



Access to justice for persons with disabilities: From international principles to practice

October 2017

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Citation: This document should be cited as: J Beqiraj, L McNamara and V Wicks, *Access to justice for persons with disabilities: From international principles to practice*, International Bar Association, October 2017.

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Acknowledgments: This report was written for the International Bar Association by the Bingham Centre for the Rule of Law. The IBA Access to Justice and Legal Aid Committee and the Bingham Centre for the Rule of Law would like to thank the IBA Committee members and affiliates who provided relevant information for this report, and Bingham Centre intern Nadeshda Jayakody, who assisted with the research. The Access to Justice and Legal Aid Committee is particularly grateful to the IBA Public and Professional Interest Division, who funded this project.



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ISBN 978-1-905221-73-8

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Executive summary

Approximately one billion people, or 15 per cent of the global population, experience some form of disability. Persons with disabilities face disproportionate socio-economic marginalisation, resulting in poorer health and medical treatment, lower quality of education, limited employment prospects and generally broad-ranging restrictions on their community participation. These negative outcomes are exacerbated by barriers to access to justice specifically experienced by persons with disabilities.

Disability is both a cause and consequence of poverty, and effective access to justice is among the essential ingredients of sustainable development and eradication of poverty. Access to justice, as a fundamental right in itself and as a precondition of the enjoyment of all other rights, is especially crucial for this category of vulnerable persons, and provides a unique tool to counter the discrimination (and often disrespect, lack of dignity or even violence) that they face. Paradoxically, however, those who need effective access to justice most are the ones most frequently encountering barriers to it.

Conceptual framework and aims of the report

The conceptual framework of this report draws on human rights law – particularly (but not only) on the United Nations Convention on the Rights of Persons with Disabilities (CRPD) – and on law and economic development theories as they relate to disability issues. The report thus relies on the definition of ‘persons with disabilities’ adopted in the CRPD, which promotes a shift away from a purely medical model of disability to one that includes social realities. The concept includes:

‘[t]hose who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.

The report pursues three complementary aims, which are to:

- identify barriers to access to justice for persons with disabilities;
- gather examples of solutions used to overcome those barriers; and
- provide insight into how examples of good practice may be transferable internationally to inform access to justice practices.

The report explores how a rights-based approach grounded in effective access to justice could help ensure that justice policy, planning and implementation takes appropriate account of the input and needs of persons with disabilities. It aims to contribute to this by analysing the main legal issues and practices that operate as barriers to access to justice for persons with disabilities, and highlighting possible solutions in various jurisdictions around the world.

The report is part of a research project commissioned by the International Bar Association (IBA) Access to Justice and Legal Aid Committee (‘the Committee’) and adds to previous research undertaken by the Committee on barriers to achieving access to justice and solutions thereto. As a core ingredient of the rule of law, access to justice enables people to have their voices heard and

to exercise their legal rights deriving from constitutions, statutes, the common law or international instruments. Access to justice is an indispensable factor in promoting empowerment, securing access to equal human dignity and achieving social and economic development. The Bingham Centre for the Rule of Law, as an independent research institute devoted to the study and promotion of the rule of law worldwide, undertook the research and writing for the Committee, with the Committee participating in the process by way of proposing topics, supplying some data and involving its membership and other IBA members in the collection of best practices. The Committee's goals in commissioning this work are to:

- raise awareness of the different types of barriers to access to justice for persons with disabilities, and of ways to address those barriers;
- provide a valuable tool for lawyers, practitioners, civil society organisations and others in increasing access to justice for persons with disabilities, thus encouraging practical rights enforcement; and
- create the opportunity to learn about national and international practices and prompt further discussion and research into how the legal community, working with civil society and governments, can be involved in maintaining or improving access to justice for persons with disabilities, especially in times of austerity.

Findings

Vulnerability connected to and deriving from disability is partly inherent and partly generated, for instance, by societal, cultural, legal and physical barriers to the full enjoyment of human rights. Yet, international policy-makers and stakeholders have not historically recognised or prioritised disability issues within international development efforts. It is only in the Sustainable Development Agenda, adopted in 2015, that governments have included explicit references to persons with disabilities, and disaggregation of data by disability is a core principle. The Sustainable Development Agenda presents a unique opportunity in this regard, and has strong potential to contribute in practical ways to the protection of the rights of persons with disabilities.

It is essential that the legal community recognises it can play an important role in the fight against poverty through the empowerment of the most vulnerable groups, at both national and international levels. The report underlines a number of relevant measures and directions that the legal community can undertake to make a useful contribution to the protection of the rights of persons with disabilities, the enhancement of their welfare and the delivery of the Sustainable Development Agenda. Key findings include:

- There is some evidence regarding a disjuncture between victimisation of persons with disabilities and crime reporting rates, which reiterates the invisibility of persons with disabilities at the policy level. Lawyers involved in providing legal assistance and representation can effectively contribute to defeating this barrier. In the context of measurement of progress in relation to Goal 16 on access to justice, one of the indicators requires measurement of the crime-reporting rate, which would provide data on a larger scale, especially if broken down by disability status.

- Policies driven by austerity constraints should not result in discriminatory practices, whether de jure or de facto. Accordingly, protection of the rights of persons with disabilities needs to be incorporated explicitly among the core inspiring principles of those policies. Lawyers involved in advocacy and law reform have a moral and legal obligation to sponsor this approach.
- Strategic litigation is often a very effective ‘eye-opener’ and can help highlight and expose issues related to the conditions and needs of persons with disabilities, but there is a need for further research and collection of accurate data, that will inform policy reforms.
- There is need for additional enquiry into the compatibility of standards of deprivation of liberty with human rights law, as delineated in the CRPD. Such research should also take into consideration the impact that the diversity of legal models – adversarial versus inquisitorial – has on the approaches taken in the different jurisdictions.
- There is an increased need to integrate psychological analysis into legal research and practice, to help address the needs of persons with disabilities in the field of justice. The report contains reference to widespread practices of specialised training of judges, lawyers, police and other staff – including as part of legal education programmes in universities or law schools – but these are rarely mandatory.
- The report highlights the need to develop existing guidelines related to standards of treatment and communication with persons with disabilities involved in judicial proceedings into more coherent statutory codes of practice, especially in common law jurisdictions. Moreover, it is essential that research is undertaken on the impact and outcomes of the various innovative measures, projects and solutions adopted in different jurisdictions.
- Technology can support efforts to help persons with disabilities overcome marginalisation in society and by the justice system. It is important that the legal community be open and alert to the effective use of such solutions where they can enhance inclusion of persons with disabilities, even if these may be at an early stage of evolution and not specifically aimed at persons with disabilities.

List of acronyms

NB: The Convention on the Rights of Persons with Disabilities and the Committee on the Rights of Persons with Disabilities have the same official abbreviation. For the purposes of this report, to avoid confusion between the two, the unofficial abbreviation CmtRPD is being used for the Committee on the Rights of Persons with Disabilities.

ADR	Alternative Dispute Resolution
BIICL	British Institute of International and Comparative Law
BPI	Building Partnerships for Protection of Persons with Disabilities Initiative
CISD	Corrections Independent Support Officers
CRPD	Convention on the Rights of Persons with Disabilities
CmtRPD	Committee on the Rights of Persons with Disabilities
EASO	European Asylum Support Office
ECHR	European Court of Human Rights
EU	European Union
GRH	Ground rules hearings
IBA	International Bar Association
IPSN	Identification of persons with special needs
ITP	Independent Third Person
LAO	Legal Aid Ontario
MDAC	The Mental Disability Advocacy Centre
MHC	Mental Health Court
MoJ	Ministry of Justice
NAAJA	North Australian Aboriginal Justice Agency
NCRA	Not criminally responsible assessments
NGEC	National Gender and Equality Commission
NGO	Non-governmental organisation
OHCHR	Office of the High Commissioner for Human Rights
ODR	Online dispute resolution
PO	<i>Personligt Ombud</i> /Personal Ombudsman

PPO	Prisons and Probation Ombudsman
RI	Registered Intermediary
SCTS	Scottish Courts and Tribunals Service
SDGs	Sustainable Development Goals
TAG	The Advocate's Gateway
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime

Chapter 1: Introduction

1.1 Context: Access to justice for persons with disabilities

Approximately one billion people, or 15 per cent of the global population, experience some form of disability, with 110–190 million experiencing a significant disability.¹ Article 1 of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) defines ‘persons with disabilities’ as including:

‘[t]hose 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.’²

Importantly, this definition has shifted away from a purely medical model of disability to one that includes social realities. In other words, disability is the ‘social effect of the interaction between individual impairment and the social and material environment’.³

Persons with disabilities face disproportionate socio-economic marginalisation, resulting in poorer health and medical treatment, lower quality of education, limited employment prospects and generally broad-ranging restrictions on their community participation. These negative outcomes are exacerbated by barriers to access to justice specifically experienced by persons with disabilities.

Access to justice, as a fundamental right in itself and as a precondition of the enjoyment of all other rights, is especially crucial for this category of vulnerable persons, and provides a unique tool to counter the discrimination (and often disrespect, lack of dignity or even violence) that they face. For example, persons with disabilities are frequently denied legal capacity and have difficulty accessing courts and quasi-judicial bodies. Paradoxically, however, those who need effective access to justice most are the ones most frequently encountering barriers to it.

While each country has historically or culturally-specific practices and situations that hinder access to justice for persons with disabilities, it is important to situate those country-specific experiences within the wider international legal context. Two dimensions of the international context are of special importance.

First, international law establishes a comprehensive set of rights and minimum guarantees that are specifically tailored to the needs and conditions of persons with disabilities. These are set out in the CRPD. The CRPD clearly establishes that actual access to justice is important for persons with disabilities and stipulates that states must ‘ensure effective access to justice for persons with disabilities on an equal basis with others’.⁴ The CRPD is very broadly accepted, which demonstrates the global

1 World Bank, Disability: Overview, 29 March 2017, available at www.worldbank.org/en/topic/disability/overview accessed 6 July 2017.

2 United Nations Convention on the Rights of Persons with Disabilities, adopted and opened for signature, ratification and accession by General Assembly resolution 61/106 of 13 December 2006, entry into force 3 May 2008, Art 1.

3 United Nations Committee on the Rights of Persons with Disabilities, General Comment No 3 on women and girls with disabilities (Article 6), 26 August 2016, para 5.

4 United Nations Convention on the Rights of Persons with Disabilities, Art 13.

commitment to empowering individuals with disabilities: as of August 2017, 174 states have ratified the CRPD and a further 13 states are signatories.⁵

Second, the resolution to mainstream disability issues as an integral part of relevant development strategies, which is emphasised in the Preamble of the CRPD,⁶ has been clearly incorporated in recent international commitments to sustainable development. The 2030 Sustainable Development Agenda (the ‘Agenda’) that the UN General Assembly unanimously adopted in September 2015⁷ bears strong potential to contribute in practical ways to the protection of the rights of persons with disabilities and to the enhancement of their welfare. ‘Persons with disabilities’ or ‘disability’ are referenced several times in the text of the Agenda, and five of the Sustainable Development Goals (SDGs) contained in the Agenda specifically mention the need to remove obstacles and constraints, and strengthen support for persons with disabilities.⁸ The Agenda also includes a goal on the rule of law and access to justice (Goal 16), which recognises the important role that law and justice have to play in promoting poverty reduction and sustainable development. SDG 16 sets out to:

‘[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.⁹

Moreover, quite importantly, monitoring the implementation of the Agenda will prompt the collection of data broken down by category – including disability, alongside age, gender, migration status, etc – to ensure that the most vulnerable groups of the global population are not left behind.¹⁰ The absence of appropriate information, including statistical and research data, has an adverse impact and makes persons with disabilities and the challenges they face invisible at policy level. As recognised in Article 31 of the CRPD, the collection of comprehensive and reliable statistics will enable states to formulate and implement policies to give effect to the obligations under the CRPD.

Against this background, the report will explore how a rights-based approach grounded in effective access to justice could help ensure that justice policy, planning and implementation takes appropriate account of the input and needs of persons with disabilities. The report aims to contribute to this by analysing the main legal issues and practices that operate as barriers to access to justice for persons with disabilities and highlighting possible solutions in various jurisdictions around the world.

This report is part of a research project commissioned by the International Bar Association (IBA) Access to Justice and Legal Aid Committee (‘the Committee’). The Committee has previously undertaken research into general barriers to and solutions for achieving access to justice; legal aid for the accused in criminal cases; redress for victims of violence; and access to justice for children. As a core ingredient of the rule of law, access to justice enables people to have their voices heard

5 For a visual presentation, see map available at www.bit.ly/2brQQIF accessed 6 July 2017.

6 United Nations Convention on the Rights of Persons with Disabilities, Preamble, letter (g).

7 United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015.

8 The Sustainable Development Goals that explicitly mention persons with disabilities include: Goal 4 on inclusive and quality education; Goal 8 on inclusive and sustainable economic growth, employment and decent work for all; Goal 10 on the reduction of inequalities within and among countries; Goal 11 on making cities inclusive, safe, resilient and sustainable; and Goal 17 on building global partnerships for sustainable development. Additionally, Goal 3 on good health and well-being and Goal 16 on access to justice are implicitly linked but directly relevant to persons with disabilities.

9 Goals represent the general objectives, and are accompanied by more detailed Targets. Target 16.3 sets out to ‘Promote the rule of law at the national and international levels and ensure equal access to justice for all.’

10 ‘Leave no one behind’ is the core motto of the 2030 Sustainable Development Agenda.

and exercise their legal rights deriving from constitutions, statutes, the common law or international instruments. It is an indispensable factor in promoting empowerment, securing access to equal human dignity and achieving social and economic development. Therefore, the Bingham Centre for the Rule of Law, as an independent research institute devoted to the study and promotion of the rule of law worldwide, undertook the research and writing for the Committee, with the Committee participating in the process by way of proposing topics, supplying some data and involving its membership and other IBA members in the collection of best practices.

The Committee's goals in commissioning this work are to:

- raise awareness of the different types of barriers to access to justice for persons with disabilities, and of ways to address those barriers;
- provide a valuable tool for lawyers, practitioners, civil society organisations and others in increasing access to justice for persons with disabilities, thus encouraging practical rights enforcement; and
- create the opportunity to learn about national and international practices and prompt further discussion and research into how the legal community, working with civil society and governments, can be involved in maintaining or improving access to justice for persons with disabilities, especially in times of austerity.

In this way, the report is a part of the Committee's ongoing activities that gather, publicise and coordinate information from around the world on barriers to access to justice in different jurisdictions, and ways in which these barriers can be overcome.

1.2 Aims

The report pursues three complementary aims, which are to:

- identify barriers to access to justice for persons with disabilities;
- gather examples of solutions used to overcome those barriers; and
- provide insight into how examples of good practice may be transferable internationally to inform access to justice practices.

This study focuses on access to a fair and equitable justice system that guarantees adequate protection of the rights of persons with disabilities, whether as accused, victims, witnesses or bearers of other interests. It aims to foster international discussion on efforts to improve access to justice through sharing information beyond borders to provide possible inspiration, raise awareness, involve an expanding range of stakeholders and institutions, and spread good practice.

1.3 Methodology

This report relies primarily on desk-based research, mainly examining existing quantitative and qualitative data and literature concerning the main challenges that persons with disabilities face in having effective access to justice on an equal basis with others. As such, the research sits within the wider scholarship and practice in the area. As well as benefiting from that work, it aims to contribute to it, with the report identifying issues and areas of particular relevance and interest that could be further explored in the future through additional research and information elicited from a survey and/or targeted, semi-structured interviews with IBA members and other experts.

1.4 Structure of the report and further resources

This introduction explains the project's context, aims and methodology. Chapter 2 explains the key definitions and global legal standards regarding persons with disabilities. Chapters 3 and 4 constitute the core of the report, identifying common problems and solutions regarding access to justice for persons with disabilities. Chapter 5 concludes with reflections and recommendations, with particular reference to the international legal context.

Throughout the report, there are text boxes with examples and case studies relating to the issues discussed. The sources for these are cited in short form, with details listed by chapter in the bibliography.

The report is available online from the websites of the IBA Access to Justice and Legal Aid Committee and the Bingham Centre for the Rule of Law.

Chapter 2: Access to justice for persons with disabilities: The international legal framework

The conceptual framework of this report draws on human rights law – particularly (but not only) on the CRPD – and on law and economic development theories as they relate to disability issues. Therefore, before analysing the main barriers to access to justice for persons with disabilities in the following chapters, it is useful to explain a few key definitions and the basic content of the international legal framework.

2.1 Access to justice

As in previous reports, we use a comprehensive concept of access to justice that covers different stages of the process of obtaining a solution to justice problems.¹¹ It starts with the existence of rights enshrined in laws, and awareness and understanding of those rights. It embraces access to dispute resolution mechanisms as part of justice institutions that are both formal (ie, institutions established by the state) and informal (eg, traditional or religious authorities, mediation and arbitration). Effective access includes the availability of, and access to, counsel and representation. It also encompasses the ability of such mechanisms to provide just, fair, impartial and enforceable solutions.

This approach reflects the general UN expanded notion of access to justice, which entails ‘much more than improving an individual’s access to courts... It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable’.¹² Accordingly, it has been pointed out that the concept of access to justice encompasses not only *procedural* access (ie, effectively engaging in and using the established legal system), but also *substantive* access (ie, equitable and beneficial judicial outcomes) and *promotional* access (ie, promotion of citizens’ belonging and empowerment).¹³

Challenges to guaranteeing access to justice for persons with disabilities need to be considered in the context of the CRPD. The CRPD recognises that access to justice – as a right and fundamental freedom – is indivisible from and interdependent with other rights and freedoms enshrined in the CRPD. A comprehensive analysis of the development and scope of the right to access to justice is beyond this report, and has been addressed in-depth elsewhere.¹⁴ However, it is worth noting here two particular profiles: the link with closely interconnected guarantees such as the rights to an effective remedy, fair trial and equality, and the precise meaning of ‘access to justice’ in the context of the CRPD.

2.1.1 Access to justice, effective remedy, fair trial and equality

The right to access to justice can be understood as being made up of, dependent on and expanding the rights to effective remedy, fair trial and equality. The right to an effective remedy speaks to substantive

11 See Julinda Beqiraj and Lawrence McNamara, *Children and Access to Justice: National Practices, International Challenges* (Bingham Centre for the Rule of Law Report 02/2016), International Bar Association, October 2016, p 5, fn 6.

12 United Nations Development Programme (UNDP), *Access to Justice: Practice Note*, 2004, p 3.

13 Eilionóir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2016), Chapter 1.

14 *Ibid*, Chapter 2; Stephanie Ortoleva, ‘Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System’, (2011) 17(2) *ILSA Journal of International & Comparative Law*, 282–320.

access to justice, while the right to a fair trial sets standards regarding procedural access to justice.¹⁵ Non-discrimination or equality clauses can attach to the right to effective remedy and fair trial, further reflecting the foundation of a general right to access to justice.¹⁶ Anti-discrimination provisions typically guarantee equality before the law and/or protection from discrimination based on factors such as age, race, religion and, importantly for the purposes of this report, disability. These are articulated as part of the general principles of the CRPD at Article 3. When applied to legal proceedings, non-discrimination provisions constitute an important pillar of access to justice for persons with disabilities; that is, in order to enjoy effective access to justice, persons with disabilities must be treated equally before the law and have equal opportunities to participate in the justice system. At the same time, equality of opportunities may require the adoption of (positively) discriminatory measures to place persons with disabilities on an equal footing with others, such as the requirement to provide accommodations to facilitate participation in legal proceedings.

Such interconnections are made clear in the CRPD's articulation of access to justice, which is broad and incorporates more stages and aspects of administering justice; in turn, this creates a more robust legal and conceptual platform to enforce the rights of persons with disabilities. Article 13 of the CRPD establishes:

'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.'

2.1.2 The pivotal role of access to justice within the CRPD framework

Effective access to justice is a precondition to, an enabler of and a guarantee for the full enjoyment of all other rights and fundamental freedoms. It creates an empowering environment in which persons with disabilities can better assert their legal rights, including, for instance: the right to protection of integrity of the person (Article 17); freedom of expression and opinion and access to information (Article 21); respect for privacy (Article 22); and home and the family (Article 23); the right to education (Article 24); health (Article 25); and employment (Article 27).

Such an environment should be informed by the general principle of 'Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons' enounced in Article 8 of the CRPD. It imposes a specific requirement on states to 'foster respect for the rights and dignity of persons with disabilities'; this could be achieved through various awareness-raising media campaigns and training programmes about the rights of persons with disabilities.

15 The Universal Declaration of Human Rights (UDHR) contains the earliest articulation of the right to an effective remedy (Art 8) and the right to a fair trial (Art 10).

16 Equality rights are now fairly commonplace, and can be found in documents like the European Convention on Human Rights (Art 14), the Charter of Fundamental Rights of the European Union (Arts 20–26), the American Convention on Human Rights (Art 24) and the African Charter on Human and Peoples' Rights (Arts 2 and 3).

When read together with Article 13, Article 8 requires that access to justice starts with individual and public awareness of how persons with disabilities are entitled to and can access justice.

Quite importantly from the perspective of an effective access to justice, an Optional Protocol to the CRPD establishes a complaint mechanism where individuals can bring claims regarding alleged violations of their rights established in the CRPD – once they have exhausted the available domestic remedies.¹⁷

2.2 The concept of legal capacity

There is another key provision that warrants special attention when assessing the scope of access to justice in the CRPD: the right to legal capacity for persons with disabilities enounced in Article 12. As noted by the Committee on the Rights of Persons with Disabilities

Persons with disabilities ‘remain the group whose legal capacity is most commonly denied in legal systems worldwide.’

Source: Committee on the Rights of Persons with Disabilities, *General Comment No 1, 2014*.

(CmtRPD), which monitors implementation of the CRPD by States Parties, legal capacity comprises the ability to hold rights (legal standing) and to exercise those rights (legal agency).¹⁸ Legal standing involves recognition as a legal person before the law — this includes having a birth certificate or being on the electoral role. Legal agency involves the capacity to enter, modify or end legal relationships, and have the law support such actions. Examples of legal agency include buying and selling property, or refusing medical treatment.

Legal capacity affirms and protects an individual’s right to make decisions for themselves, free from intervention from others. The concept is fundamental to recognising an individual’s personhood and autonomy. The CmtRPD has declared that ‘legal capacity is a universal attribute inherent in all persons by virtue of their humanity’.¹⁹

2.2.1 Approaches to restrictions or denial of legal capacity

Article 12 of the CRPD affirms that all persons with disabilities have full legal capacity. However, persons with disabilities, including those with physical, mental, intellectual or sensory impairments, are ‘the group whose legal capacity is most often denied in legal systems across the globe’.²⁰ The restriction or denial of legal capacity for persons with disabilities can rest on different justifications. Analysis of state practice by the CmtRPD reflects at least three approaches, but each raises problematic questions.²¹

First, the ‘status approach’ equates disability with lack of legal capacity (ie, the status of disability automatically strips an individual of legal capacity). Removal of legal capacity is the automatic consequence of the diagnosis of an impairment. Persons with cognitive or psychosocial disabilities

17 Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities, adopted and opened for signature, ratification and accession by General Assembly resolution 61/106 of 13 December 2006, entry into force 3 May 2008. As of November 2016, there were 92 States Parties to the Protocol.

18 Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Equal recognition before the law* (Article 12), 19 May 2014, para 13.

19 *Ibid*, para 8.

20 *Ibid*, paras 8, 14.

21 *Ibid*, para 15.

are disproportionately affected by denial of legal capacity.²² This view uses an erroneous understanding of disability and legal capacity as binary, zero-sum factors. In practice, there are graduated levels of ability and capacity, which can and should be bolstered with structural supports instead of automatic and completely substituted decision-making.

Second, the ‘outcomes approach’ grants or withholds legal capacity based on the ‘reasonableness’ of an individual’s decision-making, rather than on a disability per se. For instance, an individual’s decision to refuse medical treatment could be questioned as being against that individual’s ‘best interests’ and thus result in a lack of legal capacity to make that decision. This approach applies a paternalistic double standard to persons with disabilities; that is, it penalises persons with disabilities for making mistakes or taking risks, while most people without disabilities would make those ‘wrong’ choices freely.

Last, the ‘functional approach’ accords legal capacity based on whether a person can appreciate the nature and consequences of their actions. This rests on a problematic conflation of legal capacity with mental capacity. Mental capacity reflects a person’s decision-making skills, and in itself is scientifically difficult to assess.

In focus: Supported decision-making

Article 12 of the CRPD²³ prohibits discriminatory denial of legal capacity, and ‘requires that support be provided in the exercise of legal capacity’ where needed.²⁴ This model is frequently referred to as ‘supported decision-making’.²⁵ It recognises that a person with disabilities should remain the primary decision-maker, and simultaneously acknowledges that improving support from multiple sources can bolster the autonomy of persons with disabilities.

The CmtRPD points out that ‘support’ is a broad term that encompasses informal and formal arrangements.²⁶ Support can be provided in different degrees (eg, translation services or peer

Moldova: Persons that are declared incapacitated have no access to justice as they lack legal standing; only the person’s guardian or the public prosecutor can bring a civil case to court on behalf of a person deprived of legal capacity if there is a public issue at stake.

Acting on a petition by the Office of the People’s Advocate, on 13 November 2014, the Constitutional Court of the Republic of Moldova issued a decision by which it recognised the rights of persons declared ‘incapacitated’ to lodge complaints with the Office of the People’s Advocate, and to request remedies when their decisions are not respected. However, the decision did not apply to national courts.

Source: Special Rapporteur on the Rights of Persons with Disabilities, Report on Moldova, 2016, para 54.

Canada (British Columbia): The 1996 Representation Agreement Act in British Columbia is a particularly successful manifestation of ‘supported decision-making’ principles, as it was passed with considerable participation and inspiration from disability and aging organisations (such as the British Columbia Association for Community Living and the Alzheimer Society of British Columbia).

Capacity is presumed for persons with mental illness and/or intellectual disabilities (section 3). Should a person foresee a loss of their capacity, they can enter into, amend and revoke a ‘representation agreement’ — this authorises a representative to help that person make decisions, or make decisions on behalf of that person, such as personal care or finances.

The Act rejects a strict dichotomy of capacity and incapacity, and instead allows for flexibility in assessing and understanding a spectrum of capabilities. For instance, a person can enter into representation agreements even if they are found to lack capacity under traditional contract law provisions, or cannot manage their healthcare or routine management of financial affairs (section 8). Furthermore, a person’s method of ‘communicating with others is not grounds for deciding that he or she is incapable of understanding anything’ (section 3).

Source: Representation Agreement Act, British Columbia, handout, www.bit.ly/2so2S0e; Presentation by Christine Gordon, www.bit.ly/2sjp0rY.

22 *Ibid*, para 9.

23 For further discussion on Art 12, see www.bit.ly/2t2O1su accessed 13 July 2017.

24 See n 18 above, para 17.

25 For a review of various supported decision-making models, see: Soumitra Pathare and Laura S Shieds, ‘Supported Decision-Making for Persons with Mental Illness: A Review’, (2012) (34)2 *Public Health Reviews*, www.bit.ly/2tVfZCX accessed 13 July 2017.

26 See n 18 above, para 17.

advocacy) from different people or institutions (eg, trusted friend or legal counsel). Support also includes: measures relating to universal design and accessibility (ie, when public and private actors (eg, banks) provide information in an understandable format or provide professional sign language interpretation); recognition of diverse, non-conventional communication methods (eg, non-verbal communication); and the possibility for persons with disabilities to engage in advance planning, (ie, state will and preferences in advance), which will be followed at a later date, when they may not be in the position to communicate their intentions.²⁷

The literature suggests different sets of principles that might inform supported decision-making for persons with disabilities. A position paper by Inclusion Europe, a European association of persons with disabilities, outlines key elements of a system for support in decision-making. These include, among others: promotion and support of self-advocacy; replacing traditional guardianship with a system of supported decision-making; selection and registration of support persons; and preventing and resolving conflicts between support and supported persons.²⁸

Legal capacity of persons with disabilities is most often denied or restricted through guardianship arrangements, under which they may lose some or all of their civil rights.²⁹ A study reviewing guardianship regimes in the United States recommended that alternative, supported decision-making models must be evaluated based on whether they:

- maximise the individual's responsibility for and involvement in decisions affecting their life;
- ensure that the individual's wishes and preferences are respected;
- ensure legal recognition of decisions made with support or by the individual's appointed agent; and/or
- have the most effective mechanisms for oversight and monitoring to ensure that the support relationship does not result in harm to the

Czech Republic: As of 2014, after several years of campaigning by civil society, the Czech Republic passed a new Civil Code that abolished plenary guardianship. In its place, the new legislation introduced a form of 'supported decision-making'.

People who foresee their legal incapacity are allowed to write advance directives, which outline a person's intentions regarding their finances and daily life. The scheme foresees that the legal capacity of people with disabilities remains intact, and the contract between the support person and the person with needs to be approved by court.

Additionally, the new Civil Code allows for the institution of guardianship councils — three or more people meet at least once a year to monitor the activities of guardians. Though this institution is not mandatory, the guardianship council exemplifies a method to keep guardians under supervision, to better protect the capacity and will of the person with a disability.

Source: *The Mental Disability Advocacy Centre, Report 2013*, p 49.

Sweden: Plenary guardianship in Sweden was abolished in 1989. Though partial guardianship is still available as a last resort, Sweden was innovative in introducing a personal ombudsman system (Personligt Ombud (PO)) in 2000. These are highly-skilled advocates (such as social workers or lawyers) that support people with psychosocial disabilities in dealing with a variety of issues, including access to various social services, resolving family or neighbourly relations, and grappling with existential matters (such as the repercussions of disability in their lives, and hope for positive change in the future).

POs are independent from psychiatric or social services, and operate within a client-centred framework. The PO makes contact and develops a trusting relationship with their client. The client chooses the PO, and sets the agenda for what issues need to be addressed. POs do not have any offices, as offices are thought to symbolise and thus reinforce power imbalance between the PO and client. There is also no formal referral procedure or signing of forms: a client simply needs to ask for help, therefore bureaucracy is diminished.

The Swedish National Board of Health and Welfare reports that POs' work saves society up to 17 times the cost of the PO service itself. This is because contact with a PO redirects clients from passive, reactionary services (like psychiatric care and income support) towards more positive, preventative measures (rehabilitation, access to employment opportunities, etc).

Source: *Swedish National Board of Health and Welfare*, www.bit.ly/1v3t2RE.

²⁷ *Ibid.*

²⁸ Inclusion Europe, *Key Elements of a System for Supported Decision-Making*, Position paper, 2008, www.bit.ly/2rdw71q accessed 13 July 2017.

²⁹ For examples in European countries, see Mental Disability Advocacy Centre, *Legal Capacity in Europe, A Call to Action to Governments and to the EU*, Report, October 2013, www.bit.ly/2thrKTS accessed 13 July 2017.

individual and protects against conflicts of interest, undue influence or coercion of the individual needing support.³⁰

Though guardianship arrangements are not necessarily abusive, the often-unchecked power imbalance can result in exploitative situations and/or neglect of an individual's wellbeing and wishes.³¹ In fact, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has clearly linked the deprivation of legal capacity to the potential for serious abuse, especially in healthcare settings (eg, involuntary treatment or forced residency at certain facilities).³² Accordingly, Article 12(4) of the CRPD requires states to set out appropriate and effective safeguards for the exercise of legal capacity. It mandates that:

‘all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures that relate to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body’.

The CmtRPD explains that, where will and preferences cannot be determined, the guiding principle should be the ‘best interpretation of will and preferences’ of the person with a disability, rather than what is in their ‘best interests’. The former better respects the legal capacity of persons with disabilities, as the ‘best interests’ standard opens the door for substitute decision-making.³³

Croatia: A 2011 report presenting the findings of monitoring visits to selected psychiatric hospitals and social care institutions in Croatia noted particularly egregious violations at one of the rehabilitation institutions, which required the transfer of legal capacity to institutional staff as a residency condition. Such imposition of guardianship represents a clear conflict of interest, as well as manipulation of guardianship as a tool for neglecting the rights of persons with disabilities, rather than promoting them.

The report is by the Mental Disability Advocacy Centre (MDAC), an international human rights non-governmental organisation (NGO), whose mission is to advance the rights of children and adults with intellectual or psychosocial disabilities. It recommends, among other things, that the Croatian government immediately remove plenary guardianship from legislation, adopt alternatives to guardianships (including supported decision-making), and review each person under guardianship to determine if that person desires restoration of legal capacity.

Source: *Mental Disability Advocacy Centre, Report 2011, p 46.*

30 Leslie Salzman, ‘Guardianship for persons with mental illness – A legal and appropriate alternative?’ (2011) *Saint Louis University Journal of Health Law & Policy* 328–9.

31 See European Agency for Fundamental Rights, *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, Publications Office of the European Union, 2013, part 3, www.bit.ly/2pPOpJn.

32 United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/22/53, 1 February 2013, para 27–35; 65–70; 80, www.bit.ly/18UCGLQ accessed 13 July 2017.

33 See n 18 above, para 21.

Chapter 3: Overarching barriers to access to justice

3.1 Societal barriers

Whether in religious texts, eugenics essays or present-day media, persons with disabilities are repeatedly and erroneously portrayed as inherently ‘wicked’, ‘abnormal’ or ‘deviant’.³⁴ This stigmatisation is then used to justify mockery, harassment, social isolation or violence against them. Moreover, patterns of stigmatisation and discrimination operate in complex ways in practice when the individuals concerned belong to particularly vulnerable groups (eg, Roma children placed in special schools for children with learning difficulties and/or mental disability).³⁵ Popular notions of disability also conflate disability with incapacity, which promotes a patronising view that people with disabilities are wholly dependent on others, and place an undue burden on social welfare systems.

United Kingdom: 2014 research on attitudes towards disability and disabled persons across the UK, commissioned by Scope, formerly the The Spastics Society, shows that:

- 67 per cent of the British public feel uncomfortable talking to disabled people;
- 36 per cent of people tend to think of disabled people as not as productive as everyone else;
- 85 per cent of the British public believe that disabled people face prejudice;
- 21 per cent of 18–34 year olds admit that they have actually avoided talking to a disabled person because they weren’t sure how to communicate with them;
- disabled people and their families tell Scope that negative attitudes affect every area of their lives; for example, in the playground, at work, in shops or on the street; and
- people are more comfortable with the idea of a relative marrying a disabled person or the person next door being disabled than they are with their Member of Parliament or boss being disabled. This suggests that people are more uncomfortable with the idea of disabled people being in positions of authority.

Source: *Scope Report*, p 3.

Moldova: A disability certification process is used in Moldova, which acts as a gateway to services and forms the basis of the statistical monitoring system. It also contributes to public perceptions of disability; representatives of the National Statistics Bureau have reported that a person is not regarded as having a disability unless the person has received certification.

The determination of disability is broadly founded on the medical approach and the assumption that an individual’s social potential and ability to be a productive member of society is correlated with their health. According to criteria based upon this approach, a person is categorised as having a ‘slight’, ‘moderate’ or ‘severe’ disability and is issued a certificate of disability. The Special Rapporteur on the Rights of Persons with Disabilities noted in a 2016 report that persons in the ‘slight’ category tend to be dismissed from essential support services, while those in the ‘severe’ category are at risk of having their autonomy stripped from them. Moreover, the information received by the Special Rapporteur suggested the disability certification system is costly, administratively complex and not immune to cases of corruption and discriminatory practices.

The Moldovan government has expressed its intention to revise the process.

Source: *Special Rapporteur on the Rights of Persons with Disabilities, Report on Moldova, 2016*, p 8.

Discriminatory attitudes and false beliefs — like the ones mentioned above — dehumanise persons with disabilities and create de facto barriers to accessing different facets of the justice system. For instance, police³⁶ or legal counsel³⁷ may act on prejudice or ignorance when interacting with persons

34 Colin Barnes, *Disabled People in Britain and Discrimination: A case for Anti-Discrimination Legislation*, (Hurst & Company 1991), Chapter 2.

35 In the landmark case *DH and Others v the Czech Republic* (2007), the Grand Chamber of the European Court of Human Rights concluded that placing Romani children in special schools for children with learning difficulties and/or mental disability, based on culturally biased enrolment tests, amounts to racial discrimination. More recently, the European Union has also paid increasing attention to the matter, and has launched infringement procedures related to the enforcement of EU anti-discrimination law, against the Czech Republic, Slovakia and Hungary, see www.bit.ly/2sVKZVX accessed 13 July 2017.

36 David M Perry and Lawrence Carter-Long, ‘How Misunderstanding Disability Leads to Police Violence’, *The Atlantic*, (6 May 2014), www.theatlantic.com/2s9js16 accessed 13 July 2017.

37 Norah Fry Research Centre, *What Happens when People with Learning Disabilities Need Advice About the Law?* July 2013, www.bit.ly/1moPvEF accessed 13 July 2017.

with disabilities, effectively deterring them from pursuing a legitimate claim. Studies also show that jurors have relied on stereotypes to make incorrect assumptions about the criminal responsibility or untrustworthiness of persons with disabilities who are accused or testifying.³⁸ In addition, persons with disabilities may face unjustified questioning of their competency when acting as judges, jurors or counsel.

Unlike when remedying de jure discrimination (see following section), simply repealing or replacing laws is often insufficient for addressing societal barriers. Instead, more positive, structural education programmes and awareness-raising campaigns are required to foster attitudinal shifts. Indeed, as aforementioned, Article 13(2) of the CRPD imposes a duty on states to ‘promote appropriate training for those working in the field of administration of justice, including police and prison staff’.

Australia: Philip French (Chief Executive Officer of People with Disabilities, an advocacy organisation in Australia) notes the ‘enormous cultural resistance to the idea that people with disability can adjudicate cases’. He cites the example of a jurisprudential case, *Finney v The Hills Grammar School*, where a number of people from the public wrote letters to the Sydney Morning Herald questioning the suitability of the adjudicator, a blind person, to adjudicate on a case involving discrimination (in education).

Source: Law and Justice Foundation of New South Wales report, p 45.

Canada: In July 2016, Legal Aid Ontario (LAO) launched a mandatory mental health training programme for all LAO employees (the programme is equally available to private bars and legal clinics). This is part of their 2014–2018 Mental Health Strategy.

Training addresses topics like the history of mental health advocacy in Canada, understanding the nature of disability, promoting effective communication and accommodation skills, and exploring mental wellness in the legal progression itself. It involves presentations from both mental health providers and professionals, and includes a comprehensive resource manual for lawyers to access in order to bolster their advocacy and connect clients with appropriate mental health services. LAO has geared training towards ensuring that their services are ‘trauma-informed’ and culturally competent.

Twenty-five selected representatives participated in the training, and will serve as regional mental health leads in their criminal courts across the province. LAO aims to further deliver this training to all of its lawyers, across all disciplines. A particular goal of this programme is creating ‘client legal needs-assessment tools specific to each practice area’, which ‘will help advocates and administrative staff identify the full range of legal rights and options available to clients with mental health issues.’

Source: Legal Aid Ontario, *The Mental Health Strategy*, www.bit.ly/2rem10m.

New Zealand: In response to a national inquiry into mental health services, in 1997, the New Zealand Ministry of Health established the ‘Like Minds, Like Mine’ project (formerly known as ‘Like Minds’). It was one of the first comprehensive campaigns in the world to counter stigma and discrimination against people with mental illness, and continues to this day.

There is clear collaboration between governmental and community institutions. The New Zealand government provides funding for the project, with the Ministry of Health holding strategic responsibility.

The project specifically adopts a social model of disability (as opposed to a ‘medical’ model) and a human rights perspective, in line with the CRPD. ‘Like Minds’ has tracked public attitudes to mental health since its inception. From 2014 to 2019, its focus is workplace inclusion, guidelines for positive media portrayal of mental illness and promoting community solutions to discrimination and stigma.

It is calculated that, for every \$1 spent on the Like Minds campaign, there is an estimated \$13.80 of economic benefit returned (increased access to employment, hours worked and increased use of primary care).

Source: Ministry of Health, *Like Minds, Like Mine, national Plan 2014–2019*.

38 Michael Perlin, ‘The Sanist Lives of Jurors in Death Penalty Cases: The puzzling role of mitigating mental disability evidence’, (1994) 239 *Notre Dame Journal of Law, Ethics & Public Policy*; Stephen P Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (Cornell Law Faculty Publications 1998), Paper 287.

United States: In the late 1990s, several high-profile cases exposed how Massachusetts' law enforcement agencies were systematically failing to take crimes against persons with disabilities seriously. This, in part, sparked the development of the Building Partnerships for Protection of Persons with Disabilities Initiative (BPI).

The BPI has a broad mandate that coordinates adult protective service agencies, law enforcement, legal counsel and other stakeholders, in order to address abuse, neglect and crimes against persons with disabilities. One aspect of their multi-disciplinary collaborative approach includes mandating training for police, prosecutors, victim/witness advocates, medical personnel and the judiciary. The training revolves around recognising, reporting, investigating and prosecuting crimes against persons with disabilities in an appropriate manner. This includes knowing and using 'people-first language', understanding the prevalence of abuse against persons with disabilities and learning how to communicate effectively with persons with disabilities.

In a guide for those wanting to replicate the BPI system, it is emphasised that such training for stakeholders should be held on an ongoing basis and updated as new issues arise. The BPI has been replicated as pilot projects in three other US states: Ohio, Delaware and Oregon.

Source: Building Partnerships for Protection of Persons with Disabilities Initiative guide, www.bit.ly/2thxVaH.

There are various existing guides to help lawyers and other people in positions of power to interact sensitively with persons with disabilities.

Canada: The Ontario Bar Association has made public a bar training module providing basic information on how disabilities are treated in the law, the concept of disability and relevant legislation. While specific legal frameworks may be exclusive to Ontario and Canada, the document has a helpful chapter outlining general considerations for lawyers when dealing with clients that have disabilities.

Source: Ontario Bar Association, Providing Legal Services to People with Disabilities, www.bit.ly/2rngmZY.

United States: The State Bar of Michigan (as part of their Equal Access Initiative) has published a series of newsletters addressing a wide range of issues faced by persons with disabilities. There are several pertaining to accommodations in various situations, such as when a person has visual disabilities, autism or a non-obvious limitation in mobility.

Source: State Bar of Michigan Disabilities Newsletter Archive, www.bit.ly/2thHNRD.

3.2 Legal barriers

3.2.1 Discriminatory laws or lack of specific and adequate laws and provisions

Although the CRPD was adopted more than a decade ago, some jurisdictions continue to have blatantly discriminatory legislation against persons with disabilities. Such direct discrimination includes using pejorative language to refer to persons with disabilities, failure to recognise disabilities, the explicit denial of various civil rights (often tied to the denial of legal capacity) on the basis of disability and failure to recognise a disability bias motivation in criminal law.

Even if not directly linked to how legal proceedings unfold, general legal discrimination against persons with disabilities has both symbolic and practical implications for access to justice. Legal exclusion from social, economic or political participation sends a message that persons with disabilities should not 'bother' trying to access any state institutions — including the justice system — for their benefit. Practically speaking, denying rights such as the franchise, or the ability to conclude contracts, means

Gabon: The CmtRPD has noted the absence in Gabonese legislation of:

- an explicit prohibition of disability-based discrimination and a lack of legal remedies and sanctions to uphold the right to non-discrimination by persons with disabilities;
- a dedicated mechanism to address discrimination cases; and
- appropriate labour laws and measures to end discrimination in the workplace.

The CtPRD recommended the Gabonese government to undertake specific measures to remedy these issues.

Source: United Nations, Toolkit on Disability for Africa, p 6.

A few other examples of state legislation and practice include:

- In **Ireland**, the Prohibition of Incitement to Hatred Act of 1989 fails to recognise a disability bias motivation.
- As of October 2014, 12 EU Member States (**Austria, Belgium, Croatia, Finland, France, Hungary, Lithuania, the Netherlands, Romania, Slovenia, Spain and the UK**) explicitly recognise a disability bias motivation in criminal law.
- Three thousand, six hundred and twenty-nine incidents of hate crime against disabled persons were reported in **England and Wales** in 2016. This constitutes a 44 per cent increase from 2014/2015 and a 108 per cent increase from 2011/2012.

Source: Conference on Access to Justice for Vulnerable People, presentation by Alan Cusack; www.bit.ly/2szKj pz.

that persons with disabilities have significantly fewer avenues by which to promote improvements to access to justice (whether by supporting a political party amicable to their needs, or engaging directly in community initiatives to promote access to justice).

The immediate solution to many discriminatory laws is simply to repeal them or eliminate the offensive terminology.

Zambia: The outdated 1951 Mental Disorders Act is still in force. It refers to people with disabilities as ‘idiots’, ‘lunatics’ or persons ‘apparently mentally disordered or defective’.

Other discriminatory legislation include:

- the Electoral Act No 13, disqualifying persons with psychosocial disabilities from registering as voters (Art 7 (1) (d));
- the Electoral Commission Act No 17, enabling the removal of a member who is ‘insane or otherwise declared to be of unsound mind’ (Art 5);
- the Citizens of Zambia Act No 124, restricting registration as a citizen for people ‘adjudged or otherwise declared to be unsound of mind’ (Art 17); and
- the Will and Administration of Testate Estates Act No 60, disqualifying people from legal acts on the basis of a disability (Arts 4 and 5).

Source: *Special Rapporteur on the Rights of Persons with Disabilities, Report on Zambia, 2016.*

United States: The Federal Voting Rights Act specifically allows US states to deny people the right to vote ‘by reason of criminal conviction or mental incapacity’.

As of 2012, about 30 US states have laws that can limit the franchise of persons with disabilities. Specifically, seven states deny the right to vote to ‘idiots or insane persons’; others deny the vote to those of ‘unsound mind, non-compos mentis, or those who are not of quiet and peaceable behaviour’; 16 states bar those adjudged mentally incompetent or incapacitated from voting; and four states’ constitutions bar people ‘under guardianship’ from voting.

Source: *Disability Justice, www.bit.ly/2bk2YMM.*

3.2.2 Access to legal information and understanding of legal rights

As the United Nations Development Programme (UNDP) has aptly stated:

‘Legal awareness is the foundation for fighting injustice. The poor and other disadvantaged people cannot seek remedies for injustice when they do not know what their rights and entitlements are under the law. Information on remedies for injustice must be intelligible to the public and knowledge provided to them must serve their practical purposes.’³⁹

Yet, many persons with disabilities (and those who support them) still do not have a clear understanding of relevant legal information. They often face questions such as who to refer to for help; what procedures or remedies can and should be pursued; or how much time, effort and money will the dispute resolution process take, and is it worth it?

These are already inherently difficult questions, due to the complexity of many legal systems. When taking into account the widespread marginalisation of persons with disabilities, getting answers to these questions seems an insurmountable hurdle. While there are multiple reasons why persons with disabilities have minimal access to legal information, this section focuses on two main issues: institutionalisation and information presented in inaccessible formats. Issues around decisions on institutionalisation will be more broadly considered and discussed in Chapter 4; this section addresses the problem of access to information, including legal information about rights and remedies in institutionalised contexts.

³⁹ United Nations Development Programme, Access to Justice Practice Note, 2004, www.bit.ly/2tVfb0S accessed 13 July 2017.

In focus: Access to legal information in institutionalised contexts

Policies of forced institutionalisation and segregation of persons with disabilities into healthcare or residential institutions, in order to provide concentrated support services, have increasingly come under fire in recent decades, while the worldwide ‘independent living’ movement has grown.⁴⁰ Articles 14 and 19 of the CRPD codify this changed attitude towards institutionalisation, and stipulate the right to liberty of persons with disabilities and the freedom to choose where and with whom to live. Yet, segregation of persons with disabilities remains common practice in many places, whether by group or social care homes, nursing homes or medical facilities.

Such segregation limits access to legal information in several ways. Resident persons with disabilities will likely have limited ability to build knowledge of, and rapport with, legal professionals or advocacy centres. This is because interaction is almost exclusively restricted to that with carers, administrative staff and family members. Institutional settings may also be physically isolated from areas where legal professional and advocacy centres are located. The unequal power dynamics between resident persons with disabilities and service staff — reinforced by the lack of choice in many daily decisions in institutionalised settings — may also discourage resident persons with disabilities from asking about their rights.

In focus: Accessible information

If persons with disabilities are able to make contact with legal professionals or find legal resources, they can then face another significant barrier: a lack of accessible communications and/or documents that will enable them to make informed decisions. This includes a lack of easy-to-read or plain language formats, as well as a failure to provide braille or sign language translation. It has been noted that:

‘[g]iven the diversity in requirements of individuals, and since corresponding needs to be accommodated will vary, it is also worth considering whether legal information and services can be provided in a way that is more generally accessible to people with disabilities as a whole, or, at a minimum, to specific groups of people with disabilities. This, in short, would be to take a ‘universal design’ approach to enhance the accessibility of legal services and information to people with disabilities.’⁴¹

Moldova: Following a visit to Moldova in 2015, the UN Special Rapporteur on the Rights of Persons with Disabilities highlighted that immediate action must be taken to close institutions.

The report documented deplorable human rights violations in psychiatric institutions. It estimates that 2,500 people with disabilities permanently live in such institutions, segregated from the community.

The report highlighted that these conditions deter persons with disabilities and their families from reporting human rights abuses, and those who can speak out have little or no recourse to justice and remedy. In criminal cases concerning abuse in institutions, the complaints lodged by persons with disabilities are often not adequately or independently investigated because of prejudice against them, the vested interests of the government supplying such services, and their lack of legal standing and physical isolation.

The Special Rapporteur also received reports of persons with disabilities being pressured to withdraw complaints of abuse in institutions. In such cases, the perpetrators of these crimes avoid prosecution and act with a high degree of impunity, which not only contributes to a cycle of ongoing violence and abuse, but also prevents persons with disabilities who have been victims of human rights abuse from gaining any access to remedy or redress.

In line with the CRPD, Moldova is required to develop community support services that enable people to live in the community.

Source: *Special Rapporteur on the Rights of Persons with Disabilities, Report on Moldova, 2016, para 55.*

40 Maggie Shreve, *The Independent Living Movement: History and Philosophy to Implementation and Practice*, Workshop Manual, www.bit.ly/2sluhce accessed 13 July 2017.

41 See n 13 above, p 55.

‘Universal design’ is a concept used by the CRPD, involving the ‘design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design’. The benefit of a universal design approach is that they should ensure full, equal and unrestricted access for all users, including persons with disabilities (for instance, plain English and easy-to-read formats can support those with English as a second language, or lower literacy skills). Importantly, Article 9 of the CRPD explicitly imposes on States Parties the duty to ensure accessibility in both urban and rural areas. While this can be tackled through ad hoc mechanisms and schemes involving technological solutions — including online and mobile courts, and telephone advice — the problem could also be addressed through legislative reform. In the context of a law reform inquiry on legal barriers for persons with disabilities in Australia, the National Rural Law and Justice Alliance (Australia’s peak national NGO for regional, rural and remote law and justice) recommended that ‘some consideration be given to the recognition of rurality and remoteness as a common area of discrimination and that the Australian Human Rights Commission give thought to how this can be incorporated, if possible, into existing human rights and anti-discrimination frameworks’.⁴²

The application of universal design, however, does not automatically eliminate the need for technical aids. In the framework of the CRPD, it is stated that ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where these are needed.⁴³ Examples may include the use of hearing enhancement systems and induction loop systems which help hearing aid users to communicate efficiently and confidently in noisy environments.

Developments in technology can make communications in legal proceedings more accessible. Video and computer technologies, for instance, can be employed to magnify images to enable counsel to focus attention on small detail. The same technology may allow jurors with limited vision, for example, to view the evidence clearly. Similarly, real-time captioning allows simultaneous transcription of the proceedings to appear on a display monitor, which is an aid to all participants, with and without disabilities.⁴⁴

CRPD Article 13 (access to justice), Article 9 (accessibility) and Article 5(3) (reasonable accommodation to promote equality and eliminate discrimination) should be read together.

Australia: Hearing loss is disproportionately high among Aboriginal people in Australia. In the Northern Territories, few Aboriginal people are given an opportunity to learn Auslan (Australian Sign Language) or signed English. Thus, they depend on their ability to lip read, assess other visual cues and their own, locally based signed language.

The North Australian Aboriginal Justice Agency (NAAJA) reports that clients who are deaf often face a ‘double language barrier’. Many defendants speak English as a third or fourth language and are unable to communicate effectively with sign interpreters in English and it can often be difficult to find Auslan interpreters who are able to communicate with clients in their language.

It also notes that, where hearing loss is undetected or not addressed in the criminal justice system, a client’s ability to engage with and participate in the process at all stages from summons/arrest, investigation and throughout any court mentions or hearings is significantly affected.

The importance of understanding the court process and any orders of the court is particularly relevant in cases where bail conditions are imposed, a Domestic Violence Order is put in place or a client is placed under a supervised order in the community with conditions attached to it. The consequence of breaching any of these conditions often results in further charges being laid and, in many cases, imprisonment.

Source: North Australian Aboriginal Justice Agency report, p 4.

⁴² The National Rural Law and Justice Alliance and the Centre for Rural Regional Law and Justice, *Submission to the Australian Law Reform Commission’s Legal Barriers for People with a Disability*, www.bit.ly/2u6etyv accessed 13 July 2017.

⁴³ Committee on the Rights of Persons with Disabilities, *General Comment No 2 on Article 9*, 2014.

⁴⁴ Peter Blanck, Ann Wilichowski and James Schmeling, ‘Disability Civil Rights Law and Policy: Accessible Courtroom Technology’, (2004) 12(3) *William & Mary Bill of Rights Journal*, 387, www.bit.ly/2rxmmuB accessed 13 July 2017.

As the CmtRPD notes, ‘accessibility is related to groups, whereas reasonable accommodation is related to individuals’.⁴⁵ When providing legal information and resources for persons with disabilities, governments should ensure broad accessibility (eg, universal access). In cases where such broad accessibility standards do not account for an individual’s impairment, the state has, in principle, a further obligation to accommodate the special needs of that individual.

3.3 Financial barriers

People with disabilities are disproportionately mid-to-low income earners, and face difficulties in gaining employment.⁴⁶ The Equality and Human Rights Commission found that, across Britain, persons with disability are twice as likely to be living in food poverty than those without disability.⁴⁷ The disability pay gap has widened in recent years, and less than half of adults with disabilities are employed (versus almost 80 per cent of adults without disabilities).⁴⁸ As the World Bank notes, poverty can ‘lead to secondary disabilities for those individuals who are already disabled, as a result of the poor living conditions, health endangering employment, malnutrition, poor access to health care and education opportunities etc.’, and this creates a vicious cycle.

The relationship between poverty and access to justice is in some respects rather straightforward. If an individual has limited financial ability, they are likely focused on basic survival and thus have little time and resources to pursue costly and/or lengthy legal proceedings, and engage and pay for quality legal counsel services. Unfortunately, lack of financial resources usually leads to increased vulnerability to exploitation, and the necessity of access to justice becomes correspondingly more crucial.

Many states are aware of this relationship, and thus offer basic legal aid programmes for qualifying individuals. It has also been argued that Article 13 of the CRPD ‘should be interpreted to provide that persons with disabilities have a general right to legal aid’.⁴⁹ Yet, such programmes are often generalised and thus do not provide adequate solutions for the specific challenges and barriers (social, physical, legal) for persons with disabilities mentioned in this chapter.

United Kingdom: In July 2013, the UK government introduced fees to have a claim heard at an employment tribunal. This was the first time fees have been charged since the tribunal system was established in 1964.

Although the government’s equality impact assessment in 2012 concluded that fees would have few if any adverse impacts on equality, the Ministry of Justice (MoJ) figures show that disability discrimination claims fell rapidly since fees were introduced: 63 per cent fewer were accepted by the employment tribunals between the first quarter of 2013/14 (pre-fees) and the first quarter of 2014/15 (post-fees).

Although a remission scheme is foreseen, it is subject to a monthly income and disposal capital test; such eligibility test is hardly satisfied by disabled persons when the disability living allowance is calculated and included as disposable capital.

In July 2017, the UK Supreme Court (*R (on the application of UNISON) v Lord Chancellor*) ruled that employment tribunal fees altogether were ‘illegal’ and ‘inconsistent with access to justice’. Accordingly, the Government will stop charging fees and make arrangements to refund payments.

Source: *The Guardian*, www.bit.ly/2rxA7OV.

Free legal advice clinics focusing specifically on disability rights issues have increased in recent decades. Examples include:

Scotland and Northern Ireland: the Disability Law Service provides access to information sheets;

Canada: ARCH Disability Law Centre in Canada;

Australia: the Disability Discrimination Legal Service; and

United States: the National Disability Rights Network.

Source: Flynn, *Disabled Justice?*, p 59.

45 Committee on the Rights of Persons with Disabilities, *General Comment No 2* on Article 9, 2014, para 25.

46 Jeanine Braithwaite and Daniel Mont, *Disability and Poverty: A Survey of World Bank, Poverty Assessments and implications*, (The World Bank 2008), www.bit.ly/2rZ2qWo accessed 13 July 2017.

47 May Bulman, ‘Disabled people over two times more likely to be living in food poverty than able-bodied, report finds’, *The Independent*, (April 2017), www.ind.pn/2nMhDEQ accessed 13 July 2017.

48 *Ibid.*

49 Frances Gibson, ‘Article 13 of the Convention on the Rights of Persons with Disabilities – a right to legal aid?’ (2010) 15(2) *Australian Journal of Human Rights*, 123.

The poor standard of disability data in some areas of the world hampers an adequate assessment of the quality and quantity of access to justice for persons with disabilities, which is crucial to designing effective policies and programmes. Availability of comprehensive and accurate statistics would put pressure on governments to increase the accessibility of publicly available legal advice services to persons with disabilities.

3.4 'Accessibility' barriers

Physical barriers can impede many persons with disabilities from accessing justice at a courtroom, lawyer's office, police station or other relevant building. Moreover, quite often persons with disabilities are also excluded from key roles in the justice system as lawyers, judges or members of a jury. At a symbolic level, lack of physical accessibility (or segregated accommodations for persons with disabilities, for instance, a ramp at the back of a building) can make persons with disabilities feel excluded, and thus discourage them from pursuing justice. Disability advocates thus argue for universal design of physical spaces, as previously mentioned in section 3.2.2.

South Africa: The first discrimination disability suit before the Equality Court in South Africa was brought by a South African lawyer who was a wheelchair user. She complained under the Promotion of Equality and Prevention of Unfair Discrimination Act against the Justice Department and the Department of Public Works because of the inaccessibility of the courthouses. She had to be carried down a flight of stairs to enter the courthouse and, on another occasion, the Court had to postpone her cases because she could not get into the room.

The Court reached a final settlement in which the government admitted that it had failed to provide proper wheelchair access and that this was a form of unfair discrimination against the complainant and other people with similar accessibility needs.

Source: *United Nations, Toolkit on Disability for Africa*, p 11.

Ireland: The Criminal Courts of Justice is the largest courts project undertaken in Ireland in the last 200 years. 'As a major public facility, it was a prime objective to ensure the universal accessibility of the Criminal Courts of Justice. An independent three stage accessibility audit was carried out at the planning, detailed design and building handover stages of the project. This ensured a high quality and well planned facility with consideration given to all aspects of inclusive design... Areas considered in the design include; set down and parking; access and entrances; surface textures, both internal and external; public counters; lighting; induction loops and tactile signage; corridor widths, seating and public safety; ironmongery and doors; ramps within court rooms, steps and handrails; accessible toilet facilities; passenger lifts, refuge call points as standard and the promotion of safe egress during fire evacuation... Noteworthy design features include... colour contrasting and tactile signage to aid the visually impaired and full wheelchair accessibility despite the requirement for significant level variations within court rooms.'

Source: *Website of the Architecture Gallery*, www.bit.ly/2sqTHw0.

As earlier noted, the non-discrimination provision at Article 5(3) of the CRPD requires that 'in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'. The CRPD (Article 2) clarifies the meaning of 'reasonable accommodation' as 'necessary and appropriate modification and adjustments not imposing

Online Dispute Resolution (ODR) has a great potential for increasing access to justice for persons with disabilities, including in rural or remote areas. As a 'technology facilitated form of Alternative Dispute Resolution (ADR)', it is used, in particular, in the context of dispute resolution processes that do not rely on litigation, such as negotiation, mediation and arbitration, and in certain sectors, such as consumer disputes.

There are now numerous online dispute resolution platforms that provide fast and inexpensive solutions for disputes. The possibility to participate asynchronously offers to persons with motor or cognitive impairments the advantage of taking the necessary time to participate effectively. However, ODR is at an early stage in its evolution and disability access is not necessarily a priority. Examples include:

- the **EU** ADR Directive and the ODR platform www.bit.ly/1MkFXBc;
- ODR services in **India** www.bit.ly/2sYzEEo; and
- the proposal to introduce the ODR model in **England** and **Canada**, including in relation to non-serious criminal cases www.bit.ly/2tt5SZ1.

Source: *Larson, Access to justice, 2014; HILL Trend report*, www.bit.ly/2trPxV3.

a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. In the context of access to justice for persons with disabilities (both physical and intellectual disability), it may be that a 'reasonable adjustment' could require a change of venue for court hearings for a disabled accused or victim. Similarly, visual or hearing impairment may also impede physical access and related adjustments will need to be introduced. Adjustments are crucial to guaranteeing access to justice in practice, but the scope of 'reasonable' adjustments based on disability grounds (eg, building a ramp for wheelchair users or changing a venue in specific cases) may vary considerably across jurisdictions. The case of jurors with a visual or hearing impairment provides an interesting example. While the prohibition of disabled jurors participating in a criminal trial is increasingly being challenged, the main problem relates to the 'reasonable adjustments' during court proceedings, in particular around the acceptability or not of support during jury deliberations.⁵⁰ Since the effective participation of sight or hearing-impaired jurors may require a third party joining discussions in the jury room, there has been debate around whether this external person would change the jury dynamic in discussions or compromise the requirements around jury secrecy.

Scotland: The Scottish Courts and Tribunals Service (SCTS), an independent body corporate established by the Judiciary and Courts (Scotland) Act 2008, has published a consultation paper on how to make jury service more accessible for persons with sight and/or hearing impairments. It recommends that:

- jury citation documents be amended to invite potential jurors, including those who have visual or hearing impairments, to contact the court at an early stage to explore accommodations;
- a central point of contact (Juror Liaison Officer) be appointed at each court, and can coordinate juror requests for reasonable accommodations;
- consideration be given to the use of new technology, in the form of laptops, electronic tablets or i-Pads, for the purposes of enhancing the presentation of evidence; and
- the final decision relating to the suitability of proceedings in which a particular juror may serve – based on the nature of the evidence to be led – will be one of the presiding judge, and that a suitable statutory power to this effect be sought.

Source: *The Law Society of Scotland, Consultation response, September 2016, p2, www.bit.ly/2rsASs9.*

England and Wales: The Judicial College's Equal Treatment Bench Book provides a guide for judges, magistrates and all other judicial office holders. It includes a section on 'Mental disabilities, specific learning difficulties and mental capacity'.

Practical measures to address and accommodate the needs of persons with mental and/or physical disabilities include:

- **Place of trial:** The need to arrange for evidence to be taken by depositions or for the trial to take place other than in a courtroom may be less evident as access is unlikely to be a problem, although the individual may be better able to give evidence in a familiar environment. A longer time estimate may be required because of the need to take evidence more slowly and with more breaks.
- **Communication:** A modified approach may be required when seeking to obtain reliable evidence from a person with mental health problems, especially those who are mentally frail, and the judge will wish to control any form of harassment by an over-zealous advocate. It is necessary to ascertain whether any communication difficulties are the result of mental impairment or caused by physical limitations that can be overcome by the use of physical aids or other techniques. An interpreter may be able to assist with strange or distorted speech.
- **Facilities:** The environment may be unsuitable to the individual for reasons that are not apparent (eg, certain kinds of lighting can affect those with epilepsy). Appropriate changes may then need to be made.

Source: *Equal Treatment Bench Book, Chapter 7, www.bit.ly/2rskiJc.*

⁵⁰ The Law Society of Scotland, *Consultation response*, September 2016, p 2, www.bit.ly/2rsASs9 accessed 13 July 2017.

Chapter 4: Specific barriers to access to justice in legal proceedings

The overarching barriers addressed in Chapter 3 also operate when persons with a physical or intellectual disability are directly involved in judicial proceedings, whether as accused, victims or witnesses. However, those overarching barriers often manifest themselves in very specific – but very common – ways. As mentioned in section 3.1, social stigma may predispose key stakeholders in the justice system against persons with disabilities. Specifically, the police or other relevant investigators may dismiss or misinterpret testimony from persons with disabilities as baseless, and decline to pursue criminal legal proceedings. In extreme cases, the police or investigators’ unfamiliarity with the behaviour of persons with disabilities may lead them to mistakenly criminalise a victim. In all judicial cases (criminal, civil or administrative), Article 12 of the CRPD guarantees support in the exercise of legal capacity, including recognition of diverse communication methods, such as allowing for procedural accommodation or provision of professional sign language interpretation.

This chapter analyses particular obstacles to access to justice for persons with disabilities in criminal, civil and administrative proceedings.

4.1 Criminal proceedings

4.1.1 Persons with disabilities in pre-trial proceedings

A significant number of people with some form of physical or mental disability, including learning disability, mental illness or other mental impairment, enter and move through local criminal justice systems every day as accused, victims or witnesses. The pre-trial stage is a crucial moment in the criminal procedure that often strongly influences and may even determine the outcome of the entire judicial proceedings. It is therefore essential that the staff involved at this stage (the police, lawyers, judges, social workers and health professionals, etc) are adequately trained to recognise those forms of disability that are not immediately apparent and accommodate any needs that arise. For instance, some people with visual or auditory disabilities who do not wear glasses or hearing aids may not be obviously disabled. This is even more the case for other so-called ‘hidden disabilities’ or ‘invisible illnesses’, such as autism, Asperger syndrome or psychological disorders, including Post-Traumatic Stress Disorder. Yet, the outcome of the proceedings

Israel: In response to advocacy from civil society organisation Bizchut (the Israel Human Rights Centre for Persons with Disabilities), the Israeli government enacted the Investigation and Testimony Procedural Act (Accommodations for People with Cognitive or Mental Disability) of 2005.

This legislation mandates that ‘a person with a cognitive disability be investigated by a “special investigator”. Special investigators – appointed by the Minister of Welfare – are psychologists, social workers, clinical criminologists, or professionals with a background in special education, who have undergone special training to fulfil this role. These professionals are vested with the powers of police investigators. As part of their task, they must explain to the investigated person in simple and understandable language their duty to tell the truth as well the privilege against self-incrimination. In carrying out their tasks, the special investigators may consult with additional experts.

The Act contains additional provisions about the way to conduct the investigation, including the duty to notify a family member about its occurrence, and it spells out the right of persons with cognitive and mental disabilities to be accompanied by a person of their choice during an investigation. The Act mandates in detail the duty to document the investigation, the preferred method being visual (video) recording, and if this is not attainable, audio or manual recording is permitted.’

Source: Ziv, *Witnesses with Mental Disabilities*, p 10, www.bit.ly/2rmYomz.

may change substantially depending on whether the individuals concerned are adequately screened and these disabilities are recognised in time.

Singapore: In its implementation report to the CmtRPD, Singapore reported that:

‘The Appropriate Adult Scheme was introduced with the aim of assisting persons with mental intellectual disabilities who come into contact with the police. Singapore recognises that persons with disabilities may be especially vulnerable to experiencing distress during police investigations and may, in particular, have difficulties communicating facts during police interviews. Under this Scheme, trained volunteers, otherwise known as Appropriate Adults, are present during the police interview to provide support to persons with disabilities, including bridging communication gaps with the Police and providing emotional support to persons with disabilities. Since January 2015, the Scheme has been implemented in all Police Divisions across Singapore.’

Source: *Report by Singapore, 2016, para 8.3, www.bit.ly/2tncwww.*

Australia: In Victoria, people can volunteer to be Independent Third Persons (ITPs). ITPs attend police interviews to support people with a disability or mental illness. ITPs can also be present when police ask a person to provide fingerprints or a body sample or attend a bail hearing at the police station with a bail justice. The police are required to secure an ITP for someone with an ‘impaired mental state or capacity’ (this is not defined, but the Victoria Police Manual implies a link to ‘mental disorder’). Otherwise, evidence given may be rejected in court.

ITPs are trained to facilitate communication (ie, ensuring the interviewee understands the questions asked, which may involve requesting the police to repeat or rephrase a question); provide assistance in contacting a lawyer, relative or friend if requested; and stopping an interview if the interviewee becomes distressed, or is otherwise unable to concentrate.

Corrections Independent Support Officers (CISO) are volunteer ITPs and volunteers from the Office of the Public Advocate who support prisoners with a diagnosed intellectual disability during disciplinary hearings. CISOs explain a prisoner’s rights; judge whether the prisoner understands their rights and can freely exercise them before the hearing can commence; and facilitate communication throughout the hearing process.

Source: *Website of the Office of the Public Advocate, www.bit.ly/2rkneU7; Breaking the Cycle, Office of the Public Advocate report, www.bit.ly/2rkizBD.*

England and Wales: The Advocate’s Gateway (TAG) provides free access to practical, evidence-based guidance on vulnerable witnesses and defendants. It has developed a number of practical toolkits, including one on ‘Ground rules hearings and the fair treatment of vulnerable people in court’, which is aimed at supporting the early identification of vulnerability in witnesses and defendants, and the adoption or making of reasonable adjustments, so that the justice system is fair. Ground rules hearings (GRHs) are commonly requested by advocates who identify risk factors indicating that the defendant or a witness has particular needs, such as communication needs. GRHs are used by judges to make directions for the fair treatment and participation of vulnerable persons in judicial proceedings, whether as witnesses or defendants.

The toolkit was intended for use in criminal proceedings in England and Wales, but it has been used in other jurisdictions as well, and beyond the criminal justice area (eg, in **Northern Ireland** and New South Wales (**Australia**)).

Other TAG toolkits include ‘Planning to question someone with an autism spectrum disorder including Asperger syndrome’; ‘Planning to question someone with a learning disability’; and ‘Planning to question someone with “hidden” disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)’.

The toolkits are addressed to advocates, solicitors, police officers, judges and social workers.

Source: *The Advocate’s Gateway website, www.bit.ly/1vsYqt5.*

In focus: Persons with disabilities as witnesses and victims of crime

What is considered ‘reliable’ testimony often depends on clear memory and recollection, ‘non-erratic’ behaviour on the stand and consistent, straightforward communication of a narrative. Yet, persons with disabilities — particularly those with cognitive or mental disabilities — often receive and provide evidentiary information in a way that people without disabilities are not used to. There is, however, no reason to assume that a witness who has a learning disability or mental health condition is not competent to give evidence. It is necessary to be aware of and accommodate these differences, to ensure that persons with disabilities can participate equally and effectively in

testifying during a trial. Accommodations for equal participation in testifying may consist of: a friendlier environment in the courtroom, including the use of animals to accompany witnesses; the involvement of ‘intermediaries’,⁵¹ speaking more slowly, where appropriate, allowing pauses for assimilation; framing questions in a way that assists recollection and the provision of more qualitative information, dealing with issues in chronological order and avoiding addressing new topics without explanation; and use of expert testimony that explains the meaning of a witness’ words and conduct to the judge.⁵²

United States: On 1 July 2017, House Bill 151 came into effect in the State of Florida. The Bill stipulates that ‘the court may set any other conditions it finds just and appropriate when taking the testimony of... a person who has an intellectual disability... including the use of a therapy animal or facility dog... in any proceeding involving a sexual offense or child abuse, abandonment, or neglect’.

A facility dog is trained, evaluated and certified, and provides ‘unobtrusive emotional support’ in facility settings. A therapy animal means an animal trained, evaluated and certified to provide animal therapy. These reflect some of the many different emotional supports that may make a courtroom an easier place in which to testify.

Source: Florida House of Representatives 2017 Legislature, www.bit.ly/2tsp1Hb.

Persons with disabilities often fail to be recognised and identified as a victim group, either by victim support organisations or those engaged at a central government policy level in dealing with victims’ issues.

The US Department of Justice reported that, in 2014, the rate of violent victimisation against persons with disabilities was 2.5 times higher than for non-disabled persons.⁵³ Recent evidence from Ireland shows that victimisation of persons with intellectual disabilities is becoming more prevalent but that these incidents are underreported (66 per cent of persons with disabilities who suffered sexual violence and attended Rape Crisis Centres between 2008 and 2010 did not report the abuse to a formal authority).⁵⁴ There is, however, mainly anecdotal evidence supported by limited statistical data.

England and Wales: The Youth Justice and Evidence Act 1999 authorises the use of ‘special measures’ to assist vulnerable witnesses. Special measures include ‘pre-recorded cross-examination’ and ‘examination of witnesses through an intermediary’. A system of accreditation of Registered Intermediaries (RIs) by the Ministry of Justice is in place, but intermediaries outside the RIs scheme are also allowed to provide their services.

Witnesses may be eligible for special measures because of their age, mental capacity, fear or distress. Witnesses with mental disabilities are eligible, although special measures are only available for such witnesses if the ‘quality’ of their evidence (as defined in section 16(5)) would be diminished by reason of the disability.

The scheme involving the use of intermediaries has also been employed in **Northern Ireland**, where it is statutorily guaranteed for both the accused and witnesses with a mental disability or other mental impairment. A pilot scheme targeted to children has been operating in New South Wales (**Australia**) since 2015.

In **Scotland**, RIs operate at the police level, but are not involved in judicial proceedings.

Source: *Conference on Access to Justice for Vulnerable People*, presentation by Michelle Mattison.

Israel: The Investigation and Testimony Procedural Act of 2005 provides that, in the communication between the witness and the judge, mental health or other related professionals may attest to how disability may have affected the witness’ or witnesses’ testimony. They can also suggest how questions should be rephrased in order for a response to be more credible. In addition, they can communicate with the witness through pictures, electronic devices or other non-verbal methods, in order to interpret and convey to the court an enhanced understanding of the witness’ testimony.

Source: Ziv, ‘Witnesses with Mental Disabilities’, p 12, www.bit.ly/2rmYomz.

51 Janine Benedet and Isabel Grant, ‘Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases’, (2012) 50(1) *Osgoode Hall Law Journal*, 1–45, www.bit.ly/2sudRVn accessed 13 July 2017.

52 Neta Ziv, ‘Witnesses with Mental Disabilities: Accommodations and the Search for Truth’, (2007) 27(4) *Disability Studies Quarterly*. See also Equal Treatment Bench Book, Section 7.

53 Erika Harrell, *Crime Against Persons with Disabilities, 2009–2014 – Statistical Tables*, US Department of Justice, p 4, www.bit.ly/2skNjNj accessed 13 July 2017.

54 Rape Crisis Network Ireland, *Sexual Violence Against People with Disabilities: Data collection and barriers to disclosure*, October 2011, p 44.

4.1.2 Legal responsibility for criminal acts

As discussed in section 3.2, the CRPD does not permit ‘discriminatory denial of legal capacity’.⁵⁵ It has been authoritatively pointed out that ‘[i]f persons with disabilities have the legal capacity to act on an equal basis with others, this... implies as a corollary the legal responsibility for those consequences on an equal basis with others’.⁵⁶ In the context of criminal proceedings, the UN Office of the High Commissioner for Human Rights (OHCHR) has deemed it discriminatory and unlawful to exculpate automatically persons from criminal liability on the basis of disability and that, instead, ‘disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant’.⁵⁷

This may seem counterintuitive, as defences based on disability (eg, ‘insane automatism’) could be understood as a welcome attempt to combat the disproportionate criminalisation of persons with disabilities. On the other hand, eliminating such defences based on disability can be seen as a necessary rejection of infantilising persons with disabilities. We cannot here sketch out the many nuances of this complex and unresolved challenge⁵⁸ but, suffice to say, developing non-discriminatory alternatives to defences based on disability may be necessary in order to comply with the CRPD.⁵⁹ What such disability-neutral defences might look like has not been clearly established, and is thus still subject to much academic discussion.⁶⁰

The issue of legal responsibility discussed here is closely linked to, and has two significant effects on, criminal proceedings: ‘unfitness to stand trial’ declarations and ‘not criminally responsible assessments’ (NCRAs).

In focus: ‘Unfitness to stand trial’ declarations

A declaration of ‘unfitness to stand trial’, which determines a person’s lack of mental capacity, typically results in a custodial order (eg, in psychiatric facilities) or other forms of deprivation of liberty (eg, conditional discharges into the community), sometimes for indefinite periods. Where a declaration is made on the basis of disability (as measured by mental capacity), this will be contrary to Article 14 of the CRPD if ‘it deprives the person of his or her right to due process and safeguards that

55 See n 18 above, para 15.

56 Tina Minkowitz, ‘Rethinking Criminal Responsibility From a Critical Disability Perspective: the Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond’, (2014) 23(3) *Griffith Law Review*. Tina Minkowitz represented the World Network of Users and Survivors of Psychiatry in the drafting and negotiation of the United Nations Convention on the Rights of Persons with Disabilities.

57 ‘In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.’ See: Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, 26 January 2009, A/HRC/10/48, www.bit.ly/2sXQbZo accessed 13 July 2017.

58 See n 56 above; for critiques to this approach, see John Dawson, ‘A realistic approach to assessing mental health laws’ compliance with the UNCRPD’, (2015) 40 *International Journal of Law and Psychiatry*, 70–79 and Peter Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’, (2012) 75 *The Modern Law Review*, 752–778.

59 ‘The position of CRPD Committee on the directive that states to abolish the insanity defence has not been clarified, something that the Committee did not explicitly endorse or criticise in the General Comment No. 1 on Article 12.’ See Piers Gooding and Charles O’Mahony, ‘Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia’, (2015) 44 *International Journal of Law Crime and Justice* 122–145.

60 Jill Peay, ‘Mental incapacity and criminal liability: Redrawing the fault lines?’ (2015) 40 *International Journal of Law and Psychiatry* 25–35; Christopher Slobogin, ‘Eliminating mental disability as a legal criterion in deprivation of liberty cases: The impact of the Convention on the Rights of Persons With Disabilities on the insanity defense, civil commitment, and competency law’, (2016) 40 *Law & Psychology Review* 297–320.

are applicable to every defendant'.⁶¹ The CmtRPD has clarified the meaning of this provision in the context of the review of reports submitted by States Parties.

Australia: The CmtRPD reviewed a 2003 case decided by the District Court of Western Australia. The case involved an Aboriginal national of Australia who was declared unfit to plead and was detained in prison without having been convicted of any offence, and after all the charges against him were quashed in application of the Mentally Impaired Defendants Act. The competent authorities adopted this decision because of the lack of available alternatives and support services, even though they considered that prison 'was not the appropriate environment' for the defendant.

Detention was ordered on the basis of the assessment by the State Party's authorities of potential consequences of the defendant's intellectual disability; therefore, in the absence of any criminal conviction, disability constituted the core cause of detention.

The CmtRPD concluded that the author's detention amounted to a violation of Article 14(1)(b) of the CRPD according to which 'the existence of a disability shall in no case justify a deprivation of liberty'.

Source: Committee on the Rights of Persons with Disabilities, Views concerning communication No 7/2012, CRPD/C/16/D/7/2012.

Ecuador: The CmtRPD expressed concern that declaring persons with disabilities unfit to stand trial is a pretext for applying security measures involving their indefinite deprivation of liberty and that they are not entitled to the same guarantees as other persons in the criminal justice system. It recommended that Ecuador refrain from declaring persons with disabilities unfit to stand trial when they are accused of an offence so that they are entitled to due process on an equal basis with others, and that the general guarantees of criminal law and procedure are observed.

Source: Committee on the Rights of Persons with Disabilities, Concluding Observations on Ecuador, 2014, para 28–9, www.bit.ly/2sUhrYq.

Denmark: The CmtRPD expressed concern at the distinction made by the State Party between punishment and treatment. On the basis of that distinction, persons considered 'unfit to stand trial' on account of their impairment are not punished but are sentenced to treatment. The CRPD clarified that treatment is a social control sanction and should be replaced by formal criminal sanctions for offenders whose involvement in crime has been determined. It concluded that the procedure applied when determining whether a person should be sentenced to treatment is therefore incompatible with Article 14 and recommended the Danish authorities 'initiate a structural review of the procedures used to sanction persons with disabilities when they commit criminal offences. The system should comply with the general safeguards and guarantees established for all persons accused of a crime in the criminal justice system, inter alia, the presumption of innocence, and the right to defence and to a fair trial.'

Source: Committee on the Rights of Persons with Disabilities, Concluding Observations on Denmark, 2014, para 34, www.bit.ly/2rwxQTW.

Republic of Korea: The CmtRPD noted with concern the lack of information on the existing safeguards and guarantees to ensure the right to a fair trial of persons with disabilities who are declared unfit to stand trial. The Korean authorities had omitted to provide information on the actual measures applied as sanctions for those persons considered unfit to stand trial. It recommended 'the establishment of procedural accommodations that ensure fair trial and due process guarantees for persons with disabilities' and 'that the declaration of unfitness to stand trial be removed from the criminal justice system in order to allow due process for persons with disabilities on an equal basis with others'.

Source: Committee on the Rights of Persons with Disabilities, Concluding Observations on Korea, 2014, para 28, www.bit.ly/2skGyVP.

Specific, acceptable alternatives to unfitness to stand trial declarations are not immediately clear. On a general level, the rejection of unfitness to plead decisions would presumably lead states to bolster 'procedural accommodations and support would be provided for all stages of criminal proceedings, including investigative stages'.⁶² These would likely be more extensive versions of accommodations, support and assistive procedures mentioned in the beginning of Chapter 4. Indeed, the CRPD obligation for equal recognition before the law and the corollary rights to access to justice, liberty and security of the person, and the right to be free from cruel, inhuman and degrading treatment are interpreted by the CRPD as promoting a move from 'adaptation or specialized design' models, towards equality and 'universalism'.⁶³

61 United Nations Office of the High Commissioner of Human Rights, *Statement on Article 14 of the Convention on the Rights of Persons with Disabilities*, 2014, www.bit.ly/2sI6PdF accessed 13 July 2017.

62 See n 56 above, p 458.

63 Piers Gooding, Anna Arstein-Kerslake, Louis Andrews and Bernadette McSherry, '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*, 860.

As the Australian Law Reform Commission notes, ‘the integrity of a criminal trial (and, arguably, the criminal law itself) would be prejudiced if the defendant does not have the ability to understand and participate in a meaningful way’.⁶⁴ To eliminate assessments of fitness to stand trial without implementing adequate procedural safeguards would thus likely expose persons with disabilities to breaches of their right to a fair trial as guaranteed under Articles 12 and 13 of the CRPD.

Having said that, such a vision for reforming the criminal law (specifically, unfitness to plead rules) poses important challenges for policy makers. It has been pointed out that such a task may be harder to achieve in adversarial common law systems – for instance, in England, Wales, Northern Ireland and Australia⁶⁵ – as opposed to inquisitorial systems typical of civil law jurisdictions, where the inquisitorial role of the judge appeases some of the concerns around equality of arms during trial. Accordingly, ‘civil law and other non-adversarial systems, including restorative practices in common law jurisdictions, may prove a fruitful line of inquiry in this field of law reform’.⁶⁶

An important related issue is that of the indefinite detention of accused persons found unfit to stand trial. While indefinite custodial orders as such are incompatible with the CRPD, safeguards may apply in practice, to guarantee that the detainee’s suitability for release is assessed periodically. Nevertheless, these models also seem to be incompatible with the CRPD. In this regard, a significant tension arises as to whether the custodial order should resemble a sentence of imprisonment with a definite term, which might otherwise be imposed by a court if the accused was found guilty (emphasis on criminal sanctioning), or should be related to the progress and needs of the individual (emphasis on therapeutic aims implying possible extensions justified on that basis). The CmtRPD has criticised therapeutic approaches in criminal law concerning accused with disabilities, because ‘persons considered “unfit to stand trial” on account of their impairment are not punished but are sentenced to treatment’.⁶⁷ Accordingly, the CRPD compels the abolition of indefinite detention of persons with disabilities in all forms, including where the custodial order has a fixed term, which may in practice be extended by, or with the input of, health officials.⁶⁸

In focus: ‘Not criminally responsible’ assessments

Another way through which Article 14 of the CRPD affects criminal proceedings is with regard to NCRAs. While an ‘unfitness to stand trial’ determination concerns the person’s current mental state, an NCRA refers to the mental state of the accused at the time when the offence was committed. NCRAs are often handed down after a successful insanity defence and – similar to determinations that someone is unfit to stand trial – they can lead to

Mexico: The CmtRPD has noted with concern that persons with intellectual or psychosocial disabilities have frequently been the subject of declarations of non-liability in the context of criminal proceedings, in the absence of procedural safeguards. It is also concerned that the reform of the Code of Criminal Procedure maintains non-liability by reason of disability as a concept in the legal system.

Source: Committee on the Rights of Persons with Disabilities, *Concluding Observations on Mexico*, para 27, www.bit.ly/2t3CplQ.

64 Australian Law Commission website, www.bit.ly/2tWb70g accessed 13 July 2017.

65 Piers Gooding and Charles O’Mahony, ‘Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons with Disabilities: Comparing Reform in England, Wales, Northern Ireland and Australia’, (2016) 44 *International Journal of Law, Crime and Justice*, 122.

66 *Ibid*, p 862 and fn 255.

67 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Denmark*, CRPD/C/DNK/CO/1, 30 October 2014, para 34.

68 See n 65 above, p 864.

deprivation of liberty of persons with disabilities in a discriminatory way. That is, instead of being fully acquitted (like other defendants using disability-neutral defences), NCRAs may allow a review board or presiding judge to order a defendant with disabilities to detention at a hospital or psychiatric facility. Given that NCRAs are justifying such deprivation (at least partially) on the basis of disability, they have been deemed contrary to the CRPD. Concerns regarding indefinite deprivation of liberty – similar to those discussed in relation to ‘unfitness to stand trial’ orders – also arise in this case.

4.1.3 Standards of facilities in which persons with disabilities are detained

Article 14(2) of the CRPD requires States Parties to ‘ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of th[e] Convention, including by provision of reasonable accommodation’.

Failure to make reasonable accommodation for persons in detention would thus amount to a breach of the CRPD. Reasonable accommodations may include those related to physical accessibility, as explored in section 3.4, or communicative accessibility, as mentioned at the beginning of

Chapter 4. Ideally, detention centre infrastructure would also adhere to the principle of universal design, in accordance with Article 9 of the CRPD (general accessibility).

In particular, various international instruments also recognise a person’s fundamental right to health in prison. As will be addressed further in section 4.2.1, this constitutes not only the right to proper healthcare (at least equivalent to that in the community), but also the right to live in an environment that does not cause or make worse a disease or disability.⁶⁹ Unfortunately, however, this right is not respected in the vast majority of prison systems around the world. Restrictions on mobility (eg, physical restrictions like chains, or more intangible restrictions like highly-regimented day schedules), isolation from social and psychiatric supports, solitary confinement and unsanitary conditions increase the risk of distress, depression, anxiety and self-harm, which can either develop into or exacerbate existing disabilities. Due to physical or mental vulnerability, prisoners with disabilities are also more exposed to manipulation or violence from other inmates or prison staff. This is especially the case when a prisoner’s ‘erratic behaviour’ is taken

Argentina: When assessing prison conditions for a person with physical disability, the CmtrRPD noted that:

‘The accommodations made by the prison authorities are insufficient because the bathroom is too small to enter using a wheelchair, the partially adapted plastic chair in the bathroom does not meet basic safety standards, and [the plaintiff] cannot get to the toilet or shower on his own and therefore depends on help from a nurse or other person. Although a call button was installed, it often takes some time before someone responds. He has developed bedsores on a number of occasions owing to the lack of a special mattress to prevent them, and his range of movement is extremely limited. He can only attend to his basic needs using bedpans or other such devices, and the lack of assistance from others means that he cannot clean himself on a daily basis. The absence of suitable infrastructure for persons with disabilities and the substandard conditions of detention constitute both an affront to his dignity and inhuman treatment.’

Source: *Committee on the Rights of Persons with Disabilities, Communication 8/2012, para 8.4, www.bit.ly/2tsqa1t.*

Australia: Recent research conducted in Queensland found that 73 per cent of male and 86 per cent of female Aboriginal and Torres Strait people in custody in high security prisons suffered a mental disorder. The researchers concluded that ‘the prevalence of mental disorder among Indigenous adults in Queensland custody is very high compared with community estimates’ and ‘there remains an urgent need to develop and resource culturally capable mental health services for Indigenous Australians in custody’.

Source: *North Australian Aboriginal Justice Agency report 2013, p 3.*

⁶⁹ Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, E/CN.4/2005/51, 11 February 2005, para 45, which states: ‘[a]s well as an entitlement to health care, the right to health includes an entitlement to the underlying determinants of health, including adequate sanitation, safe water and adequate food and shelter’.

as wilful disobedience (thus warranting reactionary punishment or abuse), rather than a symptom of their disability. Prisons generally lack the resources to adequately identify and provide health services for prisoners with disabilities.⁷⁰

Prison reform and over-incarceration of persons with disabilities lie at the intersection of welfare, legal and health policies. There is, however, broad anecdotal evidence but limited statistical evidence on the incidence of disability, mental health and cognitive impairment in prisons, including representation of specific sub-groups of persons with disabilities, for example children or indigenous persons. The variety of solutions to these expansive problems has been addressed comprehensively elsewhere, most notably in the United Nations Office on Drugs and Crime Handbook on Prisoners with Special Needs.⁷¹ Three main initiatives will be highlighted here.

In focus: Diversion from the penal system

Great emphasis is placed on diverting persons with disabilities from the penal system. In fact, the CmtRPD has stated that penal detention should be a last resort, only when other programmes like restorative justice are insufficient to deter future crime.⁷² Diversion includes police and prosecutors being trained to recognise persons with disabilities, and exercising discretion pre-trial to divert them from criminal proceedings. Diversion also includes voluntary participation in treatment programmes instead of longer penal sentences. Diversion programmes must not involve a transfer to mental health commitment regimes or force an individual to participate in mental health services; such services should be provided on the basis of the individual's free and informed consent.⁷³

United States: Specialised mental health courts aim to divert convicted persons by offering some combination of judicial supervision and voluntary participation in community social services for treatment, as an alternative to penal detention. Those participating in mental health courts are usually specifically trained to deal with persons with mental health problems, so as to provide a supportive environment for rehabilitation, as opposed to punishment.

There are over 300 mental health courts in the US. One study found that, 'when compared with other mentally ill inmates, participants in the mental health court reduced their probability of a new criminal charge by 26 percent and reduced the probability of a new violent criminal charge by 55 percent'. Another study found that, 'during follow-up, 25 percent of the mental health court group perpetrated violence compared with 42 percent of the control group'.

Source: Binder, 'Mental Health Courts', 2015.

70 Mindy Sotiri, with Patrick McGee and Eileen Baldry, *No End in Sight. The imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment*, A Report Prepared by the Aboriginal Disability Justice Campaign, September 2012, www.bit.ly/2sylyJI accessed 13 July 2017; Human Rights Watch, *Callous and Cruel: Use of Force against Inmates with Mental Disabilities in US Jails and Prisons*, 2015, www.bit.ly/2syrv9o accessed 13 July 2017; Carolyn Raphaely, 'Oscar Pistorius case highlights plight of South Africa's disabled prisoners', *The Guardian* (22 February 2013), www.bit.ly/2sJD7VI accessed 13 July 2017.

71 United Nations Office on Drugs and Crime, *Handbook on Prisoners with special needs*, 2009, www.bit.ly/1VXMYZ3 accessed 13 July 2017.

72 Committee on the Rights of Persons with Disabilities, *Concluding observations on New Zealand*, 2014, CRPD/C/NZL/CO/1, para 34, www.bit.ly/2toCy6p accessed 13 July 2017.

73 Committee on the Rights of Persons with Disabilities, *Concluding observations on Australia*, 2014, CRPD/C/AUS/CO/1, para 29, www.bit.ly/2t5O6ZJ.

Australia: One of the barriers for people with disability in the criminal justice system in the Northern Territory is a limited and underutilised legislative scheme to divert people with mental illness or disturbance from the Court of Summary Jurisdiction. Where the Court imposes a custodial supervision order, the accused person can be committed to prison (most often) or to another 'appropriate place' considered as such by the Court. In practice, no such appropriate places are made available.

The NAAJA, the largest law practice in the Northern Territory, reports that 'the main barrier to justice that people face in these situations arises not from major flaws in the legal system, but from the lack of alternatives that would allow a person to be appropriately supervised in a non-custodial setting.

There is a chronic need for great supported accommodation for people with high needs resulting from mental illness, intellectual disability or cognitive impairment. Having such places available would allow for people before the courts to remain on bail rather than be remanded in custody and would allow people to be placed on noncustodial supervision orders rather than being held in prison indefinitely.

The limited places that are available have been developed in an ad hoc way and have not always met the needs of the individuals placed in them. This places the person subject to the order, and those caring for them, at risk of harm that could be avoided.'

Source: North Australian Aboriginal Justice Agency report 2013, p 8.

England and Wales: A Mental Health Court (MHC) model was piloted at magistrates' courts in Stratford, East London and Brighton, Sussex in 2009. Criminal justice, health and third sector agencies jointly delivered the programme. A MoJ report evaluating the pilot courts noted key requirements of a MHC:

- a MHC Practitioner available daily at court;
- multi-agency agreements put in place prior to the MHC for information exchange;
- comprehensive screening and assessment of defendants for mental health issues;
- court involvement in the processes to review whether community orders are being implemented effectively;
- training and awareness events for practitioners and stakeholders; and
- identification of, and engagement with, local resources for signposting and referral of defendants to appropriate support services.

Source: Winstone and Pakes, Process Evaluation of the Mental Health Court Pilot, p iv.

In focus: Training of prison staff

A second key measure is adequate training of prison staff. Article 13 of the CRPD imposes a positive obligation on States Parties to promote appropriate training for those working in the field of administration of justice, including prison staff. This will help prison staff to understand better how to recognise and appropriately support persons with disabilities on a day-to-day basis.

France: In 2015, Human Rights Watch visited several French prisons to conduct interviews and found that prisoners with psychosocial disabilities have inadequate accommodation and access to services or support. One of their many recommendations included asking the Director of Prison Administration to ensure that 'all prison guards receive regular training on mental health and that they are provided with sufficient time to participate in those trainings.

Trainings should include sessions on the signs of mental health conditions, ways to support prisoners with mental health conditions, verbal de-escalation techniques, tools to interact effectively and humanely with inmates who have such disabilities, suicide prevention and side effects of medication.'

Source: Human Rights Watch, 2016.

The Netherlands: Special protocols for all members of staff have been developed on how to prevent suicides, deal with completed suicides and deal with the aftercare situation in mental healthcare in prisons.

The policy focuses on the period before an eventual attempt of suicide or completed suicide; the period around a suicide incident; and the period after the incident, taking into account the situation of staff, prisoners and families.

The Protocols are integrated into the total communication structure of the institutions and are part of the basic education of uniformed staff.

Source: United Nations Office on Drugs and Crime, Handbook on persons with special needs, p 31.

Kenya: The Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention were adopted by the African Commission on Human and Peoples' Rights in April 2014 and are already being used in several African countries. These include a section on persons with disabilities.

A recent study by the African Policing Civilian Oversight Forum based in South Africa, in collaboration with the National Gender and Equality Commission (NGEC) in Kenya, assesses the implementation of the Guidelines in Kenya.

The key conclusions of the study are that:

- absence or inadequate procedural or substantive guarantees for detainees with disabilities, including denial of reasonable accommodation, amount to violation of the right to access justice;
- the law is not a neutral arbiter in ensuring the pre-trial detention rights of persons with disabilities. Inherent biases exist against prisoners with certain types of disabilities who, by dint of such disabilities, are incarcerated without recourse. This situation is illustrated aptly by the continuing denial of legal capacity for many persons with disabilities; and
- there is a willingness within the Kenya Prison Service to do the right thing. The Service therefore should be provided with technical support as well as resources to undertake needed reforms.

Source: African Policing Civilian Oversight Forum, NGEC, *Pre-trial Detention for Persons with Disabilities in Correctional Institutions, 2017*, p vii.

In focus: Monitoring by independent authorities

Article 16(3) of the CRPD requires that, 'in order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities'. This implies that prisons, or other institutions that serve persons with disabilities (by existing as a place of detention), must be subject to scrutiny by regular independent monitoring. Such oversight is important to keep states accountable to their international and domestic obligations regarding persons with disabilities in prisons.

England and Wales: In 2016, the Prisons and Probation Ombudsman (PPO) published a report on prisoners' mental health, recommending 25 key improvements that could be made in areas such as coordinating care, information sharing among staff, and mental health assessments within prisons. The PPO 'is appointed by and reports directly to the Secretary of State for Justice. The Ombudsman's office is wholly independent of the services in remit, which include those provided by the National Offender Management Service; the National Probation Service for England and Wales; the Community Rehabilitation companies for England and Wales; Prisoner Escort and Custody Service; the Home Office (Immigration Enforcement); the Youth Justice Board; and those local authorities with secure children's homes. It is operationally independent of, but sponsored by, the Ministry of Justice (MoJ).'

Source: *Prison and Probations Ombudsman, 2016*.

4.2 Civil proceedings

4.2.1 Challenging decisions made about persons with disabilities

Protecting or challenging legal capacity, as discussed in section 2.2, animates the core of civil litigation surrounding persons with disabilities. As such, this section will not discuss the overarching solution to civil problems (ie, promoting supported decision-making to combat denial of legal capacity), but will address two key issues that arise in civil proceedings: institutionalisation and involuntary medical treatment.

In focus: Institutionalisation and deprivation of liberty

In Chapter 3, institutionalisation is defined as the policy of segregating persons with disabilities into healthcare or residential institutions in order to provide concentrated support services. Features of an 'institution' include: depersonalisation, rigidity of routine, block treatment, social or geographical

distance from the community and paternalistic arrangements.⁷⁴ An institution is thus not necessarily determined by its size, but rather by the degree of autonomy available to residents to exercise control over day-to-day decisions.

Article 14 of the CRPD on liberty and security of the person stipulates that:

‘States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.’

In the guidelines on Article 14, the CmtRPD has been firm that Article 14(1) (b) absolutely ‘prohibits the deprivation of liberty on the basis of actual or perceived impairment *even if additional factors or criteria are also used to justify the deprivation of liberty*’ (emphasis added).⁷⁵ During the drafting of Article 14, it was debated whether the wording should have emphasised that disability could not be the sole or exclusive basis for depriving liberty. Yet, this wording was ultimately rejected, strengthening the interpretation that Article 14 imposes an absolute prohibition of deprivation of liberty based on disability. This apparently applies to psychiatric detention and forced institutionalisation – not to detention following a criminal conviction⁷⁶ (see section 4.1.2) – but there is some ambiguity as to the scope of the prohibition and possible qualifications and/or derogations.⁷⁷

The OHCHR, for instance, has noted that the absolute ban on depriving liberty on the basis of disability in Article 14 ‘should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention’; rather, it simply means that ‘the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis’. Also, the European Agency for Fundamental Rights noted in 2012 that the ‘CRPD Committee has not referred to a disability-neutral situation, for example, linked to the preservation of public order’.⁷⁸

Such ambiguity is especially important to highlight, given that previously articulated UN and regional human rights standards on deprivation of liberty appear to be incompatible with the CRPD. For instance, the UN Human Rights Committee, which monitors the implementation of the UN Covenant on Civil and Political Rights, in its General Comment no 35 on Article 9 (Liberty and

74 Veronika Ispanovic Radojkovic, *Deinstitutionalization and independent living of persons with disabilities*, Presentation at the Technical Assistance and Information Exchange Workshop on Rights of Persons with Disabilities In Health Settings, 27–28 September 2012, www.bit.ly/2unD55g accessed 13 July 2017.

75 Committee on the Rights of Persons with Disabilities, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities*, September 2015, para 7, www.bit.ly/2rZCZTf accessed 13 July 2017.

76 Article 14(2) sets out that ‘2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.’ See also n 75, para 17, www.bit.ly/2rZCZTf accessed 13 July 2017.

77 The certainty of standards surrounding deprivation of persons with disabilities of their liberty has been subject to some academic debate. For literature comparing the approaches of the European Court of Human Rights and the Committee on the Right of Persons with Disabilities, see Philip William Hugh Fennell and Urfan Khaliq, ‘Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English law’, (2011) 6 *European Human Rights Law Review*, 662–674; Eilionóir Flynn, ‘Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches’ (2016) 26 *International Journal of Mental Health and Capacity Law*, 75–101.

78 European Union Agency for Fundamental Rights, *Involuntary placement and involuntary treatment of persons with mental health problems*, June 2012, p 16, www.bit.ly/1TWq65C accessed 13 July 2017.

security of person), stated that:

‘[t]he existence of a disability shall not in itself justify a deprivation of liberty but rather *any deprivation of liberty must be necessary and proportionate*, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law’ (emphasis added).⁷⁹

This acceptance of deprivation of liberty in the presence of some other factors is apparently contrary to the Guidelines on Article 14 from the CmtRPD, which emphasise the ‘absolute prohibition’ on deprivation of liberty based on disability.

Similarly, the European Convention on Human Rights explicitly allows for liberty deprivation on the ground of ‘unsound mind’, and has developed case law with an emphasis on procedural safeguards (similar to that articulated in the quote above).⁸⁰ The Council of Europe Steering Committee on Bioethics has deemed this regional case law as compatible with the CRPD,⁸¹ but the UN Special Rapporteur on the Rights of Persons with Disabilities has criticised such statements of compatibility as ‘inconsistent with the CRPD and the CRPD Committee’s jurisprudence, including the most recently elaborated Guidelines on Article 14 adopted in September 2015’.⁸²

Article 19 of the CRPD codifies the right of persons with disabilities to choose where and with whom to live, contrary to institutionalisation policies. Read together with Article 14(1)(b) of the CRPD, it constitutes the legal framework regulating institutionalisation. It is clear that there must be strong procedural safeguards against involuntary placement in an institution, as well as the possibility for judicial review of such placements, should they occur.⁸³ This is to prevent the stigma associated with segregated living and, more importantly, the exploitation that can and does occur in institutions.

The European Agency for Fundamental Rights summarised the **Council of Europe** standards on deprivation of liberty of persons with disabilities as follows:

‘The decision of placement should be taken by an authority legally vested with competence to place a person in a psychiatric hospital or other establishment, and the decision must be founded on a conclusively proven state of mental health problem, unless there are urgent circumstances. It is not sufficient that the authority be presented with a request for placement of a person suffering from a mental health problem, rather it must be examined whether there are compelling reasons, related to the health of the person concerned or to the rights or interests of others, justifying the placement.

The procedure leading to the placement decision should ensure that the person concerned has an opportunity to be heard, if necessary through a representative.

The detention should not be prolonged beyond what is justified by the mental health of the person subjected to the placement measure.

The regime of the condition should correspond to its therapeutic purpose. Finally, judicial review should at all times be available in order to assess the continued lawfulness of the detention.’

Source: European Union Agency for Fundamental Rights, *Involuntary placement*, 2012, p 20.

79 United Nations Human Rights Committee, *General comment No 35 on liberty and security of person* (Article 9), para 19, www.bit.ly/2nuiMk5 accessed 13 July 2017. For a summary of the case law and the scope of this provision, see n 78 above, pp 20–21.

80 Mental Disability Advocacy Centre, *Summaries of Mental Disability Cases Decided by the European Court of Human Rights*, 2007, www.bit.ly/2rKkSy1 accessed 13 July 2017.

81 Council of Europe, Steering Committee on Bioethics, *Abridged report of the 41st plenary meeting*, 2–4 November 2011, Appendix II, www.bit.ly/2rKiPKr accessed 13 July 2017.

82 Council of Europe, Committee on Bioethics, Additional Protocol on the protection of the human rights and dignity of persons with mental disorders with regard to involuntary placement and involuntary treatment, *Compilation of comments received during the public consultation*, 9 December 2015, p 26, www.bit.ly/2s36rEE accessed 13 July 2017.

83 See n 75, para 24.

The MDAC⁸⁴ has recorded such abuse at various psychiatric or mental health institutions in Bulgaria,⁸⁵ Croatia,⁸⁶ Czech Republic,⁸⁷ Hungary⁸⁸ and Uganda.⁸⁹

Bulgaria: In *Stanev v Bulgaria*, the European Court of Human Rights (ECHR) found that the applicant's institutionalisation in a social care home for nine years constituted an unjustifiable deprivation of liberty, contrary to Article 5 of the ECHR. Factors leading to this decision included the institution's highly regimented schedule, conditional absences from the institutions and lack of autonomy over daily matters. In the judgment, the ECHR also noted leading cases on this issue, and that:

'there was a deprivation of liberty in circumstances such as the following: (a) where the applicant, who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital (see *Shtukaturov v Russia*, no. 44009/05, § 108, ECHR 2008); (b) where the applicant had initially consented to her admission to a clinic but had subsequently attempted to escape (see *Storck v. Germany*, no. 61603/00, § 76, ECHR 2005-V); and (c) where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave (see *H.L. v. the United Kingdom*, no. 45508/99, §§ 89-94, ECHR 2004-IX).'

Source: *Stanev v Bulgaria*, 2012, para 118, www.bit.ly/2ttHu6b.

United States: The US District Court in Jacksonville, Florida, ruled on a case brought by a 49-year-old woman with a spinal-cord injury caused by a motorcycle accident with a drunk driver, who was at risk of being forced into a nursing home because of changes in her caregiver situation (*Haddad v Arnold*, 2010). Although the complainant had been on the waiting list for Medicaid community-based waiver services for two years and had alerted the state of her need, she was told that the requested services would only be available if she entered a nursing home.

The complainant argued that she would suffer irreparable harm if forced to enter a nursing home, and the Court agreed, ordering the state to offer her community-based services. The reason behind the decision was that 'segregating people with disabilities is a form of discrimination'.

The decision determined that isolating people with disabilities in institutional settings deprives them of the opportunity to participate in the community, interact with individuals who do not have disabilities and make daily choices. The ruling also acknowledged that unnecessary institutionalisation stigmatises people with disabilities.

Source: *DiversityInc*, www.bit.ly/2sFPp3T.

In focus: Involuntary medical treatment

This issue is closely linked to institutionalisation because persons with disabilities who are committed to medical institutions are more likely to receive treatment they did not ask for. The UN Special Rapporteur on Torture found that '[i]nside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment'.⁹⁰

Article 17 of the CRPD states that '[e]very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others'. Article 25 of the CRPD also stipulates that healthcare be provided on the basis of free and informed consent, without discrimination. This reiterates the general international law on the right to health, and medical treatment needing to be administered on a voluntary basis. For instance, the UN Committee on Economic, Social and Cultural Rights has stated (regarding the right to highest attainable standard of health):

84 Mental Disability Advocacy Centre website: www.bit.ly/2t2iKWf accessed 13 July 2017.

85 Mental Disability Advocacy Centre, *My Home, My Choice in Bulgaria: The right to community living for people with mental disabilities in 2014*, www.bit.ly/2rZeMxM accessed 13 July 2017.

86 Mental Disability Advocacy Centre, *Out of Sight: Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia*, 2011, www.bit.ly/2syoLZK accessed 13 July 2017.

87 Mental Disability Advocacy Centre, *My Home, My Choice in the Czech Republic*, 2014, www.bit.ly/2rYTwZd accessed 13 July 2017.

88 Mental Disability Advocacy Centre, *My Home, My Choice in Hungary: The right to community living for people with mental disabilities in 2014*, www.bit.ly/2t2yity accessed 13 July 2017; Mental Disability Advocacy Centre, *Straightjackets and Seclusion: An Investigation into Abuse and Neglect of Children and Adults with Disabilities in Hungary*, 2017, www.bit.ly/2pylohZ accessed 13 July 2017.

89 Mental Disability Advocacy Centre, *Psychiatric hospitals in Uganda – A human rights investigation*, 2014, www.bit.ly/2t3abdV accessed 13 July 2017.

90 Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Report, A/63/175, 28 July 2008, para 63.

‘[t]he right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including... the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.’⁹¹

Consequently, as the Special Rapporteur for the Rights of Persons with Disabilities has noted:

‘[i]t is clear that health is not an end in itself that can be pursued independent of the will of the individual, but enjoyment of the right to health requires respect for each individual’s will and autonomy over their own physical and mental integrity. Any argument which permits supplanting individual consent on the basis of ‘therapeutic purpose’ or ‘medical necessity’ is in conflict with international human rights standards on the right to health.’⁹²

Given the CRPD’s emphasis on safeguarding the legal capacity of persons with disabilities, it appears that the approach to involuntary medical treatment is similar to that of deprivation of liberty; that is, there must be an absolute prohibition on such involuntary treatment on the basis of disability. For example, the CmtRPD expressed concern ‘about the lack of clarity concerning the scope of legislation to protect persons with disabilities from being subjected to treatment without their free and informed consent, including forced treatment in mental health services’.⁹³ It then recommended Tunisia to ‘incorporate into the law the abolition of surgery and treatment without the full and informed consent of the patient’.⁹⁴

Many countries must now grapple with reforming their laws to align with such requirements, as current mental health laws tend to allow for involuntary medical treatment of persons with disabilities in particular circumstances. In the European Union, in 13 Member States, the risk of harm and the need for treatment are the two criteria listed alongside having a mental health problem that justify involuntary placement and treatment. This is the case in Denmark, Greece, Finland, France, Ireland, Latvia, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden and the UK.⁹⁵

4.3 Administrative proceedings

Article 11 of the CRPD stipulates that states must, in accordance with international law, provide ‘all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk’. This has significant implications for service or aid provision related to natural disasters, conflict situations or humanitarian emergencies – for instance, such service or aid provision must

91 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14 on the right to the highest attainable standard of health* (Article 12), E/C.12/2000/4, 11 August 2000, para 8.

92 Council of Europe, Committee on Bioethics, Additional Protocol on the protection of the human rights and dignity of persons with mental disorders with regard to involuntary placement and involuntary treatment, *Compilation of comments received during the public consultation*, 9 December 2015, p 29, www.bit.ly/2s36rEE accessed 13 July 2017.

93 Committee on the Rights of Persons with Disabilities, *Concluding observations on Tunisia*, 2011, CRPD/C/TUN/CO/1, www.bit.ly/2t2Wg7m accessed 13 July 2017.

94 *Ibid.*

95 See n 78 above. On the situation in Germany see *Forced hospitalization and involuntary treatment in the light of the CRPD*, Position paper by the State Coordination Agency, 2013, www.bit.ly/2syyHIU accessed 13 July 2017.

Denmark: 'In 2015, [the Danish Emergency Management Agency] started the development of a new free early warning application for smart phones. The application will initially broadcast emergency messages from the authorities on acute danger situations, alerts from The Danish Meteorological Institute on hazardous weather and information about major traffic irregularities.

The idea is to give Danes with a smart phone the chance to use their phone as a mobile siren and get more specific information on the emergency situation as well as information on how to act accordingly and improve immediate safety measures. The application targets the general population, but increases the opportunity especially for persons with hearing disabilities to receive early warning and emergency alerts. The access to emergency information and possible safety measures in the specific situation will likewise be improved for persons with other disabilities. The development of the application focuses on how to make the application relevant, accessible and usable for disabled persons.'

Source: *Submissions to the Committee on the Rights of Persons with Disabilities on thematic study on Article 11*, www.bit.ly/2sz1ZZ.

Middle East and North Africa: The Arab Forum for the Rights of Persons with Disabilities (AFPRD) has recently released a report with various recommendations for improving disability specific services for refugees in Libya, Egypt, Yemen, Jordan and Turkey. Their recommendations are divided into particular topics, including protection, registration, health and rehabilitation, income, education and access to basic needs such as shelter, food and clean water.

Key suggestions include greater collaboration with disabled persons' organisations and those delivering humanitarian aid; increased and more effective data collection on refugees with disabilities; and focusing more resources on increasing community supports for refugees with disabilities.

Source: *AFPRD, Report 2016*.

accommodate the needs of persons with disabilities and should adhere to the principle of universal design.⁹⁶

In a similar vein, the OHCHR has stated 'the administrative detention of persons with disabilities in migration and asylum-seeking contexts is not consistent with the Convention when it is applied without the provision of adequate support and reasonable accommodation'.⁹⁷ Facilities that receive migrants and asylum seekers – such as offices dealing for applications for refugee status – also need to implement procedures that effectively identify persons with disabilities which, in turn, allows for direction to proper support programmes and tracking of demographics to better tailor service provision in the future.⁹⁸

More specific to legal proceedings, the CRPD may mean a more expansive definition of 'refugee'. The UN Convention relating to the Status of Refugees defines a refugee as someone who:

'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.⁹⁹

European Union: 'The European Asylum Support Office (EASO) developed a tool for the identification of persons with special needs (IPSN tool) to support Member States. The IPSN tool lists indicators that officials involved in the asylum procedure and reception can use to spot possible vulnerabilities, even if they do not have expert knowledge in medicine, psychology or related fields. Based on the EASO tool, the Bulgarian State Agency for Refugees (SAR) will introduce a specific instrument to identify vulnerable asylum seekers, including asylum seekers with disabilities, later in 2016.'

Source: *Identification of persons with special needs tool*, www.bit.ly/1UsyHsJ.

96 *Thematic study on the rights of persons with disabilities under Article 11 of the CRPD, on situations of risk and humanitarian emergencies*, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/31/30, 30 November 2015, www.bit.ly/2sqDEKq accessed 13 July 2017.

97 *Ibid*, para 6.

98 European Union Agency for Fundamental Rights, *Thematic focus: Migrants with disabilities*, www.bit.ly/2nfyVRM accessed 13 July 2017.

99 United Nations Convention relating to the Status of Refugees, adopted on 28 July 1951, entry into force on 22 April 1954, Art 1(2), www.bit.ly/1H7mna5 accessed 13 July 2017.

As Crock, Ernst and McCallum have argued, this definition has historically posed several problems for persons with disabilities attempting to claim refugee status.¹⁰⁰ For instance, a person with disabilities may not have the cognitive capacity to subjectively hold a ‘well-founded fear’ in the circumstances; this could be resolved by putting more weight on the objective assessment of fear. Alternatively, courts may reject the proposition that ‘persons with disabilities’ is an acceptable ‘social group’.¹⁰¹

United Nations High Commissioner for Refugees: The United Nations High Commissioner for Refugees (UNHCR) has developed a ‘Resettlement Assessment Tool’ to enhance its effectiveness and harmonise procedures for assessing refugees for resettlement. This includes a primer on who persons with disabilities are, and what particular obstacles they may face when fleeing their country due to persecution. Though it is tailored for UNHCR agencies, the step-by-step breakdown in assessing a resettlement claim may provide a helpful template for bodies that have similar interactions with refugees and asylum seekers with disabilities.

Source: *United Nations High Commissioner for Refugees, Resettlement Assessment Tool*, www.bit.ly/2t9vDLw.

Key questions remain around what exactly constitutes ‘persecution’.¹⁰² Specifically, does denying reasonable accommodation to persons with disabilities amount to persecution, and in what context will discrimination against persons with disabilities amount to persecution? In light of the CRPD codifying various rights of persons with disabilities, it now appears to be easier to argue that the failure to provide reasonable accommodation or systematic discrimination on the basis of disability would constitute a ‘serious violation of human rights’ and thus amount to persecution.

100 Mary Crock, Christine Ernst and Ron McCallum AO, ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’, (2012) 24(4) *International Journal of Refugee Law*, 735–764.

101 Gillian Parekh, ‘Is There Refuge for People with Disabilities Within the 1951 Convention relating to the Status of Refugees?’ (2009) 1 *Critical Disability Discourses Journal*, www.bit.ly/2tBR3RC accessed 13 July 2017.

102 *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para 51.

Chapter 5: The way forward: Disability, the Sustainable Development Agenda and the role of the legal community

Disability is both a cause and consequence of poverty, and effective access to justice is among the essential ingredients of sustainable development and the eradication of poverty. Vulnerability connected to and deriving from disability is partly inherent and partly generated, for instance, by societal, cultural, legal and physical barriers to the full enjoyment of human rights. Internationally, there have been significant legal steps taken to address these issues. Almost 90 per cent of UN Member States have ratified the CRPD, committing to implement its core principles and provisions. Accordingly, this report has set out the international legal principles that should inform national legislation and practices that aim to reduce and overcome barriers to access to justice for persons with disabilities.

Yet, international policy-makers and stakeholders have not historically recognised or prioritised disability issues within international development efforts. It is only in the Sustainable Development Agenda adopted in 2015 that governments have included explicit references to persons with disabilities, and disaggregation of data by disability is a core principle. The success of the Agenda, which will guide global and national policies relating to sustainable development for the next 15 years, will also depend on the mainstreaming of the needs and perspective of persons with disabilities into national plans for implementation and monitoring.

The Sustainable Development Agenda presents a unique opportunity in this regard and has a strong potential to contribute in practical ways to the protection of the rights of persons with disabilities. Alongside the acknowledgement of the importance of access to justice for sustainable development, in Goal 16, the fundamental undertaking in the Agenda, to ‘leave no one behind’, will prompt the collection of accurate statistics and research data broken down by category, including disability. These will possibly enable a higher visibility of the needs of persons with disabilities and the challenges they face at the policy level, and promote the adoption of targeted measures to give effect to the obligations under the CRPD.

It is essential that the legal community recognises that it can play an important role in the fight against poverty through the empowerment of the most vulnerable groups, at both national and international levels. The report underlines a number of relevant measures and directions that lawyers involved in advocacy, law reform, drafting of new legislation, legal education, and legal assistance and representation can undertake to make a useful contribution to the protection of the rights of persons with disabilities, the enhancement of their welfare and the delivery of the Sustainable Development Agenda. In particular:

- Research and analysis carried out in this report has pointed to some evidence regarding a disjuncture between victimisation of persons with disabilities and crime reporting rates, which reiterates the invisibility of this group at the policy level. Lawyers involved in providing legal assistance and representation can effectively contribute to defeating this barrier. In relation to the measurement of outcomes and the concrete impact of reforms related to Goal 16 on access to

justice, one of the indicators requires measurement of crime reporting, defined as the ‘Percentage of victims of violence in the previous 12 months who reported their victimisation to competent authorities or other officially recognised conflict resolution mechanisms.’ The indicator rests on the assumption that the crime reporting rates provide a measure of the confidence of victims of violent crimes in the ability of the police and other authorities involved to offer assistance and effective redress. Further disaggregation of data by disability status would provide information on whether there are differences in the tendency to report victimisation experiences across different groups.

- Persons with disabilities are repeatedly invisible. Policies driven by austerity constraints should not result in discriminatory practices, whether de jure or de facto. Accordingly, protection of the rights of persons with disabilities needs to be incorporated explicitly among the core inspiring principles of those policies. Lawyers involved in advocacy and law reform have a moral and legal obligation to endorse this approach.
- Strategic litigation is often a very effective ‘eye-opener’ and can help highlight and expose issues related to the conditions and needs of persons with disabilities, but there is a need for further research and collection of accurate data that will inform policy reforms.
- Research has highlighted the need for additional enquiry into the compatibility of standards of deprivation of liberty with human rights law, as delineated in the CRPD. Such research should also take into consideration the impact that the diversity of legal models – adversarial versus inquisitorial – has on the approaches taken in the different jurisdictions.
- The report has also pointed out an increased need to integrate psychological analysis into legal research and practice, to help address the needs of persons with disabilities in the field of justice. The report contains reference to widespread practices of specialised training of judges, lawyers, police and other staff – including as part of legal education programmes in universities or law schools – but these are rarely mandatory.
- More generally, while the report contains relevant examples of good practices of promotion and protection of the rights of persons with disabilities around the world – either through a more rigorous implementation of the principle of non-discrimination or through specific adjustments – it also highlights two important gaps. First, courts often employ guidelines related to standards of treatment and communication with persons with disabilities involved in judicial proceedings with various roles and in different stages, but these guidelines may require to be developed more coherently into statutory codes of practice, especially in common law jurisdictions. Second, it is essential that research is undertaken on the outcomes and impact of the various innovative measures, projects and solutions adopted.
- Technology can support efforts to help persons with disabilities overcome marginalisation in society and by the justice system. ODR offers a good example of the potential for increasing access to justice for persons with disabilities, including in rural or remote areas, by using technology-facilitated platforms. It is important that the legal community be open and alert to effective uses of such solutions where they can enhance inclusion of persons with disabilities, even if these may be at an early stage of evolution and may not be specifically aimed at persons with disabilities.

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ISBN: 978-1-905221-73-8

