

Submission to the Office of the High Commissioner for Human Rights

Article 13 – Access to Justice, Convention on the Rights of Persons with Disabilities

10 May 2017

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About Victoria Legal Aid

Victoria Legal Aid (**VLA**)¹ is an independent statutory body established under the *Legal Aid Act 1978* (Vic) to provide access to justice to the community through legal advocacy, advice and assistance to socially and economically disadvantaged persons across the state of Victoria, Australia. Our organisation provides client-centred services through dedicated thematic practice areas to address the legal needs of those most marginalised, including persons with disabilities.

VLA is a leading provider of legal services to persons with disabilities in Victoria, with 22,580 clients identifying as having a disability or mental health condition in 2015-2016². VLA's service delivery model takes a dual-pronged approach to promoting access to justice for this client group. We provide both specialist legal services and non-legal advocacy and support. Our Civil Justice Program includes a specialist legal service, the Mental Health and Disability Law sub-program (**MHDL**), which provides advice and representation at courts, tribunals and psychiatric hospitals for persons with disabilities and mental health conditions.

MHDL lawyers work in partnership with Independent Mental Health Advocacy (**IMHA**), a state-wide non-legal advocacy service for persons receiving compulsory treatment under the *Mental Health Act 2014* (Vic) (**Mental Health Act**). Advocates in IMHA support and assist people to participate in decisions about their assessment, treatment and recovery and empower them to recognise and pursue legal remedies.

Both these programs are explained in further detail below from pages 4–7.

¹ For more information, please see our website: <https://www.legalaid.vic.gov.au/>

² Annual Report 2015-16, Victoria Legal Aid.

Executive Summary

VLA welcomes the opportunity to provide this submission to the Office of the High Commissioner for Human Rights (**OHCHR**). As a legal aid programme with specialist services to improve access to justice for persons with disabilities, we hope to provide a valuable stakeholder perspective and illustrative data to the study on Article 13 (**Art 13**) of the Convention on the Rights of Persons with Disabilities (**CRPD**). Our submission proceeds in three parts.

Our submission focusses largely on our services for persons appearing before the Mental Health Tribunal in Victoria and who are subject to compulsory treatment orders under the Mental Health Act. However, Victoria Legal Aid also engages with people with disability in a range of other, important, ways through our large criminal practice, our welfare entitlements practice and in our equality law program. We enclose a copy of our recent submission to the Australian Disability Discrimination Commissioner highlighting, among other things, a range of procedural modifications which we consider are necessary to meaningfully realise access to justice in the context of criminal proceedings (see, particularly p 5 – 8).

This submission is divided into four parts.

First, we provide a brief snapshot of disability, legal need and legal aid funding in Australia.

Second, we outline VLA's operating context, focussing on our rights-based approach to legal assistance and non-legal advocacy for persons with disabilities. Throughout our practice, we have witnessed a clear connection between the adequacy of resources provided for legal assistance and significant service gaps. In our experience, limited funding has led to limited access to justice for persons with disabilities in a context where the interests and rights concerned are both significant and fundamental.

Third, we provide our comment on Art 13 as informed by our practice experience of the relationship between access to justice for persons with disabilities and accessible specialist legal aid assistance and support services.

Fourth, we outline the legal, policy framework and legal aid funding issues in Australia and Victoria specifically on access to justice for persons with disabilities, including the provision of procedural and age-appropriate supports in judicial, quasi-judicial and administrative processes.

Snapshot of legal issues, disability and legal aid in Australia

Australian disability law and policy is heavily influenced by the CRPD. It is difficult, however, for a person to assert their rights if they:

- (a) are not aware of their rights
- (b) cannot identify that their rights have been infringed
- (c) do not know how to exercise their rights
- (d) are not supported to exercise their rights.

These four challenges to realising rights are exacerbated for clients with disability. This is because our clients frequently experience legal and medical interventions, poverty, institutionalisation or often have higher support needs.

In a 2014 review of access to justice and the legal assistance sector funding in Australia, the Productivity Commission³ found that people with disability:

- are more likely than those without disability to have a legal problem;⁴
- are more likely to be affected by multiple legal problems;⁵
- are more likely to be affected by complex, clustered, substantial legal problems⁶ which are less likely to be resolved.

As a result, legal assistance has a crucial role in rights protection for persons with disabilities in Australia.

Australia is, however, one of the lower funding nations of legal assistance services per capita.⁷ The way legal assistance is funded in Australia has an especially acute impact on people with disability. Comparatively limited funding of legal services creates a persistent and significant risk (and, in our experience, an every-day reality) of an access to justice gap for persons with disabilities.

³ The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians.

⁴ Australian Government, Productivity Commission, *Access to Justice Arrangements Report* (2014, AGP) Vol 1 at 97. Accessible online at: <http://www.pc.gov.au/inquiries/completed/access-justice/report>.

⁵ *Ibid* at Vol 1 at 95.

⁶ *Ibid* at Vol 1 at 97

⁷ *Ibid* at Vol 2 at 735.

VLA, mental health and disability law and accessible justice

Background

VLA's most intensive users of legal services⁸ are more likely to have a mental health condition, acquired brain injury or cognitive disability, reflecting the wide access to justice gap. This submission will focus on our services for persons appearing before the MHT and who are subject to compulsory treatment orders.

On any given day in Victoria, 3,000 people are subject to orders made by the Mental Health Tribunal (**MHT**) for compulsory treatment under the Mental Health Act. Ninety-three percent of legal representation at the MHT is provided by VLA's outreach duty lawyer service, with MHDL providing over 70 services every fortnight at over 30 different venues. In 2015-2016, VLA represented almost 1000 clients on 1185 occasions. While we use a nuanced demand model to allocate resources under significant demand pressure, ultimately less than 20% of persons appearing before the MHT have legal representation, and service gaps in access to advice services heavily contribute to diminished access to justice.⁹

VLA's mental health program includes Mental Health and Disability Law (**MHDL**) and Independent Mental Health Advocacy (**IMHA**). MHDL lawyers and IMHA advocates provide integrated legal and non-legal advocacy services for people subject to compulsory treatment under the Mental Health Act and facilitate links to other important services within VLA and to external organisations.

We work within the justice and mental health systems to ensure the rights of people experiencing compulsory treatment are promoted and respected.

Mental Health and Disability Law sub-program

VLA's MHDL sub-program seeks to promote and facilitate effective access to justice for persons with disabilities through provision of legal and procedural advice, information and representation in both court and tribunal settings.

Key activities for MHDL include:

- (a) phone advice;
- (b) legal assistance related to Electroconvulsive Treatment Order (**ECT**) and Inpatient Treatment Order (**ITO**) matters and legal advice concerning Community Treatment Order (**CTO**) matters under the Mental Health Act;
- (c) legal assistance for Forensic Leave Panel hearings for those under the *Crimes (Mental Impairment and Unfitness to be Tried Act (CMIA)*; and
- (d) legal assistance for Guardianship and Administration orders under the *Guardianship and Administration Act 1986 (Vic)*.

The MHDL sub-program takes a rights-based approach to practice, flowing from, in part, the right based orientation of the Mental Health Act. Our approach to inclusive and rights-based legal assistance has demonstrated that lawyers can support persons with disabilities to meaningfully access oversight mechanisms and minimise restrictions on human rights in a number of ways:

⁸ While these users represent 1.2 per cent of VLA's total clients, they constitute 12 % of services provided during that period. See, Rosy Jolic and Victoria Legal Aid, *Research brief: Victoria Legal Aid client profiles – high-contact users of legal aid services* (2014) at 2. Accessible online at: <http://www.rk.com.au/assets/PDF/vla-client-profiles.pdf>

⁹ Data is drawn from our client records.

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- (a) listening and acting on instructions rather than perceived 'best interests' to ensure their wishes and voice are heard
 - (b) taking action to remove legal restrictions on rights and to increase freedoms (such as access to community activities for inpatients)
 - (c) supporting the person to participate in the hearings and decisions that directly affect them
 - (d) making sure hearings are conducted inclusively and fairly and that the governing legislative tests lead the analysis, rather than a broader discussion of a client's 'best interests'
 - (e) ensuring decisions impacting human rights restrictions are legally valid and evidence-based
 - (f) helping those subject to orders and other interventions to understand the rationale behind the restrictions on them and how to minimise or challenge those restrictions
 - (g) check, influence and challenge, when necessary, the way laws operate at a systemic level to maximise compatibility with human rights principles.

We set out key issues of relevance to your study below.

Resource limitations on providing legal assistance

Due to funding limitations, VLA cannot provide enough services to meet the demand for our services, resulting in reduced access to justice for persons with disabilities. In particular, VLA is concerned about representation rates for people facing MHT hearings in Victoria, compared with other jurisdictions.

The position in Victoria is in contrast to comparable jurisdictions, such as New South Wales (77% legally represented in 2014-2015¹⁰), England, New York and Washington (in these jurisdictions all compulsory inpatients are entitled to legal representation at hearings related to their detention and compulsory treatment). In England, representation is funded without reference to a client's means; the only criterion is whether it would be reasonable. MHT matters are 'invariably' considered reasonable so merit funding for legal representation.¹¹

Compulsory treatment and access to justice

There are significant rights implications arising from the imposition of compulsory treatment. Those subjected to compulsory treatment, including those detained on an inpatient basis to receive that treatment, have many of their rights limited.¹²

There are significant demand pressures on VLA's services in this area however. After the passage of the Mental Health Act in 2014, there was an increase in MHT sittings. There are service gaps across the state of Victoria for persons facing ITO and ECT orders, and persons on CTOs are rarely able to access representation, because of the limited capacity of VLA to provide duty lawyer services.

The Mental Health Act requires that treatment be delivered in the least restrictive manner possible with the fewest restrictions on rights and dignity.¹³ Another goal of the Act was to protect the rights of

¹⁰ New South Wales Mental Health Review Tribunal, *Annual Report 2014-2015* (2015) at 24.

¹¹ Eleanore Fritze, *Shining a Light Behind Closed Doors*, Churchill Fellowship Report (2015) at 29. Accessible online at https://www.churchilltrust.com.au/media/fellows/Fritze_E_Shining_a_light_behind_closed_doors.pdf

¹² Including: The freedom to move around and be at liberty, freedom of where and with whom to live, freedom to have a family and to have contact with family, the right not to be tortured or subjected to other cruel, inhumane and degrading treatment or punishment; the right not to be subjected to medical treatment without consent, the right to live in the community; the right to privacy, freedom of decision-making about a wide range of matters, such as daily activities, financial affairs and the right to not have those decisions interfered with, the right to recognition of personal autonomy and legal capacity.

¹³ Mental Health Bill 2014, Second Reading.

those receiving assessment or treatment through keeping them informed of their rights and through support to exercise those rights. However, that goal is not fully realised in a system in which, partly due to resource constraints, less than one in five people before the MHT are legally represented.

Service Design

MHDL's service model has had to adapt to ensure those experiencing the greatest imposition on their rights and autonomy can be legally represented with our limited resources. Accordingly, VLA prioritises those who are subject to ECT orders. We recognise the permanent impact ECT can have on a person, the side-effects of ECT impairing a person's ability to self-represent, and have significant concerns with medical treatment without consent.

Our service also prioritises people subject to ITOs, particularly those who are experiencing their first involuntary admission due to the significant imposition and limitations on their rights and personal autonomy.

Due to resource constraints, we cannot represent everyone before the MHT. However, we allocate our existing resources in accordance with the following principles:

- (a) risk of fundamental rights infringement, such as ECT;
- (b) participation of the person concerned to have an active role and voice in proceedings; and
- (c) those who have multiple disabilities;
- (d) young persons;
- (e) those who would have difficulty communicating or participating without legal representation; and
- (f) other access to justice concerns including risks to the right to a fair hearing.

The objective legal merit of an application by an inpatient to challenge their treatment order is only one consideration in our decision whether we can represent them before the MHT. As we appreciate the importance of people having a voice in proceedings that intimately impact their lives as well as the need to support their active participation, we allocate resources in accordance with these principles. This does mean, however, that we cannot assist other sub-groups of clients before the MHT who could also benefit from legal representation, including those subject to CTOs.

Issues at the MHT that impact on legal representation

Following the enactment of the Mental Health Act, the number of hearings increased significantly.

Scheduling concerns are a particular issue for ECT matters. These matters are frequently scheduled on an ad-hoc basis. Between January – March 2016, 20% of ECT applications were heard the same day the application was made, 25% within a day and 22% within two days. In the context of limited legal services, the way ECT applications are currently scheduled present extreme challenges to arranging legal representation for a person, despite the significant rights at stake.

Independent Mental Health Advocacy

In August 2015, VLA commenced delivering a state-wide non-legal advocacy program, IMHA.¹⁴ IMHA team has a vision of promoting and supporting the human rights of people experiencing compulsory treatment in mental health care. IMHA was designed in consultation with people with lived experience of mental health issues and the mental health system and has an advisory group of people who have

¹⁴ Funded by the Victorian Department of Health and Human Services.

lived experience of mental health issues. IMHA works with people who are on inpatient or community-based compulsory treatment orders¹⁵, as well as those on forensic¹⁶ or security orders.¹⁷

IMHA is staffed by a team of 17 workers, including advocates, a senior consumer consultant and manager. The service works with consumers, support people, mental health services and the mental health system to embed supported decision making and recovery-orientated service delivery.

Advocates engage in representational (or instructed) advocacy, and by taking their instructions from consumers. This approach is intended to ensure that people are supported to exercise their rights, speak for themselves and have someone 'on their side' who can represent their views, preferences and concerns to service providers and other relevant stakeholders. Ultimately, IMHA always aims to support people to become empowered with self-advocacy skills so that they can advocate for themselves in the future.

Advocates also provide people with information about their rights and the mental health system and make referrals to legal, health and social welfare services. In support of access to justice by people receiving compulsory mental health treatment, advocates provide people with linkage to VLA's MHDL program and as well as coaching for people to self-advocate at mental health tribunal hearings.

With the creation of IMHA, the close collaboration between advocates and lawyers allows VLA to provide holistic client-centred services so MHDL can assist clients to overcome barriers to participation, including understanding legal information and communication with lawyers¹⁸.

In recognition of the implications for access to justice and reflecting our practice experience in holistic service delivery, we comment below on how the requirement to provide procedural accommodations and supports under Art 13 necessarily includes access to legal assistance and other supports.

¹⁵ See, Mental Health Act, ss 28, 39, 45, 52.

¹⁶ See, CMIA, s 26.

¹⁷ See, Mental Health Act, s 275.

¹⁸ Australian Government, Productivity Commission, *Access to Justice Arrangements Report* (2014, AGP) Vol 1 at 176. Accessible online at: <http://www.pc.gov.au/inquiries/completed/access-justice/report>.

Art 13 and Accessible Legal Assistance

Access to legal remedies and the opportunity to respond to legal interventions proportional to the rights infringed is an essential element of access to justice for persons with disabilities. Legal systems are complex and difficult to navigate for the uninitiated. Persons with disabilities face multiple barriers in realising access to justice. This is why access to justice for persons with disabilities also necessitates access to supports and legal representation.

The relationship between access to legal representation and access to justice in the CRPD is well established. In the first General Comment on the CRPD, the Committee on the Rights of Persons with Disabilities (**the Committee**) stated that ‘State parties must... ensure that persons with disabilities have access to legal representation on an equal basis with others’ including the opportunity to challenge interference with their legal capacity.¹⁹

Access to Justice and related rights

As a ‘threshold right’, access to justice is fundamental for participation and inclusion in society. This is because it provides the mechanism through which a person may claim or protect other rights or interests. Persons with disability disproportionately experience rights deprivations compared to those without because their access to justice is more frequently socially, financially, environmentally and institutionally blocked.

Accordingly, access to justice, as framed in Art 13 of the CRPD, recognises the universal, inalienable, indivisible, interdependent and interrelated nature of human rights in accessing justice, including but not limited to:

- The right to equal recognition before and under the law, including equal protection and benefit of the law²⁰
- Recognition of legal capacity²¹
- Recognition of personal autonomy²²
- Respect for inherent dignity (including freedom to make one’s own choices and to be independent)²³
- The right of children with disabilities to preserve their identities²⁴
- The right to equality and non-discrimination.²⁵

The above rights are arguably more important in the disability and mental health context as this group experiences medical and legal interventions to a greater extent than other people. As persons with disabilities experience disproportionate violations of their right to access justice it perpetuates and exacerbates their experience of exclusion, discrimination and violence. This means that persons with disabilities are frequently effectively denied the protection of the law that the legal system affords.

Recognition of persons with disabilities as equal, autonomous, independent decision-makers and legal actors empowers them to challenge deprivations of the following:

- The right to liberty and security of person²⁶

¹⁹ CRPD/C/GC/1 [38].

²⁰ CRPD, Art 5(1).

²¹ CRPD, Art 12.

²² CRPD, Preamble (n).

²³ CRPD, Art 3(a)

²⁴ CRPD, Art 3(h).

²⁵ CRPD, Art 5.

²⁶ CRPD, Art 14.

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- Freedom from torture or cruel, inhumane or degrading treatment or punishment²⁷
 - Freedom from exploitation, violence and abuse²⁸
 - Protection of the integrity of the person (including issues of involuntary treatment)²⁹
 - The right to living independently and being included in the community³⁰
 - Respect for home and the family³¹
 - Respect for privacy³²
 - The prohibition of discrimination on the basis of disability, including indirect discrimination³³
 - Freedom from medical treatment without consent.³⁴

As access to justice obligations heighten proportionate to the significance of the rights infringed, in the disability and mental health context, access to legal representation is a vital safeguard in ensuring not only the above rights are protected, but further that persons with disabilities are given a voice in proceedings that intimately impact their lives.

Supports and Access to Justice

While access to justice is often framed as only a civil right, Art 13 recognises that persons with disabilities require supports and accommodations to have access to justice on an equal basis with others. Accordingly, it provides for an obligation on State parties to provide procedural accommodations. The relationship between obligations to provide accommodations and supports is a general principle in disability human rights law because, historically, persons with disability were excluded through not just direct discrimination, but also indirect discrimination. This is rooted in the failure to recognise that disability itself arises from a person with impairments interacting with external attitudinal and environmental barriers that perpetuate and exacerbate exclusion.³⁵

These procedural accommodations are not limited by the concept of disproportionate or undue burden and so apply to all persons with disabilities, even those who require intensive supports.³⁶ This differentiation between the idea of reasonable accommodations is vital, because the right of access to justice acts as the guarantor for the effective enjoyment and exercise of all rights.

Failure to provide a procedural accommodation therefore has been recognised to constitute a form of discrimination on the basis of disability in connection with the right of access to justice.³⁷ A recent view by the Committee in the case of Marlon Noble found that failure to support or accommodate someone in the exercise of their legal capacity and to analyse which measures could be adopted to do so constituted a breach of Art 5(a) and (2) of the CRPD.³⁸

²⁷ CRPD, Art 15.

²⁸ CRPD, Art 16.

²⁹ CRPD, Art 17.

³⁰ CRPD, Art 19.

³¹ CRPD, Art 23.

³² CRPD, Art 14.

³³ CRPD, Art 2.

³⁴ CRPD, Art 25.

³⁵ Union of the Physically Impaired Against Segregation, *Fundamental Principles of Disability* (1976).

³⁶ CRPD, Preamble (j).

³⁷ A/HRC/34/26, 10 [35].

³⁸ Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012*, 16th sess, UN Doc CRPD/C/16/D/7/2012 (2 September 2016) at 15 [8.4].

Specialist, intersectional and holistic legal assistance and support delivery

The Committee in its General Comment on Article 12 affirmed that State parties must ensure that persons with disabilities have access to legal representation on an equal basis with others.³⁹ However, the obligation extends further than a superficial reading of Art 13 may suggest. As these clients may have significant support needs and frequently have complex, clustered, multiple and significant legal issues, specialised legal knowledge and holistic service delivery that is sensitive to intersectional identity is required.

Intersectional identify and access to justice

The Committee has addressed intersectional identity as a concern in access to justice which must be accounted for through appropriate supports. In particular, the Committee highlighted how women with disabilities face further barriers in accessing justice, including with regard to exploitation, violence and abuse due to attitudinal barriers, discrimination and lack of procedural accommodations.⁴⁰ The Committee specifically noted that the tendency to refer women with disabilities to social services rather than legal services to pursue remedies is a barrier to justice in itself. Furthermore, as women with disabilities are even more likely to experience forced interventions and violence than men with disabilities, access to judicial remedies that are gender sensitive⁴¹ are essential to prevent impunity and perpetuation of abuse.⁴²

Children with disabilities are also recognised to require age-appropriate supports and assistance in access to justice⁴³ and so an age sensitive approach is to be taken in provision of legal services and other access supports including respect for the evolving capacities of children with disabilities and their right to preserve their identities.⁴⁴

In our view, this approach should also be taken to other intersectional identities in providing individualised support as well as target discrimination and violation founded on multiple identities, to provide access to justice for *all* persons with disabilities.

Specialist services

Art 13(2) (and other sections⁴⁵) of the CRPD which require specialised training on the rights of the CRPD for professional staff working with people with disabilities support a reading of the CPRD as also obliging specialised service delivery.

Not only is there an obligation that professionals and staff working with persons with disabilities should be trained in the CRPD so as to better provide assistance and services guaranteed by those rights,⁴⁶ Art 13 also specifically requires appropriate training for those working in the administration of justice in ensuring access to justice for persons with disabilities. This highlights the necessity for lawyers representing persons with disabilities to be appropriately trained in the rights deprivations experienced by persons with disabilities and the legal avenues to find effective redress. Additionally, as discussed above, the rights involved often include deprivations of liberty, legal capacity and freedom from forced medical treatment and violations of the integrity of the person. Accordingly, it is important for lawyers to be competent and familiar with the CRPD.

³⁹ CRPD/C/GC/1, 10 [38].

⁴⁰ CRPD-C-GC-3, 15 [52]. A/HRC/20/5, [41]; A/67/227, [42].

⁴¹ CRPD, Preamble (s).

⁴² CRPD-C-GC-3, 15 [53].

⁴³ CRPD, Preamble (r); arts 7; 7(2); 7(3); 13(1); 16(2).

⁴⁴ CRPD, Preamble (h).

⁴⁵ CRPD, Preamble (i); art 9; art 13(2).

⁴⁶ CRPD, Art 4(1)(i).

Moreover, as stated above, the CRPD Committee in the case of Marlon Noble determined that the obligation to provide supports includes a positive obligation to analyse, identify and implement appropriate supports. Access to appropriately specialised and trained legal and non-legal professionals is a measure to fulfil this requirement.

Holistic service delivery with non-legal advocacy and supports

The requirement for access to justice in Art 13(1) incorporates specific protection for a person's effective role as a participant in their legal proceedings (from the preliminary stage and throughout).⁴⁷ As a result, and based on our experience of working to address challenges to procedural rights through legal and non-legal advocacy, we consider that procedural accommodations and non-legal supports and advocacy are essential to enabling the person to have a voice.

Adequately resourcing legal assistance and supports

Despite the requirement to make legal assistance available to persons with disabilities, persons with disabilities are not only more likely to have legal problems than those without, but that legal need is also more likely to be unmet and their matters unresolved.⁴⁸

This is why adequately resourcing legal aid programmes to provide the appropriate specialist services as well as non-legal advocacy and supports, is a vital component in the obligation to provide supports in access to justice for persons with disabilities under the CRPD. As will be outlined in further detail below, the implementation of this obligation often falls short of the need in Victoria, creating an ever-widening access to justice gap for person with disabilities.

⁴⁷ CRPD, art 13(1).

⁴⁸ Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia* (2012) 19. Available online: [http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/LAW_Survey_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf)

Law and Policy on Access to Justice in Victoria

As one of the original signatories to the CRPD, Australia has been actively engaged both internationally and at a national and local level in implementing a rights-based approach to disability law and policy.

In brief, the CRPD has had broad influence on Australian law and policy:

- The National Disability Insurance Scheme is intended to give effect to Australia's obligations under the CRPD⁴⁹ in the provision of disability services and draws its general principles directly from the CRPD.⁵⁰
- National Disability Strategy 2010-2020 provides a framework for disability policy in response to Australia ratifying the CRPD to protect, promote and fulfil the human rights of persons with disabilities, their families and carers and contributes to Australia's reporting responsibilities under the CRPD.⁵¹
- Since the ratification of the CRPD, Australia has undertaken numerous law reform initiatives concerning disability that affirmed the provision of formal support measures as necessary for access to justice.⁵²

Procedural accommodations and supports in the court room

In Victoria, the Disability Access Bench Book provides a number of recommendations to judicial officers to exercise their discretion to make adjustments to court procedure under evidence law and their inherent supervisory powers.⁵³ It has a broad range of recommendations for adjustments for persons with disabilities as complainants, defendants, witnesses and otherwise.

Examples of effective supports in Australian courts for persons with disabilities that have enabled them to access the mainstream justice system in line with the requirement for universal design with supports include:

- additional breaks in court proceedings⁵⁴
- counsel explaining court processes to the person in an accessible way, and ensuring language is accessible or slowed to allow interpretation and/or explanation⁵⁵
- providing a support person, such as court-based supporters as a measure via special witness declarations and to allow for other additional support measures in the adversarial court setting, such as judges instructing counsel to speak slower or use simpler terms⁵⁶

⁴⁹ *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**), s 3.

⁵⁰ *NDIS Act*, s 4.

⁵¹ Commonwealth of Australia, *National Disability Strategy 2010-2020* (2011) at 9.

⁵² New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) Rec. 2.2; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), Report No 28 (2014) 89 [3.124]-[3.125]; Australian Human Rights Commission, *Equal before the law: Towards Disability Justice Strategies* (February 2014) 199-200 [7.35]-[7.40], Rec 7—1; Department of the Attorney-General, *Review of the Criminal law (Mentally Impaired Accused) Act 1998: Final Report*, Government of Western Australia (April 2016) 73, 74.

⁵³ Judicial College of Victoria, *Disability Access Bench Book* (2016) ss 3.3, 5.6.1, 5.7, 5.9, 5.10, 5.19, 5.20.1, 5.20.2, 5.21.

⁵⁴ See, eg, *GAE v Western Australia* [2011] EWCA Crim 443; *R v JG* [2014] ACTSC 120 [14].

⁵⁵ See, eg, *R v JG* [2014] SASCFC 112; *R v Muller* [2013] ACTSC 154.

⁵⁶ See eg, *Crimes Act 1914* (Cth) s 15YAB; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8; *Evidence Act 1977* (Qld) s 21A(1); *Evidence Act 1906* (WA) s 106R; *Evidence Act 1995* (NSW) s 26; *Evidence Act 2008* (Vic) ss 11(1), 26; *Evidence Act 1929* (SA) ss 13, 25; *Evidence Act 2011* (ACT) s 26; *Evidence (National Uniform Legislation) Act 2011* (NT) s 11, 26; *Domestic and Family Violence Act 2007* (NT) s 104.

- ‘easy English’ summaries of trial proceedings including provision of dot-point summaries at the end of each court day⁵⁷
- video testimony for those who may find the courtroom environment distressing or confusing⁵⁸
- suggesting educational sessions/programmes for accused who may be considered fit to stand trial following education⁵⁹
- modifying court rooms in a variety of ways to make them more accessible.

Robust legal advocacy is crucial in accessing these procedural supports and accommodations, not only in executing them, but also advocating for them.

Laws in Victoria

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**) enshrines the human rights of all Victorians, including persons with disabilities. It requires that public authorities⁶⁰ give proper consideration to and act consistently with human rights and also that courts and tribunals interpret and apply legislation consistently with human rights.⁶¹ Relevant rights in the Charter to persons with disabilities include:

- (a) recognition and equality before the law⁶²
- (b) the right not to be subjected to medical or scientific experimentation or treatment without full, free and informed consent⁶³
- (c) freedom of movement⁶⁴
- (d) the right to privacy and protection of reputation⁶⁵
- (e) freedom of thought, conscience, religion and belief⁶⁶
- (f) the right to liberty and security of person⁶⁷
- (g) the right to humane treatment when deprived of liberty⁶⁸
- (h) the right to a fair hearing.⁶⁹

Right to Legal Assistance in Victoria

The idea of a right to legal assistance as a component of a fair hearing is relatively new⁷⁰ and can be construed either in a negative or positive sense. For example, it may be characterised (in the negative sense) as a restriction on preventing access to a lawyer. Alternatively, it may be characterised as

⁵⁷ *R v Jake Fairest* [2016] VSC 329.

⁵⁸ *GAE v Western Australia* [2011] EWCA Crim 443.

⁵⁹ *R v Jake Fairest* [2016] VSC 329.

⁶⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.

⁶¹ *Ibid*, s 38.

⁶² *Ibid*, s 8.

⁶³ *Ibid* s 10(c).

⁶⁴ *Ibid* s 12.

⁶⁵ *Ibid*, s 13.

⁶⁶ *Ibid*, s 14.

⁶⁷ *Ibid* s 21.

⁶⁸ *Ibid* s 22.

⁶⁹ *Ibid* s 24.

⁷⁰ *International Covenant on Civil and Political Rights*, art 14. The right of a defendant to be ‘tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it’.

imposing a positive obligation on the government to provide a lawyer at the government's expense.⁷¹ In Australia, the right to a fair trial may in some circumstances require legal representation.⁷² Those accused of serious offences (attracting lengthy sentences) only proceed without representation in exceptional cases. By contrast, a right to representation in hearings under the MHA or other hearings that have a significant impact on the human rights of a person with a disability has not yet developed in Victoria.

In a recent Victorian case,⁷³ the Victorian Supreme Court held that a lack of procedural accommodations and supports in the legal system was a breach of the Charter. The applicant was a person with a disability who was self-represented. The Court held that, in light of the applicant's circumstances, the failure of the judge to ensure she was treated equally and effectively protected against discrimination by reason of her disability (through making adjustments and accommodations to procedures) was a violation of his obligation under s 8(3) of the Charter. Justice Bell noted that the claimant's inability to effectively participate was substantially due to the judge's failure and constituted discrimination and denied the right to a fair hearing under s 24(1). In addition, in this case, the Court also referred to the legal principle of equality of arms and the CRPD principle of effective participation in the proceedings.

This judgement demonstrates not only the importance of accommodations and supports in a fair hearing and under Victorian law, but also identifies that persons with disabilities who are unrepresented face significant barriers to accessing justice.

Resourcing Legal Assistance

The Law Council has stated that 'the right to a fair trial and effective access to justice is undermined by a failure of successive governments to commit sufficient resources to support legal assistance services, as evidenced by increasingly stringent restrictions on eligibility for legal aid'.⁷⁴

Legal Aid funding in Victoria

The Access to Justice Review undertaken in Victoria during 2015-2016 recommended a funding boost for VLA to ensure that those most in need could access legal assistance.⁷⁵ This follows a similar recommendation about the need for greater resourcing of legal assistance from the Productivity Commission in 2014.⁷⁶ Implementation of these recommendations is essential to enable VLA to continue our work in providing legal assistance to those most vulnerable and to allow us to expand our services to address the large unmet legal need in our community, particularly for those with disabilities.

⁷¹ Australian Law Reform Commission, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws: Final Report* (2016) 247-248.

⁷² *Dietrich v The Queen* (1992) 177 CLR 292, 311 (Mason CJ and McHugh J).

⁷³ *Matsoukatidou, Maria v Yarra Ranges Council; Matsoukatidou, Betty v Yarra Ranges Council* [2017] VSC 61.

⁷⁴ Law Council of Australia, *Submission 75*, 'Traditional Rights and Freedoms—Encroachments by Commonwealth Laws Interim Report', Australian Law Reform Commission (2015).

⁷⁵ Victorian State Government, *Access to Justice Review Volume 2 Report and Recommendations* August 2016 431-432. Accessible online at: <https://engage.vic.gov.au/accesstojustice>

⁷⁶ Australian Government, Productivity Commission, *Access to Justice Arrangements Report* (2014, AGP) Vol 1 at 30.

Conclusion

In our practice experience, persons with disabilities are disproportionately impacted by lack of adequately resourced legal aid due to numerous intersecting barriers in accessing justice for persons including:

- (a) lack of procedural and age-appropriate accommodations (and those that account for intersectional identity such as women with disabilities)⁷⁷
- (b) lack of financial and other resources
- (c) decision-makers viewing persons with disabilities as unreliable decision-makers or unreliable witnesses to their own experiences
- (d) difficulty articulating their concerns or voice in a manner convincing to a court or tribunal
- (e) difficulty understanding the jargon of the legal processes that affect them as insufficient efforts have been made to include them or communicate with them
- (f) inability to access lawyers in inpatient settings
- (g) communication challenges when instructing counsel
- (h) institutionalisation that promotes compliance rather than empowering persons with disabilities to have a voice in decisions that affect their lives.

Access to supports, including specialist legal assistance and non-legal supports and advocacy is fundamental in closing the access to justice gap for persons with disabilities. It is also a requirement under the CRPD Art 13 because:

- Art 13 incorporates and depends on numerous related rights, such as recognition of legal capacity, that need to be considered for effective access to justice.
- Art 13 itself provides for an obligation on state parties to identify and provide supports, including procedural and age-appropriate supports.
- Persons with disabilities have distinct support needs, are more likely to have legal problems and that these problems are also more likely to be complex, multiple, substantial and clustered. Accordingly, the requirement for appropriate procedural accommodations and supports includes access to effective specialist legal services and support from competent professionals who are trained in the rights they work to guarantee.
- The obligation to identify and provide supports including legal assistance necessitates adequate resourcing of legal aid programmes to ensure legal assistance and supports in access to justice.

Properly resourced Legal Aid programmes like VLA who have a right-based approach are essential in providing the above outlined specialist, intersectional and holistic legal and non-legal services to promote access to justice.

⁷⁷ CRPD-C-GC-3 [52].