matters in practice. Moreover, some persons with disabilities might be more likely to contact a disability advocacy organization for assistance when they

³³ *GFHF and Secretary, Department of Social Services (Social services second review)* [2018] AATA 675 (28 March 2018) [17].

³⁴ 'National Disability Advocacy Program', *Disability and Carers* (Web Page, 6 December 2018) <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/national-disability-advocacy-program-ndap>>.

³⁵ *Ibid.*

receive an unfavourable Centrelink decision. In these circumstances, disability advocates can provide assistance themselves as well as referring the person to appropriate legal services providers.³⁶

These types of disability advocacy are tailored to meet the needs and rights of persons with disabilities.³⁷ In appealing a DSP decision, they can help applicants to understand, make decisions about and act on: the appeal process, the types of medical evidence and other documents needed, or the options which could be made if the result of appealing is unfavorable to applicants.

3. Both are equally important

As we mentioned above, both legal assistance and disability advocacy provide unique types of supports that meet different needs of persons with disabilities. Thus, they are equally important. The degree of involvement of legal assistance and disability advocacy will also depend on the circumstances of cases. For example, in some cases, applicants who use non-verbal forms of communication may need specific support from a disability advocate to express themselves and communicate their decisions to the Tribunal, lawyer and the other parties. In these cases, a legal professional may not have the skills and experience to appropriately and effectively communicate with the applicants to, for example, take their instructions. Disability advocates will play a crucial role in those cases.

On the other hand, a legal representative will be indispensable in some other cases. For example, to get points under Impairment Table 5 ('mental health'), an applicant needs be fully diagnosed in the '13-week period commencing on the date the claim is lodged with Centrelink'.³⁸ However, there are case laws holding that the applicant may still get the points by getting the diagnosis after the date of the claim.³⁹ Thus, there could be a special situation in which Centrelink rejected the application because the applicant did not have a diagnosis and by the time getting to the Tribunal, he/she might have the diagnosis. Disability advocates might not be aware of the case in this situation, whereas specialist lawyers would be aware of it and use the rule in that case to protect the rights of the applicant.

IV. Interpretation and application of the CRPD

1. Introduction

As an international human rights treaty, the CRPD aims to ensure the rights of persons with disabilities and requires States to take positive measures regarding those rights. Australia has signed and ratified the CRPD in 2007 and 2008 respectively, meaning that it is under an

³⁶ *National Disability Advocacy Framework* (Framework, 1 August 2012) [9] ('Framework').

³⁷ *Ibid* [13(a)].

³⁸ Victoria Legal Aid, *Qualifying for the Disability Support Pension: Joint Committee of Public Accounts Inquiry* (Submission 34, 14 November 2016) 13.

³⁹ *Eid and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2013] AATA 558 (8 August 2013) [88], which was approved in *Gordon and Secretary, Department of Social Services (Social services second review)* [2019] AATA (7 May 2019).

obligation to promote 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'.⁴⁰

Articles 12 and 13 of the CRPD are interrelated, as the recognition of the right to legal capacity in article 12 is essential for State Parties' obligation under article 13 to ensure equal access to justice.⁴¹ Access to justice on an equal basis with others will never be achieved if a person is not fully recognized 'before the law with equal standing in courts and tribunals'.⁴² For persons with disabilities, due to their functional impairments, it is important for States to provide them with support so that they can fully exercise their legal capacity. As a result, the two articles suggest the necessity of access to both legal assistance and disability advocacy, as a means of providing support to persons with disabilities.

2. Article 12

Legal capacity is defined as the 'capacity to act', which means the ability and power to engage in particular undertakings or transactions, to maintain a particular status or relationship with another individual.⁴³ More generally it means to 'create, modify or extinguish legal relationships'.⁴⁴ Thus, it is clear that legal capacity is about all persons having the recognized 'power' to make their own decisions.⁴⁵

Article 12 states that all individuals have legal capacity, regardless of their varying abilities. Thus, according to the CRPD Committee in its General Comment, States must replace regimes of substitute decision-making with regimes of supported decision-making that respect the rights, will and preferences of the persons with disability.⁴⁶ The reason for this proposition is that as the substituted decision-making framework requires an assessment to determine people's abilities to make decisions, it undermines their legal capacity. On the other hand, the support model protects disabled people from 'unwanted interference but simultaneously recognizes the interdependence of human decision-making and includes proactive measures to support individuals to exercise their legal capacity to make decisions'.⁴⁷ The necessity of support is

⁴⁰ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 1 ('CRPD').

⁴¹ Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, UN Doc CRPD/C/GC/1 (19 May 2014) 10 ('*General Comment No.1*').

⁴² *Ibid.*

⁴³ *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its Sixth Session*, UN Doc A/60/266 (17 August 2005).

⁴⁴ *Ibid.*

⁴⁵ Kristin Booth Glen, 'The Challenge: The CRPD and the Right to Legal Capacity', *American Bar Association* (Web Page, 8 November 2018) <https://www.americanbar.org/groups/international_law/publications/international_law_news/2013/spring/challenge_crpdc_right_legal_capacity/>.

⁴⁶ *General Comment No. 1* (n 41) 1.

⁴⁷ Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realizing the Right to Support in Exercising Legal Capacity' (2014) 10(1) *International Journal of Law in Context* 81, 91.

further confirmed as article 12(3) imposes on states an obligation to provide support in exercising legal capacity of persons with disabilities.

Article 12 does not provide a fixed definition of ‘support’. It is the intention of the drafters to give ‘support’ an open and flexible definition because people need different kinds of supports in different circumstances and the kind of support also depends on their particular disabilities.⁴⁸ As mentioned above, since support for persons with disabilities includes a wide range of activities, both legal assistance and disability advocacy may be categorized to fall under the definition of ‘support’ because they equip persons with disabilities with information, knowledge and other relevant assistance (i.e, emotional or communicational supports) they might not have to make decisions regarding the proceedings and participate in the appeals process.⁴⁹

In addition, per article 5, as States are required to make all necessary and appropriate modification or adjustments that do not impose a disproportionate or undue burden to allow persons with disabilities to exercise their rights,⁵⁰ it is important to have a mixture of both disability advocacy and legal assistance, proportionate to the circumstances of the case.

3. Article 13

Article 13(1) regulates the State’s obligation to ‘ensure effective access to justice for persons with disabilities on an equal basis with others’.⁵¹

The Australian Government Access to Justice Advisory Committee, which was appointed by the Commonwealth Government in 1994, conceptualizes ‘access to justice’ to include equality of access to high-quality legal services or other effective mechanisms of dispute resolution, such as disability advocacy.⁵²

As persons with disability account for 40% of the three million Australians living in poverty, it is arguable that many of them will not be able to pay for private support services to assist them during the AAT appeal process.⁵³ In addition, in Australia, favorable judgements to persons with disabilities would be at a significantly higher rate when legal assistance was offered.⁵⁴ That higher rate indicates the effectiveness of assistance for persons with disabilities during legal proceedings. Thus, in order to comply with the requirement of equal and of high-quality access to justice under article 13, Government should provide state-funded legal assistance and

⁴⁸ General Comment No. 1 (n 41).

⁴⁹ *Report of the Special Rapporteur* (n 32) [14].

⁵⁰ CRPD art 5.

⁵¹ CRPD art 13.

⁵² Louis Schetzer, Joanna Mullins and Roberto Buonamano, ‘Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW’ (Background Paper, Law & Justice Foundation of New South Wales, August 2002) 6-7.

⁵³ ‘Poverty in Australia 2018’ (Research Report, ‘the Australian Council of Social Service’, 2018) 58.

⁵⁴ Frances Gibson, ‘Article 13 of the Convention on the Rights of Persons with Disabilities - A Right to Legal Aid?’ (2010) 15(2) *Australian Journal of Human Rights* 123, 127, citing Alan Roulstone, ‘The Legal Road to Rights? Disabling Premises, Obiter Dicta and the Disability Discrimination Act 1995’ (2003) 18(2) *Disability & Society* 117-31.

disability advocacy, which is free or at least affordable, for persons with disabilities. In other words, article 13 suggests that government-funded legal assistance and disability advocacy should be considered as an important safeguard for States to ensure equal and effective access to justice.⁵⁵

4. Conclusion

Based on the requirements of articles 12 and 13 of the CRPD, it is arguable that legal assistance and disability advocacy are significant in ensuring the legal capacity of persons with disabilities as well as their equal access to justice. Article 13 also suggests that such support should be either free or affordable.

Finally, it is important to note that although legal assistance and disability advocacy fall under the support model, they are not the only two means of support available. Thus, it is still contentious whether either of them is compulsory to Australian obligations under the CRPD. However, regarding the functions and advantages of legal assistance and disability advocacy mentioned above, as well as the implied right to free/affordable legal assistance in Article 13, they should be highly encouraged.

V. Current Problems Regarding Availability and Accessibility of Support

Problems with access to legal assistance and disability advocacy remained after Australia's ratification of the CPRD in 2008.⁵⁶ Three problems will be mentioned in this report, which are the imbalanced power between parties, the lack of proper training and funding, and the double barriers faced by Indigenous people.

1. Imbalanced power between parties

As the other party in AAT appeals about Centrelink decisions, the Department of Social Services always has legal representation. In contrast, it is common for applicants to attend AAT hearings without legal representation. Our 2018 report analyzed 45 second stage AAT cases over the period of November 2017 to November 2018. Amongst those 45 cases, only 8 applicants were assisted with legal representation.⁵⁷

In the absence of adequate preparation under legal assistance, persons with disabilities may encounter barriers preventing applicants from understanding and participating on an equal basis with the Department, such as 'the unfamiliar environment, formalities and jargon'.⁵⁸ As recognized in *TDQN and Secretary, Department of Social Services*, it is 'not common' for self-

⁵⁵ Gibson (n 54) 128.

⁵⁶ 'Legislative and Regulatory Framework', *Australian Law Reform Commission* (Framework, 12 November 2013) <<https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-ip-44/equality-capacity-and-disability-in-commonwealth-laws/legislative-and-regulatory-framework/>>.

⁵⁷ 2018 Report (n 6) 107.

⁵⁸ *Disability Access Bench book* (Judicial College of Victoria, 2016) [2.3.3] ('Bench Book').

represented applicants without legal representation to misunderstand the process of AAT appeals.⁵⁹

Even without being assisted by a legal service, the Department itself already has privilege before the Tribunal appeal process starts, as a powerful governmental department holding significant financial and informational resources. However, persons with disabilities, due to 'physical and communication access barriers', may not maximize their merits in the hearing without legal assistance.⁶⁰ For example, in *Manjunath*, the Tribunal noted that the applicant was giving lengthy answers to the questions posed and this did not assist his case.⁶¹

Legal assistance (including legal representation) for both parties would balance the power between them.⁶² From administrative tribunals studies in Sandefur's research, as opposed to no legal representation at all, the presence of legal assistance would signal to the court that the party is of significance and that the merits of the claim worthy of consideration.⁶³ Also, it is possible that legal representatives would provide the represented party with an advantage and the outcome of the legal proceeding would be better.⁶⁴

2. Lack of training and lack of funding

Mainstream legal services are very expensive and beyond reach for most people, especially persons with disabilities as many of them are living under poverty. When persons with disabilities do not have the financial capacity to self-fund legal assistance, they may seek legal assistance from legal aid, community legal centers and other organizations.

So many legal professionals from both public and private fields have not been trained to support their disabled clients. For example, some of them may not know how to communicate with clients who use non-verbal forms of communication and to understand the expression of clients with cognitive disabilities. That incapability may undermine the support providers' duties to respect the rights, will and preferences of the persons and thus negatively impact the right of persons with disabilities to exercise their legal capacity.⁶⁵ Such lack of skills may result in the legal professionals undermining the capabilities and contributions of persons with disabilities in the process of making their decisions. Thus, it may not only increase the risk of an inefficient provision of service, but also undermine the compliance of Australia under article 8 of the CRPD, which requires States Parties to 'promote awareness of the capabilities and contributions of

⁵⁹ *TDQN and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1850 (7 June 2018) [79].

⁶⁰ *Bench book* (n 58) [2.3.4].

⁶¹ *Manjunath and Secretary, Department of Social Services (Social services second review)* [2018] AATA 1077 (27 April 2018) [2].

⁶² Colleen FS Hanahan, Anna E Carpenter and Alyx Mark, 'Lawyers, Power and Strategic Expertise' (2016) 93(2) *Denver Law Review* 469, 506 ('Lawyers').

⁶³ Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact* (2015) 80(5) *American Sociological Review* 909, 910.

⁶⁴ 'Lawyers' (n 62) 506.

⁶⁵ CRPD art 12.

persons with disabilities'.⁶⁶ The lack of training may also contradict article 13(2), which requires States Parties to 'promote appropriate training for those working in the field of administration of justice'.⁶⁷

One of the potential reasons for the lack of training is insufficient funding from the government. The Commonwealth's funding per capita to Legal Aid Commission has been reduced from \$10.88 in 1996-7 to \$8.01 in 2017-8.⁶⁸ The 2016 Annual Report of the National Association of Community Legal Centers stated that, from 2014 to 2015, community legal centers had to turn away 159,220 people from receiving legal assistance. It was reported that about 67.3% of the refusals was due to the lack of funding.⁶⁹ In addition, due to the launch of the NDIS, many disability advocacy organizations are facing budget cuts from the government. For example, in New South Wales, 'the government's planned cuts to disability funding will force many advocacy services to close from 2020, which will leave 90 percent of people in NSW not eligible for the NDIS with little or no access to any support at all', said Serena Ovens, CEO of the Disability Advocacy Alliance.⁷⁰ Thus, inadequate funding from the government is likely to negatively impact the capability of these services to provide assistance to people.

3. Multiple Barriers to Access – Indigenous AAT applicants

Though there are no statistics specifically on how many Aboriginal and Torres Strait Islander people could not get legal assistance in AAT appeals related to DSP decision, it is uncontentious to say that they are facing multiple barriers to access to legal assistance. Those barriers include: a lack of awareness about relevant legal issues, communication barriers due to the lack of accessible information in native language and difference between traditional and current legal systems.⁷¹

Another barrier for Indigenous People would be the lack of cultural safety or cultural competence in providing services of legal assistance and disability advocacy, due to differences between cultures. There are many areas where cultural differences affect the provision of disability support services such as 'perception of disability', 'relationship to land', 'triggers and responses to shame', 'rules of governing the interactions between men and women', or 'style of communications'.⁷² Such difference may make the interactions more challenging and thus undermine the effectiveness of legal service, especially when the disability support service is designed for the general public and not tailored to the needs of indigenous people.⁷³

⁶⁶ CRPD art 8.

⁶⁷ CRPD art 13(2).

⁶⁸ Law Council of Australia, *2017-18 Federal Budget* (Report, 19 January 2017) [18].

⁶⁹ National Association of Community Legal Centres, *2016 Annual Report* (Report, 2016) 2.

⁷⁰ Naomi Neilson, 'Disability Advocates Call for More Support Amid Funding Cuts', *Third Sector* (Web Page, 4 October 2018) <<https://thirdsector.com.au/disability-advocacy-calling-for-more-support-amid-funding-cuts/>>.

⁷¹ Senate Committees, Parliament of Australia, 'Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services' (Report, 13 October 2016) [3.1].

⁷² South Australian Health & Medical Research Institute, *VACCHO Project: 'No One's Left Out': Improving Support for Aboriginal People with Disability* (Literature Review, February 2018) 18.

⁷³ *Ibid* 58.

The lack of funding from the government also plays a critical role in creating such barriers. Meanwhile, while the cost of providing legal services has increased, the amount of funding provided to Aboriginal and Torres Strait Islander legal services has been declining since 2013.⁷⁴ Although the 2017-8 Commonwealth budget announced a reversal of planned cuts, this does not change the fact that services for Aboriginal and Torres Strait Islander people remain 'chronically underfunded'.⁷⁵ The insufficient funding on legal assistance to indigenous people would impact 'highly vulnerable Aboriginal and Torres Strait Islander people' by making it more difficult to modify supported services to meet their specific needs.⁷⁶ Thus, it conflicts their rights of being equal before the law and assessing to legal service under the CRPD.

4. Conclusion

The three problems above would potentially lead to a higher rate of DSP's applications being rejected by the AAT. The consequence is that persons with disabilities lose the income they are entitled under DSP and therefore their living conditions are worsened.⁷⁷ These poor living conditions are arguably in contravention of article 28 of the CRPD, which encourages States to ensure an adequate standard of living and social protection for persons with disabilities.⁷⁸ It is arguable that people can apply to the Newstart program as an alternative to DSP.⁷⁹ However, since Newstart's payment is significantly lower than DSP's, it is still better for persons with disability to receive support under DSP system.⁸⁰

VI. Recommendations for a DSP Support Model

Currently, there are some supports for DSP applicants such as the DSP Toolkit, which is 'a resource for medical practitioners, social and community workers who want to help their clients obtain evidence for their DSP applications'.⁸¹ The toolkit serves as a summary of the DSP application process and should be used 'in conjunction with training sessions' provided by SSRV. However, this Toolkit provides general knowledge regarding the process rather than any specific support for applicants who appeal a DSP decision at the AAT. Thus, we would like to recommend

⁷⁴ Law Council of Australia, *Aboriginal and Torres Strait Islander People* (Final Report - Part 1, August 2018) 37.

⁷⁵ 'Relief that Legal Funding for Indigenous People will not be Further Slashed', Amnesty International (Web Page, 24 April 2017) <<https://www.amnesty.org.au/relief-legal-funding-indigenous-people-will-not-slashed/>>.

⁷⁶ National Aboriginal & Torres Strait Islander Legal Services, *Submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Submission, September 2017) 62.

⁷⁷ Victoria Legal Aid, *On the Merits: Getting Important and Complex Decisions Right: Submission to the Statutory Review of the Administrative Appeals Tribunal* (Submission, August 2018) 5.

⁷⁸ CRPD art 28

⁷⁹ Nijole Naujokas and Sydney Policy Lab, 'Ask a Policy Expert: Why Is It So Hard to Get On The Disability Support Pension?' *The Guardian* (online, 7 May 2019) <<https://www.theguardian.com/australia-news/2019/may/07/ask-a-policy-expert-why-is-it-so-hard-to-get-on-the-disability-support-pension>>.

⁸⁰ Ibid.

⁸¹ 'DSP Toolkit', Social Security Rights Victoria (Web Page) <<http://www.ssrv.org.au/disability-support-pension-toolkit/>>.

a model that is similar to the NDIS Appeal Support Model to be applied to the DSP appealing process, as such model may provide more practical and material supports to the applicants.

1. NDIS Appeal Support Model

The NDIS is the Australian Government's program to support persons with disabilities by funding the provision of reasonable and necessary supports⁸² so that they can improve their skills and independence over time. The aim of the scheme is to 'give effect to Australia's obligations under the CRPD'⁸³ and provide funding for supports and services to 460,000 Australians aged under 65, who have permanent and significant impairments.⁸⁴

The scheme is administered by the National Disability Insurance Agency ('NDIA') under the *National Disability Insurance Scheme Act 2013 (Cth)* ('NDIS Act'). The decision of whether the prospective participant meets the access criteria to participate in the scheme⁸⁵ is a reviewable decision.⁸⁶ First, the prospective participant must apply for an internal review from the NDIA.⁸⁷ If he/she does not agree with the outcome of the internal review, he/she can then make an application to the AAT to re-assess the internal reviewer's decision.⁸⁸ A model for NDIS Appeals has been set up to ensure that 'all people with disability, and other people affected by reviewable decisions of the NDIA, have access to support when seeking review of those decisions in the AAT'.⁸⁹

Currently, there are two main sources that the applicant can seek support from, which are the skilled disability advocacy groups and the legal services providers. These two means of support, as mentioned above, are very consistent with the definition of 'support' and the underlying principle of the CRPD which encourages the universal recognition of legal capacity. Disability advocacy support will be provided by support persons, who are National Disability Advocacy Program's advocates. Applicants can also have access to other organizations that support persons with disabilities. The role of those advocates is to deal with non-legal matters such as explaining the appeal process, assisting with documents preparation, and even attend hearings with the applicants.⁹⁰ For legal assistance, the applicant will get access to funding to pay for their expenses. In order for the funding to be granted, the matters must be relatively complex and the applicants must apply for internal review before they can apply for the funding. Such a process raises a question of possible difficulties if legal issues arise during the internal review application.

⁸² *National Disability Insurance Scheme Act 2013 (Cth)* art 3 ('NDIS Act').

⁸³ *Ibid* art 3(1)(a).

⁸⁴ 'What is the NDIS?', *NDIS* (Web Page) <<https://www.ndis.gov.au/understanding/what-ndis>>.

⁸⁵ *NDIS Act* art 21(1).

⁸⁶ *Ibid* art 99(a).

⁸⁷ *Ibid* art 100(6).

⁸⁸ *Ibid* art 103.

⁸⁹ 'NDIS Appeals', *Disability and Carers* (Web Page, 18 September 2018) <<https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-appeals>>.

⁹⁰ *Ibid*.

After receiving the internal review decision, an applicant must lodge an application with the AAT. After that, the matter will be assessed by the Legal Aid Commission ('LAC') and the LAC will consider whether or not to grant funding for legal assistance.⁹¹ Such an application will need to include different documents such as the NDIA decision in dispute, the application to the AAT, any NDIA internal review decision and any other relevant supporting documentations.⁹² After that, the applicant needs to complete and sign the Application Form, which can be located on the websites of the Department of Social Services and the LAC.⁹³ The funding for legal services may be granted in circumstances where the LAC decides that there is a significant likelihood that legal assistance will lead to wider community benefit; or the applicant is vulnerable and would likely benefit from legal assistance.⁹⁴ Finally, while the applicants will need to satisfy the merits test, they will not be subject to means testing and will not be responsible for contributing towards the cost of the legal services.⁹⁵ The elimination of the mean test makes this support more universally accessible, since the outcome of the funding application will no longer depend on the applicant's income.

To determine whether funding for legal assistance will lead to benefits to the community, the LAC will assess the interpretation or application of the NDIS Act's provision used in making the decision.⁹⁶ Such assessment will include whether the interpretation and application of the provision have been well understood with an obvious meaning and fully addressed by the AAT or a court. When the provision has not been fully considered by the AAT or a court, the application would still fail if such provision was comparable to a fully addressed provision.⁹⁷ In addition, 'the evidence base in relation to a disability, therapy or support' will also be taken into account.⁹⁸ The assessment to determine community's benefits can be considered a limitation of the NDIS Appeal Model, as it is only meant to be used to clarify the meaning and application of the new NDIS Scheme, rather than giving everyone access to legal assistance in terms of their individual matters.

In determining whether a person is experiencing disadvantage and would benefit from legal assistance, an assessment of the applicant's ability to self-represent, his/her family/carer's ability to support self-representation and the availability of legal assistance, will be conducted by the LAC.⁹⁹ Finally, if the applicant is not satisfied with the outcome of LAC funding application, they may appeal by making a written request.¹⁰⁰

⁹¹ Department of Social Services, *Guideline for the Assessment of Applications for NDIS Appeals Legal Services Funding for National Disability Insurance Agency (NDIA) Decision Reviews in the Administrative Appeals Tribunal* (effective from April 2019) part 1.1.

⁹² Ibid part 2.2.

⁹³ Ibid part 2.4.

⁹⁴ Ibid part 3.1.

⁹⁵ Ibid.

⁹⁶ Ibid part 4.1.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid part 6.1.

The NDIS Appeal Support Model is a complete model with very well set out criteria. The details regarding the assessment of each criteria are clearly explained by the NDIA. The model has also removed the mean test, which makes it more accessible to persons with disabilities. Furthermore, the two means of support from this model are consistent with the CRPD. However, there is still room for improvement. For example, the model should be extended to cover the internal review, and the information and its language should be modified to make become more accessible to applicants from minority backgrounds. Also, the assessment to determine community's benefits should be modified to serve the need of more people. We will provide some recommendations below, and hopefully those recommendations, incorporated with the current NDIS Appeal Support Model, can serve as a guidance for the future DSP Appeal Support Model.

2. Further recommendation

2.1. Make legal and disability advocacy supports more accessible during DSP Appeal Process

As we explained above, it is clear that legal and disability advocacy support during the appeal process are critical for persons with disabilities, as it will not only assist the applicants with the knowledge, information and skills they needed to achieve a better outcome but also help ensure Australia's compliance with the CRPD. However, there is evidence that many persons with disabilities have not been able to receive support because of limited resources due to the lack of funding. Thus, increasing funding for legal assistance and disability advocacy organizations may help improve the capacities of these organizations and therefore enable them to assist more people. Also, more funding will allow not only the support providers but also the AAT to make themselves more accessible for persons with disabilities. For example, the AAT can translate the documents into different languages (including Aboriginal languages) or make their building more accessible.¹⁰¹ One question arises from this suggestion is how the increased funds should be distributed to different organizations. As explained above, the degree of involvement of legal or disability support depends on the circumstances of the cases. Thus, we need to collect more data in order to understand demand for each type of support.

2.2. Collect more data so we can understand and respond to the problem

Currently, we don't have any data showing the current demand for legal assistance or disability advocacy during the DSP AAT appeal process. This data could be obtained by conducting a comprehensive study of previous DSP AAT appeal cases. That study will provide us with more information regarding the number of applicants who had legal assistance or disability advocacy supports and their outcomes. These numbers would play an important role in understanding the correlation between support and the outcomes of the cases. Also, we still don't know the exact number of how many people sought help from but got rejected by disability advocacy support providers due to the lack of funding. These data will be very important for AFDO to advocate to the government for free or affordable support. It may also provide the sector and government with good insight into the current demand/supply of different types of supports so that the government can increase and distribute funding more appropriately.

¹⁰¹ 'Understanding Barrier to Accessibility' (Council of Ontario University, June 2013).

2.3. Provide further training to raise rights awareness among legal professionals and AAT staff

As we explained above, currently, legal professionals may not have the necessary skills to work with persons with disabilities. As such, the effectiveness of the services may be negatively impacted. Thus, more training for legal professionals and others involved in the appeals process, particularly AAT staff, Conference Registrars and Members, would help increase not only their awareness about the right to legal capacity of persons with disabilities but also the quality of services. For disability advocates, legal training regarding the DSP AAT appeal process may also benefit them, so they can recognise legal issues and either provide support or refer to legal assistance in a timely manner. Such training would improve the efficiency of support providers and also comply with articles 8 and 13(2) of the CRPD.

Disability awareness training will also support the AAT to ensure that all of its processes, communications, information, physical environments, facilities and services are fully accessible to applicants, as required under article 9 of the CRPD.

2.4. Enhance cooperation and information sharing

In many cases, cooperation between legal and disability advocacy support may be needed to get the best outcome for an applicant. Thus, it is important that the two means of support can cooperate well with each other. For example, when a complex legal issue arises, disability advocacy groups should be able to immediately refer the applicant to the appropriate legal centers. We believe that a digital application may serve as a proper means to improve cooperation and access to information and preparation for applicants and their supporters. That application could have functions such as educating people about the process, helping them prepare applications, tracking the applications process and providing supporters with a platform to refer the applicant and relevant documents to other providers.

That app should be built under the co-design approach, by collaboration and cooperation with the users and their communities.¹⁰² Furthermore, per article 4(3) of the CRPD, ‘in decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, through their representative organizations’.¹⁰³ As a result, it is very important for app developers to fully understand the needs of disabled persons and follow their instructions closely. If possible, we highly recommend that the disabled persons and organizations that represent their rights (i.e. AFDO, SSRV or VLA) will lead to process, so that they can fully express their demands and instruct the developers to create an app that allows disabled persons to deal with their current issues completely. This recommendation is consistent with the supported decision-making framework, where the developers will provide technical support to help persons with disabilities make the decisions.

¹⁰² Ingrid Burkett, ‘Co-designing for Social Good Part I: The Role of Citizens in Designing and Delivering Social Service’, *Pro Bono Australia* (Web Page, 13 July 2012) <<https://probonoaustralia.com.au/news/2012/07/co-designing-for-social-good-part-i-the-role-of-citizens-in-designing-and-delivering-social-service/>>.

¹⁰³ CRPD art 4(3).

GROUP 2 PROJECT

Legal Capacity and Access to Justice: The Role of Disability Service Providers in Ensuring the Availability of Legal Advice and Assistance for People with Disabilities

Partner Organisation

Scope Australia

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Executive Summary

This report has been prepared for Scope. Its purpose is to identify disability service providers' possible obligations when assisting customers to receive legal advice and advocacy. Possible obligations were identified with reference to both international human rights and Australian and Victorian domestic law. Ultimately, the exact obligations of disability service providers in such a scenario are unclear. To demonstrate the complexities of possible legal obligations in this area, two practical case studies have been provided as examples of how these obligations could arise in practice.

Introduction

The right of persons with disabilities to make decisions that impact their lives has been recognised both internationally and domestically. This is arguably the cornerstone right of the *United Nations Convention on the Rights of Persons with Disabilities (CRPD)*.¹ Within Australia there has been a growing acceptance of this right, as demonstrated by the implementation of the National Disability Insurance Scheme (NDIS), founded on the principles of choice and control, and the forthcoming *Guardianship and Administration Act 2019 (GAAA)* in Victoria, which introduces a legal framework for supported decision-making.²

Practically facilitating persons with disabilities' right to decision-making can raise complex issues. One such situation, the focus of this report, is how disability service providers (service providers), such as Scope, should assist their customers to access justice through legal advice and advocacy. It is worth noting from the outset that we are not considering whether Scope should provide legal advice directly but the role Scope may play in accessing independent services. In particular, it will focus on two scenarios:

- Where a customer wishes or may wish to engage in a legal dispute with another individual, for example another customer, and Scope has an actual or potential interest in the matter, for example they may become involved in the dispute as a legal party in their own right.
- Where a customer wishes or may wish to engage in a legal dispute that arises entirely independently from Scope's service provision, and Scope has no actual or potential interest in the matter, for example, a family dispute.

It is important to note that these scenarios are not necessarily distinct. For example, an assault of a customer by a third party may initially not raise any concerns for Scope, however questions may later arise as to Scope's role in the events preceding or following. The exact nature of the obligations will also depend upon the particular circumstances. Some factors may include: the specific nature of the services Scope provides, the specific circumstances of the customer, their

¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12 ('CRPD').

² *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a)-(e) ('NDIS Act'); *Guardianship and Administration Act 2019* (Vic) ('GAAA'); Victoria, *Parliamentary Debates*, Legislative Council, 2 May 2019, 1310-1324 (Adem Somyurek).

disability, family situation, and support network. As such, this report is intended to provide general advice and guidance on the issues and considerations that may arise.³

This report has been structured to provide the following information:

- Contextual information regarding the relevance of human rights to Scope and the key human rights, relevant to the current situation.
- Guidance on the domestic legal obligations that Scope bears in the two scenarios.
- Information regarding what international law and the *CRPD* suggests would be appropriate, when there is a lack of clear domestic legal obligations.
- Application of these obligations and principles to two case studies, based around the two scenarios, to demonstrate the complexities that they raise.

For practical application, see the **Case Studies** section. Reading the sections of this report dedicated to the theoretical framework is not necessary for a proper understanding of the **Case Studies** section.

Context

Why Human Rights are Relevant to Scope

The *CRPD* is the core international treaty outlining the application of human rights to persons with disabilities. Signed and ratified by Australia, the *CRPD* requires States Parties to “promote, protect and ensure the full and equal enjoyment of all human rights...by all persons with disabilities.”⁴ Scope plays an important role in assisting its more than 6,000 customers to realise and exercise their human rights,⁵ particularly for customers who have a higher dependence on Scope. The realisation of customers’ human rights is a relevant consideration to Scope for a number of reasons.

Scope has shown a commitment to the *CRPD*, as evident in its constitution, which states that their purpose is:

“to advance the wellbeing of people with a disability, through alignment with the United Nations Convention on the Rights of Persons with Disability (2006) and Australia’s human rights statutory framework.”⁶

This demonstrates Scope’s commitment to consider the fundamental rights, values and principles espoused by the *CRPD*.

Moreover, the NDIS, of which many of Scope’s customers will be a participant currently or in the future, is intended as a way for Australia to fulfil its obligations under the *CRPD*.

³ This report is designed to identify the complexities of these scenarios and provide general discussion. It does not constitute nor is it intended as legal advice. In practice, exact obligations will depend on each case’s specific circumstances.

⁴ *CRPD* (n 1), art 1(1).

⁵ Scope Australia, ‘Our History’, *Scope Australia* (Web Page, 13 December 2019) <<https://www.scopeaust.org.au/about-scope/history/>>.

⁶ Scope Australia, ‘Constitution of Scope Australia’ *Scope Constitution* (Electronic Document, December 2018) 1.2(a) <<https://www.scopeaust.org.au/wp-content/uploads/2019/02/Constitution-of-Scope-Aust-Ltd-December-2018.pdf>>.

This is made clear in both the *National Disability Insurance Scheme Act (2013)*,⁷ and the *NDIS Practice Standards* produced by the NDIS Quality and Safeguards Commission (QASC).⁸

Additionally, although the obligations under the *CRPD* rest on the States parties, and they bear ultimate responsibility for any contraventions, private entities providing public services are expected to comply.⁹

The ongoing Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability has both used the *CRPD* as a point of reference and has considered the right of persons with disabilities to access justice. The Royal Commission noted the importance of facilitating persons with disabilities to access meaningful independent legal advice and advocacy.¹⁰ Other service providers have been expressly questioned by the Royal Commission for their failure to ensure that their customers have appropriate access to legal advice and advocacy.¹¹

Key Human Rights

The following is a brief discussion of the relevant human rights raised by the two scenarios under discussion. It is intended to be brief, with a further focus on access to justice below under the **International Principles** section.

Access to Justice

Access to justice is a relevant consideration in these scenarios, because it requires equal access to the justice system and the ability to receive redress on the same basis as others. This includes initial advice and advocacy. Article 13 of the *CRPD* contains the right to access justice. Article 13(1) requires:

“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others... in order to facilitate their effective role as direct and indirect participants...including at investigative and other preliminary stages.”¹²

There are a number of elements of this provision that are relevant to the current scenarios. Firstly, the concept of “access to justice”. No definition is provided in the *CRPD*, nor has the Committee on the Rights of Persons with Disabilities (“The Committee”) provided guidance for what this entails.¹³ Gibson suggests that in

⁷ *NDIS Act* (n 2), s 3(1)(a).

⁸ NDIS Quality and Safeguards Commission, ‘NDIS Practice Standards and Quality Indicators’, *NDIS Quality and Safeguards Commission*, (Electronic Document, July 2018) 5 <ndiscommission.gov.au/sites/default/files/documents/2019-08/ndis-practice-standards-july-2018.pdf>.

⁹ Committee on the Rights of Persons with Disabilities, *Views: Communication No 1/2010*, 9th Sess, UN Doc CPRD/C/9/D/1/2010 (21 June 2013) 13 [9.4] (‘Nyusti, Takács, & Fazekas v. Hungary’).

¹⁰ Evidence to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Melbourne, 5 December 2019, 286, 291, 293, 301, 302, 308, 309 (Dr S. Devenasen examined by Ms K. Eastman)

¹¹ *Ibid.*

¹² *CRPD* (n 1) Art 13(1).

¹³ *CRPD*; Committee on the Rights of Persons with Disabilities, *Views: Communication No. 34/2015*, 21st sess, UN Doc CPRD/C/21/D/34/2015 (29 April 2019) (‘*V.F.C. v Spain*’); Committee on the Rights of

negotiating the *CRPD*, parties adamantly believed this was a crucial right that needed to be included but never considered the content of this concept.¹⁴ Eilionoir Flynn, relying on the Human Rights Committee's General Comment 32, defines the concept to include access to legal advice and representation as this is a prerequisite for persons with disabilities being able to meaningfully participate in the justice system.¹⁵

Secondly, the provision expressly extends the obligation on states to ensure access to the "investigative and other preliminary stages" of the justice system.¹⁶ The Committee has expressed that this means that access to justice is not just about court procedures or environments but also includes relevant actions prior to this, for example accessing legal advice.¹⁷

Finally, article 13 should be read in conjunction with the "cross-cutting" foundational rights of the *CRPD*, particularly article 5(3)'s right to reasonable accommodations.¹⁸ This effectively requires states to provide measures that respond to the specific support needs of the person with disabilities to ensure they can substantively realise their right to access justice.

Equal Recognition Before the Law

Equal recognition before the law is a central tenet of access to justice. It is applicable in this situation because it envisages persons with disabilities making their own decisions regarding legal disputes.

The right to equal recognition before the law is contained in article 12 of the *CRPD*, which relevantly states:

"1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

Persons with Disabilities, *Views: Communication No. 28/2015*, 18th sess, UN Doc CRPD/C/18/D/28/2015 (5 October 2017) ('*O.O.J. v Sweden*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No. 12/2013*, 13th sess, UN Doc CRPD/C/13/D/12/2013 (29 May 2015) ('*A.M. v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No. 8/2012*, 11th sess, UN Doc CRPD/C/11/D/8/2012 (18 June 2014) ('*X v Argentina*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No. 13/2013*, 15th sess, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) ('*Lockrey v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No. 11/2013*, 15th sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) ('*Beasley v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No. 7/2012*, 16th sess, UN Doc CRPD/C/16/D/7/2012 (10 October 2016) ('*Noble v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No. 30/2015*, 18th sess, UN Doc CRPD/C/18/D/30/2015 (5 October 2017) ('*Makarov & Makarova v Lithuania*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No. 38/2016*, 20th sess, UN Doc CRPD/C/20/D/38/2016 (24 October 2018) ('*Al Adam v Saudi Arabia*').

¹⁴ Frances Gibson, 'Article 13 of the Convention on the Rights of Persons with Disabilities - a right to legal aid?' (2010) 15(2) *Australian Journal of Human Rights* 123, 125-126.

¹⁵ Eilionoir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge, 2016), 24-25; Human Rights Committee, *General Comment No 32 - Article 14: Right to equality before courts and tribunals and to a fair trial* UN Doc CCPR/C/GC/32 (23 August 2007) general comment 32, 2-3 [8-10].

¹⁶ *CRPD* (n 1) art 13(1).

¹⁷ *Makarov & Makarova v Lithuania* (n 13) 5-6 [7.6].

¹⁸ *Lockrey v Australia* (n 13) 11 5.8; *CRPD* (n 1) art 5(3).

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”¹⁹

This article embodies the international community’s commitment to recognising that persons with disabilities can and should make decisions regarding their lives to the greatest extent possible. This extends to making decisions about taking legal action or how to engage in a legal dispute. The denial of legal capacity has been interpreted by The Committee as a contravention of article 13.²⁰

Freedom from Exploitation, Violence and Abuse

The right to freedom from exploitation, violence, and abuse is contained in article 16 of the *CRPD*. It provides that:

“1. States Parties shall take all appropriate... measures to protect persons with disabilities... from all forms of exploitation, violence and abuse...

2. States Parties shall also take all appropriate measures...including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse...

5. States Parties shall put in place effective legislation and policies... to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.”²¹

Article 16(1) was deliberately constructed using broad terms, without examples of prohibited conduct to ensure that any form of violence, abuse or exploitation would be caught by the provision.²² There is no reason to suggest that this broad definition was not intended to include situations of violence between persons with disabilities in residential care facilities and the preventative role of service providers.²³

Article 16(2) requires that persons with disabilities and their support network, which may include guardians, are provided with the relevant information and education on avoiding, recognising and reporting relevant incidents. This should include information that may form the basis of a legal claim and the provision of information regarding rights and how to exercise these rights.²⁴

¹⁹ *CRPD* (n 1) art 12(1)-(3).

²⁰ *Noble v Australia* (n 13) 15 [8.5].

²¹ *CRPD* (n 1) art 16.

²² Peter Bartlett and Marianne Schulze ‘Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities’ (2017) 53(2) *International Journal of Law and Psychiatry* 2, 5.

²³ *Ibid*, 10.

²⁴ Flynn (n 15) 39.

Finally, article 16(5) requires that there be appropriate policies in place to ensure that instances of violence, abuse and exploitation are appropriately identified, investigated and prosecuted.²⁵ This would necessarily include an element of ensuring access to justice.

Domestic Obligations

Legal Capacity

Legal capacity is an important consideration for Scope because it will determine who, in practice, engages in legal advice and representation in disputes involving customers. In Australia, capacity is the basic legal presumption that every adult person (over the age of 18 years) may make their own decisions, which will be recognised by the law.²⁶ This presumption is in line with article 12 of the *CRPD*.²⁷ However, traditionally, this could be negatively impacted or abrogated by one's disability status. This particularly impacts people with intellectual disabilities, mental illnesses, 'age-related cognitive disabilit[ies]', or other medical conditions.²⁸

The test for legal capacity has been relevantly reframed under the *GAAA*, which will enter into force from 1 March 2020. This Act will repeal the 1986 Act with the main purpose of implementing supported decision making in Victoria, as espoused by the *CRPD*.²⁹ In doing so, the legislation aims to allow persons with disabilities, to the greatest extent practicable, to 'make and participate in decisions affecting the person... express the person's will and preferences; and... to develop the person's decision-making capacity'.³⁰ Effectively, this should allow the represented person to make their own decisions where possible and, where not possible, to have their will and preferences carried out for them in a way that is as unrestricted as practicable.

²⁵ *CRPD* (n 1) art 16(5).

²⁶ Law Institute Victoria, 'LIV Capacity Guidelines and Toolkit (Concise Edition): Taking Instructions when a Client's Capacity is in Doubt', (Electronic Document, 1 October 2016) 1
<https://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/2054_LPP_CapacityGuidelines_FINAL_WEB.aspx>.

²⁷ *CRPD* (n 1) art 12.

²⁸ Law Institute Victoria (n 26) 1.

²⁹ *CRPD* (n 1), art 12.

³⁰ *GAAA* (n 2) s 8(1)(a).

Requirements for a guardianship order:

Relevantly for Scope, a person may only have a guardianship order made in relation to them if:

30 VCAT may make a guardianship order or administration order

(2) VCAT may only make a guardianship order or an administration order under this Division if satisfied that—

(a) because of the proposed represented person's disability, the person does not have decision-making capacity in relation to—

(i) in the case of a guardianship order, the personal matter in relation to which the order is sought;

'Decision-making capacity' is defined in the Act.³¹ An individual has capacity if that person can:

(a) 'understand the information relevant to the decision and the effect of the decision'

(b) 'retain that information to the extent necessary to make the decision'

(c) 'use or weigh that information as part of the process of making the decision'; and

(d) 'communicate the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means.'

It is important to note that capacity should be determined on a case-by-case basis. The Law Institute of Victoria has stated 'Each transaction must be considered *in relation to its particular character and circumstances*'.³² An individual may also have capacity with respect to one area of law while not satisfying the test for another.³³

The GAAA provides for three general frameworks that a person with a disability may fall under in relation to guardianship, including: guardianship, supported guardianship or no guardianship. It is important for Scope to take note of the type of guardianship arrangement (if any) applicable to a customer, as this will determine who engages with legal advice or advocacy on behalf of the customer.

A guardian's powers are determined by each specific VCAT order.³⁴ This means that a guardianship order will specify whether a guardian is to give legal instruction on behalf of the individual.³⁵ For customers under such an arrangement Scope may not be required to facilitate access to legal advice and advocacy because this is the guardian's responsibility.

A supported guardianship order is given where VCAT is satisfied that the '[supported] person will have decision-making capacity in relation to the personal matter... to which the supportive guardianship order... [is] made',³⁶ and conferring the order will 'promote the person's personal and social wellbeing'.³⁷ The support person will then be able to assist the supported person to

³¹ GAAA (n 2) s 5(1).

³² Law Institute Victoria (n 26) 1, emphasis added.

³³ For a list of relevant authorities and tests for different types of legal tasks (for example making a will, defending criminal charges or marriage/divorce proceedings), see: Law Institute Victoria, (n 26) 2.

³⁴ GAAA (n 2) s 38(1)(a).

³⁵ GAAA (n 2) ss 38, 40.

³⁶ GAAA (n 2) s 87(2)(b).

³⁷ GAAA (n 2) s 87(2)(c).

communicate their expressed decision.³⁸ As with guardians, the exact powers of supported guardians are dependent on the subject matter of the VCAT order. Depending on the exact nature of the order, Scope may be required to provide a supportive guardian with access to information that could otherwise be lawfully obtained about the supported person.³⁹

If the customer has *no* guardianship order, legal capacity rests with the customer. This means that the customer will personally engage in legal advice or representation. In such a situation, there may be a more compelling argument for Scope to actively assist clients in accessing justice and legal advice because their access to these services may depend on Scope's support.

Under the new GAAA, Scope, as a service provider, may receive notice of any application for a guardianship or supported guardianship order on behalf of a person under their care.⁴⁰ As such, Scope should be able to determine which guardianship arrangement customers come under and the impact this has on Scope's ability to assist customers access to legal advice and advocacy.

Examples of the Practical Difference between Different Guardianship Frameworks:

Ned has an intellectual disability for which he requires assistance to retain information. Currently, Ned does not have a guardianship order. Therefore, Ned is responsible for making his own decisions. Scope may not be obliged to assist Ned to receive legal advice or advocacy. However, without that support, this service may be inaccessible to him.

Alice is under a guardianship order which specifies that her guardian makes decisions regarding legal disputes for her. In this situation, there would be a lower onus on Scope to facilitate Alice's access to justice as this is the responsibility of her guardian.

Does Scope Owe Fiduciary Duties to their Customers?

The law may protect interests of a vulnerable party if their relationship with another can be categorised as a 'fiduciary relationship'. These relationships are characterised by 'one party plac[ing] trust and confidence in another', and the other party (fiduciary) undertaking to act in the interests of the more vulnerable party (beneficiary).⁴¹ Broadly, when the fiduciary 'undertakes' to act in the interests of the beneficiary,⁴² they will be expected to act *exclusively* in their interests within the scope of that relationship. Any fiduciary relationship will be bounded and limited in subject matter which that relationship covers.⁴³

³⁸ GAAA (n 2) ss 87, 90.

³⁹ GAAA (n 2) s 90(1)(a), 9.

⁴⁰ Under s 26(d) and (e) (guardianship orders) and s 83(d) and (e) (supported guardianship orders) of the GAAA, VCAT may give Scope notice as a service provider and therefore a party who has a 'direct interest in the application', or at VCAT's discretion. It is, however, difficult to say with certainty whether Scope fits these criteria for parties who receive notice given that the *Guardianship and Administration Act* is yet to come into effect and there is therefore no precedent for its interpretation: *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

⁴¹ M W Bryan, V J Vann and S Barkehall Thomas, *Equity & Trusts in Australia* (Cambridge University Press, 2nd ed, 2017) 150.

⁴² Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

⁴³ MW Bryan et al, *A Sourcebook on Equity & Trusts in Australia* (Cambridge University Press, 2017) 209.

Although not currently a recognised category of fiduciary relationship in Australian domestic law, the relationship between Scope and its customers does exhibit fiduciary characteristics.⁴⁴ If it is a fiduciary relationship, the direct and active involvement of Scope in assisting and facilitating customers to receive legal advice and representation could be problematic.

The key obligations which arise out of fiduciary relationships are the duties not to make a profit out of the relationship, and, importantly for Scope, 'not to place themselves in a position of conflict between self-interest and the duty owed to the [beneficiary], or in a position where they owe conflicting duties to several beneficiaries'.⁴⁵ In Australia, fiduciary duties tend to apply to financial interests, and do not impose a positive obligation on fiduciaries outside the no-profit and no-conflict rules.⁴⁶

Applying this to a service provider context, a customer could be characterised as a beneficiary to whom fiduciary duties are owed.⁴⁷ It appears that the relationship between service providers and their customers could be characterised by trust and confidence, giving rise to a fiduciary relationship. Whether this is the case may depend on the extent to which the customer relies on the support of service providers to facilitate their access to services and the community. Additionally, Scope and other service providers could be considered to have impliedly undertaken to act in the interests of their customers due to the nature of service provision. In the scenarios under discussion, there would be a clear conflict of interest where Scope may financially benefit from a customer not taking legal action against them. Scope may also be under a conflict of interest assisting customers who are opposing parties in a legal dispute. If either of these situations existed, a service provider could be in contravention of their fiduciary duties if they were to assist customers to receive independent advice or advocacy. It would therefore be prudent to avoid engagement with Scope customers in these circumstances.

It is important to note that legal obligations differ from professional, ethical or moral care incentives. Some clients rely on service providers to facilitate their access to services and the community. Service providers play a key role in fulfilling persons with disabilities' right to live independently and be included in the community.⁴⁸ Without the service provider, this would be denied to them. Thus, there is a moral and ethical compulsion upon service providers to assist wherever they can. Service providers must not take too conservative an approach to this issue as this could have a severe negative impact upon their customers.

Reportable Incident Management System

When a situation arises where one customer may wish to take legal action, there is no express or direct legal requirement that Scope must ensure that they receive information about legal advice or advocacy.

⁴⁴ Ibid, 209.

⁴⁵ Bryan, Vann and Thomas (n 41) 150.

⁴⁶ Dawson & Toohey and Gummow JJ in *Breen v Williams* (1996) 186 CLR 71 [22], [65].

⁴⁷ Indiciae of a fiduciary relationship are generally characterised by undertaking by the fiduciary to act in the beneficiary's interests, and the relative vulnerability of the beneficiary owing to this subordination and exercise of power: Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; M W Bryan, V J Vann and S Barkehall Thomas, *Equity & Trusts in Australia* (Cambridge University Press, 2nd ed, 2017) 151-52.

⁴⁸ CRPD (n 1) art 19.

However, such an obligation may arise if the conflict between customers includes incidents that Scope would be required to report to the QASC as a reportable incident. Reportable incidents are defined in the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 (IMRIR)*. Importantly, they are defined to include “unlawful sexual or physical contact with, or assault of, a person with disability” and “sexual misconduct committed against, or in the presence of, a person with disability, including grooming of the person for sexual activity.”⁴⁹ Both of these types of incidents could conceivably form the basis of a legal complaint.

It is important to note that the definition of reportable incident requires that the incident occur “in connection with the provision of services.”⁵⁰ This does not require the service provider to have caused or failed to prevent the incident.⁵¹ Rather, it has been understood broadly to include incidents that occur during the provision of service.⁵² This is important because the *IMRIR* will apply regardless of whether Scope’s provision of services had any causal role.

If the legal complaint between customers does include reportable incidents then Scope is required to have in place an incident management system that complies with the requirements in the *IMRIR*. Section 10(1)(d) requires procedures that specify “how the registered NDIS provider will provide support and assistance to persons with disability affected by an incident (including information about access to advocates such as independent advocates), to ensure their health, safety and wellbeing.”⁵³ There is little further guidance provided by the QASC as to what this may entail. However, the express mention of “access to advocates” indicates that, at a minimum, Scope must provide its customers with appropriate information to access appropriate advocacy services.⁵⁴ For customers with more complex support needs, for example communication support needs, Scope may be required to provide further support to enable the customer to access these services. The exact extent of Scope’s obligations here are unclear, and the QASC has not provided further insight.

It is worth noting that Scope, as a Victorian service provider, is required to comply with the Victorian framework as well. Importantly, this includes the Client Incident Management System.⁵⁵ Broadly, this operates similarly to the model adopted by the QASC. An important distinction between the systems is that the Victorian Guidelines, published by the Department of Health and Human Services (DHHS), suggest that “supporting the client through any action the client takes to seek justice or redress, including making a report to Victoria Police or

⁴⁹ NDIS Act (n 2), s 73z; *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* (Cth), s 16 (*‘IMRIR’*).

⁵⁰ NDIS Act (n 2) s 73z.

⁵¹ NDIS Quality and Safeguards Commission, ‘Incident Management Systems: Detailed guidance for NDIS Providers’, *NDIS Quality and Safeguards Commission*, (Electronic Document, June 2019) 13 <<https://www.ndiscommission.gov.au/sites/default/files/documents/2019-06/detailed-guidance-incident-management-systems-detailed-guidance-regi.pdf>>.

⁵² *Ibid*, 12.

⁵³ *IMRIR* (n 50) s 10(1)(d).

⁵⁴ *Ibid*.

⁵⁵ Department of Health and Human Services, ‘*Disability Act 2006: Policy and Information Manual*’, *Department of Health and Human Services* (Electronic Document, December 2012), 10.

accessing legal counsel” is part of the management system.⁵⁶ This arguably goes further than the Commonwealth framework. Fundamentally, both frameworks recognise the role of independent advocacy.

Complaints Management System

It is worth briefly noting that Scope, as a service provider, also has requirements under both federal and state legislation to ensure they have a complaints management system.⁵⁷ Complaints, as opposed to reportable incidents, refer to concerns a customer may have about the service being provided.⁵⁸

Federally, the QASC has published rules to outline the expected requirements of the complaints management system.⁵⁹ Importantly, the *CMRR* requires the system to “ensure appropriate support and assistance is provided to any person who wishes to make, or has made, a complaint.”⁶⁰ Guidance as to what this requires is to some extent provided by QASC’s guidelines. They indicate that if an individual has an advocate, support person or supportive guardian that these people should be involved.⁶¹

Broadly speaking, the expectations under Victorian legislation are similar. Scope as a service provider is required to comply with the complaints process requirements under the *Disability Act 2006*.⁶² There is less guidance provided by the Disability Services Commissioner (DSC) or DHHS for what is expected from an appropriate complaints management system. However, a self-audit tool, produced by the DSC to help guide service providers, does list supporting customers to access advocacy or other independent supports as an element of an appropriate complaints management system.⁶³

It therefore appears that, similarly to incident reporting systems, complaint management systems are expected to facilitate independent legal advice and advocacy.

⁵⁶ Ibid 19.

⁵⁷ *Disability Act 2006* (Vic) ss 104-106; *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* (Cth), s 8 (‘*CMRR*’).

⁵⁸ *Disability Act 2006* (Vic), s 109; *CMRR* (n 58) s 15.

⁵⁹ *CMRR* (n 58) s 8.

⁶⁰ Ibid.

⁶¹ NDIS Quality and Safeguards Commission, ‘Effective Complaint Handling Guidelines for NDIS Providers’, *NDIS Quality and Safeguards Commission*, (Electronic Document, June 2017) 9 <<https://www.ndiscommission.gov.au/sites/default/files/documents/2019-09/complainthandlingguidelinesforproviders.pdf>>.

⁶² *Disability Act 2006* (Vic), ss 104-106.

⁶³ Disability Services Commissioner, ‘Good Practice Guide and Self-Audit Tool: Developing an effective person person centred complaints resolution culture and process’ *Disability Services Commissioner* (Electronic Document, 2013) 54 <https://www.odsc.vic.gov.au/wp-content/uploads/GoodPracticeGuide_Full.pdf>.

Implications of the *Charter of Human Rights and Responsibilities*

It is currently unclear whether the *Charter of Human Rights and Responsibilities 2006* (the *Charter*) would apply to a service provider and, if so, how it may apply in the kind of scenario currently being considered.

It is not clear whether Scope would be considered a public authority.⁶⁴ Much of this would depend on whether the services Scope provides are, firstly, “functions of a public nature” and, secondly, whether they are exercised on behalf of the State.⁶⁵ It is not possible to definitively determine whether Scope would satisfy these requirements. However, the fact that Scope has taken control of 226 Specialist Disability Accommodation services and 12 respite services previously managed by the DHHS may indicate that they would be considered to be a public authority.⁶⁶

If Scope were to be considered a public authority they would be required to comply with the enumerated human rights within the *Charter* or at least to give them proper consideration.⁶⁷ While there are rights regarding a “fair hearing” and “rights to a criminal proceeding” these don’t necessarily apply to the current situation.⁶⁸ Therefore, while Scope should be aware of the impact of the charter it will not always be of primary concern.

International Principles

Before discussing the international law perspective on the importance of accessing legal advice and representation for persons with disabilities and how this should be facilitated, it is worth reiterating Scope’s interest in international law (See **Context**).

Guidance from the Committee

As noted above there has been little in-depth consideration of what the obligations in article 13 of the *CRPD* actually entail.

The Committee, in providing concluding observations to States parties’ reports, has regularly noted that access to justice remains a serious concern for persons with disabilities.⁶⁹

⁶⁴ *Charter of Human Rights and Responsibilities 2006* (Vic), s4(1). (‘*The Charter*’)

⁶⁵ *Ibid* 4(1)(c).

⁶⁶ Scope Australia, ‘Scope selected to deliver accommodation support services by Victorian Government’, *Scope Australia* (Web Page, 13 December 2019) <<https://www.scopeaust.org.au/news-event/scope-to-deliver-accommodation-services-by-victorian-government/>>.

⁶⁷ *The Charter* (n 65), s 38.

⁶⁸ *The Charter* (n 65), ss 24-25.

⁶⁹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 511th meeting, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019); Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Spain*, 463rd meeting, UN Doc CRPD/C/ESP/CO/2-3 (13 May 2019); Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial periodic report of Norway*, 471st meeting, UN Doc CRPD/C/NOR/CO/1 (7 May 2019); Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial periodic report Poland*, 425th meeting, UN Doc CRPD/C/POL/CO/1 (29 October 2018); Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial periodic report of South Africa*, 413rd meeting, UN Doc CRPD/C/ZAF/CO/1 (23 October 2018); Committee on the Rights of Persons with Disabilities, *Concluding*

Currently most jurisprudence that touches on article 13 concerns how the denial of legal capacity, under article 12, then impacts an individual's ability to access justice.⁷⁰ The committee has also considered how the denial of communication services, such as an Auslan interpreter, by the court may deny an individual access to peripheral aspects of the justice system, for example, participating in a jury.⁷¹ The committee has considered the state failing to provide legal representation to an individual who otherwise could not access this service.⁷² However, this is not directly relevant as it was the denial of legal representation once the legal proceeding had begun, rather than the initial preliminary advice or representation that may initiate such a proceeding. There are, however, a number of pending communications alleging a breach of article 13 and these may provide further guidance in the future.⁷³

Regarding persons with disabilities' access to the same legal protections and redress as the rest of the community, the committee was expressly "concerned" about the lack of consistency between state and federal legislation and policies in Australia.⁷⁴ However, the committee's recommendations merely suggest there should be consistent legislation and policies. They do not consider the minimum content that they should include.⁷⁵

Ultimately, although the committee should be considered a particularly persuasive source for interpreting the requirements of article 13, they have not currently contemplated it in scenarios similar to those being considered.

Academic Discussion

Academic discussion of the meaning of the concept of access to justice for persons with disabilities in international law is informative as it provides guidance for the steps that Scope should consider.

Flynn, in discussing the barriers that persons with disabilities face when accessing the justice system noted that:

"For many of us, the first step in accessing the law is relatively straightforward. We research the information available online, and generally consult a legal practitioner, to determine how we should interact with the legal system in order to assert our rights."⁷⁶

observations on the initial periodic report of the United Kingdom of Great Britain and Northern Ireland, 356th meeting, UN Doc CRPD/C/GBR/CO/1 (3 October 2017).

⁷⁰ *Makarov & Makarova v Lithuania* (n 13); *Noble v Australia* (n 13).

⁷¹ *Lockrey v Australia* (n 13); *Beasley v Australia* (n 13).

⁷² *Makarov & Makarova v Lithuania* (n 13) 5 [7.2].

⁷³ Committee on the Rights of Persons with Disabilities 'Table of Pending cases before the Committee on the Rights of Persons with Disabilities (CRPD) Office of the United Nations' High Commissioner for Human Rights' (Electronic Document)
<<https://www.ohchr.org/Documents/HRBodies/CRPD/Tablependingcases.pdf>>.

⁷⁴ *Concluding observations on the combined second and third periodic reports of Australia* (n 70) 7 [25].

⁷⁵ *Ibid*, 7-8 [26].

⁷⁶ Flynn (n 15) 80.

As this suggests, information is the fundamental foundational block for accessing justice. Without information regarding your rights, whether that be freedom from violence, contractual rights regarding service provision, or property rights, no individual is ever going to be able to recognise that something legally wrong has occurred.⁷⁷ Without information regarding how to access independent legal advice or representation or independent advocacy, it's unreasonable to expect an individual to understand how they can access these services.⁷⁸

How Scope can assist its customers in accessing this foundational information is a complex issue. Providing general information about individuals' rights and how to access legal assistance would seem to be a bare minimum expectation. It is appropriate for Scope to provide this general information because of the central role their service plays in customers' lives. To some extent this information is provided in the Victorian Government and Scope's 'Speak up and be safe from abuse' toolkit.⁷⁹ These documents provide some key information around who to call if a person with disabilities needs assistance in a legal matter including specialist legal and advocacy services.⁸⁰ It doesn't necessarily provide enough practical information about what constitutes a crime; for example, the definition of crime as "theft, physical assault or sexual assault" may need more explanation.⁸¹

It is also important to note that while a generally accessible document, such as the 'Speak up and be safe from abuse' toolkit, may be appropriate and accessible for many of Scope's customers there may be some whose support needs require a more tailored approach. This would be expected considering the obligations both under art 5(3) of the *CRPD* and Australian domestic anti-discrimination legislation.⁸² How this will look in practice is difficult to determine as it will depend upon the specific circumstances of the individual. However, it may require more direct and active action from Scope rather than only having an available resource that can be viewed.

Flynn also considered how access and use of this information is affected by "institutional settings".⁸³ This was defined to include full-time residential services shared with other people with disabilities, group homes, or other congregated settings.⁸⁴ Fundamentally, Flynn believed the problem was the relationship between supported person and support provider.⁸⁵ There are a number of problematic characteristics of this relationship. Firstly, there is often a level of

⁷⁷ Flynn (n 15) 50.

⁷⁸ *ibid.*

⁷⁹ Scope Australia and Victoria State Government 'Speak up and be safe from abuse: Communication Toolkit and Resources', *Speak up and be safe* (Web Page, 13 December 2019) <<https://www.speakupandbesafe.com.au/resources>>.

⁸⁰ Scope Australia and Victoria State Government 'Speak up and be safe from abuse: Where to get support factsheet' *Speak up and be safe* (Electronic Document) 2-3, <<https://www.speakupandbesafe.com.au/resourceshttps://www.speakupandbesafe.com.au/sites/default/files/inline-files/factsheet%20-%20where%20to%20get%20support.pdf>>.

⁸¹ *Ibid.*, 1.

⁸² *CRPD* (n 1) art 5(3); *Disability Discrimination Act 1992* (Cth) s 24; *Equal Opportunity Act 2010* (Vic) ss 44-45.

⁸³ Flynn (n 15) 51.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

dependence, where the supported person relies on the support provider to assist them to achieve what they want. Secondly, there can be a level of control where the support provider controls when and how the supported person does certain activities. Finally, there may be a degree of trust and confidence where the supported person relies on the advice given by the support provider. How service providers counteract this relationship so that their customers have appropriate independent advice and information is difficult. There is some indication that the QASC envisages service providers to more actively involve independent advocates to support clients.⁸⁶ This approach has also been taken in some situations in the United Kingdom, which is discussed further below.

Comparative Jurisdiction

Finally, it is worth briefly highlighting how the United Kingdom has legislatively responded to this issue. This is useful, as it demonstrates how another jurisdiction has interpreted how to implement access to justice for persons with disabilities.

In 2014, the United Kingdom introduced the *Care Act (UK) 2014* in response to a wide ranging review of the care service industry.⁸⁷ Importantly, it provides that if an individual receiving care is at risk of, or has, suffered abuse or neglect, this incident must be reviewed either by an independent body known as the Safeguarding Adults Board (SAB) or by the local authority who is involved in providing the care to the individual.⁸⁸ If either the SAB or the local authority believes that the individual is unable to understand, retain or use relevant information or that they cannot communicate their views, then they must appoint an independent advocate to represent and support that individual.⁸⁹ This independent advocate cannot be engaged in professionally providing care or assistance to the individual.⁹⁰ It is also worth noting that the way advocates are supposed to engage with those they represent is heavily prescribed in the regulations; for example, it requires them to meet the individual in private, directs them to gather information from certain parties, and what their specific role is in supporting and representing the individual.⁹¹

What is informative about the *Care Act (UK) 2014* is it recognises, and attempts to respond to, the two fundamental issues raised in cases dealing with concerns about the care and support provided to persons with disabilities. Firstly, it recognises that these individuals are isolated. As one advocate in the UK noted too many of these people “had nobody in the world.”⁹² If these individuals don’t have a support network to assist them to access and engage with a complaint or investigation process then they won’t access it. In such a situation an incredible amount of responsibility or moral compulsion rests upon the service provider as they are the ones who support and assist the person in other areas of their lives. This raises the second problem that

⁸⁶ Incident Management Systems: Detailed guidance for NDIS Providers (n 52) 13.

⁸⁷ *Care Act (UK) 2014*, explanatory notes.

⁸⁸ *Ibid* ss 42, 44.

⁸⁹ *Ibid* s 68.

⁹⁰ *The Care and Support (Independent Advocacy Support) Regulations 2014* (UK) reg 2.2.

⁹¹ *Ibid* reg 5.

⁹² Tony Hunter ‘Scie’s guide to providing independent advocacy’, *The Guardian* (Web Page, 13 November 2014) <<https://www.theguardian.com/social-care-network/2014/nov/13/care-act-2014-advocacy-services>>.

the Act tries to respond to. It recognises that while a service provider would often be the party who would support the individual in other situations, the nature of the complaint or investigation means it is entirely inappropriate for them to play that role. To solve this problem and ensure that the individuals concerned can meaningfully engage with the process, the act mandatorily requires the SAB or the local authority to provide the individual with an independent advocate that will assist and support them.

Case Studies

Case Study One: Conflict of Interest

Scenario One:

Jack is a 34 year old male with an intellectual disability. He is non-verbal and his support worker assists him to communicate with people unfamiliar to him. Jack has lived in his current group home for the last ten years and has had a relationship with his service provider for the last twenty years. Jack does not have any kind of guardianship order under the GAAA.

Recently, Jill has moved into the same group home as Jack. Although Jack and Jill had a harmonious relationship initially, there have been growing concerns. Jack feels like he is being targeted by Jill and there have been multiple physical confrontations of varying degrees of seriousness. Up to this point, the service provider's efforts to remedy the situation have been unsuccessful. Jack has decided that he would like things to change and would like to seek advice about what his options are.

Application:

Guardianship

Jack is not under a guardianship order and so will be expected to make his own decisions, exercising his own legal capacity. Because of Jack's disability, he may require support to communicate these decisions.

Fiduciary Duty

Scope may be in a fiduciary relationship with Jack. This would depend upon the actual nature of the services Scope provides and the degree of trust and confidence Jack has in Scope. If this were the case, Scope would need to ensure that they did not breach any potential fiduciary obligations, namely that they would not profit from or have any conflict arise out of the provision of services to Jack. Relevantly here, if Jack was concerned with how Scope has handled his conflict with Jill, there would be a conflict of interest if Scope assisted him to receive legal advice or advocacy.

However, Scope needs to balance the potential implications of the fiduciary relationship, and its potential prohibition against the continued provision of service, against Scope's care commitment. In Jack's scenario, if there are no independent individuals who can communicate with Jack without Scope, Jack would be denied access to justice. In such a situation, Scope's care commitment may be more compelling.

Reportable Incident Management System

The incidents between Jack and Jill may constitute a reportable incident under either the NDIS framework or the Victorian framework. If this were the case both the QASC and the DHHS

envisage customers having access to independent advocacy and, potentially, legal advice during the investigation and complaint process.

Complaints Management System

If Jack is concerned by Scope's response to the incidents involving Jill, Jack may wish to make a complaint. This is facilitated under both the NDIS and Victorian frameworks. Both of these frameworks again envisage a central role for independent advocates to support and assist the customer through the complaint process.

International Law

Article 13 of the *CRPD* codifies the rights of persons with disabilities to access justice on an equal basis with others. Particularly important to the concept of access to justice is the provision of enough information to allow an individual to understand what their rights are, whether they have been breached, and if so, what their options are. A generally accessible document detailing this information is required under article 9 of the *CRPD*. For some clients, individual adjustments and tailoring may be necessary to ensure substantive equality of access. This is in line with article 5 of the *CRPD*.

Academic discussion of the meaning of 'access to justice', particularly in the context of group homes, has emphasised the importance of this advice and advocacy being entirely separate from the service provider. This is designed to counter the potentially controlling relationship between service provider and customer.

Because of the traditional relationship between service providers and their customers, it is particularly important that this legal advice or advocacy is provided independently from legal service.

Case Study Two: No Conflict of Interest

Scenario Two:

Mary is a 42-year-old woman with a cognitive disability. She is a resident of a group home which she shares with three other women. Mary is very independent but requires assistance with understanding some information dependent on making decisions. Mary has a supported guardianship order under the *GAAA* that applies to making legal and financial decisions. Her appointed supportive guardian is David, who has been involved with Mary as her advocate for the last ten years.

Mary is very happy with her living and support arrangements. Recently, Mary has been involved in a legal dispute with other members of her family. This dispute has nothing to do with her living and support arrangements. Mary is unsure what her rights are in relation to the dispute and is unsure what legal services she should seek out.

Application

Guardianship Order

Mary's supported guardianship order under the *GAAA* is significant. Under this order, David is obligated to support Mary to make decisions with respect to assisting her in the understanding of information relevant to the decision. Ultimately, however, the final decision will rest with Mary. Depending on the conditions of the guardianship order imposed by *VCAT*, David may have the power to collect information on Mary's behalf. Because Mary has a support network relating

to making legal decisions, there may be less of an onus on Scope to facilitate access to legal advice and advocacy.

Fiduciary Duty

There is no obvious conflict of interest that could arise in this situation, given the external nature of the legal dispute. As such, if a fiduciary relationship existed between Mary and Scope (which may be unlikely considering Mary's independence in relation to Scope), Scope may be able to assist her. This assistance would be bounded by the obligation not to gain a financial benefit from the legal dispute. In situations like this, where there is no conflict of interest, the argument to assist Mary is strongest.

International Law

Mary's situation is broadly similar to Jack's. The need for independent advice and advocacy to counter the perception of control and influence over Mary is less compelling as Scope does not have any interest in the legal dispute. As such, if Mary requested assistance from Scope, it would be appropriate for that to be provided.

GROUP 3 PROJECT

The Legal Capacity of NDIS Participants to give Instructions during Merits Review Proceedings

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Introduction

The NDIS Act (the “Act”) provides for particular circumstances in which a third party may do certain acts on behalf of an NDIS participant. A plan nominee (“PN”) may act on behalf of an adult participant, whilst a child representative (“CR”) may act on behalf of a child participant.

Certain decisions made by the NDIA are liable to merits review by the Administrative Appeals Tribunal. The key concern of this research paper is whether solicitors are able to take instructions from a plan nominee or child representative during such proceedings. This paper will also provide suggestions for solicitors so that they can ensure compliance with both the Act and the *Convention on the Rights of Persons with Disabilities*.

In general, a solicitor should be aware of the following:

- Rule 8.1 of the ASCR requires a solicitor to take instructions from a competent client. This obligation continues, notwithstanding the existence of a plan nominee or child representative.
- In relation to adult clients, the mere appointment of a plan nominee does not affect their legal capacity.
- In relation to child clients, the Act starts from the presumption that a child does not have legal capacity.
- Where a client has requested the appointment of a plan nominee, a solicitor should determine whether the client has exercised their legal capacity to delegate the task of giving legal instructions to the plan nominee. If they have delegated this task, a solicitor can take instructions from the plan nominee.
- If a solicitor is concerned about the legal capacity of a client, they should apply a functional capacity test.

If the client is assessed as not having legal capacity to give legal instructions, a solicitor should be aware of the following:

- A plan nominee is empowered by the Act to give legal instructions on behalf of the client under the limited circumstances set out in rr 5.5 and 5.6 of the Nominee Rules.

- A solicitor should check the terms of appointment of a plan nominee and confirm that the plan nominee has authority to provide legal instructions on particular matters.
- When taking instructions from a plan nominee, the solicitor should first confirm that the plan nominee has fulfilled their duties under the Act and Nominee Rules
- A child representative is empowered by the Act to give legal instructions on behalf of a child unless the CEO has determined otherwise
- When taking instructions from a child representative, a solicitor should first confirm that the child representative has fulfilled their duties under the Act and Children Rules.
- To ensure that the solicitor is complying with their professional obligations and with the *Convention on the Rights of Persons with Disabilities*, they should always utilise supported decision-making strategies before resorting to taking instructions from a plan nominee or child representative.

Taking Instructions Directly from NDIS Participants

Adult participants

The appointment of a plan nominee does not affect the participant’s legal capacity.

The Act provides for two different mechanisms by which a PN may be appointed. First, a PN can be appointed at the request of the participant under s 86(2)(a).¹ Second, a PN can be appointed at the initiative of the CEO of the NDIA under s 86(2)(b).² Importantly, neither the Act nor the NDIS (Nominee) Rules (“Nominee Rules”) require that a capacity assessment be conducted as a precondition of an appointment. Therefore, the appointment of a PN does not result in the blanket removal of legal capacity and leaves the rights of the participant intact, subject to the following circumstances. First, pursuant to r 5.5, a CEO-appointed PN may act “on behalf of the participant” where they “[consider]” that the participant is “not capable of doing the act.”³ Second, pursuant to r 5.6, a participant-requested PN may act where they are “satisfied” that it is either not possible for the participant to do that act themselves,⁴ or that the participant, while

¹ *National Disability Insurance Scheme Act 2013* (Cth) s 86(2)(a).

² *Ibid* s 86(2)(b).

³ *National Disability Insurance Scheme (Nominee) Rules* r 5.5.

⁴ *Ibid* r 5.6(a).

being able to do the act, does not want to do so.⁵ This demonstrates that the Act establishes a scheme under which the legal capacity of the participant is to be assessed by the PN on a case-by-case basis. The PN is only empowered to act on behalf of the participant in the limited circumstances set out in rr 5.5 and 5.6.⁶

Professional obligations provide that the solicitor is to take instructions from the client

Pursuant to professional rules, solicitors have an obligation to follow their client's 'lawful, proper and competent instructions.'⁷ This means where a client has the capacity to instruct a solicitor, the solicitor must follow the client's instructions.

The default presumption in Victoria according to Bell J in *Fritsch*⁸ and LIV guidelines⁹ is that every person (including NDIS participants) over the age of 18 years has capacity to make their own decisions. Bell J stated that "the individual is taken to have legal personality because 'rights and duties involve choice' and individuals 'naturally ... enjoy the ability to choose.'" He also highlights that this is also an international human right.¹⁰ This means that any clients above the age of 18 are presumed to have mental capacity to instruct their lawyers. This might ostensibly suggest something approaching compliance with article 12 of the Convention on the Rights of Persons with Disabilities ("CRPD"), which suggests a move toward affording full legal capacity to all, even in cases where an individual suffers from severe intellectual disabilities. However, this presumption may be rebutted.¹¹ Since the presumption exists, the burden of proof falls on the party trying to disprove the presence of capacity.¹² In theory, any disability a client may have should not affect their capacity.

If the presumption of capacity is not rebutted and the participant is deemed not have capacity, the duty of solicitor under rule 8.1 of the ASCR is to take and act on instructions directly issued by the client. In determining whether they must take instructions from an NDIS participant client, a solicitor may have to assess the client's capacity.

⁵ Ibid r 5.6(b).

⁶ Ibid rr 5.5 and 5.6.

⁷ Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, Rule 8.1.

⁸ *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87, [548].

⁹ LIV Capacity Guidelines and Toolkit.

¹⁰ Ibid, 545.

¹¹ *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87, [548]

¹² *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432.

In general, where the capacity of the client is unclear, the solicitor may need to apply tests for capacity. The law reform commission advises that there is no uniform standard for the level of cognitive ability an individual must demonstrate in order to have legal capacity. As a general rule, capacity will be present where a client can: a) understand the information relevant to the decision; b) retain that information; c) use or weigh that information as part of the process of making the decision (using reasoned processes) and d) communicate their decision.

However, LIV guidelines and in *Goddard Elliott v Fritsch* suggest capacity will depend on the complexity of the specific instructions in question. Where a solicitor has doubts about a client's capacity to give competent instructions, it is the solicitor's responsibility to explore this issue further. If the solicitor has any doubts about the capacity of a client, the solicitor can obtain a formal capacity assessment from a medical practitioner. In cases where mental capacity requires a lawyer's active notice, the lawyer must be reasonably satisfied that the client has the capacity to take part in legal proceedings.

Child Participants

Under the NDIS Act there is a presumption that the child does not have legal capacity.

The operation of the Act gives rise to a presumption that a child participant lacks legal capacity unless a determination has been made by the CEO that provides otherwise.¹³ This issue will be further developed in subsequent sections of the report. At this stage, it is sufficient to note that s 74(1)¹⁴ assumes that there will always be a CR, given that there are no provisions that allow for their appointment by the CEO.

Professional obligations regarding children

If a participant is under the age of 18, they may be represented by a CR instead of a PN. CRs are usually a parental guardian of the participant, but may, when the CEO deems a parental guardian to be unsuitable to be a CR, comprise a third party appointed by the CEO. In general solicitor taking instructions from a CR might be less controversial than from a PN. Unlike adult participants, minors are not automatically presumed to have full legal capacity, regardless of any disability.

¹³ *National Disability Insurance Scheme Act 2013* (Cth) s 74(5).

¹⁴ *National Disability Insurance Scheme Act 2013* (Cth) s 74(1).

The duty at rule 8.1 to follow the instructions of a client only applies if the client is capable of issuing lawful, proper and competent instructions. Instructions issued by a client who lacks capacity are not lawful, proper and competent. This means the solicitor can only follow instructions if the client has legal capacity. When a client cannot instruct the solicitor, the solicitor must take instructions from a CR. A solicitor must however still act in the client's best interests pursuant to rule 4.1.1 of the ASCR.

The Act gives rise to the presumption that a child participant lacks legal capacity unless a determination has been made by the CEO that provides otherwise.¹⁵ When this is the case, a solicitor is bound by rule 8.1 to follow the child client's instructions.

It is also worth noting that while the NDIS Act gives rise to a presumption that children do not automatically have legal capacity, this is not necessarily the case more broadly in law. Article 12 of the CRPD presumes legal capacity for everyone without regard for disability or age. The Law Institute of Victoria's Capacity guidelines presume that every adult (individuals aged 18 and over) has capacity to give instructions.¹⁶ However, there is no mention that children are presumed not to have capacity. Indeed, the guidelines warn solicitors against making judgments of a client's capacity based on, *inter alia*, age (although this may be interpreted as a reference to old age, the open-ended language suggests simply that age should not be a factor).

Neither capacity nor lack of capacity of children should be presumed. The duty at rule 8.1 may come with preliminary capacity assessments that must be completed before it is clear whether a solicitor must take instructions directly from a child client.

Broadly speaking, each situation where a solicitor may wish to take instructions from a CR rather than from the participant directly will fall under one of three categories: 1) the participant clearly has capacity; 2) the participant clearly lacks capacity; and 3) it is doubtful whether the participant has capacity. CRs may be authorised to wholly or partially (to an agreed-upon extent) manage a participant's plan unless the CEO decides, after being satisfied that the participant has capacity and that the situation is appropriate, that the CR should not manage.

In the first situation, the solicitor must take instructions from the client directly, to the extent of any inconsistency. If a client has capacity, rule 8 applies and the solicitor must follow their instructions.

¹⁵ NDIS Act s 74(5)

¹⁶ LIV Guidelines and Toolkit, [1]

In the second situation, the solicitor cannot take instructions from the participant and may be forced to take instructions from the CR, as there would be no lawful, competent and proper instructions from the client to follow. If the client has no capacity, there is no way a solicitor could take instructions directly from them. The only recourse a solicitor would then have would be to take instructions from the CR. A restriction does however apply: the solicitor remains bound by rule 4.1.1 of the ASCR. They cannot act against the best interests of their client, even (hypothetically) at a CR's instructions.

The CR, in acting on behalf of a participant, has duties to ascertain the wishes of the participant and act in their best interests. However, like PNs, they do not have a duty to act on this. Therefore, the solicitor should pay special attention to whether the CR's actions are in the best interest of the participant.

In the third situation, circumstances may differ. In certain situations, underage clients may be treated as having capacity to instruct their solicitors. In *Gillick*, a UK case, the court established the principle that children with sufficient maturity can have medical competence. Their wishes must take precedence over the wishes of their parents. The power of a parent in matters where the child is concerned is not absolute. Where the child is deemed to have reached sufficient maturity and capacity to make up their own mind about a decision, power is shifted to the child. This case was based on medical capacity, but the court's ruling expanded the scope beyond mere medical consent. The court hinted that this was to include legal decisions. In *Re Z*, another English case before the Family Court, expanded the meaning of *Gillick* competence. Here, the client was 14 years old. The court found that despite his young age, he was capable of 'sufficient understanding' of the matter and was therefore capable of making up his own mind in regards to any instructions to his solicitor. The court explicitly expanded *Gillick* competence to include legal as well as medical decisions, specifically capacity to instruct solicitors. In Australia, the High Court in *Marion's* case affirmed *Gillick* competence as good law. Parents could not have ultimate say in matters of a child's medical issues where the child had competence. However, the court seems to have taken a more restricted view as to where and how a child can be considered mature enough and limited *Gillick* competence to medical consent. The judgment was handed down years before *Re Z*, so it is unclear whether *Gillick* competence in Australia extends quite as far, or whether there is an analogue.

In cases where capacity is uncertain, there is as yet no presumption of capacity, solicitors have no *prima facie* obligation to refer the matter to the court or to seek a formal capacity assessment from a medical practitioner.

What if the client cannot be supported to provide instructions?

In some cases, clients may lack capacity and cannot be supported by the solicitor to provide instructions. In *Goddard Elliott v Fritsch*,¹⁷ the client, Paul Fritsch (not an NDIS participant) lacked the capacity to instruct a solicitor to settle. The solicitor was well aware of the client's history with mental health (he suffered from a major depressive illness and PTSD). His solicitor had expressed concerns over this. However, nothing was ever made of this. The solicitor made no attempt to even consider issues of capacity. There was an unwillingness or inability on the part of the solicitor to support the client in providing instructions. The lawyers simply acted. Although this case did not concern an NDIS participant, it demonstrates the importance of assessing capacity and of ensuring that any client is supported to provide instructions.

In assessing capacity, the court considered a medical report from Fritsch's psychiatrist detailing his mental condition to be insufficient to displace the presumption of capacity. Instead, the court adopted the view standard of capacity which is required for a person to participate in legal proceedings is the same standard of capacity which is required for a person to enter into legal transactions.¹⁸ Bell J endorsed an approach where the focus should be on the capacity of the client to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers and to understand and act on the advice which they are given. According to him, this approach has found favour in Australia.¹⁹

Generally, where there is merely a justified uncertainty over a client's capacity to instruct a solicitor, the solicitor has an obligation to bring the issue to the attention of the court.²⁰ In *Fritsch*, this would have been helpful as the Supreme Court could appoint a litigation guardian. In NDIS cases, upon referral, a court may determine the appropriateness of any potential appointments of PNs or CRs who can either support a participant in providing instructions or act on behalf of a participant. When a participant cannot themselves provide instructions and cannot be supported to provide them (i.e. fail the capacity test outlined above), LIV guidelines provide that

¹⁷ *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87

¹⁸ *Ibid*, 555

¹⁹ *A v City of Swan* [2010] WASC 204 (16 August 2010) [72] (Murphy JA); *Owners of Strata Plan No 23007* [2006] FCA 900; (2006) 153 FCR 398, 412 [58] (Edmonds J).

²⁰ *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87, [542]

as a last resort, a solicitor may rely on substitute decision-making,²¹ in a case where a participant cannot be supported to provide instructions, a solicitor may refer the matter to the court and request that a PN or CR be appointed to make decisions on behalf of the participant.

Authority of Plan Nominees and Child Representatives to Instruct Solicitors under the NDIS Act

Plan nominees

Statutory construction shows that plan nominees are empowered to give instructions

In determining whether a PN is empowered under the Act to give instructions to a solicitor on behalf of a participant, it is necessary to undertake statutory construction of the term “review” as found in section 78(1)(a). This section provides that a PN may do an act in relation to the preparation, review or replacement of the participant’s plan.²² The preliminary question is whether the term “review” extends to AAT merits review proceedings. If this is found to be the case, then it follows that a PN could do an act, such as the giving of instructions to a solicitor, on behalf of the participant. Construction of the term “review” requires analysis of the language, context and purpose of the Act.²³

Language

When the scheme of the Act is considered as a whole, it becomes evident that it provides for three types of “review.” The first is an unscheduled review,²⁴ whereby under s 48(1) a participant can request the NDIA to conduct a review of their plan at any time.²⁵ The second is an internal review,²⁶ whereby s 100(2) provides that a participant can request the decision-maker to conduct an internal review of a reviewable decision.²⁷ Section 99 sets out the kinds of decisions that are subject to internal review.²⁸ The third is merits review,²⁹ whereby s 103

²¹ LIV Capacity Guidelines and Toolkit [4]

²² *National Disability Insurance Scheme Act 2013* (Cth) s 78(1)(a).

²³ *Hogan v Hinch* (2011) 243 CLR 506, [55].

²⁴ Michael Manthorpe, ‘Administration of reviews under the *National Disability Insurance Scheme Act 2013*’ (Report, Commonwealth Ombudsman, 15 May 2018) [2.3].

²⁵ *National Disability Insurance Scheme Act 2013* (Cth) s 48(1).

²⁶ Manthorpe, above n 19, [2.4].

²⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 100(2).

²⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 99.

²⁹ Manthorpe, above n 19, [2.5].

confers jurisdiction upon the Administrative Appeals Tribunal (“Tribunal”) to conduct a review of a decision that has resulted from an internal review.³⁰ The Act further provides that any request that the participant can make under the Act can also be made by the PN “on behalf of the participant.”³¹ Therefore, a PN is empowered to make a request for an unscheduled review, internal review or external review.

Despite the above, the term “review” is not explicitly defined in the Act. Additionally, the author is not aware of any case law that has interpreted its scope. It has been acknowledged that the language used in the Act is “confusing” due to the fact that the term “review” is used both in relation to internal reviews conducted within the NDIA, and in relation to external reviews conducted by the Tribunal.³²

In light of the three types of review provided for by the Act, it becomes clear that there are two possible interpretations of the term “review” in s 78(1)(a). A narrow construction extends to acts done when the participant is interacting with the NDIA during unscheduled reviews and an internal reviews. A broad construction extends further to include acts done in relation to an external review. The latter construction would include the giving of instructions to a solicitor involved in the external review. Given that the Act provides no clear delineation as to the scope of this term, it is necessary to look to both the context and purpose of the Act.

Context: substituted decision-making

A provision “is not to be construed by taking the language of the section and divorcing individual elements from...the context in which they appear.”³³ This requires examination of the whole of the statute under consideration. When the whole of the Act is read together with the Nominee Rules, it becomes clear that the Act provides for a combination of substituted decision-making mechanisms and supported decision-making mechanisms.³⁴ The former requires a decision-maker to favour an objective assessment of the person’s “best interests,”³⁵ whereas the latter requires a facilitator to identify the will and preferences of the individual and use this as the

³⁰ *Andrew and National Disability Insurance Agency* [2019] AATA 249, [8].

³¹ *National Disability Insurance Scheme Act 2013* (Cth) s 78(2).

³² *Andrew and National Disability Insurance Agency* [2019] AATA 249, [7].

³³ *Coleman v Power & Ors* (2004) 220 CLR 1, [174].

³⁴ Office of the Public Advocate, ‘Guide to NDIS decision-making’ (Guide, Victorian Office of the Public Advocate, January 2018) [4].

³⁵ Eilionoir Flynn and Anna Arstein-Kerslake, ‘Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity’ (2014) *International Journal of Law in Context* 10(1) 81, 95.

basis for decisions.³⁶ The fact that the Act provides for the possibility of substituted decision-making tends to suggest that the broader construction of “review” is to be applied. The following provisions of the Act and the Nominee Rules lead to the conclusion that the Act establishes mechanisms for both substituted and supported decision-making mechanisms.

Generally speaking, s 78(1) empowers a PN to do any “act” that “relates to” the preparation, review, replacement and funding management of the plan.³⁷ An act taken by the PN under this section has effect as if it has been done by the participant themselves.³⁸ The fact that the PN’s actions have such an effect reflects the substituted decision-making model.

A number of provisions of the Act and Nominee Rules point towards the scheme’s goal of striking a balance between, on the one hand, the centrality of the choice and control of the participant³⁹ and, on the other hand, an understanding that there will be circumstances where the participant may be unable to manage their affairs.⁴⁰ First, s 4 provides that “people with [a] disability should be supported to exercise choice,”⁴¹ but balances this against the consideration that this can only be done “to the full extent of their capacity.”⁴² The latter appears to presuppose the existence of situations where the “full extent” of a participant’s capacity might not be commensurate with full legal capacity. Second, the heading for s 5 explicitly acknowledges the operation of substituted decision-making (“guiding principles guiding actions of people who may do acts or things on behalf of others”).⁴³ This was enacted to ensure that the role of advocates in promoting the interests of participants would be respected and acknowledged.⁴⁴ Third, s 17A provides that the NDIS is to “respect the interests of people with disability in exercising choice and control.”⁴⁵ This recognition of legal capacity is balanced against the consideration that the “capacity [of participants] to exercise choice and control” should be “maximised,”⁴⁶ and that

³⁶ Ibid.

³⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 78(1).

³⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 78(3).

³⁹ Second Reading speech, *National Disability Insurance Scheme Bill 2012* (Cth) 13878.

⁴⁰ Explanatory Memorandum, Statement of compatibility with human rights, *National Disability Insurance Scheme Bill 2013* (Cth) 14.

⁴¹ *National Disability Insurance Scheme Act 2013* (Cth) s 4(4).

⁴² *National Disability Insurance Scheme Act 2013* (Cth) s 4(8).

⁴³ *National Disability Insurance Scheme Act 2013* (Cth) s 5.

⁴⁴ Supplementary Explanatory Memorandum, *National Disability Insurance Scheme Bill 2013* 3.

⁴⁵ *National Disability Insurance Scheme Act 2013* (Cth) s 17A(3)(a).

⁴⁶ *National Disability Insurance Scheme Act 2013* (Cth) s 17A(2).

they must be enabled to make decisions “to the extent of their capacity.”⁴⁷ These latter provisions presuppose that there will be circumstances where the participant’s legal capacity is limited or absent. Fourth, part 3.3 of the Nominee Rules provides that an appointment of a PN is allowed “only when it is not possible for participants to be assisted to make decisions for themselves.”⁴⁸ This provides explicit support for the operation of a substituted decision-making framework. In relation to a CEO-appointed PN, the appointment can only be made “when necessary, as a last resort, and subject to appropriate safeguards.”⁴⁹ This reflects an emphasis on the need to promote the choice and control of a participant by limiting CEO appointments to a narrow range of circumstances.

A PN can be appointed at the request of the participant pursuant to s 86(2)(a),⁵⁰ thus reflecting a supported decision-making framework. That is, a participant can exercise their legal capacity to choose to request the appointment. A PN can also be appointed in the absence of a request from the participant. An appointment such as this is made on the initiative of the CEO.⁵¹ Under s 90(1) a participant may make a request for the removal of a CEO-initiated PN.⁵² The CEO is not obliged to comply with this request,⁵³ thus demonstrating the imposition of a substituted decision-making mechanism. Furthermore, where there is an existing guardian or administrator whose powers are similar to those of a PN, and the CEO thinks it is appropriate to appoint a PN, there is a presumption that the guardian or administrator should be appointed as the participant’s PN.⁵⁴ Given that the scheme providing for guardians and administrators is premised upon a substituted decision-making paradigm, this presumption is further indication of the fact that the Act is similarly underpinned by this philosophy.

When doing an act on behalf of the participant, a PN is required to ascertain the “wishes” of the participant and to act in such a way as to promote the “personal and social wellbeing of the participant.”⁵⁵ This is indicative of substituted decision-making, whereby an objective “best

⁴⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 17A(3)(b).

⁴⁸ *National Disability Insurance Scheme (Nominee) Rules* r 3.3.

⁴⁹ *National Disability Insurance Scheme (Nominee) Rules* r 3.14(b)(ii).

⁵⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 86(2)(a).

⁵¹ *National Disability Insurance Scheme Act 2013* (Cth) s 86(2)(b).

⁵² *National Disability Insurance Scheme Act 2013* (Cth) s 90(1).

⁵³ *National Disability Insurance Scheme Act 2013* (Cth) s 90(1).

⁵⁴ *National Disability Insurance Scheme (Nominee) Rules* r 4.8(a).

⁵⁵ *National Disability Insurance Scheme Act 2013* (Cth) s 80; *National Disability Insurance Scheme (Nominee) Rules* rr 5.3, 5.4.

interests” approach is applied. That is, while the PN is required to ascertain the preferences of the participant, these can be overridden by the PN’s objective assessment of the participant’s personal and social wellbeing.⁵⁶

Context: merits review

When the Act as a whole is read together with the Nominee Rules and the *Administrative Appeals Tribunal Act* (“the AAT Act”), it becomes clear that it provides for merits review to be conducted in relation to a “reviewable decision.”⁵⁷ As will be demonstrated, this consideration also tends to support the broader construction of “review.”

By reason of the effect of Australian administrative law, the review process undertaken by the Tribunal is incorporated into the decision-making process of the NDIA.⁵⁸ This consideration lends support to the broader construction of “review.” That is, it can be accepted that decisions of the Tribunal are considered to be integrated within the NDIA’s decision-making processes regarding internal reviews, which give rise to reviewable decisions. It is a necessary corollary of this that any acts the PN is under a duty to undertake in the context of an internal review will be the same acts that they are under a duty to undertake in the context of an external review.

This conclusion is further supported by the consideration that the Tribunal is said to “step into the shoes of the original decision-maker” upon review.⁵⁹ In doing this, it is important to identify the “operative decision” that is being considered.⁶⁰ For example, the operative decision might be one to approve the statement of participant supports in a participant’s plan. In light of the discussion above, a PN may be empowered to act on behalf of the participant in relation to the internal review of a decision of this kind. A further relevant consideration is the fact that the Tribunal is able to consider new evidence that has come to light subsequent to the original decision.⁶¹ Provided that the PN acts in accordance with Parts 5.5 and 5.6,⁶² they are

⁵⁶ Explanatory Memorandum, Statement of compatibility with human rights, National Disability Insurance Scheme Bill 2013 (Cth) 16.

⁵⁷ *National Disability Insurance Scheme Act 2013* (Cth) ss 99, 103.

⁵⁸ *Re Wendy Halliday as the Administrator of the Estate of the Late Ashley Pauling and Secretary of Social Services* [2018] AATA 3865, [24].

⁵⁹ *Re Wendy Halliday as the Administrator of the Estate of the Late Ashley Pauling and Secretary of Social Services* [2018] AATA 3865, [23].

⁶⁰ *Ewin and National Disability Insurance Agency* [2018] AATA 4726, [38].

⁶¹ *Re Wendy Halliday as the Administrator of the Estate of the Late Ashley Pauling and Secretary of Social Services* [2018] AATA 3865, [22].

⁶² National Disability Insurance Scheme (Nominee) Rules rr 5.5, 5.6.

empowered to provide instructions to lawyers regarding any fresh evidence that has arisen subsequent to the reviewable decision having been made. To find otherwise would be to frustrate the Tribunal in the performance of its merits review function.

Purpose

When undertaking statutory construction, it is necessary that the purpose of the statute be identified. The “interpretation that would best achieve the purpose or object of the Act” must be adopted.⁶³

The objects of the Act are set out in s 3. The first object that is relevant to the interpretation of “review” is the purpose of giving effect to Australia’s obligations arising under the CRPD.⁶⁴ As will be demonstrated below, substituted decision-making mechanisms are inconsistent with art 12.⁶⁵ This leads to the conclusion that any act done by a PN on behalf of a participant who is considered to lack legal capacity would be inconsistent with the CRPD. Clearly, this would cover instances of a PN providing instructions to a lawyer during Tribunal proceedings. The Act might also be inconsistent with art 13, which provides that State Parties shall ensure access to justice for people with a disability on an “equal basis with others.”⁶⁶ Removing the right of a participant to have their decisions respected in circumstances where they are deemed to lack legal capacity, and therefore undermining their legal personhood, results in unequal access to justice. As such, the giving of instructions to lawyers within the context of Tribunal proceedings is not consistent with the first object of the Act.

For similar reasons, the substituted decision-making mechanisms provided by the Act appear to be inconsistent with the object of “[enabling] people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their support.”⁶⁷

The Act also aims to “support the independence and social and economic participation of people with disability.”⁶⁸ This can be read in conjunction with the object of providing “reasonable and

⁶³ *Acts Interpretation Act 1901* (Cth) s 15AA.

⁶⁴ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a); Explanatory Memorandum, Statement of compatibility with human rights, National Disability Insurance Scheme Bill 2013 (Cth) 4; Second Reading speech, National Disability Insurance Scheme Bill 2012 (Cth) 13879.

⁶⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 12.

⁶⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 13.

⁶⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(e).

⁶⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(c).

necessary supports” to participants.⁶⁹ Together, these purposes demonstrate that the Act aims to increase the participation of people with disabilities within society through the provision of reasonable and necessary supports. These reasonable and necessary supports are to be specified in the support statement component of a participant's plan.⁷⁰ Therefore, it can be seen that the purpose of supporting a participant’s inclusion in society is to be achieved through the creation and implementation of NDIS plans. The role of PNs in relation to this purpose is evident in the Nominee Rules, whereby a CEO is to have regard to “whether the participant would be able to participate effectively in the NDIS without having a nominee appointed” when deciding whether to appoint a PN without a request from the participant.⁷¹

As such, it can be seen that the Act seeks to fulfill the purpose of facilitating the participation of people with disabilities in society through the performance of the PNs of their strictly limited duties. Adoption of the narrow construction of “review” would frustrate the central purpose of the Act. Participants who receive assistance from a PN during an internal review would not be able to receive equivalent assistance, through the PN giving legal instructions on their behalf, during a subsequent external review. While the role and duties of a PN may conflict with the CRPD, there is a strong counterargument to the effect that a narrow construction of “review” would result in reducing participants’ access to NDIS plans.

In summary, a contextual and purposive interpretation of the Act points towards the broader construction of the term “review.”

Child Representatives

Statutory construction shows that child representatives are empowered to give instructions

In determining whether a CR is empowered to give instructions to a solicitor, it is necessary to undertake statutory construction of the term “thing” as found in s 74(1).⁷² The question is whether the term “thing” extends to giving instructions to a lawyer in the context of Tribunal merits review proceedings. Construction of this term will require analysis of the language, context and purpose of the Act.⁷³

⁶⁹ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(d).

⁷⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 33(2)(b).

⁷¹ *National Disability Insurance Scheme (Nominee) Rules* r 3.14(b)(i).

⁷² *National Disability Insurance Scheme Act 2013* (Cth) s 74(1).

⁷³ *Hogan v Hinch* (2011) 243 CLR 506, [55].

Language

S 74(1) provides that “if this Act requires or permits a thing to be done...the thing is to be done” by the person or persons who have parental responsibility for the child, or a person determined in writing by the CEO.⁷⁴ The term “thing” is not defined in the Act and the author is not aware of any case law that elucidates the parameters of this term.

Similar considerations arise in relation to the scope of the term “thing” as in relation to the scope of the term “review.” As aforementioned, the Act provides for three different types of review. In this context, the issue becomes whether a narrow or broad construction of the term “thing” emerges from the Act. A narrow construction would limit a CR to doing “things” in relation to unscheduled reviews and internal reviews. A broad construction would empower a CR to do “things”, such as providing instructions to lawyers, in the context of unscheduled reviews, internal reviews and external reviews.

Context: substituted decision-making

When the Act and National Disability Insurance Scheme (Children) Rules (“Children Rules”) are considered as a whole, it becomes clear that they establish a framework for substituted decision-making. This is clearly evident from the language of s 74(1), which provides that “things” that are required or permitted under the Act may be “done by” the CR.⁷⁵

The duties of a CR are set out in s 76, which provides that they must “ascertain the wishes of the child.”⁷⁶ Similar to s 80 in relation to a PN, a CR will not breach their duties provided that they reasonably believe that they have both ascertained the child’s wishes and that the doing of, or refraining from doing, the thing “is in the best interests of the child.”⁷⁷ Therefore, the wishes of the child can be overridden by the CR’s objective assessment as to their “best interests,” thus indicating the operation of substituted decision-making. The centrality of the “best interests” of the child is also seen in s 5(f) and r 1.4(b), which provides that the “best interests” are “paramount.”⁷⁸

⁷⁴ *National Disability Insurance Scheme Act 2013* (Cth) s 74(1).

⁷⁵ *National Disability Insurance Scheme Act 2013* (Cth) s 74.

⁷⁶ *National Disability Insurance Scheme Act 2013* (Cth) s 76(1).

⁷⁷ *National Disability Insurance Scheme Act 2013* (Cth) ss 76(2)-(3).

⁷⁸ *National Disability Insurance Scheme (Children) Rules* r 1.4(b); *National Disability Insurance Scheme Act 2013* (Cth) s 5(f).

The application of a substituted decision-making framework in relation to child participants is, in some respects, wider than that imposed upon adult participants. As previously discussed, a PN is appointed either where a participant has requested for this to occur, or on the initiative of the CEO. However, there are no equivalent provisions in relation to the appointment of a CR. Rather, it is assumed that there will either be a person or persons with parental responsibility⁷⁹ or a person determined by the CEO⁸⁰ who will act as the CR. Therefore, the default position established by the Act is substituted decision-making.

Context: merits review

The issues mentioned above in relation to PNs and merits review are applicable in relation to CRs, except to the extent that rr 5.5 and 5.6 are mentioned. Rather than being required to comply with rr 5.5 and 5.6, a CR would be able to do a “thing” in relation to external review provided that there is no CEO determination stating otherwise. For the sake of brevity, the remaining considerations regarding merits review will not be repeated here.

Context: other provisions

The provisions relating to the principles underlying the Act shed light on the question of whether “things” includes the giving of instructions to lawyers in Tribunal proceedings. As already mentioned, the importance of a participant exercising choice and control⁸¹ is to be balanced against the assumption that this can only occur “to the full extent of their capacity.”⁸² This lends support to the broader construction of “things,” whereby a CR would be empowered to give legal instructions to the extent that the child participant does not have the legal capacity to do so.

Furthermore, given the fact that a person with parental responsibility is automatically considered to be a CR,⁸³ together with the acknowledgement and respect that the Act gives to the role of families,⁸⁴ the broader construction of “things” appears to be favoured. That is, the fact that the role of family members is elevated tends to support the notion that a family member who is also a CR is empowered to give legal instructions, provided that the child does

⁷⁹ *National Disability Insurance Scheme Act 2013* (Cth) s 74(1)(a).

⁸⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 74(1)(b).

⁸¹ *National Disability Insurance Scheme Act 2013* (Cth) ss 4(4), (8).

⁸² *National Disability Insurance Scheme Act 2013* (Cth) s 4(8).

⁸³ *National Disability Insurance Scheme Act 2013* (Cth) s 74(1)(a).

⁸⁴ *National Disability Insurance Scheme Act 2013* (Cth) s 4(12).

not have legal capacity. The centrality of the family's expertise in relation to the needs of children with disabilities was highlighted in *WKZQ* and *FRCT*. These two cases related to the NDIS plans for twin boys. In each of these cases, the twins' mother applied for ABA therapy and speech therapy on behalf of each child. The Tribunal stated that the objects and general principles of the Act "acknowledge the role of families" in the process of exercising choice regarding the planning and delivery of supports.⁸⁵ Further, the Tribunal referred to the *National Guidelines: Best Practice in Early Childhood Intervention* ("ECI Guidelines"), which states that "best practices" for children with disabilities must recognise the "family's expertise" regarding their child's abilities and needs, and that "outcomes focus on what parents want for their child and family."⁸⁶ This case provides support for the conclusion that the particular role of CRs does permit them to provide instructions to lawyers in the context of merits review, provided that it has not been determined by the CEO that the child has legal capacity to do so themselves.

Finally, s 5(f) explicitly supports the implementation of an objective "best interests" framework in the circumstances where the participant is a child.⁸⁷ This supports the notion that, where a child lacks legal capacity, the CR should be empowered to give legal instructions on their behalf, provided that the instructions promote the best interests of the child.

Purpose

As previously identified, the purpose of the Act is to support the participant's inclusion in society. The Act envisages that this purpose will be achieved through the creation and implementation of NDIS plans. For the same reasons outlined in relation to PNs, it can be seen that the adoption of a narrow construction of "things" would undermine the fulfillment of the Act's objects of supporting the independence and participation of the participant⁸⁸ and the provision of reasonable supports.⁸⁹

It is one of the objects of the Act to give effect to Australia's obligations arising from the CRPD.⁹⁰ As will be demonstrated below, the role of CRs is consistent with art 7 of the CRPD,⁹¹ which

⁸⁵ *WKZQ and National Disability Insurance Agency* [2019] AATA 1480, [172].

⁸⁶ *FRCT and National Disability Insurance Agency* [2019] AATA 1478, [45]-[46].

⁸⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 5(f).

⁸⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(c).

⁸⁹ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(d).

⁹⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(a).

⁹¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 7.

relates to the rights of children with disabilities. This also lends support to the broader construction of “things.”

In summary, a contextual and purposive interpretation of the Act reveals that the term “thing” extends to the giving of legal advice to a solicitor within the context of merits review proceedings.

When And How Should A Lawyer Take Instructions From a Plan Nominee Or Child Rep?

As a general rule a solicitor can take instructions from a PN or CR if the participant does not have the capacity to instruct the solicitor. An exception to the capacity requirements exists if the PN was appointed at the request of the participant. In that case, a solicitor may take instructions from a PN on matters the participant does not want to deal with personally.

Rule 8.1 can only be followed if the client has the capacity to issue instructions that are lawful, proper and competent (i.e. has mental and legal capacity). Although the CRPD suggests that everybody regardless of circumstance should have full legal capacity, this is sometimes difficult to implement in practice. For example, some clients may not be able to properly articulate or fully comprehend the implications of certain decisions and may need assistance and support in making decisions and instructing solicitors. When the clients are NDIS participants, they are often aided to this end by PNs or CRs. When this is the case, situations inevitably arise where a solicitor may find it more convenient or even simply necessary to take instructions from the PN or CR aiding the participant instead of from the participant/client directly. However, this is only permissible under certain conditions.

Bell J ruled in *Goddard Elliott v Fritsch* that the standard of capacity required for different acts will vary depending on the act. The law does not impose a fixed standard of capacity.

Plan nominees

Check whether the client lacks capacity and/or has delegated the task to their plan nominee

As part of a solicitor’s obligations under rule 8.1, a solicitor may have to check whether the client lacks capacity. A solicitor cannot take instructions from either the client or the PN until they are satisfied which party they are authorised to take instructions from. .

A solicitor may also need to determine whether the power to instruct a lawyer was validly delegated to the PN. In determining whether a solicitor can take instructions from a PN, it may be necessary to differentiate between PNs appointed at the request of the participant from PNs

appointed at the discretion of the CEO. The key difference is that whereas the former PNs are authorised to do any act that participant cannot (i.e. lacks capacity) do, or does not wish to do, the latter type is only empowered to do any act that the participant lacks the capacity to do.⁹²

What this means for the solicitor is that in cases where the PN was appointed at the discretion of the CEO, a solicitor is bound by rule 8.1 of ASCR to only take instructions from the PN **if** the participant lacks capacity to instruct the solicitor.⁹³ Where the client clearly has capacity, a solicitor must follow the client's instructions and must not instead seek instruction from the PN.⁹⁴ There is no recourse to take instructions from the PN. On the other hand, if the client indisputably lacks capacity (e.g. is unconscious), the PN may take over instruction of a solicitor. A solicitor cannot act on the instructions of a client who does not have the necessary mental capacity.⁹⁵ In this situation where the client is clearly and completely unable to instruct a solicitor, taking instruction from the PN would not likely interfere with rule 8.1.

When representing a client whose capacity is uncertain, a solicitor may have to assess whether the participant has the capacity to instruct. As Bell J ruled in *Goddard Elliott v Fritsch*, the standard of capacity required for different acts will vary depending on the act. The law does not impose a fixed standard of capacity

However, the solicitor must only take these instructions if they are satisfied the instructions are in the best interests of the participant: a solicitor still has an obligation to act in the best interests of the client.⁹⁶ This generally means acting to preserve the client's legal interests- to maximise the size and chance of payouts.

In arrangements where the PN was appointed at the request of the participant, a participant may delegate certain acts or decisions to their plan nominee.⁹⁷ This means that in addition to situations where a participant lacks capacity, a solicitor may act on a PN's instructions if they are satisfied the participant delegated authority to instruct them.

⁹² National Disability Insurance Scheme Act 2013, s 86

⁹³ National Disability Insurance Scheme (Nominees) Rules 2013, part 5.5

⁹⁴ Rule 8.1

⁹⁵ Guidelines?

⁹⁶ Rule 4.1.1

⁹⁷ Ibid, 5.6

In cases where a participant has capacity, a solicitor will have to ascertain whether the PN was appointed at the request of the participant (their client) or on the initiative of the CEO in order to determine whether they are allowed to take instructions from the PN.

Does a plan nominee have authority to provide instructions in the particular circumstances?

Given that the appointment of a PN does not result in the blanket removal of the participant's legal capacity, it becomes clear that the PN may only do an act in limited circumstances. Where a PN has been appointed upon the request of the participant, the PN can only do an act where they are "satisfied" that it is "not possible" for the participant to do the act (either with or without support),⁹⁸ or where they are "satisfied" that whilst it "is possible" for the participant to do the act, they do not want to do it.⁹⁹ As such, a PN that is appointed on the request of the participant can only give instructions to a solicitor where either of the above conditions are satisfied. Where a participant has been appointed on the initiative of the CEO, the PN can only do an act where they "[consider]" that the participant is "not capable" of doing the act. A CEO-initiated PN can only give instructions to a solicitor where this condition is satisfied.

A solicitor should check the scope of appointment before taking instructions from a plan nominee

The scope of the CEO-initiated PN's duty to act will be circumscribed by the terms of their appointment. Generally, the PN is empowered to do an "act" in relation to the "review" of a participant's plan "to the extent specified in the instrument of appointment."¹⁰⁰ In relation to a CEO-appointed PN, the CEO may limit the matters in relation to which the person is the PN.¹⁰¹ This would necessarily limit the range of matters in relation to which a CEO-appointed PN could give instructions to a solicitor. For example, they might be limited to doing acts only in relation to the preparation and review of a support statement. A prudent solicitor would make inquiries as to the scope of the instrument of appointment and only take instructions from a PN that fall within the limits of its terms.

⁹⁸ National Disability Insurance Scheme (Nominee) Rules r 5.6(a).

⁹⁹ National Disability Insurance Scheme (Nominee) Rules r 5.6(b).

¹⁰⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 78.

¹⁰¹ *National Disability Insurance Scheme Act 2013* (Cth) s 86(3).

A solicitor should ascertain whether the plan nominee has fulfilled their duties

The actions of a PN are restrained by various requirements such as: the duty to consult any court-appointed or participant-appointed decision-maker and any person who assists the participant,¹⁰² the duty to ascertain the wishes of the participant,¹⁰³ the duty to promote the personal and social wellbeing of the participant,¹⁰⁴ and the duty to act only in the circumstances outlined in rr 5.5 and 5.6.¹⁰⁵ Therefore, once it is ascertained that a participant lacks legal capacity and that the PN may therefore provide instructions, the solicitor would be prudent to make a range of inquiries of the PN to establish that all of the aforementioned duties have been satisfied. The solicitor should make a careful and detailed case note to record the inquiries made and the relevant answers provided. The solicitor should only act on the instructions of a PN when these preconditions have been fulfilled.

A solicitor should also have regard to s 33, which sets out the matters that must be included in a participant's plan.¹⁰⁶ The plan must include a statement of the participant's goals and aspirations¹⁰⁷ and a statement of the participant's supports.¹⁰⁸ In light of these provisions, the PN's duty to do an act that relates to the "review" of a plan would be limited to acts that have a connection to the content of the plan.

Child representatives

Does the child representative have authority to provide instructions in the particular circumstances?

As previously discussed, rr 5.5 and 5.6 restrain the power of a PN to act only in certain limited circumstances. There is no equivalent limitation that applies to the scope of power of a CR. Rather, s 74(1) is of no effect only where the CEO is satisfied that the child has capacity to make decisions for themselves,¹⁰⁹ they are satisfied that it is appropriate for s 74(1) not to apply,¹¹⁰

¹⁰² National Disability Insurance Scheme (Nominee) Rules r 5.8.

¹⁰³ *National Disability Insurance Scheme Act 2013* (Cth) s 80.

¹⁰⁴ *National Disability Insurance Scheme Act 2013* (Cth) s 80.

¹⁰⁵ National Disability Insurance Scheme (Nominee) Rules rr 5.5, 5.6

¹⁰⁶ *National Disability Insurance Scheme Act 2013* (Cth) s 33.

¹⁰⁷ *National Disability Insurance Scheme Act 2013* (Cth) s 33(1).

¹⁰⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 33(2).

¹⁰⁹ *National Disability Insurance Scheme Act 2013* (Cth) s 74(5)(a).

¹¹⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 74(5)(b).

and they make a determination that it does not apply to the child.¹¹¹ In determining whether a child is capable of making their own decisions, the CEO is to apply a functional capacity test.¹¹² As such, the Act appears to assume that, in the absence of a determination made by CEO, a child lacks legal capacity. Therefore, the Act empowers a CR to give instructions to a solicitor during Tribunal proceedings unless there is a CEO determination stating otherwise.

A solicitor should ascertain whether the child representative has fulfilled their duties

The actions of a CR are considerably less constrained than those of a PN. Nevertheless, they are required to ascertain the wishes of the child,¹¹³ act in their best interests,¹¹⁴ and must consult with any guardians, persons who satisfy the parental conditions set out in Part 4.2 of the Children Rules, and persons who assist the child.¹¹⁵ A prudent lawyer would make inquiries to satisfy themselves that these obligations have been met, and should make careful records of all answers provided. They should only act on the instructions of the CR when these preconditions are satisfied.

The solicitor must comply with their professional obligations/best practice

Still need to follow professional obligations to act in clients'/participant's best interests etc - ensure there is no conflict of interest

Regardless of whether a participant has capacity and regardless of whether a solicitor is acting on instructions from a PN, CR or the client themselves, a solicitor is still obligated by Rule 4.1.1 of the ASCR to act in the client's best interest. This means the solicitor must do their utmost in ensuring best practice in providing legal services. Although courts often make reference to the best interests of the participant

The duty to follow a client's instructions means the solicitor must follow the participant's, not the plan nominee/child representative's instructions. This may not always be possible.

NDIS legislation provides that PNs and CRs must act to ascertain the wishes of and develop the independence of the participant. In theory, this should mean the instructions of PNs and CRs

¹¹¹ *National Disability Insurance Scheme Act 2013* (Cth) s 74(5)(c).

¹¹² *National Disability Insurance Scheme (Children) Rules* r 5.2(b)(i).

¹¹³ *National Disability Insurance Scheme Act 2013* (Cth) s 76.

¹¹⁴ *National Disability Insurance Scheme Act 2013* (Cth) s 76.

¹¹⁵ *National Disability Insurance Scheme (Children) Rules* r 6.4.

should align with participants' wishes and that following a PN/CRs instructions would be the same as following a client's instructions. However, there is no obligation for PNs or CRs to act on the ascertained wishes. This allows for PNs and CRs to make decisions, including solicitor instructions on behalf of participants.

If the client's and PN's/CR's instructions are not the same, following the instructions of the latter may run afoul of a solicitor's obligations under the aforementioned Solicitor's Conduct Rules and may also encounter issues of paternalism and inconsistency with article 12 of the CRPD. This section will focus on how the ASCR restricts and enables taking instructions from PNs and CRs.

To answer the question of how taking instructions from a PN or CR might interact with ASCR obligations, it is necessary to distinguish between different instances taking advice from a PN and from a CR as the scope of their powers differ.

A solicitor should still ascertain the wishes of the participant and involve them as much as possible (if they want to be involved)

Part of a solicitor's duty under ASCR 4.1.1 may be to ascertain the wishes of the participant and involve them as much as possible even when they lack capacity.

Improving Compliance with the CRPD

Plan nominees

Inconsistency with the CRPD

As has been demonstrated, the Act establishes a scheme whereby PNs are empowered to provide instructions to lawyers during Tribunal proceedings in circumstances where the participant does not have legal capacity. This largely arises out of the substituted decision-making mechanisms that the Act establishes. However, the emerging interpretation of art 12 of the CRPD contends that it provides for a presumption of absolute legal capacity. Therefore, the substituted decision-making framework created by the Act is inconsistent with both arts 12 and 13.

It has been suggested that art 12.3 is the core of art 12.¹¹⁶ It provides that "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they

¹¹⁶ Gerard Quinn and Anna Arstein-Kerslake, 'Restoring the 'Human' in 'Human Rights': Personhood and Doctrinal Innovation in the UN Disability Convention' in C. Gearty and C. Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press, 2012) 36, 47.

may require in exercising their legal capacity.”¹¹⁷ This appears to suggest that the CRPD establishes an “almost irrefutable presumption of legal capacity,”¹¹⁸ a claim that aligns with an “emerging consensus in international human rights discourse” that all people, regardless of decision-making capacity, should be afforded legal capacity on an equal footing with others.¹¹⁹ In this way, art 12 moves away from models of substituted decision-making and requires that the will and preferences of the individual be respected at all times.¹²⁰

This leads to inconsistency between the CRPD and the Act in two ways. First, given the operation of s 80, a PN is empowered to do an act provided that they reasonably believe that it will promote the personal and social wellbeing of the participant. The PN can do so notwithstanding that their actions do not comply with the wishes of the participant, provided that they reasonably believe they have ascertained the wishes of the participant.¹²¹ There is no duty compelling the PN to act according to the wishes of the participant where to do so would conflict with their personal and social wellbeing, as objectively assessed by the PN. Therefore, in circumstances where the PN is providing instructions that are inconsistent with the expressed wishes and preferences of the participant, such circumstances will be inconsistent with art 12. This is notwithstanding the fact that the participant has been assessed as lacking the requisite legal capacity to provide instructions.

The preceding conclusion leads to the further consequence that the provision of instructions by a PN is inconsistent with art 13 of the CRPD. This article provides that “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others.”¹²² By empowering PNs to provide instructions to solicitors on behalf of participants, the Act denies access to justice by people with disabilities by removing their right, albeit in limited circumstances, to have their wishes and preferences legally recognised and acted upon. The erosion of this right to legal personhood could be likened to a kind of “civil death.”¹²³

¹¹⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 12.3.

¹¹⁸ Quinn and Arstein-Kerslake, above no 102, 47.

¹¹⁹ Flynn and Arstein-Kerslake, above no 30, 82.

¹²⁰ *Ibid* 85.

¹²¹ *National Disability Insurance Scheme Act 2013* (Cth) s 80.

¹²² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 13.

¹²³ W. Blackstone, *Commentaries of the Laws of England*, Vol. 1, 442-5 (Oxford: Clarendon Press 1765).

Where there is a plan nominee, what can a solicitor do to promote the client's rights under the CRPD?

As discussed above, art 12 can be read as providing for a “proactive approach,” whereby States are required to provide support to all citizens to enable them to exercise the legal capacity that art 12 assumes is inherent in each individual without exception.¹²⁴ The UN Committee on the Rights of Persons with Disabilities has also asserted that art 12 requires substituted decision-making systems to be eliminated and replaced by supportive decision-making systems.¹²⁵

In light of this, in order to move towards greater fidelity to arts 12 and 13 of the CRPD, solicitors should seek to promote and implement supported decision-making mechanisms when representing NDIS participants. This would result in the participant being involved in the provision of instructions even where they have undergone a functional capacity test and have been assessed as lacking legal capacity. Despite such an assessment, a solicitor who is seeking to practice in conformity with the obligations arising from the CRPD would place the participant at the heart of the legal process. In this way, the full extent of the participant's legal capacity and personhood will be fulfilled. A solicitor could utilise practical strategies such as involving any trusted members of the participant's family or friendship network in the decision-making process, enlisting a peer advocate to assist in interpreting the participant's preferences and wishes, and drawing upon social and community support programs that could assist the participant.¹²⁶

Child representatives and the CRPD

There is substance in the assertion that the Act is consistent with the CRPD in relation to the rights of children with disabilities. The Children Rules explicitly recognises that a child's legal capacity evolves as they develop.¹²⁷ This recognition is given effect through various requirements including that the child be included in making decisions “to the extent possible,”¹²⁸ that the “judgments and decisions” that the child would have made should be considered,¹²⁹

¹²⁴ Flynn and Arstein-Kerslake, above no 30, 88.

¹²⁵ Ibid.

¹²⁶ Tina Minkowitz, ‘The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free From Nonconsensual Psychiatric Interventions’ (2007) 34(2) *Syracuse Journal of International Law and Commerce* 405, 409.

¹²⁷ National Disability Insurance Scheme (Children) Rules r 1.2.

¹²⁸ National Disability Insurance Scheme (Children) Rules r 1.4(d)(i).

¹²⁹ National Disability Insurance Scheme (Children) Rules r 1.4(d)(iii).

that their wishes must be ascertained,¹³⁰ and also through the ability of the CEO to make a determination under s 74(5).¹³¹

Furthermore, one of the objects of the Act is to give effect to Australia's obligations under the CRPD, which includes art 7 relating to the rights of children with disabilities. This article provides that States Parties shall take measures to ensure that children with disabilities enjoy "human rights and fundamental freedoms on an equal basis with other children." In short, this can be achieved by ensuring that the same capacity test is applied to all children, regardless of the presence of disability.

Further, art 7 provides that the "best interests of the child shall be a primary consideration" whenever action is taken in relation to the child. The Act complies with this requirement by "directly promoting the best interests of the child as being the determining factor in taking all actions concerning children with disabilities."¹³² As such, provided that the CR is giving instructions that will promote the best interests of the child, their actions will be consistent with the CRPD.

Difficult scenarios

What should a solicitor do when a plan nominee or child representative is giving instructions that are inconsistent with the expressed wishes of the client?

If a PN or CR gives a solicitor instructions that are inconsistent with the express wishes of a client with clear legal capacity, the solicitor's duty to follow a client's instructions at rule 8.1 would apply. If a PN or CR gives such instructions, the solicitor should and must ignore them. However, it may be a good idea, and it may be in the client's best interest (pursuant to rule 4.1.1) for a lawyer to first talk with the PN or CR to see why they are giving those instructions and see if their instructions will be altered following that discussion to be more consistent with the participant's wishes.

If on the other hand, the capacity of the client is in doubt or clearly and completely non-existent, the question of what the lawyer's best course of action should be is less easy to answer. While

¹³⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 76.

¹³¹ *National Disability Insurance Scheme Act 2013* (Cth) s 74(5).

¹³² Explanatory Memorandum, Statement of compatibility with human rights, National Disability Insurance Scheme Bill 2013 (Cth) 21.

it is generally permissible to act on the instructions of a PN or CR, in doing so, the lawyer must of course consider their obligations to act in the client's best interests. Again, it may be in the client's best interests to, before taking any action, to have a discussion with the PN or CR to ascertain why they are giving those instructions and see if their instructions can be altered following that discussion to be more consistent with the participant's wishes. If the solicitor is still in doubt, they should refer the matter to the court and possibly consider ceasing to act in order to avoid breaching their professional obligations.

What should a solicitor do when there are two child representatives providing conflicting instructions?

A CR is normally the person or persons who have parental responsibility of a child participant.¹³³ A person who is either a) the child's guardian (appointed by a law of the Commonwealth or State¹³⁴) or b) is one or more persons who satisfy parental condition 1¹³⁵ or parental condition 2¹³⁶ is deemed to have parental responsibility.¹³⁷

A participant may sometimes have two or more CRs. When this happens, the court is willing to treat them as having joint parental responsibility, as joint CRs. If the participant does not have capacity, they are empowered to instruct a solicitor. This is unproblematic if they are in agreement regarding instructions.

If they provide conflicting instructions, the CEO is able to determine that one (or more) person is to have parental responsibility for the child (i.e. capable of being the CR) to the exclusion of all other persons for the purposes of the NDIS Act.¹³⁸ In making this determination, the CEO must 'have regard for' the criteria set out at rule 4.9 which include the preferences of the participant, and which of the child's potential guardians are more willing and able to carry out the duties to children set out in section 76 of the NDIS Act and Part 6 of the NDIS (Children)

¹³³ NDIS (Children) Rules, Part 3.2.

¹³⁴ Ibid, Part 7.4.

¹³⁵ A parent of the child who has not ceased to have parental responsibility for the child because of an order made under the Family Law Act 1975 or a law of a State or a Territory

¹³⁶ A person under a parenting order (within the meaning of the Family Law Act 1975) who a) the child is to live with; or b) the child is to spend time with; or c) the person is responsible for the child's long-term or day-to-day care, welfare and development.

¹³⁷ NDIS (Children) Rules, Part 4.2.

¹³⁸ NDIS Act, s 75(3); NDIS (Children) Rules, Part 4.8

Rules.¹³⁹ The court in BGBZ and NDIA¹⁴⁰ affirmed these principles. Even though some doubt was expressed as to the participant's capacity, their preferences over which parent should act as a CR were carefully considered and taken into account. BGBZ, one of two people with parental responsibility for the participant was considered more appropriate, and more capable of acting as a CR. Ultimately, it was decided on these factors that BGBZ should have parental responsibility to the exclusion of the other CR.

It is worth noting that this power of the CEO is discretionary. The CEO does not have to exercise it. If this is the case, it might leave a solicitor in confusion over whose instructions to follow. Furthermore, the fact that the CEO has this power may be problematic when the NDIS is the opposing party in a legal proceeding.

If the participant has capacity, the solicitor's duty to follow a client's instructions at rule 8.1 would apply. If the participant does not, the preferences of the participant, and the capability and appropriateness of the CR should still be a significant guiding factors in determining who the solicitor. If the solicitor is still unclear, the options for lawyers in difficult situations such as these - these may include referring the matter to tribunal, ceasing to act, or even asking the CEO to make a Part 4.8 determination in spite of any conflict of interest issues that might arise.

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¹³⁹ Ibid, Part 4.9.

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GROUP 4 PROJECT

Legal Advisory Services for Persons Living with Disabilities in Indonesia

Partner Organisation

Australia Indonesia Partnership for Justice

Group Members

Tapiwa Bururu

Patrick Ryan



**Special thanks to the following
organisations**

Australia Indonesia Partnership for
Justice

Disability Discrimination Legal Service Inc

Justice Connect

Legal Aid Western Australia

Mental Health Legal Centre

Victoria Legal Aid

Women's Legal Service Victoria

Legal Advisory Services for Persons Living with Disabilities in Indonesia

Executive Summary

This report provides an analysis and evaluation of current legal advisory services being used in Australia. The report was commissioned by the Australia Indonesia Partnership for Justice to examine legal advisory services for people living with disabilities and their applicability to the Indonesian context. The aim of this research was to provide options for the Religious Courts in Indonesia that enable the accessibility measures beyond physical accommodations to be considered. This contributes to an over-arching aim of addressing the low percentage of persons with disabilities interacting with Religious Courts in Indonesia, and provide new avenues for the judicial sector to improve compliance with the Convention of the Rights for Persons with Disabilities. Seven Australian organisations were approached to collate the research for this project: Women with Disabilities Victoria, Disability Discrimination Legal Service Inc, Mental Health Legal Centre, Justice Connect, Women's Legal Service Victoria, Victoria Legal Aid, and Legal Aid Western Australia. Furthermore, whilst recognising the importance of removing physical barriers of access to justice (e.g. wheelchair accessibility), this project argues that significant work is needed beyond such measures to enhance access to justice as a whole. Therefore, educational and technological access to justice services will be explored in this report.

This work has been well received by delegates of the Religious Courts of Indonesia and the court's commitment to improving access to justice for persons with disabilities is truly commendable. The Australia Indonesia Partnership for Justice formed a historic virtual alliance between courts in Australia and Indonesia and this partnership has the potential to share knowledge and improve services for persons with disabilities living in both nations. Stemming from the objectives of this partnership, this report recommends the courts consider incorporating the following service types in their upcoming development work:

1. **Information and outreach services** that improve awareness of available legal advisory programs for persons with disabilities;

2. **In-person services** that build relationships of trust between legal services and persons with disabilities, and have the added benefit of providing assistance to those who are unable to access or interact with technology;
3. **Virtual services** that stream-line access to in-person services and ensure that those most at risk are receiving quality legal assistance; and
4. **Increased data collection** and knowledge surrounding persons with disabilities interacting with legal and court services in Indonesia. The Washington Group Questions provide a template for ensuring those in need are captured regardless of whether they identify as a person with a disability.

Introduction

Access to justice is a cornerstone of citizenship and the rule of law. Yet, for people with disability in Indonesia, there are multiple barriers to achieving equal recognition before the law. This report addresses the issue of barriers for persons with disabilities in Indonesia in accessing the Religious Courts of Indonesia. Barriers include lack of information, geographical remoteness, and the digital divide. This report will look at practices from Australia, which may help to overcome these barriers.

Background Statistics

The Religious Courts of Indonesia provided legal advisory for approximately 200,000 clients, and received over 447,000 divorce cases in 2018.¹ The Australia Indonesia Partnership for Justice analysed over 500,000 divorce case judgments, none of which referred to any immediate family member living with a disability. Of the 1000 marriage dispensation cases analysed by the Partnership only one pertained to a child living with a disability.

These figures do not reflect the proportion of persons with a disability in the Indonesian population, suggesting that there is severe under-representation of persons with disabilities accessing the Religious Courts. At a minimum, according to the 2015 Intercensal Population

¹ Australia Indonesia Partnership for Justice 2, *Decision Analysis of Divorce Cases in Indonesia* (Report, 19 November 2019) 1 <<https://aipj.or.id/pages/publication/decision-analysis-of-divorce-cases-in-indonesia>>.

Survey, 8.5% of the Indonesian population lives with a disability,² and the World Health Organisation estimates a figure of 15% globally.³ Statistics also show that there are higher numbers of women with disabilities than men (52.7% of women, 47.3% men).⁴ Further, women bring 70% of divorce cases to the Religious Courts.⁵ There is a significant disparity between the numbers of persons with disabilities interacting with the legal system compared to those without disabilities. This exposes the problem of inequality before the law for persons living with disabilities in Indonesia.

It should be noted that because comprehensive data on the rates of disability in Indonesia cannot be found it is difficult to ascertain the true extent of this disparity.⁶ Additionally, divergence between the Indonesian Intercensal Population Survey⁷ and WHO global estimation⁸ suggests the most recent data minimises the reality of disability in Indonesia.⁹ In part, this is due to definitional difficulties in the Indonesian context. For instance, many people with disabilities may not identify as having a disability. Further, there may be cultural reasons or social pressures that prevent people from categorising themselves as having a disability. For example, 'there is a negative stigma associated with disabilities in Indonesia that interprets disability as identical to sickness or weakness,'¹⁰ meaning that a significant number of families may not

² Badan Pusat Statistik, *Indonesia – Intercensal Population Survey 2015* (Report, 24 May 2016) <https://mikrodata.bps.go.id/mikrodata/index.php/catalog/715/related_citations>

³ World Health Organisation, *Summary World Report on Disability* (Report, 2011) 7 <https://apps.who.int/iris/bitstream/handle/10665/70670/WHO_NMH_VIP_11.01_eng.pdf;jsessionid=DB68E33B8F6B39AB21A335AECA071707?sequence=1>.

⁴ Badan Pusat Statistik dan Departemen Sosial, *Penyandang Masalah Kesejahteraan Sosial* (Report, 2006) 10.

⁵ Australia Indonesia Partnership for Justice 2, *Decision Analysis of Divorce Cases in Indonesia* (Report, 19 November 2019) 1 <<https://aipj.or.id/pages/publication/decision-analysis-of-divorce-cases-in-indonesia>>.

⁶ Nicola Colbran, *Access to Justice Persons with disabilities Indonesia* (Report, October 2010) 13 <https://www.ilo.org/wcmsp5/groups/public/%40asia/%40ro-bangkok/%40ilo-jakarta/documents/publication/wcms_160337.pdf>.

⁷ Badan Pusat Statistik, *Indonesia – Intercensal Population Survey 2015* (Report, 24 May 2016) <https://mikrodata.bps.go.id/mikrodata/index.php/catalog/715/related_citations>.

⁸ World Health Organisation, *Summary World Report on Disability* (Report, 2011) 7 <https://apps.who.int/iris/bitstream/handle/10665/70670/WHO_NMH_VIP_11.01_eng.pdf;jsessionid=DB68E33B8F6B39AB21A335AECA071707?sequence=1>.

⁹ Ibid 13.

¹⁰ Ibid 11.

identify or acknowledge that disability is present within their family.¹¹ This is particularly pervasive with psychiatric and psychological disabilities, and conditions such as leprosy.¹² Those with mental illness may be reluctant to interact with the judicial system, as declaring a psychiatric disability in a family law matter could result in loss of custody.¹³ To this end, there is still a need for innovative accessibility measures even if persons with disabilities are not identified by the courts.

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

On the 30th of March 2007, Indonesia signed the Convention on the Rights of Persons with Disabilities (CRPD), without reservations.¹⁴ Over four years later, on the 10th of November 2011, the CRPD was ratified, solidifying Indonesia's obligations as a signatory to the CRPD.¹⁵ Importantly, a broad yet crucial component of the CRPD focuses on bettering 'access to justice' for persons with disabilities, ensuring this Project's congruity with the obligations set out by the Convention. For our purposes, articles 5, 6, 9, 12 and 13 of CRPD offer the most relevance for access to justice for persons with disabilities under this Project.

First, despite the Convention not expressly defining persons with disabilities, paragraph (e) states 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.'¹⁶

¹¹ Ibid 30.

¹² Nicola Colbran, *Access to Justice Persons with disabilities Indonesia* (Report, October 2010) 30. <https://www.ilo.org/wcmsp5/groups/public/%40asia/%40ro-bangkok/%40ilo-jakarta/documents/publication/wcms_160337.pdf>

¹³ Interview with Mental Health Legal Centre (Tapiwa Bururu and Patrick Ryan, Melbourne Law School, The University of Melbourne, 2 December 2019).

¹⁴ International Disability Alliance, *Indonesia Ratifies the CRPD* (Web Page, 4 December) <<http://www.internationaldisabilityalliance.org/blog/indonesia-ratifies-crp>>

¹⁵ See *ibid*.

¹⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) preamble (e).

Under this interpretation this Project will include organisations which focus on a range of disabilities, from physical, sensory, cognitive and psychosocial.

Article 5 of the CRPD stipulates that *all* persons are entitled to ‘equal protection and equal benefit of the law’.¹⁷ Hence, this Project’s aim to better persons with disabilities’ access and enjoyment of the law is consistent with the CRPD. This provision requires a positive act of the state to ensure the reduction of barriers for persons with disabilities from accessing the legal system. Technological innovations aimed at reaching remote persons with disabilities provide a mechanism for realising this CRPD obligation.

In addition, provided the gendered approach of the Project, and its subsidiary concern regarding legal access for women with disabilities in Indonesia, **Article 6** is directly applicable.¹⁸ The CRPD specifically emphasises the importance of recognising that ‘women and girls with disabilities are subject to multiple discrimination’ and therefore State Parties should ‘take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.’¹⁹ The empowerment of women with disabilities is a core tenant of the CRPD, and should be considered in relation to the incredibly gendered nature of family law, and the majority of cases brought before the Religious Courts.²⁰ The services recommended throughout this report have been considered with regard to the intersecting forms of discrimination experienced by women with disabilities who are in need of legal assistance. For these reasons **Article 13** additionally offers direct applicability to the project at hand, given its broad focus on ‘accessibility to justice’.²¹

Article 12 of the convention requires equal recognition before the law for persons with disabilities, ensuring that persons with disabilities possess the fundamental right to make their own legal decisions and thus have a ‘capacity’ to act.²² Given the statistics outlined above, it

¹⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 5 (1).

¹⁸ *Ibid*, art 6.

¹⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 6.

²⁰ Australia Indonesia Partnership for Justice 2, *Decision Analysis of Divorce Cases in Indonesia* (Report, 19 November 2019) 1. <<https://aipj.or.id/pages/publication/decision-analysis-of-divorce-cases-in-indonesia>>

²¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 13.

²² *Ibid* art 12 (2)

appears that persons with disabilities are unable to adequately exercise their legal capacity through the Religious Courts in Indonesia. For these reasons, if the Australian Indonesia Partnership for Justice (AIPJ) can help implement innovative technologies aimed at both (a) educating persons with disabilities about their legal rights and (b) facilitating easily accessible legal services irrespective of an individual's physical remoteness, Religious Courts will have improved compliance with the CRPD.²³

Article 9 sets out the right for persons with disability to live independently and participate in all aspects of society.²⁴ As a signatory to the CRPD Indonesia needs to take appropriate steps to ensure access is provided to all facets of public life. This ranges from providing ramps and physical measures within buildings to ensure physical access, to providing equal access to information and internet services. This project sets out to enable the Religious Courts to enable persons with disabilities to feel empowered to participate within those spaces, and seek the protections and legal rights these courts provide.

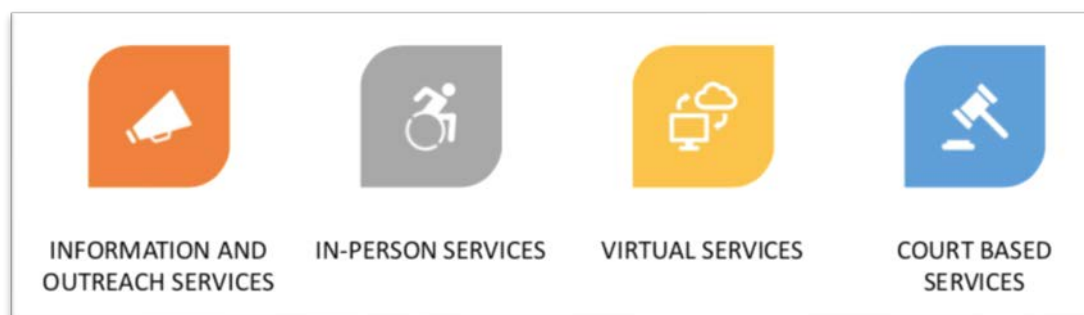
The CRPD committee's general comment on accessibility note the importance of working to 'change attitudes towards persons with disabilities in order to fight against stigma and discrimination, through ongoing education efforts, awareness-raising, cultural campaigns and communication.'²⁵ These central tenants of the convention provide the basis for this project's multi-faceted services approach to improving access to justice for persons with disabilities in Indonesia.

²³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12.

²⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 9.

²⁵ Committee on the Rights of Persons with Disabilities, *General comment No. 2 (2014): Article 9: Accessibility*, UN GAOR, 11th sess, UN Doc C/GC.2/2014 (22 May 2013).

SERVICES



The following services were chosen as they provide a broad range of accessible measures. The aim is for the Religious Courts of Indonesia to consider one or more of these services as they implement new access to justice innovations. The tables include information about the services background, logistics and benefits/limitations. Although all case studies seem relevant, we have ordered the programs based on the apparent relevance to the specific issues the Religious Courts of Indonesia are seeking to address. Due to the scope of this project all examples come from Australia, which is a federal system incorporating nine major jurisdictions. Information about each program was gathered through desk-based research (which included analysing annual reports, organisational documents and promotional materials and all organisations (with the exception of Women with Disabilities Victoria) were interviewed for the purposes of the report.

Ordered Services

1. Information and Outreach Services

- 1.1. Educational films – Women with Disabilities Victoria
- 1.2. Community Informational Sessions – Disability Discrimination Legal Service Inc

2. In-person Services

- 2.1. Night Service – Mental Health Legal Centre
- 2.2. University Partnerships – Mental Health Legal Centre
- 2.3. Health Justice Partnerships – Justice Connect and Women’s Legal Service Victoria
- 2.4. Priority Pathways Project- Women’s Legal Service Victoria

3. Virtual Services

- 3.1. The Gateway Project – Justice Connect
- 3.2. Legal Help Chat – Victoria Legal Aid
- 3.3. Virtual Office Network – Legal Aid Western Australia

4. Court-based Services

4.1. The Washington Group Questions

Information and Outreach Services

Women with Disabilities Victoria: Family Violence and Disability Films and Video²⁶

EDUCATIONAL FILMS

- Women with Disabilities Victoria's website offers accessible, public and inclusive educational films aimed at educating disability workers and persons with disabilities on how to 'identify and respond to family violence and abuse.'²⁷
- Unfortunately, the research of this organisation indicates that when compared to people who don't have disabilities, persons with disabilities suffer greater rates of domestic violence and abuse.²⁸ More specifically, domestic and family violence is even more prevalent for *women* with disabilities.²⁹
- For these reasons, disability persons organisations such as Women with Disabilities Victoria emphasise the integral role disability workers play to identify and respond to various forms of domestic violence.³⁰
- Based on these findings, Women with Disabilities Victoria partnered with National Disability Services 'to develop four short films for disability workers on family violence and disability.'³¹

The films are:

- 'Preventing and responding to family violence'
- 'Prevention of domestic and family violence'
- 'Early intervention in domestic and family violence'
- 'Responding to domestic and family violence'³²

SAFEGUARD PROJECT

²⁶Women with Disabilities Victoria, *Welcome to Women with Disabilities Victoria* (Web Page, 2 December 2019) <<https://www.wdv.org.au>>.

²⁷ Women with Disabilities Victoria, *Preventing and Responding to Violence Against Women with Disabilities: Family Violence and Disability Films* (Web Page, 2 December 2019) <<https://www.wdv.org.au/our-work/our-work-with-organisations/familyviolenceanddisabilityfilms>>.

²⁸ See *ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² Women with Disabilities Victoria, *Preventing and Responding to Violence Against Women with Disabilities: Family Violence and Disability Films* (Web Page, 2 December 2019) <<https://www.wdv.org.au/our-work/our-work-with-organisations/familyviolenceanddisabilityfilms>>.

<ul style="list-style-type: none"> • The safeguard project incorporates videos which include women with disabilities who have personally experienced domestic abuse. • They speak directly about their experience and the importance of speaking up.³³ 	
Logistics:	These films were created in 2018 and were supported by the Victorian Government.
Benefits/Limitations	<p>Benefits</p> <p>Highly accessible</p> <ul style="list-style-type: none"> • The films include 34 interpreters, captions and audio description option.³⁵ • Accompanying the videos is an Easy English guideline.³⁶ <p>Educational</p> <ul style="list-style-type: none"> • The educational videos offer clear guidance and examples to what different forms of abuse look like. • For instance, the videos provide easy to understand scenarios explaining the common reality ‘financial’ abuse, along with other forms of abuses which is both informative to workers and individuals. <p>Builds Confidence</p> <ul style="list-style-type: none"> • A key hindrance in access to justice for women with disabilities is lack of confidence. To combat this, the inclusion of persons with disabilities and those who have experienced abuse in the safeguard project assists in creating a personal connection those viewing the videos who may be experiencing similar abuse.³⁷ • For these reasons, these videos empower women with disabilities to speak up. <p>Compatibility with the CRPD and Human Rights</p> <ul style="list-style-type: none"> • The CRPD was the first human rights convention to bring intersectionality to the forefront. Therefore, the CRPD acknowledges diversity, cumulative disadvantage and

³³ Women with Disabilities Victoria, *Safeguards Project* (Web Page, 2 December 2019) <<https://www.wdv.org.au/our-work/our-work-with-organisations/safeguards/>>.

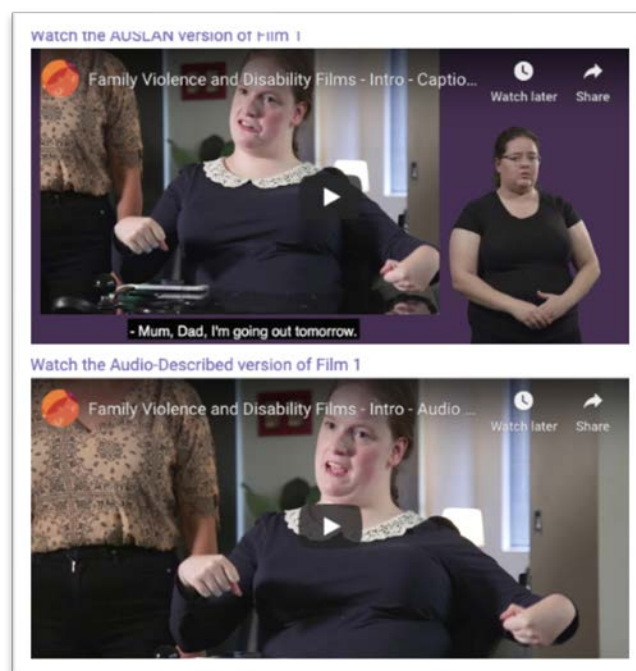
³⁴ Ibid.

³⁵ Women with Disabilities Victoria, *Preventing and Responding to Violence Against Women with Disabilities: Family Violence and Disability Films* (Web Page, 2 December 2019) <<https://www.wdv.org.au/our-work/our-work-with-organisations/familyviolenceanddisabilityfilms>>.

³⁶ Ibid.

³⁷ Women with Disabilities Victoria, *Safeguards Project* (Web Page, 2 December 2019) <<https://www.wdv.org.au/our-work/our-work-with-organisations/safeguards/>>.

	<p>multiple discrimination.³⁸</p> <ul style="list-style-type: none"> • These films/videos directly address intersectionality by assisting not just persons with disabilities but specifically women with disabilities who have been victims to domestic abuse.
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Disability Discrimination Legal Service: Community Educational Programmes³⁹
<p>Disability Discrimination Legal Service is a Community Legal Service which specialises in providing persons with disabilities legal advice regarding discrimination law. People and organisations can make a request for educational sessions either via email or phone. These sessions are free and Disability Discrimination Legal Service members go to the requested party organisation. For instance, DDLS provides educational programmes on disability rights and rights against discrimination at various Migrant Centres.</p> <p>Additionally, DDLA travels regionally to provide these educational legal rights sessions. DDLS recognises that most of the barriers are people not having knowledge about their rights, which is why education is key – particularly free, highly accessible education to vulnerable members of the community.⁴⁰</p>

³⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) preamble (16).

³⁹ Interview with Disability Discrimination Legal Service (Tapiwa Bururu and Patrick Ryan, Melbourne Law School, The University of Melbourne, 5 December 2019).

⁴⁰ Disability Discrimination Legal Service Inc, *Community Legal Education* (Web Page, 1 December 2019) < <http://ddlsaualia.org/about-us/community-legal-education/>>

Logistics:	<p>Background</p> <ul style="list-style-type: none"> • The programme has roughly 16 appointments every week in either metropolitan or rural areas. <p>Funding</p> <ul style="list-style-type: none"> • The funding stems from both Attorney Generals Department and Legal Aid Victoria. <p>Staff</p> <ul style="list-style-type: none"> • Roughly 2 lawyers work on this project. • There are roughly 5 volunteers everyday (often students), as well as a manager who works 15 hours a week and an office support person.
Benefits/Limitations	<p>Benefits</p> <ul style="list-style-type: none"> • These educational programs can travel to regional parts of Victoria, offering valuable educational lessons on identifying legal rights in relation to disability discrimination to people who may not fully understand their legal rights. <p>Negatives</p> <ul style="list-style-type: none"> • To receive and be a part of these educational programmes, you must be a part of an advocacy group to hear about the service. • The programmes have to be requested by an advocacy group, which limits accessibility to individuals who aren't a part of a particular group.

In-person Services

Mental Health Legal Centre: Night Service and University Partnership ⁴¹	
<p>Night Service</p> <ul style="list-style-type: none"> • The Night Service is a telephone help line that provides legal advice to persons with mental disabilities. • The phone service commenced in 2012 and operates Tuesday – Thursday from 6:00pm – 8:00pm. • The organisation does its best to ensure that client’s anonymity is protected while still complying with administrative reporting duties. <p>University Partnership with Mental Health Legal Centre</p> <ul style="list-style-type: none"> • Mental Health Legal Centre has partnered with RMIT University to use student volunteers for some of their legal projects. • For instance, student volunteers have worked closely with lawyers on the Night Service and the Inside Access program which is held at the Dame Phyllis Frost Centre (Women’s Correctional Centre).⁴² • The latter programme involves providing community legal education to women with mental illnesses to better understand their legal rights. The aim of this programme is to ensure that women are released from prison with fewer barriers than before.⁴³ 	
Logistics:	<p>Night Service Funding</p> <ul style="list-style-type: none"> • This service was funded by the Department of Corrections and then some philanthropic funding <p>Night Service Staff</p> <ul style="list-style-type: none"> • The night service uses roughly 10-15 lawyers • All staff are volunteers • Student volunteers also assist in the program
Benefits/Limitations	<p>Night Service Benefits</p> <ul style="list-style-type: none"> • What became apparent when speaking to staff members of Mental Health Legal Service is that access to justice issues aside, there may be elements of institutional and historic distrust in utilising the family courts and admitting one has a disability. This can

⁴¹ Interviews with Mental Health Legal Centre (Tapiwa Bururu and Patrick Ryan, Melbourne Law School, The University of Melbourne, 2 December 2019).

⁴² Mental Health Legal Centre, *Inside Access* (Web Page, 29 November) < <https://mhlc.org.au/our-programs/inside-access>>

⁴³ See *ibid*.

	<p>arise from a long-lasting nature of disempowerment people with cognitive disabilities or mental health issues have faced when dealing with the formalised family court system.</p> <ul style="list-style-type: none"> • The service's anonymity can be an effective antidote to any issues of underlying mistrust for legal services and more generally 'the establishment'. Furthermore, this anonymity can abate reluctance people might face from declaring they have a mental illness. • Given other modes of high level technology can be alienating to people, speaking to an actual person over the phone can be far easier to navigate. <p>University Partnership Benefits</p> <ul style="list-style-type: none"> • The student partnership to assist in legal projects has been a highly cost effective way of spreading labour.
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Justice Connect: Health Justice Partnerships⁴⁴	
<p>Health Justice Partnerships enable the legal and health sectors to work together to improve outcomes for older people 'experiencing elder abuse and other legal issues.'⁴⁵</p> <p>Lawyers are situated within established health care services, enabling them to provide legal assistance to those in need who might otherwise not know to seek help. Staff within healthcare settings are trained to identify legal issues, as those impacted by elder abuse may not realise they need a lawyer, and are often more likely to confide in the healthcare professionals they see regularly. The addition of a lawyer to the team improves outcomes for older clients and minimises the incidence and impact of elder abuse, as well as improving the articulation of a health justice partnership model of practice.</p>	
Logistics	<p>Background</p> <ul style="list-style-type: none"> • The program was first established over 2015 and 2016. • The Partnerships were a transition from an Outreach Model run at health services for 10-11 years where pro bono lawyers would take one-off appointments at health centres.

⁴⁴ Interview with Justice Connect (Tapiwa Bururu and Patrick Ryan, Melbourne Law School, The University of Melbourne, 4 December 2019).

⁴⁵ Justice Connect, *Health Justice Partnerships* (Web Page, 2 December 2019) <
<https://justiceconnect.org.au/our-services/seniors-law/about-hjps/#what-is-HJP>>

	<ul style="list-style-type: none"> • With the Partnership Model Justice Connect now works with three hospitals in two Australian jurisdictions. <p>Funding</p> <ul style="list-style-type: none"> • Funded by Victorian Legal Services Board + Commissioner until early 2018. • Currently diversified funding sources. <p>Staff</p> <ul style="list-style-type: none"> • One full time lawyer at program launch. • Currently two lawyers that work 4 days per week and an administrator working for 0.5 days per week.
Benefits/Limitations	<p>Benefits</p> <ul style="list-style-type: none"> • The Partnerships build on a relationship of trust that has already been fostered between client and health care service, rather than requiring the client to independently approach legal help from an unfamiliar and often daunting source. • Partnership Model is far more effective than the Outreach Model for complex issues as a trust based relationship and client can be built over a long period of time • Helps create a holistic approach to legal advice, providing both therapeutic and legal pathways for assistance, as opposed to simply litigation. This is beneficial as people with family law matters often would prefer to avoid court in order to preserve relationships with family members involved in the dispute. • Beneficial for early and primary intervention as the therapeutic approach can expose complex issues before they are compounded. • Improves accessibility for those who are often excluded from online services due to having difficulties using them • Opportunity to tailor services as necessary as there are different dynamics between different forms of violence and abuse

	Limitations <ul style="list-style-type: none"> • Requires additional non-legal support as lawyers often take on a case management role and connect clients to other services • The partnership must balance the mandatory reporting obligations of medical staff with the client-based obligations of legal staff
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Women's Legal Service Victoria: Health Justice Partnerships⁴⁶	
<p>Women's Legal Service Victoria (WLSV) is a Community Legal Service with the aim of providing free legal services to women experiencing particular disadvantage, and legal issues arising from relationship breakdown or violence.</p> <p>The service is currently creating a health justice partnership to assist pregnant women who have been reported for a being a risk to their foetus. The desire is to reduce formal litigation and build therapeutic pathways for vulnerable women to be supported in making informed decisions regarding their baby's care.</p>	
Logistics	Funding <ul style="list-style-type: none"> • Funding has been given for 12 months from the Victoria Legal Services Board • In the process of recruiting lawyers • WLSV hope to commence the scheme in early 2020
Benefits/Limitations	Please refer to Justice Connect Health Justice Partnership table

Women's Legal Service Victoria: Priority Pathways Project⁴⁷
<p>One of WLSV's goals is to increase their impact and reach the most disadvantaged women. Recognising that the women who most need the services provided are those who face the</p>

⁴⁶ Interview with Women's Legal Service Victoria (Tapiwa Bururu and Patrick Ryan, Melbourne Law School, The University of Melbourne, 4 December 2019).

⁴⁷ See *ibid.*

greatest barriers to access.

The Priority Pathways project:

- Improved the efficiency of intake at WLSV (Triage Project)
- Built stronger pathways for particular groups of women were experiencing unmet legal need (Priority Client Project)

Both dimensions of the Priority Pathways project can offer insight into improving numbers of people with disabilities accessing the Religious Courts in Indonesia. Women with disability were incorporated into the Priority Client project, as WLSV's 'legal needs analysis identified that [they] see women with disabilities at low rates given the combination of vulnerabilities seen in the research' and percentage of women living with disability in the population.⁴⁸

Improving the triaging system enabled WLSV to identify client need early, ensuring the service is being reserved for people with true access difficulties that are experiencing the most disadvantage.

Logistics

Funding

- Funding from Victoria Legal Aid for a Project Officer for 6-12 months
- The project looked to create improvements through a cost neutral program

Staff

- Coordinating Project Officer
- Existing lawyers trained paralegals to more efficiently triage clients
- Volunteer administrator for data collection and entry

Disabled Person's Organisations Involvement

- WLSV placed a Women with Disabilities Victoria (WDV) representative on the project steering group
- Developed the Disability Action Plan in consultation with WDV

⁴⁸ Women's Legal Service Victoria, *Priority Pathways Project Report* (Report, 24 November 2017) 24.<<https://www.womenslegal.org.au/files/file/Priority%20Pathways%20Project%20Report%20FINAL.pdf>>

	<ul style="list-style-type: none"> • Australian Network on Disability (AND) provided external oversight on accessibility of WLSV and reviewed the Disability Action Plan • Have not, however, been able to partner with disability organisations for day-to-day services - there is definitely an access to justice issue with disability • Referrals from disability organisations that do occur are often for hearing impaired women
Benefits/Limitations	<p>Benefits</p> <ul style="list-style-type: none"> • Improved technology and phone service while conducting the program gave WLSV a better monitoring process for determining how many calls were being received and enabled the service to avoid leaving clients waiting for unreasonable periods of time. This gave clients better interactions with the service. • Large range of volunteer lawyers enabled quality control with data collection <p>Limitations</p> <ul style="list-style-type: none"> • There are still information based access issues as some women with disabilities do not know that service is available • Telephone advice makes it sufficient to prevent women from placing themselves in a position further disadvantage, but is often not enough to enable them to self-advocate • Requires at least a 6-12 month investment in the project to ensure that background information is sufficiently thorough • Implementation period requires continued trialling and refining in order for staff to adjust and take on new triaging roles • Additional investment in technology

Virtual Services

Justice Connect: The Gateway Project ⁴⁹	
<p>Justice Connect is a Not for Profit organisation that works to improve access to justice through specialist legal services and a 10,000 lawyer-strong pro bono referral network.⁵⁰ Helping people within vulnerable communities is a core tenant of the work done by the organisation, making their work with digital innovation a particularly salient blue-print for services increasing accessibility in the disability human rights sector.</p> <p>Justice Connect commenced the Gateway Project in 2017, with the aim of improving interactions between the organisation and its stakeholders by streamlining access to services. The online services targeted by the project are of high relevance as ‘help-seekers are increasingly finding and engaging with [legal services] online. With little promotion, use of the online intake tool is increasing.’⁵¹</p> <p>The online services were tested at Community Legal Centres by help-seekers in the waiting rooms.</p> <p>Justice Connect is now working to create a global pro bono portal and are currently undertaking research for this project. The global program is a grander scale of the Gateway Project and will bring community legal centres from around the world together, enabling more people to get pro bono assistance from private lawyers.</p>	
Logistics	<p>Background</p> <ul style="list-style-type: none"> • The project commenced in 2017. • Most of the testing occurred in 2018, and the tool was launched in August 2018. <p>Funding</p> <ul style="list-style-type: none"> • \$250,000 was awarded to Justice Connect from the Google Impact Challenge. • Google staff and support were provided. • Costing is based upon salaries and the time needed

⁴⁹ Interview with Justice Connect (Tapiwa Bururu and Patrick Ryan, Melbourne Law School, The University of Melbourne, 2 December 2019).

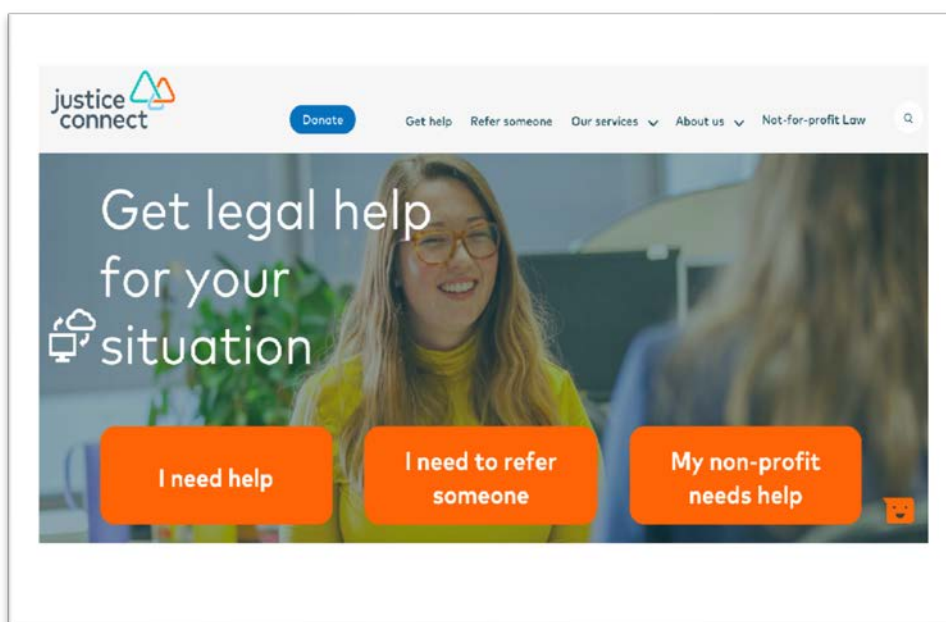
⁵⁰ Justice Connect, *Help Seeker Intake Tool Interim Evaluation* (Report, May 2019) 10 <<https://justiceconnect.org.au/wp-content/uploads/2019/06/Justice-Connect-Intake-Interim-Evaluation.pdf>>.

⁵¹ Ibid 5.

	<p>for work, plus other support and ongoing costs, including extra time for upkeep.</p> <p>Staff</p> <ul style="list-style-type: none"> • Original team of three has expanded to six.
Benefits/Limitations	<p>Benefits</p> <ul style="list-style-type: none"> • Phone time spent with help-seekers overall decreased significantly due to the online intake tool, increasing efficiency 22-44% across most programs. • Increases staff efficiency, creates a quicker and more consistent on-boarding of new client matters (although not all programs have benefited from these gains). • Enables referrals to other legal services if Justice Connect is unable to assist with a matter – referrals differ depending on the answers given by the person but most link to legal aid and mention other community legal centres and private lawyers. • There is a possibility in the future to expand the referral system and incorporate links and information for other services.⁵² • Follow up testing indicated people liked using the online tools, and preferred having the option to provide their information at their own pace. • No pressure of clients initially speaking about or re-telling trauma in cases Justice Connect is unable to provide assistance for. • Helps prevent lawyers from experiencing vicarious trauma. • The program has grown significantly - an indicator that it is working. <p>Limitations</p> <ul style="list-style-type: none"> • During their 'Help-Seeker Intake Tool Interim Evaluation' Justice Connect noted that testers who were experiencing serious mental health problems had difficulties engaging with the service, as their 'tolerance for experimentation, and their ability to

⁵² Ibid 8.

	<p>self-navigate’ were impacted.⁵³</p> <ul style="list-style-type: none"> • Additionally, some within vulnerable cohorts who are unable to access devices and do not have internet connections had difficulties accessing the tool • However, ‘It is important not to generalise as some people within vulnerable cohorts were highly connected and digitally savvy, and expressed a preference for online interaction over phone-based interactions. These preferences did not have a strong correlation with age.’⁵⁴
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Victoria Legal Aid: Legal Help Chat ⁵⁵	
<p>In October 2018 Victoria Legal Aid launched an online chat portal called ‘Legal Help Chat.’</p> <p>This service is an accessible way individuals can either obtain general legal information and be referred to other organisations.</p>	
Logistics:	<p>Background</p> <ul style="list-style-type: none"> • Since October 2018, 7,758 people have received legal

⁵³ Justice Connect, *Help-Seeker Intake Tool Interim Evaluation* (Report, May 2019) 6 < <https://justiceconnect.org.au/wp-content/uploads/2019/06/Justice-Connect-Intake-Interim-Evaluation.pdf>>.

⁵⁴ See *ibid*.

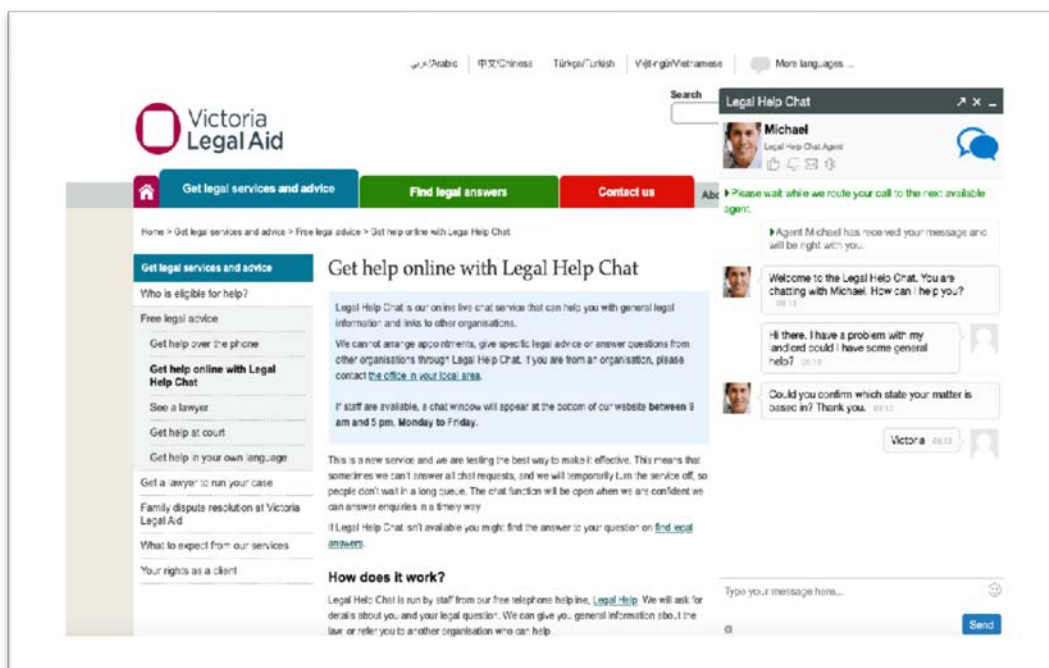
⁵⁵ Interview with Victoria Legal Aid (Tapiwa Bururu and Patrick Ryan, Melbourne Law School, The University of Melbourne, 9 December 2019).

	<p>assistance through their new online line chat service.</p> <ul style="list-style-type: none"> • There are efficient keyboard short tags to speed up the greeting formalities. • There are roughly 65 people involved in the service overall, including management staff and 'legal help officers.' • One fifth of clients come through this service. <p>Budget</p> <ul style="list-style-type: none"> • This scheme is cost effective, as existing staff are allocated to the programme. <p>Staff</p> <ul style="list-style-type: none"> • 1.7 full time staff work on this service, and there are roughly 60 chats per day.
Benefits/Limitations	<p>Benefits</p> <p>Cost:</p> <ul style="list-style-type: none"> • As discussed above, this service is highly accessible and cost effective <p>Private/Subtle:</p> <ul style="list-style-type: none"> • VLA has found that the private nature of this service is highly beneficial for early stages of family law/family violence matters • Often for family violence, victims do not want to talk aloud on the phone given the seriousness of the claim, meaning that an online chat service offers a more subtle way of obtaining legal advice <ul style="list-style-type: none"> ○ Can communicate at work without speaking aloud ○ Can communicate privately and quietly at home, often where the perpetrator of the domestic violence resides <p>Efficient:</p> <ul style="list-style-type: none"> • Average wait time is 14 seconds • As a result, the amount of incoming phone calls have diminished 9%, somewhat unclogging the phone system.⁵⁶

⁵⁶ Victoria Legal Aid, *Annual Report 2018-2019: Access to Justice for Victorians* (Report, 11 September 2019) 3 < <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-2018-19-annual-report.pdf>>.

Feedback from persons with disabilities and disabled persons organisations:

- Based upon software feedback surveys, people with disabilities have generally been happier using web chat than phone services.
- In fact, there was 90% satisfaction for the webchat service and roughly 60-70% satisfaction for phone services (including people with disabilities).
- A couple of disability advocacy organisations have approached VLA to indicate that the phone service was very difficult, and have found the online chat to be far more accessible for certain groups of people.



Legal Aid Western Australia: Virtual Offices⁵⁷

In July 2019, Legal Aid Western Australia (LAWA) launched a new network of virtual offices. The primary aim of these offices is to significantly enhance access to justice by facilitating virtual face to face legal consultations with Legal Aid lawyers with people who live significantly remotely.

Importantly, this service is directed towards the most vulnerable community members of WA, encompassing high priority cliental as persons with disabilities. These offices have been placed in remote locations where there are no physical legal aid offices.

LAWA has partnered up with 10 local community organisations, setting up the virtual offices in the 'metropolitan areas of Armadale, Joondalup, Mandurah and Midland, while regional virtual offerings can now be found at Esperance, Fitzroy Crossing, Halls Creek, Karratha, Leonora and Meekatharra.'⁵⁸

The service provides 'screens and cameras installed in the virtual offices [that] allow individuals to receive 'face-to-face' legal advice from Legal Aid lawyers' without having to leave their local area. This innovative approach represents a positive development in furthering access to justice, especially for those who live in regional Western Australia.⁵⁹

This programme has modernised the way legal advice can be given by significantly broadening its reach without sacrificing the benefits of face-to-face interactions. This service aims to break down the barriers presented by living remotely by offering quality legal service to disadvantaged clients (such as persons with disabilities) who have significant difficulty accessibly appointments due to such remoteness or disability.

Logistics

The process

1. The person is triaged first by the coordinator in Perth over the phone;
2. the virtual office appointment is scheduled based on the appropriate lawyer, e.g. for a family law matter a family lawyer will be organised;
3. the client then attends the appointment at the local organisation where he or she will be met by local volunteers who facilitate/set up

⁵⁷ Interview with Legal Aid Western Australia (Tapiwa Bururu and Patrick Ryan, Melbourne Law School, The University of Melbourne, 5 December 2019).

⁵⁸ Government of Western Australia, *Media Statements* (Web Page, 3 July 2019) <<https://www.mediastatements.wa.gov.au/>>.

⁵⁹ See *ibid*.

	<p>the process; and</p> <p>4. the virtual office takes place with an easy to use large screen with touch buttons</p> <p>Funding</p> <ul style="list-style-type: none"> • The screens and cameras provide a cost-effective way to deliver services in such locations. This is because this is far cheaper than in person appointments which does not involve the overhead of staff being relocated nor rent for hire rooms, accommodation or transport etc. • Legal Aid have funded this project themselves, based off a cost and demand funding model. Thus, if this expands they will source further funds. <p>Staff:</p> <ul style="list-style-type: none"> • Currently, the virtual officers have roughly 40 appointments per week collectively. • There is one lawyer working on the project and one coordinator. • One lawyer can deliver roughly 25 appointments per week. • Furthermore, the project utilises volunteers at each local service operators to assist in the setting up and facilitation of the virtual office. This adds an extra element of human connection to the person on the ground.
Benefits/Limitations	<p>Benefit</p> <ul style="list-style-type: none"> • Importantly, according to WALA staff members, Virtual regional offices such as Fitzroy crossing has had a successful and high intake of indigenous people who would not normally have been able to access legal services at all. • 'Face-to-face legal advice helps to build trust and rapport, which has significant advantages in terms of successful legal outcomes.'⁶⁰ • Highly cost effective – LAWA does not have to pay to relocate lawyers. • Aids compliance with the CRPD section 12 <ul style="list-style-type: none"> ○ This service is directed towards

⁶⁰ Community News, *Joondalup Times Community* (Web Page, 9 July 2019) <<https://www.communitynews.com.au/joondalup-times-community/news/legal-aid-sets-up-virtual-office-in-joondalup/>>.

	<p>disadvantaged Western Australia's who have previously been unable to obtain face to face legal advice due to their physical remoteness or inability to travel to their nearest city</p> <ul style="list-style-type: none"> ○ For this reason, the Virtual Offices embody the sentiment of article 12 of the CRPD which strives for equality. In this regard, this initiative recognises that a person should have the right to access quality legal service irrespective of their disability or physical remoteness. ○ In this respect, LAWА's legal service aims to be accessible to all Western Australians. ○ Attorney General John Quigley noted that this 'just another step in ensuring that Western Australians are not denied the right to equal justice because of poverty, marginalisation or location.'⁶¹
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⁶¹ Government of Western Australia, *Media Statements* (Web Page, 3 July 2019) < <https://www.mediastatements.wa.gov.au/>>.

Court Based Services

This report suggests that to limit the barriers people with disabilities face once they reach the court system, the Washington Group principles offer a beneficial and ‘internationally comparable general disability measurement’.⁶² The purpose of these principles is to strive toward the equalisation of opportunities for people with disabilities.⁶³ While recognising that the principles do not satisfy *all* needs for disability statistics, the questions still offer an effectively *universal* assessment of an individual’s functionality for basic activities to identify similar levels of limitations faced among people with disabilities.⁶⁴

The principle’s ability to function universally stems from its simplicity.⁶⁵ The brevity of the questions ensure that they can apply to an individual from *any* community or social context.⁶⁶ The questions aim to identify domains of activity functioning that are connected to various forms of social exclusion. Therefore, the rationales of the questions are to find:

- the ‘majority’ of persons with limitation in ‘basic level activity functioning’⁶⁷
- the ‘most commonly occurring limitations’ of these functions and⁶⁸
- ‘capture persons with similar problems across countries’⁶⁹

Therefore, these questions aim to expose individuals’ limitations to participate fully in society, arising from their disability.⁷⁰ These questions can be feasibly implemented internationally.⁷¹

For our purposes, this report suggests the court implements these five questions:

1. Do you have difficulty seeing, even if wearing glasses?

⁶² Washington Group on Disability Statistics, *Statement of Rationale for the Washington Group general measure on disability* (Report) <http://www.washingtongroup-disability.com/wp-content/uploads/2016/01/Rationale_WG_Short-1.pdf>

⁶³ See *ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Jennifer H. Madans et al, *Washington Group Position Paper: Proposed Purpose of an Internationally Comparable General Disability Measure* (Report, 23 January 2004) <http://www.washingtongroupdisability.com/wpcontent/uploads/2016/01/WG_purpose_paper.pdf>

2. Do you have difficulty hearing, even if using a hearing aid?
3. Do you have difficulty walking or climbing steps?
4. Do you have difficulty remembering or concentrating?
5. Using your usual (customary) language, do you have difficulty communicating, for example understanding or being understood?⁷²

Responses range from 'No (no difficulty)', 'Yes (some difficulty)', 'Yes (a lot of difficulty)', 'Cannot do at all'.⁷³

The benefits of applying these questions will hopefully offer an antidote to lacking and inaccurate data surrounding people with disabilities in Indonesia.⁷⁴ People who may not categorise themselves as living with disability are still able to be captured by these questions. Once there is better statistical information surrounding people with disabilities in Indonesia, the data can influence policy, budget decisions and legislation in Indonesia.⁷⁵

Recommendations

This report recommends a holistic approach to enhancing access to justice for people with disabilities in Indonesia. First, we emphasise that the enhancement of data collection and research is crucial, in order to better capture and understand the most significant limitations of access to justice for people with disabilities. Second, triage systems are key to delineating between the severities of legal issues people with disabilities face. Further, triaging can enhance efficiency and strengthen the pathways to the justice system for more vulnerable groups. Third, we suggest the use of health justice partnerships as a bridge between existing health care services and their unique connection with clients to the legal system. This can be enormously beneficial for assisting in early intervention and offering therapeutic approaches before the necessity of litigation.

⁷² Washington Group on Disability Statistics, *The Washington Group Short Set of Questions on Disability* (Report) < <http://www.washingtongroup-disability.com/wp-content/uploads/2016/01/The-Washington-Group-Short-Set-of-Questions-on-Disability.pdf>>

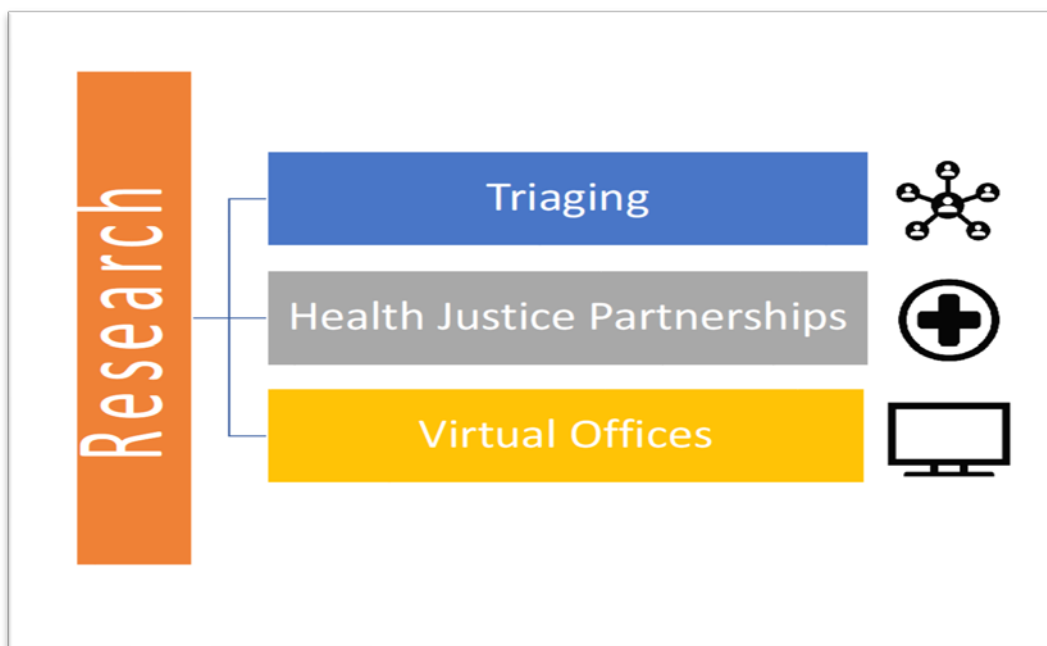
⁷³ See *ibid.*

⁷⁴ Nicola Colbran, *Access to Justice Persons with Disabilities Indonesia* (Report, October 2010) 13 < https://www.ilo.org/wcmsp5/groups/public/%40asia/%40ro-bangkok/%40ilo-jakarta/documents/publication/wcms_160337.pdf>.

⁷⁵ *Ibid* 11.

Finally, ‘virtual offices’ are a fantastic way to bring the justice system to even the most remote and vulnerable people. The setting up of screens and cameras in partner organisations located in isolated areas allows disadvantaged groups to fully utilise legal aid services despite their physical remoteness. While being cost effective, this highly innovative technological service does not sacrifice the benefits of face-to-face legal service interactions associated with rapport and trust building.

The examples in this report are some of the many efforts worldwide to improve access to justice for persons with disabilities, and to use technology more generally to improve access to justice for all people. These recommendations provide an initial step for improving compliance with the CRPD and accessibility for persons with disabilities can be furthered through more comprehensive research.



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GROUP 5 PROJECT

NDIS Internal Review Guide

Partner Organisation

Rights Information and Advocacy Centre

Group Members

Amy Rich

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NDIS INTERNAL REVIEW GUIDE

This Guide will help you with the [INTERNAL REVIEW](#) process for decisions relating to ‘[reasonable and necessary supports](#)’

The aim of this Guide is to help [everybody](#) understand the process



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You can check the meaning of the **blue words** at the end of the
Guide.

Did I Get the Best NDIS Plan for My Needs?

Who Should I Ask?

As soon as you get your **NDIS plan**, you need to make sure that it will be the best plan for you. It will be the best plan for you if you got all the supports that you need.

To make sure you got all the supports that you need, you can ask:

- Your **Local Area Coordinator (LAC)**
- Your **Support Coordinator**
- A close family member or friend

If you did not get all the supports that you need, **act quickly!**

I Am Not Happy with my NDIS Supports

What can I do?

There are 2 types of different reviews

1. Internal Review¹ I got my plan. It does not have all the supports that I need. I am not happy.	2. Unscheduled Plan Review² My life has changed. My plan is not good for me anymore. I want my plan changed.
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Which review do I need?

The review that you need is an **Internal Review!**

I Need an Internal Review

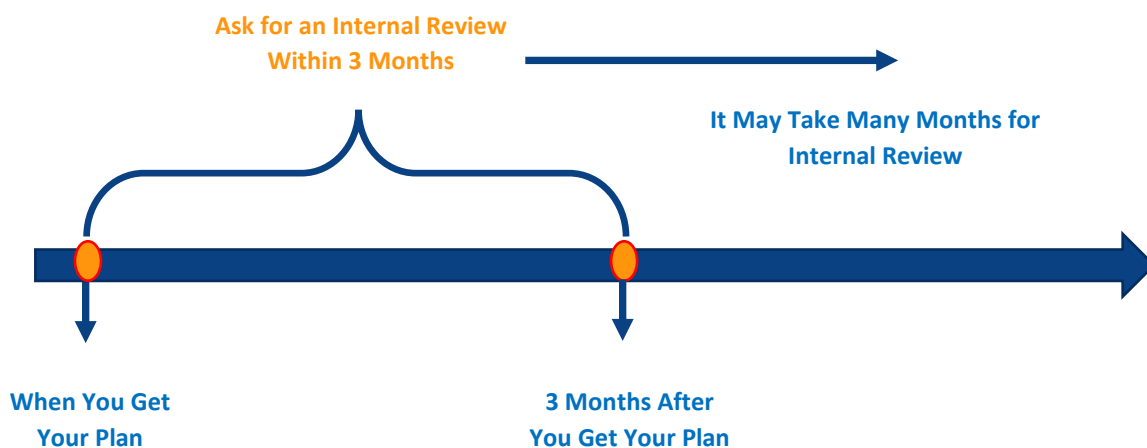
How Do I Do This?

You must apply for internal review **very fast**.

- Do it before you run out of time. You run out of time **3 months** after **getting** your **NDIS plan**.³ This may be different to the date that is written on your plan.
- Do not worry if you run out of time, you may be able to get extra time. You can ask RIAC for help.

How long will it take for **NDIA** to do an internal review?

- **NDIA** do not know how long it will take. But it could take up to 9 months.⁴



How can I ask NDIA for an internal review?

1. You can fill out an application form

You can fill out an Application Form. The application form will tell **NDIA** why you are not happy with your **NDIS plan**.

You can send it in the **mail** to:

Chief Executive Officer
National Disability Insurance Agency
GPO Box 700
Canberra ACT 2601

You can **email** it to:

enquiries@ndis.gov.au

2. You can talk to someone in person at the **NDIA office**

3. You can call this number → 1800 800 110

You can pick whatever way that you want.

The best way is to fill out the application form. This will give NDIA a lot of good information about you and the reasons why you need an internal review. **Do not worry, you can still give **NDIA** more evidence after you ask for an **internal review**.**

If your case is **urgent** and you need **internal review** very quickly, you can write this in the application form.⁵ **NDIA** may look at your application faster if they think that it is urgent.

NDIA will then contact you to discuss your **internal review**.

You can tell **NDIA** that you want a to meet them in person for the review.

If you cannot meet them in person, your **internal review** will be over the phone. You can ask **NDIA** to give you lots of notice. This will allow you to have a support person with you during the call.

What If I Need Help Asking NDIA? Can Someone Help Me?

You can ask:

- A close family member or friend
- **Support coordinator**
- Formal supports (for example, a social worker)
- **RIAC**
- **Advocacy organisations**

You can find an advocacy organisation using this link:

https://www.daru.org.au/organisation-type/individual-advocacy?fbclid=IwAR1o7xpQy51V9fx53u0yjMPDN3dUVcb7OkRBp1QjCVE2XeTqe_UhF7lee84

RIAC have filled out a form. You can use RIAC's form to help you fill out your form. **RIAC's form is at the end of this Guide.**

What Happens After I Have Applied for Internal Review?

Can I still use my plan while I wait for [internal review](#)?

Do not worry, you can still use your plan while you wait.

What can I do if my review is taking too long?

You can call the [NDIA](#) to make sure that they got your [internal review](#) application.

If the review is taking too long, you can make a complaint.

You can make a complaint to:

- [NDIA](#)
- [Commonwealth Ombudsman](#)
- Local or Federal Member of Parliament (MP)

RIAC have a complaints form that can help you. [RIAC's complaints form is at the end of this Guide.](#)

Who will review my plan?

An [NDIA](#) staff member (the [reviewer](#)) will review your plan.

The [reviewer](#) will be a new person you have not met before.⁶

What will happen?

The **reviewer** will either:⁷

1. Not change your plan
2. Make changes to your plan
3. Make a new plan

What Do I Need to do to Get Ready for My Internal Review?

1. Get therapy reports

Therapists are the people who are going to help you get the support that you need.

Some people who are therapists are:

- Doctors; occupational therapists; physiotherapists; speech pathologists.

Therapists write letters and reports.

When you go for **internal review**, you should bring lots of letters and reports. You should bring more letters and reports than you did to your planning meeting.

Here are some **tips** to make your therapist reports the best:

- **Tip 1:** Make sure your therapist knows and understands what the **NDIS** does
- **Tip 2:** Make sure your therapist writes in simple English
- **Tip 3:** Make sure your therapist writes down exactly what they think you need and why they think you need it
- **Tip 4:** Make sure your therapist writes down how much support you need (with numbers)
- **Tip 5:** Make sure your therapist writes why it will be good if you get the support that you want
- **Tip 6:** Make sure your therapist writes why it will be bad if you do not get the support that you want
- **Tip 7:** Make sure your therapist writes why the support you want is reasonable and necessary

Valid is an organisation that helps people with disabilities.

Valid have good forms. You can bring them with you to your appointments. Your therapists can fill them out using tips 1-7.

Valid's form is at the end of this Guide.

2. Write lived experience statements

Lived experience statements are pieces of writing from you and your family about you. You write lived experience statements to help **NDIS** understand why you need the support you want and why the support you want should be funded.

If you had a support before and you liked it, tell **NDIS** why you liked it and how it is helping you with your goals.

RIAC have an example of a lived experience statement. [RIAC's lived experience statement is at the end of this Guide.](#)

Another cool tip

If you did not spend all the money in your previous plans, you need to say why you did not spend that money and why you still need that money.

What Is 'Reasonable and Necessary'?

Every **NDIS** support needs to be 'reasonable and necessary'.

Reasonable means something fair. **Necessary** means something you need.

'Reasonable and necessary' has 6 parts. You need to tick all 6 boxes below for every support.

1	Assist you with your goals, objectives and aspirations	
2	Facilitate social and economic participation	
3	Value for money	
4	Effective and beneficial	
5	Not be more appropriately provided by family or the broader community	
6	Is most appropriately funded through the NDIS	

How Can I Show That My Supports Are Reasonable and Necessary?

Every support needs to:

1. Assist you with your goals, objectives and aspirations

You need to show how the support you want will help with your goals, objectives and aspirations. You can do this by showing how there is a link between them.

Goal	Support	Link
To spend more time with my family and friends	Portable pump	A portable pump will allow me to leave my house to spend time with my friends and family
To improve my communication skills	See a speech pathologist 3 times a week for 1 hour each time	Speech pathology will help me with my communications skills
To be more independent	Modifications to my motor vehicle	Being able to drive on my own will allow me to achieve my goal of being more independent

2. Facilitate social and economic participation

NDIS wants to help you be involved in social and economic life. This means that your support must help you do this.

Social and economic life could mean lots of different things to different people.

Some examples are:

- Learning new skills, participating in sports, or attending community events.


Alex's goal is to get a job. Alex does not know how to get a job. Alex would like a person to help her look for jobs and get ready to start working. Getting a job will help Alex's social and economic participation.

3. Be value for money

Value for money means that

(1) there are no cheaper alternatives;

You need to show that you have looked at all the other support choices.



If there are no other choices, bring evidence to show that there are none

If there are other choices, you need to bring evidence showing why they will not work for you

David is in a wheelchair. David also has a tool that helps him breathe. David needs the tool all the time. David likes to watch sports games. David needs a safe way to get to the games. David's occupational therapist thinks that a taxi is the safest way for David to travel. It is not safe for David to take public transport as his tool might be knocked off. Public transport will not work for David.

(2) the support will benefit you a lot;

If you have been using the support, get all the people helping you with that support to write how the support has been good.

Jane has been helping Dan with self-care. Jane is an Occupational Therapist. Dan wants to keep spending time with Jane. To show NDIA how Jane is helping Dan, Jane can write letters 1 time every month. The letters will tell NDIA that Dan's self-care keeps getting better.

If this is a new support, get the people who will help you with that support to write how the support will be good.

(3) the support may reduce your need for funding in the future.

Lin is in a wheelchair. Lin wants to be more independent in her home. Changes to Lin's bathroom will let Lin shower by herself. Without the changes, Lin needs someone to help her shower. With the new bathroom, Lin will not need help to shower anymore.

EXAMPLE OF WHEN A SUPPORT IS NOT VALUE FOR MONEY⁸

Peter wants to be a famous tennis player. Peter wants to join Funky Tennis Program. The program is 3 hours every week. Even though the tennis coaching will help Peter with his goal, the tennis coaching is not value for money because:

1. There is a cheaper choice. The cheaper choice is for Peter to play tennis at school during sport lessons.
2. Peter cannot show that Funky Tennis Program will help him a lot.
3. Funky Tennis Program does not mean that Peter will need less **NDIS** help later.

4. Be effective and beneficial

Effective means the support works. **Beneficial** means it is good for you.

To decide this, **NDIA** will look to:

- (1) other people's ideas;
- (2) other **NDIS** participants' experiences;
- (3) anything else the **NDIA** has learnt through working in the **NDIS**.

5. Not be more appropriately provided by family or the broader community

NDIS may not fund the support if they think that the people in your life can help you.

So, before you ask for a support, think about if your family members, carers or the community you live in can help you instead.

If your family, carers or the community cannot help you, know the reasons why they cannot help you.

Some reasons why your family, carers or community will not be able to help you include:

- It will be a risk to their wellbeing
- They cannot help you because of their age or their capacity
- They are very busy

6. Is most appropriately funded through the NDIS

NDIA do not fund supports that can be given to you by other services.

SERVICE	EXAMPLES OF WHAT NDIS WILL NOT FUND
HEALTH	Hospital care
EDUCATION	A learning helper at school
EMPLOYMENT	A laptop to use at work
HOUSING	Rent
TRANSPORT	Myki card for public transport

What Will the NDIS Not Cover?

THE **NDIS** WILL NOT COVER:

1. Supports that are not related to your disability
2. Everyday living costs

The NDIS won't fund	Depending on your goals, the NDIS MAY fund
Petrol expenses for supermarket shopping	Petrol expenses to get you to work on days that you cannot take public transport because of your disability
Insulin	A support person to give you your insulin
Cost of entry to a concert	A support person to go with you to a concert
Cost of internet in your home	The cost of a phone App that helps you communicate with other people in your life

What Can I Do If I Am Still Not Happy After My Internal Review?

If you are not happy with your internal review, you can get an **external review** with the **Administrative Appeals Tribunal (AAT)**.

You can get help from **advocacy organisations**. You can find an organisation close to you using this link:

https://www.daru.org.au/organisation-type/individual-advocacy?fbclid=IwAR1o7xpQy51V9fx53u0yjMPDN3dUVcb7OkRBp1QicVE2XeTqe_UhF7lee84

Or RIAC can help you.

Important Words and Phrases:

Administrative Appeals Tribunal (AAT) – A court you can go to if you are not happy with your internal review decision.

Advocacy organisations – Professional people you can turn to if you need help.

Commonwealth Ombudsman – A group of people that can help you if you feel that the NDIA have treated you unfairly.

External Review – A review you can ask for AFTER your internal review is done and you are still not happy.

Internal Review – A review you can ask for if you are not happy with your plan. You have to ask NDIA for an internal review within 3 months after getting your NDIS plan.

Local Area Coordinator (LAC) – They are people who work with you to get ready for your NDIS plan at your local community. Your LAC is your main contact for NDIS. Your LAC will help you carry out your NDIS plan and monitor how your plan is going.

NDIA – NDIA is a group of people who will go through your NDIS plans, make decisions in relation to your NDIS plans, and do internal reviews. It is short for National Disability Insurance Agency.

NDIS Plan – Following some rules, you can make your own plan based on your needs. If NDIA agreed with your plan, it is then a NDIA plan.

NDIS – NDIS is a system funded by the government for people with disabilities. NDIS will fund your NDIS plan. It is short for National Disability Insurance Scheme.

Reasonable and Necessary Support – Reasonable means something fair. Necessary means something you need. ‘Reasonable and necessary support’ means fair supports your need that are funded through NDIS.

Reviewer – the person who does internal review for you. This will be a member of NDIA.

Support Coordinator – People who help you pre-plan, carry out your NDIS plan and monitor your NDIS supports.

Unscheduled Plan Review – a review that you can ask NDIA for if you feel like your plan is no longer meeting your needs. You can ask for this review at any time.

1. NDIS Act s 99/100(2).
2. NDIS Act s 48.
3. NDIS Act s 100(2).
4. Commonwealth Ombudsman, Administration of Reviews under the National Disability Insurance Scheme Act 2013: Report on the National Disability Insurance Agency's Handling of Reviews (Report, May 2018).
5. National Disability Insurance Agency, Review of Decisions Operational Guideline – Internal Review by the NDIA (Web Page, 18 July 2019) <<https://www.ndis.gov.au/about-us/operational-guidelines/review-decisions-operational-guideline/review-decisions-operational-guideline-internal-review-ndia>>.
6. NDIS Act s 100(5)(d).
7. NDIS Act s 100(6).
8. Sing and National Disability Insurance Scheme [2018] AATA 4411.

I INTROUCTION

Rights Information and Advocacy Centre ('RIAC') asked us to produce a practical resource ('the resource') to assist people with disabilities, carers and support persons navigate the internal review process. As the majority of complaints to the Commonwealth Ombudsman involve decisions to approve statements of supports,¹ the scope of our resource focused on the internal review process in relation to 'reasonable and necessary' supports. This report has been prepared for RIAC as an accompanying document. It aims to provide further details and elaborate on the information we supplied in the resource. Throughout the resource, we used real case examples where applicable to help our target audience understand the reasonable and necessary criteria. It is posited that by supplying strong evidence that clearly and powerfully demonstrates how each support will satisfy the six reasonable and necessary criteria, a participant will have the best chance of success during the National Disability Insurance Agency ('NDIA') internal review process.

One objective of the National Disability Insurance Scheme ('NDIS') is to give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities ('CRPD').² The purpose of the CRPD 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, individual autonomy and freedom to make one's own choices.'³ When looking at the overall goals of the NDIS, it seems that the scheme broadly aligns with this purpose. However, this is not the complete picture. Participants are faced with a scheme that is legislatively incoherent, dysfunctional and inconsistent. The challenges residing within the scheme have resulted in extensive concerns that the internal review process is engrained with barriers for participants, limiting choice and control.⁴ Some barriers include limited access to information, frequent misinformation, ongoing delays and highly inaccessible procedural requirements.⁵ The NDIS internal review process is resultantly undermining access to justice for participants.⁶

Article 13 of the CRPD imposes an obligation 'to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural accommodations.'⁷ In the context of access to justice, reasonable accommodation requires the adaptation of standard procedures in order to remove barriers that people with disabilities may face.⁸ As the language and design of the National Disability Insurance Scheme Act 2013 (Cth) ('NDIS Act') and the NDIS (Supports for Participants) Rules 2013 ('Support Rules') are inaccessible

¹ Commonwealth Ombudsman, *Administration of Reviews Under the National Disability Insurance Scheme Act 2013* (Report, May 2018) 5.

² *National Disability Insurance Act 2013* (Cth) ('NDIS Act') s 3(1)(a).

³ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 1, 3.

⁴ Advocacy for Inclusion, *Response to Discussion Paper: Improving the NDIS Experience: Establishing a Participant Service Guarantee and Removing Legislative Red Tape* (Report, October 2019) 16.

⁵ *Ibid.*

⁶ Libby Brooks and Tom Ballantyne, 'Review and Appeal Rights in the NDIS' (2019) 154 *Precedent* 8, 9.

⁷ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 13.

⁸ *Ibid* art 2.

to people with disabilities, our resource is intended to promote the fulfilment of Article 13 by attempting to simplify the internal review process by providing guidance in an accessible format.

II NDIS INTERNAL REVIEW VS. UNSCHEDULED PLAN REVIEW

The NDIS Act contains two distinct grounds to review an NDIA decision. The first type of review is an unscheduled plan review under s 48(1) of the Act.⁹ Once the participant's circumstances have changed and the plan no longer meets their needs, the participant can request NDIA to conduct an unscheduled plan review at any time.¹⁰ The second type of review is an internal review for reviewable decisions, which is listed in s 99.¹¹ An approved plan pursuant s 33(2) is one of the most reviewed decisions.¹²

There is widespread confusion about these two types of reviews because they are given the same wording in the Act - 'review' and they both involve a review of the 'participant's plan'. To avoid confusion, one of the primary aims of our resource was to highlight from the outset that there is a distinction between the two types of reviews, whilst emphasising that if a participant is not happy with their plan, they should seek an internal review of a reviewable decision pursuant to s 100(2) within 3 months.¹³ It is apparent that it is not only the participants who are confused by unscheduled plan reviews and requests for internal reviews. The Commonwealth Ombudsman stated that there have been instances where participants requested an internal review but their request was processed as an unscheduled plan review.¹⁴

The major concern is that these two types of reviews lead to different legal effects: request for an unscheduled plan review under s 48 does not permit a participant to then seek an external review. s 103 makes it clear that a participant can only seek an external review for a decision made as an internal review under s 100(6).¹⁵ If a participant is not satisfied with the outcome of an unscheduled plan review, s/he will have to request for an internal review of his/her plan again before s/he can finally seek an external review with the AAT.

It is postulated that the widespread confusion around the two types of reviews can be attributed to poor legislative drafting and insufficient education about their differences, both within the NDIA and externally. We hope that our efforts to distinguish the two types of reviews in a simple way right at the beginning of the resource will provide NDIS participants with an easier start to the internal review process.

⁹ *NDIS Act 2013* (Cth) s 48(1).

¹⁰ *Ibid.*

¹¹ *Ibid* s 99.

¹² Living with Disability Research Centre, 'Quarterly Digest of Published Decisions About the NDIS from the Administrative Appeals Tribunal' (NDIS Quarterly Digest, La Trobe University, Winter 2019) 23.

¹³ *NDIS Act 2013* (Cth) s 100(2).

¹⁴ Commonwealth Ombudsman (n 1) 8.

¹⁵ *NDIS Act 2013* (Cth) s 103.

III 'REASONABLE AND NECESSARY'

Each NDIS support has to be reasonable and necessary.¹⁶ However, reasonable and necessary is not defined in the legislation. Instead, the legislation sets out six criteria that **all** must be satisfied in order for the support to be included in a participant's plan.¹⁷ This is alarming due to the fact that 'reasonable' and 'necessary' are clearly subjective terms.¹⁸ Without a clear definition, the NDIA and subsequently the courts (AAT and the Federal Court) are left with little guidance around how to assess the support against the six criteria. There are two tools that the NDIA and the AAT use to attempt to promote consistency in decision-making; the Support Rules and the NDIA Operational Guidelines. However, despite these tools, the framework remains highly discretionary. Therefore, we thought it would be beneficial to conduct a comparative analysis of case law to uncover how the courts are interpreting the six criteria. A clearer understanding of the requirements of each criterion may assist participants to better prepare for their planning meeting and subsequently, the internal review process.

A Analysis of Case Law

Justice Mortimer's judgment in *McGarrigle v NDIA*, which has been cited throughout multiple AAT decisions, highlights that different assessments should be conducted when determining whether a support is 'reasonable' and whether a support is 'necessary'.¹⁹ The judgment links sections 34(1)(a), (b) and (d) with 'necessary' and (c) and (f) with 'reasonable', while (e) falls into both.²⁰ Although this is not a conclusive characterisation, it provides practical guidance around interpreting the subjective concept of 'reasonable and necessary'. From our analysis of case law, it appears apparent that the majority of supports that are being rejected, at both the internal and external review levels, are satisfying the 'necessary' criteria, but are failing to meet one or both of the 'reasonable' criteria. Therefore, this report will elaborate on both the 'value for money' (s 34(1)(c)) and 'must be most appropriately funded by the NDIS' (s 34(1)(f)) criteria.

1 The 'Reasonable' Criteria (s 34(1)(c) and (f))

(a) Value for money

Reading Rule 3.1 of the Support Rules alongside the cases, it was evident that there were three particular considerations that continually surfaced.

1. Whether there are no cheaper alternatives available; and
2. Whether the support substantially benefits the participant; and
3. Whether the support will reduce the need for funding for the participant in the future.

¹⁶ Ibid s 34(1).

¹⁷ Ibid.

¹⁸ Brooks and Ballantyne (n 6) 9.

¹⁹ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, [91].

²⁰ Ibid [91-92].

Participants will need to supply strong and convincing evidence (in the form of therapy reports and lived-experience statements) that clearly demonstrates how the reviewed support meets the three considerations.

(i) Bring Evidence about exploration of alternatives

For consideration 1, AAT have continually brought up that many participants have not explored other alternatives. In LIJY & NDIA, the participant's father sought in-home care for 2 hours per day, 2 days per-week.²¹ AAT determined that the nature of the support was child care and stated that there were other alternatives funded by the Commonwealth that the participant's parents had not considered. AAT gave examples such as Child Care Subsidy or the Inclusion Support Program.²² Our takeaway from similar cases is that in order to satisfy consideration 1, participants need to deliver strong evidence of either proof of exhaustion of alternatives or an explanation about why there are no alternatives in his or her case.

(ii) How the support will benefit the participant needs to be explained

In relation to consideration 2, AAT is often not satisfied that a support has been assessed for its actual benefit or outcome. In BIJD & NDIA, James, a three-year-old, has developmental delay. His family requested in-home support for two days which had been rejected by the NDIA.²³ The child's interaction with people is imperative. AAT agreed that the one in-home carer could interact with the child, but only to a limited extent. Interactions with other people, including his family, would also benefit the child, but without cost.²⁴ An assessment of the support's benefit should be of priority to participants. If a participant is already using a support, a practical way to demonstrate a support's benefit would be to ask for a formal support person to come regularly (e.g. once per month) to keep a record of the participant's progressive improvement.

(iii) Reduce the need for funding in the future

In Rain & NDIA, Rain wanted a portable folding manual wheelchair and a support carer to propel her around.²⁵ The NDIA determined that granting Rain the support would create a risk of dependence on the support, which was contrary to her goal of greater self-reliance. The AAT affirmed this decision on the basis of consideration 3, as an increasing dependence on using a wheelchair was likely to increase, rather than reduce, the cost of funding for supports for Rain in the future.²⁶ Furthermore, the AAT deemed that there was an alternative and cheaper support that more closely aligned with Rain's goals, which was a four-wheeled walker.²⁷

(b) Most appropriately funded through the NDIS: Health

A highly contentious issue that is faced by NDIA and AAT is the interaction between the NDIS and healthcare. The scheme's sustainability rests on people with disabilities accessing services

²¹ *LIJY and National Disability Insurance Agency* [2018] AATA 3506.

²² *Ibid.*

²³ *BIJD and National Disability Insurance Agency* [2018] AATA 2971.

²⁴ *Ibid.*

²⁵ *Rain and National Disability Insurance Agency* [2018] AATA 2579.

²⁶ *Ibid* [51].

²⁷ *Ibid.*

outside the NDIS, including informal supports, community supports, and mainstream supports.²⁸ Therefore, if the NDIA forms the opinion that a support is the responsibility of another service industry, it will not meet this criterion.

Rules 7.4 recognises that in some circumstances healthcare services will be funded by NDIS where the supports are ‘related to a person’s ongoing functional impairment’,²⁹ and that ‘enables a person to undertake activities of daily living’.³⁰ AAT have acknowledged that the distinction between a health condition and a disability or functional impairment is by no means clear cut.³¹ Such a distinction can only be realised through a close examination of individual circumstances. Resultantly, decisions around supports have been highly inconsistent and have not provided any form of normative guidance about system boundaries. In some circumstances, such as the case of *MedCalf & NDIA*, a portable pump was found to be appropriately funded by the NDIA, but in the case of *Re Young & NDIA*, a portable oxygen concentrator was found to be more appropriately funded by the general health system. Without clear guidance in this regard, the best chance of success stems from participants’ efforts to link the need for a support with their disability and their disability related goals. Pursuant to *Medcalf*, a support may have multiple purposes, as long as one of those purposes is disability related. Below are two examples of where AAT approved supports serving both healthcare and NDIS purposes.

(i) Assistive technology item

In *Medcalf*, multiple supports were in dispute. For the purpose of demonstrating the distinction between a healthcare service and an NDIS support, a portable suction pump (assistive technology item) will be used as an example. *Medcalf* requested a portable suction pump to increase his mobility and engagement with family and friends. *Medcalf*’s case emphasises another component of Rule 7.4 that the equipment or support needs to be ‘integrally linked’ to a particular act of social and economic participation rather than delivering a general health outcome. AAT determined that the suction pump is ‘most appropriately’ funded through NDIS because the support directly related to *Medcalf*’s ongoing functional impairment and would enable him to undertake activities of daily living and “to work towards his goals of independence and social participation”.³²

(ii) ‘Maintenance supports delivered or supervised by clinically trained practitioners’

Mazy is blind and has a severe intellectual disability and hearing impairment.³³ *Mazy* requested internal review for support in the form of a registered nurse visiting her each day for administration of her insulin. NDIA rejected the request, on the basis that administration of insulin is more appropriately provided by the health system. AAT overturned NDIA’s decision as her need for support was not simply attributable to her diabetes but was due to her disability,

²⁸ Productivity Commission, *National Disability Insurance Scheme (NDIS Costs)* (Report Overview, October 2017) 6.

²⁹ *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) (‘Support Rules’) r 7.4(a).

³⁰ *Ibid* 7.4(b)

³¹ *Medcalf and National Disability Insurance Agency* [2018] AATA 3893.

³² *Ibid* [45].

³³ *Mazy and National Disability Insurance Agency* [2018] AATA 3099.

without which, she could self-administer.³⁴ Rule 7.4 recognises that in some circumstances maintenance supports by clinically trained health practitioners will be funded by the NDIS.

2 Other Considerations

(a) A Reasonable and Necessary Support must be fully funded

An overarching principle, derived from the Federal Court case of *McGarrigle*, is that if a support is deemed to be reasonable and necessary, the NDIA must provide funding for the whole support.³⁵ The court's interpretation of 'will be funded', contained in certain provisions in the legislation, formed the basis of this conclusion.³⁶ If the decision-maker wants to deviate from the identified support, they can only do so on the basis of probative evidence.³⁷

(b) Objects and Principles of the NDIS Act – s 3 and s 4

s 3 sets out the objectives of the NDIS Act,³⁸ and s 4 sets out general principles guiding actions under the Act.³⁹ These sections provide general guidance for planning and reviews within the NDIS as well as merits review at AAT. One specific object, that has repeatedly been brought up in AAT cases, is about the financial sustainability of the NDIS (s 3(3)(b)).⁴⁰ The Federal Court have not yet articulated the role that financial sustainability should play in decision-making. Although s 3(3)(b) does not form a part of the reasonable and necessary criteria, it seems apparent that the NDIA are making 'reasonable and necessary' decisions on the basis of financial sustainability. It is posited that this is an inappropriate use of s 3(3)(b), as there is nothing in s 34(1) that explicitly refers to financial sustainability of the scheme. It could be considered an implicit consideration in the 'value for money' criterion. However, in *BIJD*, the NDIA linked financial sustainability to s 34(1)(c), but the AAT stated that it was "doubtful that this was the intention of the legislature."⁴¹

(c) Reductions of Funding on the Basis of Unspent Allocations

Another important consideration that participants should have regard to is the possibility of reductions in their level of funding in subsequent plans due to unspent allocations in previous plans. This occurred in the case of *PNFK & NDIA*, where the participant's 'core' funds in his second plan was lowered due to unspent funding, despite the severity of his disability and respective needs.⁴² It is therefore important that participants prepare statements explaining why they did not spend certain amounts of funding and why they still need that funding in future plans.

3 What the NDIS Will Not Cover

³⁴ *Ibid.*

³⁵ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308.

³⁶ *NDIS Act 2013* (Cth) ss 33(5)(c), 33(2)(b), 34(1).

³⁷ *McGarrigle v National Disability Insurance Agency* [2017] FCA 308.

³⁸ *NDIS Act 2013* (Cth) s 3.

³⁹ *Ibid* s 4.

⁴⁰ *Ibid* s 3(3)(b).

⁴¹ *BIJD and National Disability Insurance Agency* [2018] AATA 2971, [66-68].

⁴² *PNFK and National Disability Insurance Agency* [2018] AATA 692.

Pursuant to Rule 5.1 of the Support Rules, the NDIA will not fund a support if it is not related to a participant's disability,⁴³ or if it relates to day-to-day living costs.⁴⁴ A case example is Ewin & NDIA, as it provides a breakdown of when petrol will be funded, through differentiating between day-to-day living costs and disability related costs.⁴⁵

Trips to bowls (near train line)	Will be funded → When the participants games were located at the venue close to the Hurstbridge train line. If not for his disability, he could take the train. Therefore, AAT determined that petrol should be funded because the support is related to his disability.
Trips to bowls (not near a train line)	Will <u>not</u> be funded → When the participant's bowls games were not near a train line, it was reasonably expected that people in the participant's locality would choose to drive. AAT determined that petrol for these trips should not be funded because it is a day-to-day living cost.
Rainy days	Will be funded → The use of public transport by the participant on rainy days was found to be impractical as he could not use an umbrella while wheeling his wheelchair. This meant that his clothes would be wet when arriving at work. AAT determined that petrol should be funded because the support is related to his disability.
Transporting children to sporting activities	Will be funded → The venues where his children's sporting activities took place were not disability accessible. AAT determined that petrol should be funded because the support is related to his disability.
Supermarket trips	Will <u>not</u> be funded → Most members of the community would drive when shopping for groceries for convenience. AAT determined that petrol should not be funded as it is a day-to-day living cost.

B NDIS Operational Guidelines

⁴³ *Support Rules* r 5.1(b).

⁴⁴ *Ibid* r 5.1(d).

⁴⁵ *Ewin and National Disability Insurance Agency* [2018] AATA 4726.

The CEO of the NDIA issued Operational Guidelines to assist decision-makers make decisions under the NDIS.⁴⁶ The AAT should have regard to the Operational Guidelines when considering whether a support is reasonable and necessary. Pursuant to *Re Drake*, the Operational Guidelines represent government policy.⁴⁷ Informal policy is secondary to legislative status, and therefore, should not apply when there is inconsistency with the NDIS Act and the Support Rules.⁴⁸ However, case law has indicated that the NDIA have a tendency to rigidly apply these Operational Guidelines at the expense of focusing on the statutory criteria.

(a) Nominated Amounts for Transport Supports

In *Ewin*, AAT specifically discussed the inconsistency between the Operational Guidelines and the legislation in relation to nominated amounts for transport supports.⁴⁹ The inconsistency arose as the nominated amount of support replaced a full and individualised consideration of the benefits to the participant. In addition, AAT emphasised that the nominated amounts may result in only partial funding to a participant who would otherwise meet the reasonable and necessary criteria.⁵⁰ Once the support has met the reasonable and necessary criteria, the scheme intends that the support will be fully funded, in line with the general principle in *McGarrigle*.

(b) Categorical Distinction Between Recreational and Professional Sports

In *Sing & NDIA*, AAT highlighted that there was an inconsistency between the dictation of the form and level of social and economic participation in the Operational Guidelines and a participant's autonomy and right to choose their own pursuit of aspiration.⁵¹ The NDIA's rejection of the support was in reliance on the interpretation of 'an ordinary life' in the Operational Guidelines.⁵² NDIA interpreted the meaning in a rigid way, making a categorical distinction between recreational and professional sports. It was against the purpose and objects of the NDIS Act because there is no one meaning of 'ordinary life'. Everyone's goals are individualised; therefore, an ordinary life will be subjective and person-centric. Different people have the right to aspire to different forms of social and economic participation, including the choice of pursuing an elite career.⁵³ AAT asserted that instead of dictating a specific form of social and economic participation for participants, NDIA should focus on whether the support meets the reasonable and necessary criteria.⁵⁴

IV IS THE NDIS MEETING ITS OBLIGATIONS UNDER THE CRPD?

⁴⁶ National Disability Insurance Agency, Operational Guidelines < <https://www.ndis.gov.au/about-us/operational-guidelines>>.

⁴⁷ *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634.

⁴⁸ *Ibid.*

⁴⁹ *Ewin and National Disability Insurance Agency* [2018] AATA 4726.

⁵⁰ *Ibid.*

⁵¹ *Sing and National Disability Insurance Agency* [2018] AATA 4411.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid* [48].

Although the overall goals of the NDIS are entrenched in fulfilling a human rights agenda, the internal review process is one example where the NDIS is not delivering on its promise to give effect to the CRPD. This report will focus on five CRPD articles (9, 13, 19, 21 and 26) to demonstrate how the NDIA internal review process is currently operating in an incompatible manner with the CRPD.

Article 13(2)

In order to ensure effective access to justice for persons with disabilities, 'the NDIS must provide appropriate training for those working in the field of administrative justice'.⁵⁵ However, there have been concerns that NDIA staff members who are conducting the internal reviews have limited expertise and knowledge of different disabilities and needs.⁵⁶ Additionally, the time allocated by the NDIA to closely examine each participant's needs has been considered inadequate.⁵⁷

Articles 9 and 21

Two CRPD articles that are of direct relevance to Article 13 are Articles 9 and 21. Article 9 contains a broad expression of the accessibility obligations imposed by the CRPD, which includes an obligation 'to promote appropriate forms of assistance and support to ensure access to information'.⁵⁸ Article 21 is narrower in scope, and imposes an obligation on State Parties to 'ensure that persons with disabilities can exercise their right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others'.⁵⁹ This includes 'providing information in accessible formats and technologies that are appropriate to different kinds of disabilities in a timely manner without additional costs'.⁶⁰ However, a major challenge facing people with disabilities who are engaging with the internal review process is inadequate access to information. Firstly, there have been multiple occurrences where participants have reported that they have been unable to obtain confirmation and subsequent status regarding their application for internal review.⁶¹

Secondly, due to the practical complexities surrounding the internal review process, and the lack of accessible information explaining the procedural requirements involved, participants have limited knowledge and understanding of how the internal review process works and their legal rights. The complexity of the process and the need to synthesise complex information about administrative procedures is resulting in participants struggling to process and apply the information. Furthermore, the language contained in the NDIS Act and Support Rules is inaccessible for many participants, leading to a lack of clarity around their level of choice and control and what constitutes a 'reasonable and necessary' support.⁶²

⁵⁵ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 13(2).

⁵⁶ Brooks and Ballantine (n 6) 10.

⁵⁷ Kostas Mavromaras et al, *Evaluation of the NDIS: Final Report* (Report, National Institute of Labour Studies, Flinders University, February 2018) 97.

⁵⁸ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 9(2)(f).

⁵⁹ *Ibid* art 21.

⁶⁰ *Ibid* art 21(a).

⁶¹ Advocacy for Inclusion (n 4) 18.

⁶² *Ibid* 32.

Thirdly, participants are finding it difficult to acquire information regarding the reasons for their original decisions. This is making it extremely difficult for participants to obtain further supporting evidence, whilst also imposing a substantial financial burden. Lack of information about the reasons for a decision around s 34(1) criteria of the NDIS Act may mean that the reports prepared will not be tailored to problems acknowledged by the NDIA.⁶³ This is why it is extremely imperative for reports to vigorously highlight why each support satisfies the reasonable and necessary criteria.

Articles 19

Article 19(b) provides that 'State Parties shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities and their full inclusion and participation in the community by ensuring that; persons with disabilities have access to a range of in-home, residential and other community services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation and segregation from the community.'⁶⁴ For many persons with disabilities, access to a range of individualised support services is a precondition for living independently in the community.⁶⁵ However, many supports that participants require to participate fully in their respective communities are being rejected for not satisfying the reasonable and necessary criteria. As already mentioned, deciding whether a support is reasonable and necessary is a matter of discretionary judgment, rather than the application of a rule or definition. While the NDIS is promising participants choice and control, their options for support are being impacted by a cost-benefit analysis and an extremely high evidentiary burden to demonstrate that a support is in fact reasonable and necessary. This creates a barrier for participants and renders the possibility of getting a support disproportionately challenging. Out of the 130 resolved cases of the 268 applications received by the AAT as at June 2017, 58% affirmed the NDIA's original decision not to fund a support.⁶⁶

By becoming a party to the CRPD, Australia has an obligation under international law to respect, to protect and to fulfil human rights. The obligation to respect imposes a requirement on Australia to not limit or deny anyone's access to living independently in the community.⁶⁷ Furthermore, in order to fulfil its human rights obligations, the NDIS needs to disseminate timely, up-to-date and accurate information essential for informed decision-making, which should be in accessible formats.⁶⁸ The Commonwealth Ombudsman received numerous complaints about the time taken for NDIA to conduct internal reviews.⁶⁹ As a result of significant delays, participants have reported that the NDIA have encouraged them to withdraw their internal review application and instead wait for their upcoming scheduled plan review.⁷⁰ However, the NDIA neglect to inform participants that if they withdraw their review application and progress to scheduled review, they may not be granted the supports they are requesting in the internal

⁶³ Ibid 27.

⁶⁴ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 19(b).

⁶⁵ Committee on the Rights of Persons with Disabilities, *General Comment No 5 (2017) on Living Independently and Being Included in the Community*, UN Doc CRPD/C/GC/5 (27 October 2017) [28] ('General Comment No 5').

⁶⁶ Productivity Commission (n 28) 420.

⁶⁷ *General Comment No 5* [47].

⁶⁸ Ibid [64].

⁶⁹ Commonwealth Ombudsman (n 1) 14.

⁷⁰ Advocacy for Inclusion (n 4) 18.

review.⁷¹ Not only does this have the potential to limit a participant's access to living independently in the community, but the NDIA are also omitting information essential to informed decision-making.

Australia's obligation to fulfil also includes a requirement that the assessment process for disability support be based on a human rights approach to disability, with a focus on the requirements of the person, rather than their impairments.⁷² Although the NDIS process does not require individuals to obtain a formal diagnosis, there is a focus on medical evidence to establish severity of disability.⁷³ Therefore, no real opportunity is given for choice and control, as support approval processes are strongly determined by professional understanding of the needs of each person.⁷⁴ For example, if someone needs an occupational therapist, the support will not be deemed reasonable and necessary unless they obtain a detailed report from an occupational therapist.

Article 26

Article 26 requires Australia to 'take effective and appropriate measures 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', meaning the government is required to 'organise, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these programmes and services are based on a multidisciplinary assessment of individual needs and strengths and support participation and inclusion in the community and all aspects of society.'⁷⁵ However, funding for a support under the NDIS must be directly attributed to a participant's disability and be separate from all other aspects of the individual's life. This model of service delivery does not involve a multidisciplinary assessment and is leaving many participants without the supports that they need. Such boundaries are incompatible with a human rights approach as it is assuming that people's support needs fit onto the NDIS's siloed service system.⁷⁶

CRPD Conclusion

The above analysis demonstrates how the NDIA internal review process is currently incompatible with the five CRPD articles discussed above.

⁷¹ Ibid 19.

⁷² *General Comment No 5* [61].

⁷³ Mission Australia, Submission to NSW Government, *Inquiry into the Implementation of the NDIS and the Provision of Disability Services in NSW 2018* (2018) 6.

⁷⁴ Deborah Warr et al, Choice, Control and the NDIS: Service Users' Perspective on Having Choice and Control in the New National Disability Insurance Scheme (Community Report, University of Melbourne, May 2017) 17.

⁷⁵ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 26(1).

⁷⁶ Alison Churchill, Mindy Sotiri and Simone Rowe, *Access to the NDIS for People with Cognitive Disability and Complex Needs who are in Contact with the Criminal Justice System: Key Challenges* (Report, The Community Restorative Centre, January 2017) 9.

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