Disability Access to Justice Research Consortium Scoping Paper:

Research needs in access to justice for people with disability in Australia and New Zealand

Literature Review, Consultation, and Emerging Research Opportunities

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# Foreword

## Transforming access to justice

A *just* system is universally accessible. It is a place where everyone has equal rights, the equal ability to exercise those rights and to participate in justice processes and yet the experience of equity and inclusion remains out of reach for many, particularly for people with disability.

The historical and continuing failures of our justice processes to recognise and realise the rights of people with disability across the system bring into question Australia’s compliance with international human rights obligations and the proper administration of justice.

People with disability are often dismissed as ‘unreliable witnesses’ by police and lawyers, while people accused of a crime are often not given access to the appropriate assistance to ensure they have access to a fair trial. This has led to the overrepresentation of people with disability in prison systems that are ill-equipped to support people with disability. The systemic barriers inherent in our justice processes have led to the criminalisation of disability and the denial of fundamental human rights.

The only remedy to the injustice experienced by people with disability is to transform the system. For people with disability to be equal before the law, recognised as rights bearers and as deliverers of justice, there are significant systemic, law, policy and practical reforms that must occur across Australia and New Zealand. In a transformed system, an assault on a person with disability is a crime, not an incident, an accused person with disability is able to access a fair trial; and we have judges, juries and lawyers with disability delivering justice.

Transforming access to justice for people with disability must be based on what Michael Black AC QC, former Chief Justice of the Federal Court of Australia, described as ‘effective solutions based on scholarship’. The scholarship behind these solutions must not only be a product of the academy either.

Research that makes a difference and results in real change must be co-designed with people with disability and Disabled People’s Organisations (DPOs) and must break the discipline and funding silos that exist within universities. The evidence base for change has too long been developed in academic silos, where disability research is underfunded and where people with disability are excluded from research.

It is the pursuit of co-designed, high-impact research that led to forty researchers from Australian and New Zealand Universities to form the Disability Access to Justice Research Consortium.

Currently led by the University of Melbourne, the Consortium which officially launched on 8September 2017 brings together researchers in law, public policy, policing, disability rights, criminology and psychology to create and deliver co-designed, high-impact research and reform.

# Introduction

This document has been prepared by the Hallmark Disability Research Initiative and the Melbourne Social Equity Institute at the University of Melbourne in conjunction with an interdisciplinary consortium of Australian and New Zealand researchers and Disabled People’s Organisations committed to advancing high-impact, participatory research on access to justice for people with disability.[[1]](#footnote-1) The consortium partners recognise that interdisciplinary research that is co-designed with the disability community will lead to deeper impact and drive more effective changes to law, policy, culture, and practice across the justice system that contributes to the realisation of the rights of people with disability.

This document expands on the work of the *Report of the Audit of Disability Research in Australia*[[2]](#footnote-2) (the *Disability Research Audit*) published by the University of Sydney’s Centre for Disability Research, and of the University of Melbourne, People with Disability Australia (PWDA), and National Disability Services in 2014. The first part comprises a literature review summarising recent research relating to access to justice for people with disability in Australia and New Zealand and identifying gaps and opportunities for further research. The second part comprises the report of a consultation with representative organisations of people with disability in Australia and New Zealand to identify the access to justice issues and research gaps of most concern to the disability community. These two elements provide the background for developing a disability access to justice research agenda to work towards the realisation of the rights of people with disability in Australia and New Zealand.

# Defining ‘people with disability’ and ‘access to justice’

This paper adopts the non-exhaustive definition of people with disability in Article 1 of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD), which includes:

… those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[[3]](#footnote-3)

This paper uses a rights-based framework for the discussion and analysis of access to justice for people with disability, defining access to justice in line with the human rights requirements outlined in Article 13 of the CRPD, which provides:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.[[4]](#footnote-4)

This paper also acknowledges that, in order for the state to meet its obligation to ensure that people with disability enjoy ‘effective access to justice … on an equal basis with others’,[[5]](#footnote-5) there are a number of individual rights that must be realised. These individual rights include, but are not limited to:

* equal recognition before the law and legal capacity,[[6]](#footnote-6)
* liberty,[[7]](#footnote-7) and
* freedom from discrimination.[[8]](#footnote-8)

This paper defines the term ‘justice’ broadly to encompass the enforcement of rights in both civil and criminal justice systems.

# Disability research in Australia and New Zealand: review of recent literature

This paper acknowledges the fact that people with disability are over-represented in nearly all aspects of the justice system in both Australia and New Zealand as a fundamental issue.[[9]](#footnote-9) It recognises that this over-representation reflects the systemic barriers to equality for people with disability in many life areas, the stigmatised status of people with disability in Australian and New Zealand society, and the particular systemic barriers to the full enjoyment of rights for people with disability in the justice system. It recognises that many (if not all) aspects of the justice system are built on a model that excludes full consideration of the circumstances, needs and rights of people with disability. There is therefore a need for whole-system reform in both Australia and New Zealand that eliminates the existing systemic barriers, actively counters the historic exclusion and stigmatisation of people with disability, as well as recognises the individual needs of people with disability, and supports them both within the justice system and through pathways out of the justice system.

However, as the 2014 *Disability Research Audit*[[10]](#footnote-10) highlighted, the existing disability research and literature is largely fragmented and not ‘fit for purpose’ for this overall reform agenda. In particular, the *Disability Research Audit* found the following:

* Disability research is not easily accessible or widely available, limiting the reach and impact of any findings.
* Disability research does not have a sustainable and mature base, is more focused on one-off topics rather than ongoing investment in research to educate, support, retain and attract disability researchers in universities, institutes, government and non-government organisations.
* Disability research is focused on restating the problem rather than on testing interventions or solutions or the evaluation of policy initiatives thwarting understanding of what works, when, for whom and under what conditions.
* There is limited research about choice, control, empowerment, rights protection, justice and legislation, economic security, person-centred and community support.
* People with disability need to be engaged in disability research and drive all decisions that affect their lives. Co-produced research that involves people with disability at all stages of design, planning, implementation and dissemination is needed and missing from the disability research base.

Moreover, while the *Disability Research Audit* recommended that future disability research adopt a rights-based discourse,[[11]](#footnote-11) this has not been fully realised within the legal literature considered in this paper.[[12]](#footnote-12) There is instead a continued reliance on the medical model of disability and an emphasis on individual (in)capacity when a person with disability interacts with the legal system.[[13]](#footnote-13) The introduction of ‘problem-solving’ courts to facilitate therapeutic alternatives to mainstream justice processes for people with disability also thwarts a rights-based approach insofar as they remain dominated by regulation, intervention and control rather than choice, support and empowerment.[[14]](#footnote-14)

There are, however, some authors who are advancing a rights-based discourse, and moving away from a discussion of vulnerability into language of empowerment, choice and control for people with disability.[[15]](#footnote-15) There is also scope for future research to use participatory methodology and co-design to advance a whole-system reform agenda.

In line with the recommendation of the *Disability Research Audit* for further research, this document provides an overview of existing research from Australia and New Zealand on access to justice for people with disability since 2012. The aim is to provide a more thorough analysis of the content of the research that exists in the field and to identify areas where more research is needed, particularly research that is “fit for purpose” for a systemic reform agenda.

## Access to justice: Intersecting themes

This paper presents a review of scholarly and other literature concerning access to justice for people with disability published between 2012 and 2017 in Australia and New Zealand. This literature has been categorised into nine themes:[[16]](#footnote-16)

1. Equal recognition before the law and legal capacity
2. Inclusion in criminal justice processes and procedures
3. Inclusion in civil, administrative and tribunal justice processes
4. Mental health and justice processes
5. Child protection, marriage, partnerships, intimate relationships, parenthood and family law
6. Aboriginal people and Torres Strait Islanders
7. Immigration, migration and culturally and linguistically diverse communities
8. Women
9. Rural and regional justice issues

Where possible, the paper also assesses the extent to which research under each theme has been conducted using principles of participatory research. The process of developing this paper has defined participatory research as research that includes people with disability and/or their representative organisations in leadership, design, delivery, and dissemination of research. The paper indicates where it has found some or all aspects of participatory research under each theme.

### Theme 1: Equal recognition before the law and legal capacity

Equal recognition before the law and the right to legal capacity of people with disability is guaranteed under Article 12 of the CRPD.[[17]](#footnote-17) The right to legal capacity includes the right to be a person before the law and to act under the law. This has implications for law, policy, and practice related to guardianship, mental health, capacity to contract, fitness to plead and stand trial and other areas of the law where legal decision-making is restricted on the basis of disability.[[18]](#footnote-18) The right also includes a state obligation to provide access to support for the exercise of legal capacity.[[19]](#footnote-19) The practice of supported decision-making has been widely considered to be one of the support methods available.[[20]](#footnote-20) It is an essential part of the state obligation to provide access to justice because without recognition as a person before the law, an individual may not have standing before a court, may not be free to engage in a contract for legal representation, and may have their decision-making denied in such a way as to deny individual access to justice in a variety of other ways.

Internationally, scholarship in this area has only significantly developed over the last ten years, since the CRPD came into force. There is considerable work being done in the United Kingdom,[[21]](#footnote-21) Ireland,[[22]](#footnote-22) and elsewhere in Europe on this subject.[[23]](#footnote-23) Australia has been lauded as one of the leaders in research on supported decision-making. Work has included pilot projects in South Australia,[[24]](#footnote-24) Victoria,[[25]](#footnote-25) the ACT,[[26]](#footnote-26) and New South Wales,[[27]](#footnote-27) though only a few independent evaluations have been done.[[28]](#footnote-28) Research into the practice of support for people with disability has been done; however, it is only just beginning to emerge in the area of support for legal decision-making.[[29]](#footnote-29) It has included work on support for people with significant communication difficulties.[[30]](#footnote-30) Increased collaboration between universities and government agencies and disability services carrying out pilot projects could provide better avenues for more robust research and evidence of the effectiveness of supported decision-making and good practice in the field.

Scholarship has emerged on the legal analysis of the right to legal capacity and the implications for the law in Australia and New Zealand. The need for reform of mental health law in Australia has been identified, including around the practices of seclusion, restraint and forced treatment.[[31]](#footnote-31) Unfitness to plead laws and unfitness to stand trial laws in Australia have also been identified as in need of reform, due to the discriminatory impact on people with cognitive disability—particularly Aboriginal people and Torres Strait Islanders with cognitive disability—and the indefinite nature of detention that can result from findings of unfitness.[[32]](#footnote-32) The Victorian Law Reform Commission’s report on legislation dealing with unfitness to stand trial highlighted in particular that under the current law, people who were fit to plead guilty but not fit to go through the whole trial process were being denied the right to plead guilty, found unfit and being made subject to indefinite supervision orders.[[33]](#footnote-33)

The need for reform to unfitness to plead laws has also been a focus of New Zealand literature.[[34]](#footnote-34) The literature notes a need for reform of these laws to reinforce the propositions that no-one should be tried in absentia and that all parties to a criminal proceeding should be aware and able to participate.[[35]](#footnote-35)

Theoretical research has emerged on the right to legal capacity and support for legal decision-making.[[36]](#footnote-36) Scholars in Australia have begun work in this area, yet only limited research has been done on the implications on the ground for the demands of CRPD Article 12. Research is needed on discrete areas of the law where decision-making is denied to people with disability in Australia, in order to investigate how support for the exercise of legal capacity can be implemented. In New Zealand, one case study of the National Health and Disability Advocacy Service has been used to describe a successful model of advocacy based on the concept of empowerment, noting that independence is a key factor in this success.[[37]](#footnote-37)

Participatory research on the right to legal capacity is only just beginning to emerge. One reason for this is that much of the work to this point has been on theory and has been conducted as desk-based research by a single researcher or a small collaboration of researchers. Participatory research in supported decision-making has also been limited because up to this point, the research has been largely organised as pilot projects by government or civil society organisations. As such, the research has been led by those groups and has had more of a practice focus as opposed to a research focus. However, there have been some participatory research projects on legal capacity and supported decision-making in which people with disability were involved in the research process and in the designing and leadership of the research.[[38]](#footnote-38) There is an opportunity to begin developing more participatory research endeavours in this theme.

### Theme 2: Inclusion in criminal justice processes and procedures

Research into inclusion in criminal justice processes and procedures has been done in areas related to policing, police investigative interviewing, pre-trial measures, at-trial measures, the prison system and throughcare. There is a substantial amount of literature addressing disability and the criminal justice system.[[39]](#footnote-39) Whilst some of this literature simply restates and acknowledges the identified problems,[[40]](#footnote-40) some of it also seeks to evaluate ‘what works, when, for who and how’.[[41]](#footnote-41)

Since the 2014 *Disability Research Audit* there has been a notable increase in the amount of literature concerned with Australian Aboriginal people and Torres Strait Islanders, and women with disability, and their inclusion in criminal justice processes and procedures.[[42]](#footnote-42) The research overwhelmingly establishes that people with cognitive disability are over-represented in the criminal justice system, and that this is particularly so for Aboriginal people and Torres Strait Islanders with a cognitive disability.[[43]](#footnote-43) There is also research showing that criminal justice outcomes for *victims* with disability are affected by their contact with the criminal justice system as *offenders*, particularly women and young people.[[44]](#footnote-44) Emerging literature is discussing the implications of the National Disability Insurance Scheme (NDIS) for the criminal justice system.[[45]](#footnote-45)

The existing literature from New Zealand on this theme has focused mainly on laws dealing with fitness to stand trial.[[46]](#footnote-46) It identifies a need for future research about the ultimate outcomes, particularly for young people who are designated as unfit to stand trial.[[47]](#footnote-47) One study also examined the tensions that exist between the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ) and the requirements of the CRPD, including the tensions between imperatives of risk management, rehabilitation and human rights.[[48]](#footnote-48) This study noted that further research into how the multi-disciplinary team functions in relation to this Act would deepen the understanding of these dilemmas surrounding risk and rehabilitation.[[49]](#footnote-49) Research has also been conducted in New Zealand on the police use of TASER devices in mental health emergencies.[[50]](#footnote-50) This literature notes that people with mental illness are particularly vulnerable to the effects of TASER devices,[[51]](#footnote-51) and suggests that further research should include qualitative research to explore police officers’ experiences of use of TASER devices, both in general and in relation to mental health emergencies.[[52]](#footnote-52)

Notwithstanding the increased volume of literature and broader analysis, deeper and comparative research is limited. This is a consequence of the difficulty of obtaining accurate and comprehensive data, largely due to inadequate reporting and poor data linkages within justice agencies and across governments.[[53]](#footnote-53)

Moreover, the non-reporting of abuse and discontinuation of matters for people living in institutional and residential settings has been identified as an ongoing issue for access to justice for people with disability.[[54]](#footnote-54)

The literature also notes that police, lawyers, courts and corrections officers often have difficulties identifying disability at the point of entry to the criminal justice system either as complainant, witness or suspect.[[55]](#footnote-55) Where and when a disability is identified there is a lack of co-ordination across justice, health and disability services to ensure that the person is able to effectively participate in interviews or at trial.[[56]](#footnote-56) While there have been some changes in the criminal justice system in New Zealand, South Australia, New South Wales and Victoria to allow for communication intermediaries in criminal proceedings[[57]](#footnote-57), there is further research required into reforms that will allow for universal access for people with disability. For instance, the Victorian Law Reform Commission recommended in-court support measures for people who may be at risk of being unfit to stand trial as a way of providing additional support and allowing them to participate in the usual criminal process, rather than being found unfit.[[58]](#footnote-58) There is also a need for further research into the residual cultural and attitudinal barriers to changes in adversarial legal culture and practice.

Future research could be targeted at developing a larger evidence base across Australia and New Zealand of quantitative and qualitative data regarding people with disability and their involvement in criminal justice processes and procedures. There is also the opportunity to develop research in this area that evaluates new and piloted measures to improve access for people with disability in the justice system, including changes to police investigative interviewing,[[59]](#footnote-59) the use of communication partners, support programs, advocacy, pre-trial directions hearings and the pre-recording of evidence[[60]](#footnote-60), as well as measures adopted following recommendations for reform in the grey literature since 2012.[[61]](#footnote-61)

Participatory research on this theme has largely been limited to research with victims with disability within the criminal justice system, particularly in the context of violence against women.[[62]](#footnote-62) While there has been some research involving offenders, this has been restricted to the qualitative input of justice users into research findings rather than using a participatory approach.[[63]](#footnote-63)

### Theme 3: Inclusion in civil, administrative and tribunal justice processes

Civil and administrative processes are critically important to a range of disability rights protection areas, including housing, disability benefits, consumer protection, discrimination claims, and other areas. However, there is considerably less Australian and New Zealand literature addressing the issue of inclusion in civil and administrative justice processes for people with disability, compared with the literature on criminal justice processes and procedures. This finding is consistent with the *Disability Research Audit*, which acknowledged that there continue to be gaps in research into inclusive and accessible communities, rights protections and justice and legislation.

Nonetheless, some literature has emerged that addresses these civil, administrative and tribunal justice processes. One study in New Zealand has addressed improving access to justice in personal injury matters through a rights-based ‘multi-factorial’ approach in relation to motor vehicle claims. [[64]](#footnote-64) It argues that there should be equal recognition of people with disability in personal injury claims, greater participation by claimants in the resolution of their claim, a role for DPOs in the process and access to non-legal remedies.[[65]](#footnote-65) Another study examining disciplinary proceedings in the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (NZLCDT) involving lawyers with physical or mental impairments has advocated for a therapeutic and health-promoting approach to dealing with such disciplinary matters.[[66]](#footnote-66)

There remain barriers for people with disability to understand and advance their legal rights, including under discrimination laws.[[67]](#footnote-67) In Australia, a pilot study was conducted in 2016 to investigate barriers to access to consumer transactions for people with decision-making impairment and to canvass options for improving support for accessing services and exercising their consumer rights in a manner consistent with Article 12 of the CRPD.[[68]](#footnote-68)

There is an ongoing need for research about access to justice in the broader civil and administrative processes. For instance, research addressing the accessibility of complaint and appeal processes and informal and alternative dispute resolution processes would be beneficial. There is a further need to develop accessible information about rights and remedies for people with disability in the civil justice context.

Aspects of participatory research were used in the Australian pilot study mentioned above, including in the leadership, design, and dissemination of the project.[[69]](#footnote-69)

### Theme 4: Mental health and justice processes

While mental health and justice processes were not specifically addressed in the *Disability Research Audit*, research on mental health and access to justice is increasingly recognised as part of the disability literature.[[70]](#footnote-70) A significant body of work has been advanced in Australia in relation to the use of seclusion and restraint on people with disability in mental health facilities and other settings. This work has sought to incorporate the perspectives of the people subjected to these practices and to develop rights-based legal and policy responses to them.[[71]](#footnote-71) There is also emerging literature critiquing the unfitness to stand trial laws for people with cognitive disability in Australia, and proposing a model of support for people at risk of being found unfit to plead, using a human rights framework.[[72]](#footnote-72) This literature notes that mental impairment and unfitness laws in Victoria and elsewhere are predicated on the notion that the person will ‘recover’ from the underlying mental condition and if so, may be ultimately released from detention or supervision.[[73]](#footnote-73) However, this model of staggered release does not fit with the modern approaches to disability and there remains a lack of a clear treatment pathway for recovery.[[74]](#footnote-74)

One gap in the literature relates to the efficacy of mental health court liaison service models across Australian jurisdictions, despite an over-representation of people with psychosocial disability in the criminal justice system.[[75]](#footnote-75) The need for clear national guidelines has subsequently emerged. Currently, services have formed independently of each other, and while these services have similar aims, the variation in resources, clinical processes, geographic coverage and their ability to provide equitable access varies.[[76]](#footnote-76) There are also issues attributed to broken referrals between allied health services and the legal system.[[77]](#footnote-77)

There is some existing literature from New Zealand on mental health and justice processes, particularly in relation to the criminal justice system and community treatment orders (CTOs)[[78]](#footnote-78) and the role of the Mental Health Review Tribunal.[[79]](#footnote-79) This literature acknowledges the high and increasing rate of CTO use in New Zealand, and notes that this needs to be addressed as a human rights issue as well as a clinical issue.[[80]](#footnote-80) There is also existing literature on the Alcohol and Other Drug Treatment Court in New Zealand, though it notes that there remains limited in-depth research on the experiences of participants in the Alcohol and Other Drug Treatment Court that can complement mere statistical information.[[81]](#footnote-81) In addition, several studies discuss the Mental Health Review Tribunal in New Zealand.[[82]](#footnote-82) This study addresses methodological issues, including issues of power differentials in the research between clinician-researcher and subjects, and the conflict between the need to provide care and containment to forensic patients who present a significant risk to others.[[83]](#footnote-83) The literature notes in particular that existing mental health legislation is often criticised for being inconsistent with a rights-based approach to healthcare, because it can permit the treatment choices of compulsory patients with capacity to be overridden.[[84]](#footnote-84) The District Inspectors who are charged with being watchdogs of patients’ rights under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* (NZ) have also raised concerns about the lack of advocacy available to voluntary patients seeking to exercise their rights.[[85]](#footnote-85)

It has been argued, however, that such safeguards are inadequate because they take a reactive approach, whereby a person’s condition will not be reviewed unless it is brought to attention.[[86]](#footnote-86) Under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* (NZ), people detained under the Act have access to district inspectors who are charged with being watchdogs of patients’ rights. In a recent study, however, district inspectors raised concerns about the lack of advocacy available for voluntary service users.[[87]](#footnote-87)

There is therefore a need for further research which examines consent in mental health legislation within a human rights-based framework.[[88]](#footnote-88) There is also a need for further research on the use of chemical restraints, particularly regarding the extent of the use of drugs aimed at controlling behaviour rather than ameliorating a medical condition,[[89]](#footnote-89) as well as psychiatric advanced directives.[[90]](#footnote-90) Moreover, further research is needed to pinpoint and address the underlying social customs through which requests for medical sterilisation procedures for intellectually disabled people are negotiated and resolved.[[91]](#footnote-91) There are also gaps in the literature in relationto people with disability’s own views on the effectiveness of legislation around mental health and disability.[[92]](#footnote-92)

The participatory research methodologies used in this field are not clear. However, they do not appear to be widely adopted.

### Theme 5: Child protection, marriage, partnerships, intimate relationships, parenthood and family law

The *Disability Research Audit* identified a lack of researchinto the inclusion of children and young people with disability in everyday life, as well as longitudinal studies that understand the potential drivers of inequities.[[93]](#footnote-93) Whilst access to justice for children and young people with disability, and parents with disability, is an emerging theme in the literature, there remains a lack of comprehensive research on most aspects of this theme in both Australia and New Zealand.

The literature identifies systemic failures resulting in disadvantage for children and parents with disability.[[94]](#footnote-94) Extensive research by Baldry et al provides that children and young people from already racialised and criminalised communities and families who struggle with cognitive or mental impairment are not supported in the community, in school or in the child and family support systems in the way middle class young people are; instead they are increasingly dealt with by systems of control rather than systems of care and support.[[95]](#footnote-95) In addition, the literature identifies an overrepresentation of families where a parent has a disability in Victoria’s child protection system.[[96]](#footnote-96)

Research from Australia also indicates that a history of offending places young people with mental illness at substantially higher risk of subsequent victimisation.[[97]](#footnote-97) There is also some emerging literature on the links between Foetal Alcohol Spectrum Disorder (FASD) and offending, although the lack of recognition of FASD as a disability, and lack of prevalence of data on the issue, are identified as outstanding issues.[[98]](#footnote-98)

Further research is required into disability and family law outside the field of child protection, particularly concerning the right to parenthood for people with intellectual disability.Similarly, research is required regarding access to justice for children with disability and the children of parents with disability.[[99]](#footnote-99) Given that none of the research identified includes the perspectives of children with disability, there should also be an emphasis on including their voices in future research.[[100]](#footnote-100)

It is not clear whether participatory research methods have been used in research in this theme. Evidence of use of such methods was not found.

### Theme 6: Aboriginal people, Torres Strait Islanders and Maori people

Since the *Disability Research Audit* there has been a substantial increase in the literature on Aboriginal people and Torres Straits Islanders and disability.[[101]](#footnote-101) The majority of existing research into Aboriginal and Torres Strait Islander people with disability overlaps with criminal justice research, and the interaction of Aboriginal and Torres Straits Islanders people with disability with criminal justice systems and processes is an ongoing focus of the research literature.[[102]](#footnote-102) As discussed above, this has included a growing research base on the indefinite incarceration of Aboriginal and Torres Straits Islander people with cognitive disability. [[103]](#footnote-103)

Likewise, the existing literature into Maori people with disability mostly relates to the criminal justice system and mental health processes.[[104]](#footnote-104) The literature suggests that Maori youth in particular are overrepresented in both criminal justice statistics and youth forensic services, and that further research into Maori mental health is important to inform ongoing service development and essential to striving for equity in mental health outcomes and offending rates among Maori people.[[105]](#footnote-105)

While there is evidence of more inclusive and participatory research in relation to Aboriginal and Torres Strait Islander communities and representatives, this is not necessarily the case in relation to those with disability.[[106]](#footnote-106) However, there have been participatory methods used in unfitness to plead research related to Aboriginal and Torres Strait Islander people with cognitive disability and in New Zealand in relation to young people using kaupapa Maori research methods.[[107]](#footnote-107) Research on this theme is heavily focused on criminal justice with gaps in research about interactions with other aspects of access to justice that need to be addressed.

### Theme 7: Immigration, migration and culturally and linguistically diverse communities

The particular profile, experience and issues affecting people with disability from culturally and linguistically diverse (CALD) communities was identified in the *Disability Research Audit* as an area that the majority of research on people with disability did not address.[[108]](#footnote-108) Research on this area remains scarce.

A recent literature review found that refugees and asylum seekers remain largely absent from both resettlement literature and disability research in Australia.[[109]](#footnote-109) Issues identified in the existing scholarship on refugees and asylum seekers include the conflation of ‘mental illness’ caused by the migratory process (particularly the impact of detention) with that of ‘social’ disability, caused by structural disadvantage and marginalisation.[[110]](#footnote-110) Moreover, there appears to be a lack of initiatives under national disability policy, including the new National Disability Insurance Scheme (NDIS), which give consideration to refugee migration and resettlement and the resulting implications for the participation and inclusion of people with disability.[[111]](#footnote-111)

One New Zealand article has addressed the narrow question of rights accorded to migrants suffering from mental harm under the *Immigration Act 2009* (NZ).[[112]](#footnote-112) This article argues that deportation policies under New Zealand law need to be reformed to align with international human rights obligations for people with disability (including mental illness), including equal treatment before the law in relation to deportation.[[113]](#footnote-113)

Further research is required on access to justice for people with disability from culturally and linguistically diverse communities and refugee or asylum seeker backgrounds. Future research should also strive to be participatory and to include people with disability from these backgrounds, as there is little evidence of this in the current literature on this theme.

### Theme 8: Women

The *Disability Research Audit* also identified that the majority of the existing disability research did not address the profile, experience or issues specifically affecting women with disability.[[114]](#footnote-114) Since 2012, there has been a growing body of research related to access to justice for women with disability, much of which has focused on violence perpetrated against them in domestic or service settings.[[115]](#footnote-115) There is a significant gap in all other areas of access to justice issues related to women with disability.

The prevalence of violence against women with disability has proven to be difficult to measure due to a lack of national data.[[116]](#footnote-116) The existing research identifies under-reporting and inadequate recording of data in the current national surveys as contributing to this problem.[[117]](#footnote-117) Women with intellectual disability, in particular, are under-represented in domestic violence research, despite being one of the groups most at risk of violence and abuse.[[118]](#footnote-118) The literature specifically identifies issues in accessing and engaging with women with disability in institutional and residential settings.[[119]](#footnote-119) Existing research points to the need for an intersectional approach to research and policy that recognises the relationship between disability violence and gendered violence in both research and reporting in this area.[[120]](#footnote-120)

The literature also acknowledges a need for future research focused on supporting women with intellectual disability in a way that allows for autonomy yet prevents abuse.[[121]](#footnote-121) Future research should acknowledge the interrelated issues for women with disability in the criminal justice system and the child protection system in relation to rights-based versus interventionist approaches.[[122]](#footnote-122) Research beyond that related to violence is much needed in the area of women with disability and access to justice. In addition, further research is needed to pinpoint and address the underlying social customs through which requests for medical sterilisation procedures are negotiated and resolved.[[123]](#footnote-123)

Some of the literature, particularly in relation to violence against women with disability, has been participatory.[[124]](#footnote-124) This is not, however, the case for all research on this theme.

### Theme 9: Rural and regional justice issues

The *Disability Research Audit* identified people living in remote areas as one of the specific areas that the majority of existing disability research had failed to address.[[125]](#footnote-125) In particular, there is very little research reflecting the experiences of people with disability (including mental illness) living in rural and remote areas, and the particular issues they face.[[126]](#footnote-126)

Where literature exists in relation to this theme, it is mostly limited to issues in relation to rural and regional Aboriginal and Torres Strait Islander communities and criminal justice systems and processes (see above, Theme 6).[[127]](#footnote-127) Future research is required regarding people with disability in rural and regional areas across the justice system, both in Australia and New Zealand.

## Research gaps and future research opportunities in Australia and New Zealand

While there has been growth in research addressing disability access to justice in some areas—such as access to justice in the criminal justice system, and access to justice for Aboriginal and Torres Strait Islander people and women with disability facing violence— this review revealed gaps in the research across and within each of the ten themes identified in the literature review. The biggest gaps relate to inclusion in civil, administrative and tribunal justice processes, family law, immigration, migration and culturally and linguistically diverse communities, and rural and regional communities. There are also likely research gaps in areas not covered by the themes identified in this document. There is also a lack of research in all areas that include participatory research practices such as involving people with disability as partners and co-producers of research.

Other areas for further research include the following:

* Further research into a universal legal capacity model, including both potential law reform and the further development of supported decision-making practice.
* The development of a best-practice support and advocacy model for people with disability in justice processes across Australia and New Zealand.
* Investigation of the role of support services in assisting parents with intellectual disability and their children.
* An analysis of the number of children in out-of-home care in Australia and New Zealand with disability, and their care and support needs.
* Research that investigates the emerging over-representation of parents and children with disability in the care and protection system across Australia and New Zealand.
* Intersectional approaches to violence for women with disability living in institutional and residential settings.
* The creation of a model approach to interdisciplinary participatory research on disability rights and access to justice.
* Research specifically focused on access to justice for people with disability regarding parenthood and family law.

As noted above, given the over-representation of people with disability in so many areas of the justice system, there is also a need to ensure that future research is targeted at informing and facilitating a system-wide reform of all aspects of the justice systems in Australia and New Zealand. Therefore, whilst it is important to address the gaps in the existing literature as identified above, future research should also take a holistic approach and be ‘fit for purpose’ for this reform agenda. This includes adopting a human rights-based framework and ensuring greater representation of people with disability in the research process through participatory methods.

# DPO consultation: Research gaps and issues identified by the disability community

## Research methodology

The goal of this research was to gain an overview of access to justice issues for people with disability as identified by disabled people’s organisations (DPOs) and other community organisations with specialist knowledge or expertise. We wanted to hear from the disability community about experiences of the justice system. The interviews were semi-structured and conducted via Skype, which enabled the inclusion of representatives from several interstate and New Zealand organisations as well as several Victorian organisations. Most of the organisations consulted focused their responses on the area of criminal law, but there were some references to other areas of law.

Funding for this consultation was limited and the findings are not meant to be an exhaustive representation of the perspectives of people with disability in Australia. The organisations were selected based on their past work and expertise in this area. It is not an exhaustive list of organisations that have worked in the field of disability justice in Australia and New Zealand. The interviews that were conducted provided much more valuable information and insights than could be included in this report. We intend this report to merely be a starting point for a collaborative effort between academics, DPOs, activists, community groups, and other stakeholders to work towards ensuring better access to justice for people with disability.

The following organisations were consulted:

1. **Disabled People’s Organisations (DPO) Australia**: DPO Australia is an alliance of four national peak bodies: First Peoples Disability Network, Women With Disabilities Australia, National Ethnic Disability Alliance, and People with Disability Australia.
2. **People with Disability Australia (PWDA)**: PWDA provides rights-related information, advice and referral services for people with disability and their associates; short-term individual and group advocacy assistance to people with disability and their associates; advocacy for reform around systemic issues that adversely affect people with disability and their associates.
3. **First Peoples Disability Network (FPDN)**: FPDN is a rights-based advocacy service for Aboriginal and Torres Strait Islander people with disability. In relation to access to justice, FPDN assists people before and after contact with the judicial system.
4. **Disabled Peoples’ Assembly, New Zealand**: Disabled Peoples’ Assembly focuses on systemic advocacy, working across various issues.
5. **Women with Disabilities Victoria (WDV)**: WDV is the peak organisation for women with all types of disability in Victoria. It is run by women with disability, for women with disability. Its work is grounded in a human rights-based framework that links gender and disability issues to a full range of civil, political, economic, social and cultural rights.
6. **Communication Rights Australia**: Communication Rights Australia provides specialist information and advocates for people with disability whose human rights have been infringed, giving priority to those with little or no speech.
7. **Anne McDonald Centre**: The Anne McDonald Centre provides assessment and therapy for people of any age and with any diagnosis with little or no functional speech.
8. **Victorian Advocacy League for Individuals with Disabilities (VALiD)**: VALiD provides a range of advocacy and information strategies that connect together, supporting people with disability on their journey towards empowerment and a good life.
9. **Disability Justice Advocacy (DJA)**: DJA provides advocacy support to people who have ongoing support needs as a result of disability. Its focus is on the people with disability and supporting their needs, rights and interests to address and resolve issues they identify.
10. **Victoria Legal Aid**: Victoria Legal Aid assists people with their legal issues. It focuses on protecting the rights of all Victorians, and providing assistance for those who need it the most. It assists people with legal problems in the areas of criminal law, family law and some civil law matters.

## Overview of findings

The organisations consulted for this paper emphasised the importance of equal access to justice for people with disability and the barriers that prevent that access. Improving access to justice is pressing because, with the gradual integration and now the greater push for inclusion of people with disability within society, undoubtedly, they will experience ‘the good, bad and ugly’ of society that everyone else experiences in society. Especially in light of the advent of the National Disability Insurance Scheme (NDIS) in Australia, which is intended to give people with disability greater choice and control over their lives and the resources to live independently in the community, people with disability will be more involved in the community and may have a higher involvement in justice processes.

The consultations indicated a common view of why barriers to access to justice for people with disability exist. People with disability have been perceived as having been ‘looked after’ by their parents or by the institutions where people with disability have been placed in the past; consequently, wrongdoing against people with disability is often denied or dealt with by internal investigations by disability organisations. There was commonly no desire or perceived need to trouble the police or the justice system.

Those consulted made a range of recommendations for legal and policy changes—most of which would benefit from a research evidence base—to improve access to justice for people with disability. For example, most of the organisations recommended a greater amount of training on disability itself. They argued that most police, lawyers and solicitors need more disability training to be able to work with and relate to people with disability in a more dignified, confident and equal manner. Many groups also emphasised the need for greater adaptability of court process to accommodate varying communication methods. With the development of varying methods of communication, both electronically and with ‘communication partners’ it was felt that the judicial processes must find ways to accommodate these methods of communication whilst retaining the sanctity of the judicial process. Faster linkage with lawyers and establishing more links between courts and social services were also identified as key issues.

The following sections discuss in more detail the barriers to access to justice, and recommendations for reform, identified by the organisations consulted.

## Barriers to access to justice faced by people with disability

### The status of people with disability in society

People with disability have been advocating for equal treatment within society for decades. We have made some progress in a number of areas. However, it appears the justice system is very behind when it comes to people with disability. Issues identified by the consultations as barriers to accessing the justice system included the perceived credibility of people with disability, and intimidation by the process and the people in control of those processes – that is, the service providers, police, lawyers and judges.

According to the organisations consulted, those involved in the justice process often have negative stereotypes of people with disability. This likely affects how people with disability are treated by disability service providers, police, solicitors and judges.

The Law has inbuilt discrimination. People with disabilities can be deemed not to have legal capacity.

DPO Australia

People with disabilities are not taken seriously. What they say generally is not believed by service providers or police. Police have a negative stereotype and perception of people with disabilities which affects how they respond to people with disabilities. Police can be intimidating which scares people with disabilities.

People with Disability Australia

A lack of understanding about disability and some behaviour being can be seen as criminal but it is caused by a disability.

Disabled Peoples’ Assembly, New Zealand

Disabled Peoples’ Assembly further stated that poverty and social isolation makes it difficult for people with disability to report crimes — including crimes within the home.

Other organisations identified other barriers around communication by victims of crime. For example, in 2014, in his presentation ‘Experiences of people with Disabilities as Victims of Crime’, Trevor Carroll stated:

Some victims are unable to communicate the crime due to a lack of support and appropriate augmentative and alternative communication aides.  Some victims are prevented from reporting crime by pressure from family members.

Trevor Carroll, Disability Justice Advocacy

Communication is often an issue for people with disabilities going through the justice process. It is very difficult to get a support person to assist people with disability through the justice process.

Disabled Peoples’ Assembly, New Zealand

## Barriers caused by poor processes among disability service providers

According to many of the organisations consulted, the initial major barrier for people with disability to accessing justice is the unwillingness of disability service providers to allow people with disability to contact the police when a legal wrongdoing has occurred against them within their facility. Disability service provider management usually deal with such matters through internal investigations, which can result in the matter disappearing and the person with disability receiving no justice in the matter.

According to PWDA, if violence occurs against people with disability within an accommodation service, management say it is an in-home matter and tell people not to contact the police. Police may not know or understand that service providers may prevent people with disability from accessing the police. According to PWDA, police need to explore ways to overcome this barrier.

Communication Rights Australia reported that cases are always put in the ‘too hard basket’. Barriers occur at all levels including: service providers; reporting the incident; police involvement and interviewing; and interaction with legal representatives.

### Communication, access and attitudinal barriers in dealing with police

If people with disability do manage to report their incident to the police, in many cases, they then face questions about the validity of their reporting of the incident and doubts about the way they communicate.

According to PWDA, police can be intimidating and people with disability may be scared to go to the police. PWDA also noted that people with disability are often not able to access police stations. Communication Rights Australia reported that often cases are rejected at the ‘reporting stage’ because “’the person cannot communicate properly or independently’. Cases are generally prevented from continuing from this stage because police want to interview the person on their own but cannot understand the person’s communication. Advocates are usually called in to assist at this stage but their status is not seen as ‘professional’ as compared to lawyers.

The Independent Third Party Scheme was referred to during the consultations. This is a volunteer program developed by the Victorian Office of the Public Advocate. Volunteers are trained to attend police interviews for people with disability to ensure they are not disadvantaged during the interview process. Their role includes, among other duties, facilitating communication between the person and the police, and ensuring that the person understands all aspects of the interview process to the best of their ability. The organisations consulted expressed concern that these advocates are viewed as volunteers rather than professionals.

Communication Rights Australia noted that abuse usually occurs in accommodation facilities. It identified concerns that management is not always accepting the person’s evidence due to communication difficulties, and that management may also sometimes fail to recognise the person’s right to advocacy assistance. There is also a concern about the lack of resources to assist and support people with disability with their communication support needs. Disability Justice Advocacy provided an example to illustrate what may happen when a person with disability has no independent support to communicate their complaint and the inability of police, through an apparent lack of training, to interview a person who cannot talk, read or write.

X was a resident in a community residential unit. X had limited communication and needed time to be understood. X was being abused by a staff member, but could not express this. Every time the staff member went near him, X would scream and push the staff member away.

X’s ability to give evidence was deemed to be unreliable.

Victoria Legal Aid also identified physical access to a police station to report incidents, itself, as a potential barrier to people with disability accessing justice.

The Anne McDonald Centre noted some reports where the police were very helpful and knowledgeable about disability. The police showed understanding and patience towards communication methods of people with disability. The Centre reported that its staff find the police very good, that they have obviously completed a lot of training, and they are sympathetic and patient with people with disability’s different modes of communication. A representative of the Centre gave the following example:

X uses a pointing board and electronic board. He complained of abuse. The police were receptive to his communication method and took down the details, and the case went to the Magistrates Court.

However, there was a problem with X’s lawyers. They were not receptive to how X communicated and insisted X spell out every word instead of allowing the speech therapist to complete X’s sentences when it was obvious what X was saying.

X’s case was referred to the County Court. Both the judge and jury were good. A speech pathologist assisted X. However, the lawyer made X spell out the whole oath, which was an appalling waste of time.

X used a word board, which was agreed to by everyone. The trial was a fair trial. However, it was X’s word against the perpetrator. There was no further evidence so the perpetrator was found not guilty. However, the system worked well for X, as he could use his method of communication, both his alphabet pointing boards, and had the accommodation and support to access the justice system on an equal basis as the rest of society.

### Barriers facing Aboriginal and Torres Strait Islander people with disability

The consultations indicated that lawyers and solicitors often do not have experience, knowledge or understanding of Aboriginal and Torres Strait Islander people with disability. This lack of experience causes many problems when trying to engage with lawyers and solicitors. FPDN said that lawyers and solicitors need to gain greater cultural awareness when interacting with Aboriginal and Torres Strait Islander people with disability; for example, hearing impairment is not visible and may be mistaken for misbehaviour; the same may also happen with cognitive disability. This is particularly problematic because of the widely recognised overrepresentation of Aboriginal and Torres Strait Islander People in the criminal justice system.

### Lack of recognition of legal capacity

People with intellectual and mental health disability are often denied the legal capacity to take legal action. According to DPO Australia:

… the whole area of mental health justice needs major reform or even to be discarded. There is a need to change the law which denies that capacity.

### Inaccessibility of courts

Often people with disability are faced with the issues of inaccessibility of the courts. PWDA observed that people with disability are required to contact court buildings to check they are wheelchair accessible before their case is heard. PWDA argued that court buildings should be more aware of the concept of ‘reasonable accommodation’ to ensure all courts are wheelchair accessible. People with disability also need to be more aware of their rights in this regard.

Women with Disabilities Victoria (WDV) referred to its ‘Voices Against Violence’ research, during which:

… a woman talked about having to just about wheel over the respondent’s feet in the courtroom, and there was all these issues about lack of AUSLAN interpreters, judges not understanding that people couldn’t hear them if they were low in hearing; those sorts of things.

WDV conducted a survey of around 46 court users—people who used courts and worked in courts—and in the process discovered that courts (unlike most government departments) did not have disability action plans.

## Recommendations for research and reform

### Research

1. Research should include greater representation of people with disability. This means ensuring people with disability can genuinely have input in research projects and in the impact of those projects. Clear statements and policies are required to ensure that participation and co-production are implemented.[[128]](#footnote-128)

### Review of legislation

1. Discussion and review of mental health legislation is required to enable people with mental impairments to have and exercise their legal capacity.[[129]](#footnote-129)
2. The recommendations of numerous state, territory and commonwealth reports on barriers to access to justice for people with disability should be given greater attention. For example, Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (Australian Law Reform Commission, 2014); Australian Human Rights Commission, *Equal Before the Law: How the criminal justice system is failing people with disability* (Australian Human Rights Commission, 2016).

### Disability awareness training

1. More disability awareness training is needed for all participants in the justice system, including police, legal practitioners, and the judiciary. This training needs to cover how to respect people with disability on an equal basis with others, especially in the area of communication generally, complaints handling, cross-examination, and other areas.[[130]](#footnote-130) This training must be culturally appropriate for different communities, including Aboriginal and Torres Strait Islander people.[[131]](#footnote-131)

### Disability justice plans

1. Disability justice plans must be developed and implemented in all areas of the justice system.[[132]](#footnote-132)

### Increased support for people with disability going through the justice system

1. There must be more support for people with disability going through the justice process. This includes witness intermediaries in the form of independent communication experts, similar to the effective process adopted in the United Kingdom.[[133]](#footnote-133)
2. Before any meetings or legal proceedings begin, the person’s disability and support needs must be established and catered for.[[134]](#footnote-134) This includes:
   1. ensuring a comfortable and familiar environment for people with intellectual disability to be interviewed;
   2. applying for legal aid as soon as a complaint or issue arises;
   3. ensuring family members are informed of the process;
   4. ensuring people with disabiltiy are given the opportunity to understand the law and be better informed;
   5. developing a mentoring program; and
   6. educating people in day services about legal processes.
3. Education about disability is needed in all areas of the judicial process.

### Changes in judicial knowledge and practices

1. A group should be established to establish an integrated, multi-disciplinary approach to integrate disability specialist knowledge with Aboriginal and Torres Strait Islander specialist knowledge. This could be co-ordinated by the Attorneys General.
2. Investigation is required into the role magistrates and parole boards can play to steer Aboriginal and Torres Strait Islander people (with and without disability) away from incarceration.[[135]](#footnote-135)
3. Expansion of the Assessment and Referral Court to other courts and jurisdictions, that is, beyond the Victorian Magistrates’ Court. The Assessment and Referral Court is a separate court, which gives more time for people with disability to talk and to link with lawyers and provides more time for people with disability to understand the process and to be heard.[[136]](#footnote-136)
4. Until the Assessment and Referral Court is established in all courts, a triage system should be implemented in courts so that people with disability can move straight into a courtroom setting that is not busy or rushed and where they can access a lawyer. A support worker can assist with communication, and people with disability can learn and understand the court processes in their own time.[[137]](#footnote-137)
5. It is imperative that people with disability are linked to a lawyer earlier so the lawyer can become aware of the person’s communication style and needs. Support workers should be made aware of the need to engage a lawyer as soon as possible after an incident or issue arises.[[138]](#footnote-138)
6. Professionals in the justice system need to understand that they may have to adjust their methods of communication so as to include all people. This might involve, for example, slowing the process down and using an independent communication support person. Communication must be acknowledged as a two-way process. An equal interaction would include making available supports the individual requires to ensure they can have their message clearly articulated to police, lawyers, and courts.[[139]](#footnote-139)
7. Alternative methods of interviewing should be established to accommodate various disabilities, especially communication and cognitive impairments.
8. Availability of well-trained communication partners must be increased. People with hearing impairment and communication impairments should be able to choose their interpreaters and/or communication partners.
9. Extra time for hearings should be allowed where required.
10. In the particular case of New Zealand, the following is required:
    1. Increased resources for supported decision-making, and better processes for providing support (including sign language interpretation) for making complaints, should be provided.[[140]](#footnote-140)
    2. ‘Disability Action Plans’ must be developed in all community services to ensure people with disability can access them.
    3. The *Mental Health Act*, guardianship and property laws should be reviewed to ensure they are consistent with the CRPD.

# Conclusion

The literature review identified some areas of recent research growth in access to justice for people with disability, such as Aboriginal and Torres Strait Islander people with disability, the criminal justice system and women with disability experiencing violence. However, it also identified significant gaps in the recent research, including the following:

* a lack of application of the principle of universal legal capacity;
* barriers facing women with disability in accessing justice for issues beyond violence;
* access to justice for people with disability living in institutional settings;
* access to justice for people with disability in rural and regional settings;
* civil and administrative justice procedures and the inclusion of people with disability; and
* barriers facing migrants, immigrant, refugees, and people with disability from culturally and linguistically diverse backgrounds.

This list is by no means exhaustive and provides only a small window into the vast research needs to secure access to justice for people with disability.

Furthermore, this review has highlighted the importance of a system-wide reform to provide overall access to justice for people with disability and address the over-representation of people with disability in the justice system. Therefore, future research will also need to address the failures of the justice system in a holistic sense, in addition to the particular issues identified.

The consultation touched on many of the research and practice gaps highlighted in the literature review. These include:

* insufficient recognition of legal capacity in legislation (especially mental health legislation) and practice;
* inaccessibility of legal processes in the criminal justice system, including a lack of recognition of alternative forms of communication and a failure to provide education and support;
* lack of awareness and adequate responses to the specific experiences and requirements of Aboriginal and Torres Strait Islander people with disability; and
* a failure to implement the recommendations of prior research and reviews.

The literature review and the consultation with DPOs also raised the higher-level issues of the design and conduct of research, emphasising the need to have people with disability involved as collaborators and partners on access to justice research. This has implications beyond the conduct of specific research projects, and beyond the issue of access to justice narrowly defined. Improvements to access to education and employment are also essential to ensure that people with disability can become researchers and lead changes to the law, policy and practice.

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2. Gwynnyth Llewellyn, *Report of Audit of Disability Research in Australia* (Centre for Disability Research and Policy, Faculty of Health Sciences, University of Sydney, 2014). [↑](#footnote-ref-2)
3. *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; note also art 2 ‘Definitions’. [↑](#footnote-ref-3)
4. Ibid art 13(1). [↑](#footnote-ref-4)
5. Ibid art 13. [↑](#footnote-ref-5)
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9. See, for example, Piers Gooding, Bernadette McSherry, Anna Arstein-Kerslake and Louis Andrews, ‘Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change’ (2017) 40 *Melbourne University Law Review* 816; Marie Segrave, Claire Spivakovsky and Anna Eriksson, ‘The Maelstrom of punishment, mental illness, intellectual disability and cognitive impairment’ (2017) 19(3) *Punishment and Society* 267; Barbara Carter, *Rebuilding the village: Supporting families where a parent has a disability Report 2: Child Protection* (Office of the Public Advocate, Victoria, 2015); Stacey Lim, Ian Lambie and Erana Cooper, ‘New Zealand Youth That Sexually Offend: Improving Outcomes for Maori Rangatahi and Their Whanau’ (2012) 24(5) *Sexual Abuse: A Journal of Research and Treatment* 459. [↑](#footnote-ref-9)
10. Llewellyn, above n2. [↑](#footnote-ref-10)
11. Ibid 8. [↑](#footnote-ref-11)
12. A full analysis of judicial commentary, case law and legislation was beyond the scope of this review, however while there have been some reforms to the law to improve access to justice for people with disability in the criminal justice system for example access to communication assistance, most of the legislation across Australia and New Zealand refers to ‘special measures’, ‘special witnesses’, ‘vulnerability’, ‘competence and lack of capacity’. Examples include but are not limited to section 13 in the Uniform Evidence Legislation (see further, *Evidence Act 1995* (Cth)) or provisions such as *Evidence Act 1906* (WA) s 106F; *Criminal Procedure Act 1986* (NSW) ss 275B, 306ZK and Sch 2, cls 88–90; *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) ss 8 & 12 amending the *Evidence Act 1929* (SA) to allow for special arrangements for ‘vulnerable witnesses’ rather than adopting rights-based terminology. [↑](#footnote-ref-12)
13. As well as references to ‘vulnerability’ and the medical model of disability in legislation, see above n12, commentators such as Steele et al point to the problem of using the medical model of disability as part of court diversion programs: Linda Steele, Leanne Dowse and Julian Trofimovs, ‘Who is Diverted? Moving beyond Diagnosed Impairment towards a Social and Political Analysis of Diversion’ [2016] 8 *Sydney Law Review* 179. [↑](#footnote-ref-13)
14. Linda Steele, ‘Policing normalcy: sexual violence against women offenders with disability’ (2017) 31(3) *Continuum Journal of Media & Cultural Studies* 422; Claire Spivakovsky and Kate Seear, ‘Making the abject: problem-solving courts, addition, mental illness and impairment’ (2017) 31(3) *Continuum Journal of Media and Cultural Studies* 458. Note also the earlier analysis in Claire Spivakovsky, ‘From punishment to protection: Containing and controlling the lives of people with disabilities in human rights’(2014) 16(5) *Punishment and Society* 560. [↑](#footnote-ref-14)
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16. The literature search included Google Scholar and University of Melbourne Discovery Portal as well as searches through Australian Government and federal, state and territory parliamentary websites.

    Google Scholar searches used the following search terms: ‘disability access to justice legal New Zealand’, ‘disability access to justice rural and regional New Zealand’, ‘access to justice for people with disability’, ‘access to justice for people with disability Australia’, ‘access to justice for people with disability New Zealand’, ‘right to access to justice disability Australia’, right to access to justice disability New Zealand’, ‘access to justice for people with disability’, ‘disability access to justice’, ‘disability access to justice Australia’, ‘disability access to justice New Zealand’, ‘dispute resolution and people with disability’, ‘child protection and disability’, ‘civil remedies access to justice for people with disability’, ‘universal access to justice for people with disability Australia’.

    University of Melbourne Discovery Portal searches included: ‘access to justice for people with disability’, ‘access to justice for people with disability Australia’, ‘access to justice for people with disability New Zealand’, ‘right to access to justice disability Australia’, ‘disability access to justice rural and regional Australia’, ‘disability access to justice rural and regional New Zealand’. [↑](#footnote-ref-16)
17. For a discussion of the right, see, eg, Flynn, above n15; Bernadette McSherry, ‘Regulating seclusion and restraint in health care settings: The promise of the *Convention on the Rights of Persons with Disabilities*’ (2017) 53 *International Journal of Law and Psychiatry* 39; Gooding et al, above n9; Arstein-Kerslake and Flynn, above n15; Weller, above n15; Piers Gooding and Charles O’Mahoney, ‘Laws on unfitness to stand trial and the UN *Convention on the Rights of Persons with Disabilities*: Comparing reform in England, Wales, Northern Ireland and Australia,’ (2016) 44 *International Journal of Law, Crime and Justice* 122; Heather Douglas and Paul Harpur, ‘Intellectual disabilities, domestic violence and legal engagement’ (2016) 31(3) *Disability and Society* 305. [↑](#footnote-ref-17)
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19. *Convention on the Rights of Persons with Disabilities*, above n3, art 12(3). [↑](#footnote-ref-19)
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21. See, eg, Lucy Series, ‘Relationships, autonomy and legal capacity: Mental capacity and support paradigms’ (2015) 40 *International journal of law and psychiatry* 80; Peter Bartlett, ‘The United Nations *Convention on the Rights of Persons with Disabilities* and mental health law’ (2012) 75(5) *The Modern Law Review* 752; Geneva Richardson, ‘Mental disabilities and the law: From substitute to supported decision-making?’ (2012) 65(1) *Current Legal Problems* 333; Jill Stavert, ‘The exercise of legal capacity, supported decision-making and Scotland’s mental health and incapacity legislation: working with CRPD challenges’ (2015) 4(2) *Laws* 296; Eilionóir Flynn, ‘Mental (in) Capacity or Legal Capacity: A Human Rights Analysis of the Proposed Fusion of Mental Health and Mental Capacity Law in Northern Ireland’ (2013) 64 *Northern Ireland Legal Quarterly* 485; George Szmukler, Rowena Daw and Felicity Callard, ‘Mental health law and the UN *Convention on the Rights of Persons with Disabilities*’ (2014) 37(3) *International journal of law and psychiatry* 24. [↑](#footnote-ref-21)
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23. See, eg, the [European Union funded *Person Project*](http://www.eu-person.com/): <<http://www.eu-person.com/>>; the [Bulgarian supported decision-making project](http://zelda.org.lv/en/news/supported-decision-making-bringing-change-to-lives-of-people-with-mental-disabilities-2427): <<http://zelda.org.lv/en/news/supported-decision-making-bringing-change-to-lives-of-people-with-mental-disabilities-2427>>. [↑](#footnote-ref-23)
24. Office of the Public Advocate (South Australia), [*Supported Decision Making*](http://www.opa.sa.gov.au/resources/supported_decision_making)<<http://www.opa.sa.gov.au/resources/supported_decision_making>>. [↑](#footnote-ref-24)
25. Office of the Public Advocate (Victoria), [*Supported Decision Making*](http://www.publicadvocate.vic.gov.au/advocacy-research/supported-decision-making)<<http://www.publicadvocate.vic.gov.au/advocacy-research/supported-decision-making>>. [↑](#footnote-ref-25)
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27. Ageing, Disability and Home Care, NSW Government, [*Supported Decision Making*](https://www.adhc.nsw.gov.au/individuals/inclusion_and_participation/supported-decision-making)<<https://www.adhc.nsw.gov.au/individuals/inclusion_and_participation/supported-decision-making>>. [↑](#footnote-ref-27)
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57. See, eg, the Children’s Champions Pilot in NSW and the use of Communication Partners in SA discussed in the Tasmania Law Reform Institute Issues Paper; Tasmania Law Reform Institute, above n55. At the time of writing this paper the [Victorian Government had announced funding](http://www.premier.vic.gov.au/supporting-victims-of-crime-in-the-justice-system/) for an Intermediary Pilot scheme in the Victorian County and Supreme Courts but further details regarding the pilot are yet to be released <<http://www.premier.vic.gov.au/supporting-victims-of-crime-in-the-justice-system/>>. [↑](#footnote-ref-57)
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72. See, eg, Melbourne Social Equity Institute, University of Melbourne, [*Unfitness to Plead Project*](http://socialequity.unimelb.edu.au/research/projects/disability-and-mental-health/unfitness-to-plead)<<http://socialequity.unimelb.edu.au/research/projects/disability-and-mental-health/unfitness-to-plead>>; see also Gooding et al, above n9, which uses a CRPD rights-based framework. However, Joseph Allan and Vincent Egan, ‘Fitness to stand trial in New Zealand: Different factors associated with fitness to stand trial between mentally disordered and intellectually disabled defendants in the New Zealand Criminal justice system’ (2014) 21(5) *Psychiatry, Psychology and the Law* 658 is less focused on the rights-based approach. [↑](#footnote-ref-72)
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92. McSherry et al, above n71. [↑](#footnote-ref-92)
93. Llewellyn et al, above n2. [↑](#footnote-ref-93)
94. Carter, above n9.Note also, The Parenting Research Centre, [*Parenting Young Children: Helping parents with an intellectual disability learn parenting skills*](http://www.parentingrc.org.au/case-studies/9-enhancing-service-capacity/46-parenting-young-children-helping-parents-with-an-intellectual-disability-learn-parenting-skills-46) <<http://www.parentingrc.org.au/case-studies/9-enhancing-service-capacity/46-parenting-young-children-helping-parents-with-an-intellectual-disability-learn-parenting-skills-46>> and Debbie Vilensky, ‘[Parents with a disability 'judged on parental skills before they can learn', inquiry hears](http://mobile.abc.net.au/news/2015-04-16/parents-with-a-disability-treated-almost-like-criminals/6399036)’, ABC (online) 16 April 2015 <<http://mobile.abc.net.au/news/2015-04-16/parents-with-a-disability-treated-almost-like-criminals/6399036>>. [↑](#footnote-ref-94)
95. Eileen Baldry, Leanne Dowse, Ruth McCausland and Melissa Clarence, *Lifecourse Institutional Costs of homelessness for vulnerable groups, Final report* (Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs, 2012). [↑](#footnote-ref-95)
96. See, eg, Carter, above n9.Arguably in other jurisdictions although comprehensive data to this end has not formed part of the literature used for this review/requires further investigation. [↑](#footnote-ref-96)
97. Cashman and Thomas, above n39. [↑](#footnote-ref-97)
98. Blagg et al, above n41; Clare Townsend, Kate Hammill and Paul White, ‘Fetal alcohol disorder, disability and the criminal justice system’ (2015) 8(17) *Indigenous Law Bulletin* 30. [↑](#footnote-ref-98)
99. [Kirsten](https://strathprints.strath.ac.uk/view/author/455054.html) Stalker, Julie Taylor, Debi Fry, Chris Jones Audrey Cameron, Alasdair Stewart and Anita Franklin, [*Protecting disabled children: what the latest research tells us*](http://www.communitycare.co.uk/2015/08/14/protection-disabled-children-latest-research-tells-us/) (Community Care, 2015).<http://www.communitycare.co.uk/2015/08/14/protection-disabled-children-latest-research-tells-us/>. [↑](#footnote-ref-99)
100. Ibid. [↑](#footnote-ref-100)
101. See, eg, Gooding et al, above n9; Hafekost et al, above n42; McCausland and Baldry, above n40; Lloyd et al, above n42; Blagg et al, above n41; Haysom et al, above n42; Trofimovs and Dowse, above n42; Jonathon Hunyor, ‘[A Kangaroo Loose in the Top Paddock – Criminal Justice, Mental Impairment and Fitness for Trial in the Northern Territory’](http://www.naaja.org.au/wp-content/uploads/2014/07/A-Kangaroo-Loose-in-the-Top-Paddock-Criminal-Justice-Mental-Impairment-and-Fitness-for-Trial-in-the-Northern-Territory.docx) (Paper presented at the Uluru Criminal Law Conference, Uluru, 31 August 2012) <<http://www.naaja.org.au/wp-content/uploads/2014/07/A-Kangaroo-Loose-in-the-Top-Paddock-Criminal-Justice-Mental-Impairment-and-Fitness-for-Trial-in-the-Northern-Territory.docx>>. [↑](#footnote-ref-101)
102. Ibid. [↑](#footnote-ref-102)
103. Hunyor, above n101. Note also Jonathon Hunyor, ‘Imprisonment: Paperless arrests and the rise of executive power in the Northern Territory’ (2015) 8(21) *Indigenous Law Bulletin* 3. [↑](#footnote-ref-103)
104. See, eg, Lim et al, above n9; Volmaine Toki, ‘Therapeutic jurisprudence and mental health courts for Maori’ (2010) 33 *International Journal of Law and Psychiatry* 440. [↑](#footnote-ref-104)
105. Lim et al, above n9, 459. [↑](#footnote-ref-105)
106. See, eg, Lloyd et al, above n42. [↑](#footnote-ref-106)
107. Melbourne Social Equity Institute, *Unfitness to Plead Project*,above n72; see also Stella Aroha Black, Jacquie Kidd, Katey Thom, Alice Mills, Tracey McIntosh and Khylee Quince, ‘Researching Ngā Kōti Rangatahi – Youth Courts on Marae: Koia te Hāngaitanga -That’s the right way?’ (2017) 1(1) *The Ethnographic Edge* 33–45. [↑](#footnote-ref-107)
108. Ibid. [↑](#footnote-ref-108)
109. Karen Soldatic, Kelly Somers, Amma Buckley and Caroline Fleay, ‘‘Nowhere to be found’: disabled refugees and asylum seekers within the Australian resettlement landscape’ (2017) 2(1) *Disability and the Global South* 501. [↑](#footnote-ref-109)
110. Ibid. [↑](#footnote-ref-110)
111. Ibid. [↑](#footnote-ref-111)
112. Timothy P Fadgen and Guy Charlton, ‘Humanitarian Concerns and Deportation Orders Under the *Immigration Act 2009*; Are International Obligations Enough Protection for the Immigrant with Mental Illness?’ (2012) 43 *Victoria University of Wellington Law Review* 423. [↑](#footnote-ref-112)
113. Ibid. [↑](#footnote-ref-113)
114. Ibid. [↑](#footnote-ref-114)
115. See, eg, Steele, above n14; Hafekost et al, above n42; Dowse, Soldatic, Spangaro, and Toorn, above n42; Dowse, Frohmader and Didi, above n42; Segrave et al, above n9; Disabled Peoples Organisation Australia, ‘List of issues [Australia] to be adopted during the 18th Session of the Committee on the Rights of Persons with Disabilities’*,* Submission to the UN Committee on the Rights of Persons with DisabilitiesPrepared, 2017; Weller, above n15; Douglas and Harpur, above n17. See also Patsie Frawley, Sue Dyson, Sally Robinson and Jen Dixon., *Landscapes: State of knowledge* — *What does it take? Developing informed and effective tertiary responses to violence and abuse of women and girls with disabilities in Australia: State of knowledge paper* (Australia’s National Research Organisation for Women’s Safety, 2015) <<https://anrows.org.au/sites/default/files/3_3.4%20Landscapes%20Disability.pdf>>. [↑](#footnote-ref-115)
116. Frohmader and Brophy, above n115. [↑](#footnote-ref-116)
117. Dowse, Soldatic, Spangaro, and Toorn, above n42. [↑](#footnote-ref-117)
118. Katrina Pestka and Sarah Wendt, ‘Belonging: women living with intellectual disabilities and experiences of domestic violence’ (2014) 29(7) *Disability & Society* 1031. [↑](#footnote-ref-118)
119. Australian Cross Disability Alliance, above n15. See also the discussion and recommendations for reform or further investigation contained in the grey literature, eg, Senate Community Affairs References Committee, Parliament of Australia, [*Violence, abuse and neglect against people with disability in institutional and residential settings*](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report)*, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (2015) <<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report>>; Senate Community Affairs Reference Committee, Parliament of Australia, [*Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia: Final Report*](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report) (2016) <<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report>>; Law Reform Committee, Parliament of Victoria, [*Inquiry into Abuse in Disability Services: Final Report*](https://www.parliament.vic.gov.au/fcdc/inquiries/article/1851)  (2016) <<https://www.parliament.vic.gov.au/fcdc/inquiries/article/1851>>. [↑](#footnote-ref-119)
120. Dowse, Soldatic, Spangaro, and Toorn, above n42.

     Pestka and Wendt, above n118. [↑](#footnote-ref-120)
121. Douglas and Harpur, above n17. [↑](#footnote-ref-121)
122. Note the discussion in Healey, above n62. Note also the arguments put forward in Carolyn Frohmader, Leanne Dowse and Aminath Didi, [*Preventing violence against women and girls with disabilities: Integrating a human rights perspective*](http://wwda.org.au/wp-content/uploads/2013/12/Think_Piece_Revised_Edition.pdf) (Women with Disabilities Australia, 2015) <http://wwda.org.au/wp-content/uploads/2013/12/Think\_Piece\_Revised\_Edition.pdf>. [↑](#footnote-ref-122)
123. Hamilton, above n91, 61. [↑](#footnote-ref-123)
124. Dowse, Soldatic, Frohmader and Toorn, above n62; Dowse, Soldatic, Spangaro, and Toorn, above n42; Healey, above n62. [↑](#footnote-ref-124)
125. Llewellyn et al, above n2. [↑](#footnote-ref-125)
126. Rebecca Barton, Tracy Robinson, Gwynnyth Llewellyn, Kathy Thorncraft and Andy Smidt, ‘Rural and remote perspectives in disability and mental health research in Australia: 2000 – 2013’ (2015) 13(1) *Advances in Mental Health* 30. [↑](#footnote-ref-126)
127. See, for example, Blagg et al, above n41; Barton et al, above n126. [↑](#footnote-ref-127)
128. Recommended by DPO Australia. [↑](#footnote-ref-128)
129. Recommended by DPO Australia. [↑](#footnote-ref-129)
130. Recommended by Communication Rights Australia, VALiD, and People with Disabilities Assembly, New Zealand. [↑](#footnote-ref-130)
131. Recommended by First Peoples Disability Network. [↑](#footnote-ref-131)
132. Recommended by People With Disability Australia. [↑](#footnote-ref-132)
133. Recommended by People With Disability Australia. [↑](#footnote-ref-133)
134. Recommended by VALiD. [↑](#footnote-ref-134)
135. Recommended by First Peoples Disability Network. [↑](#footnote-ref-135)
136. Recommended by Victoria Legal Aid. [↑](#footnote-ref-136)
137. Recommended by Victoria Legal Aid. [↑](#footnote-ref-137)
138. Recommended by Victoria Legal Aid. [↑](#footnote-ref-138)
139. Recommended by Communication Rights Australia. [↑](#footnote-ref-139)
140. Recommended by Disabled Peoples’ Assembly NZ. [↑](#footnote-ref-140)